

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

3  
4                               GPA1, LLC,  
5                               *Petitioner,*

6  
7                               vs.

8  
9                               CITY OF CORVALLIS,  
10                              *Respondent,*

11                              and

12  
13  
14                              NORTHWEST ALLIANCE CORVALLIS,  
15                              *Intervenor-Respondent.*

16  
17                              LUBA No. 2016-013

18  
19                              FINAL OPINION  
20                              AND ORDER

21  
22                              Appeal from City of Corvallis.

23  
24                              Bill Kloos, Eugene, filed a petition for review and argued on behalf of  
25                              petitioner. With him on the brief was Law Office of Bill Kloos PC.

26  
27                              David E. Coulombe, City Attorney, Corvallis, filed a response brief and  
28                              argued on behalf of respondent. With him on the brief was Fewel, Brewer &  
29                              Coulombe.

30  
31                              Daniel J. Stotter, Corvallis, filed a response brief and argued on behalf of  
32                              intervenor-respondent. With him on the brief was Stotter and Associates LLC.

33  
34                              RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board  
35                              Member, participated in the decision.

36  
37                              REMANDED

06/15/2016

1           You are entitled to judicial review of this Order. Judicial review is  
2 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the city council denying its application  
4 for detailed development plan approval to extend an arterial road through its  
5 property.

6 **REPLY BRIEF**

7 Petitioner moves for permission to file a reply brief to respond to alleged  
8 new matters raised in the response brief. The city opposes the motion and  
9 argues that only Part 5 of the reply brief responds to a new matter: the city’s  
10 argument that petitioner waived an issue raised in the first assignment of error.

11 Parts 1 through 4 of the reply brief reply to alleged new matters raised in  
12 the city’s response to petitioner’s second assignment of error. Petitioner’s  
13 second assignment of error alleges that the application is an application for  
14 “needed housing on buildable land[.]” as that phrase is used in ORS  
15 197.307(4). The issues raised in the city’s response brief and the reply brief  
16 address whether petitioner’s property is “buildable land[.]” Although we deny  
17 the second assignment of error because we conclude that the application is not  
18 an application for “needed housing” as defined in ORS 197.303(1), it would  
19 lengthen an already lengthy opinion to separate wheat from chaff with respect  
20 to the reply brief. The reply brief is allowed.

1 **FACTS**

2 Petitioner is the owner of an approximately 222-acre property that is  
3 known as the Timberhill Planned Development (Timberhill PD). The  
4 Timberhill PD includes several different low, medium, and medium-high  
5 density residential comprehensive plan designations and corresponding low,  
6 medium, and medium-high density residential zoning designations, and a  
7 commercially designated portion that is zoned PD (PA-O) (Professional and  
8 Administrative Office). A portion of the southwest corner of the Timberhill PD  
9 is developed with a townhome development.

10 The Timberhill PD is located on the northern boundary of the city, and is  
11 bounded on the south by N.W. Walnut Boulevard, on the west by N.W. 29<sup>th</sup>  
12 Street, on the east by the city limits, and on the north by N.W. Lester Avenue,  
13 although it is not directly adjacent to N.W. Lester Avenue. Existing N.W.  
14 Kings Boulevard (Kings Boulevard), a north/south arterial street, currently runs  
15 through a small portion of the southern part of the property and terminates  
16 north of the southern boundary of the property just north of its intersection with  
17 N.W. Walnut Boulevard. That portion of Kings Boulevard serves the  
18 townhome development located in the southwest corner of the Timberhill PD.  
19 Petitioner’s application seeks to extend Kings Boulevard from its existing  
20 terminus on the property north, through its property, to eventually connect to  
21 N.W. Lester Avenue.

1           The Corvallis Transportation Plan (CTP), adopted by the city in 1996,  
2 includes a figure that shows Kings Boulevard running through the property and  
3 identifies it as an arterial roadway. CTP Appendix A, Figure A-2. The North  
4 Corvallis Area Plan (NCAP), the refinement plan that was adopted in 2002 for  
5 the area of the city that includes the Timberhill PD, includes a figure that  
6 identifies Kings Boulevard running through the site. Record 736. Both the CTP  
7 and the NCAP are incorporated into the city's comprehensive plan.

8           In 2000, the city council approved a Conceptual Development Plan  
9 (2000 CDP) for the Timberhill PD. Record 699. The 2000 CDP approved a  
10 Kings Boulevard extension through the Timberhill PD in the approximate  
11 location shown in petitioner's application. Record 699-712. The entire  
12 property, including the portion of the subject property that the 2000 CDP  
13 approved the road to be located in, contains land that is designated in the  
14 Corvallis Comprehensive Plan (CCP) and the Corvallis Land Development  
15 Code (LDC) as Highly Protected Riparian Corridor, Highly Protected  
16 Significant Vegetation, Partially Protected Significant Vegetation, and also  
17 contains protected wetlands.

18           In 2013, petitioner prepared and submitted to the city engineer a study of  
19 three different alignments for the Kings Boulevard extension through the  
20 Timberhill PD. Record 788-818. Each alignment also included a modified  
21 option that increased the street slope by 2% for an 8% slope. All of the  
22 alignments located the road in the approximate location approved in the 2000

1 CDP and shown in the NCAP and the CTP. The alternatives study evaluated  
2 each alignment's impacts to protected natural features and concluded that  
3 building the road at the city's maximum 6% slope for an arterial street would  
4 have a greater impact on protected natural features. The study concluded that  
5 for each alignment, building the road at an 8% slope would decrease the  
6 amount of cut and fill and result in fewer impacts to natural features. In March  
7 2014, petitioner dedicated to the city and the city manager accepted a right of  
8 way through its property in the location of Option 1A, approximately 84 feet  
9 wide and 4,945 feet long, totaling 9.32 acres (2014 Dedication). Record 133-  
10 140.

11 In January, 2015, petitioner applied for subdivision approval to create  
12 ten lots within the Timberhill PD and for detailed development plan approval  
13 to develop one of those lots with student housing.<sup>1</sup> Petitioner's tentative  
14 subdivision plat and detailed development plan showed the Kings Boulevard  
15 right of way that had been dedicated a year earlier. Petitioner took the position  
16 that the right of way dedication had the effect of fixing the exact location of  
17 Kings Boulevard through the property, and that no further city review of Kings

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<sup>1</sup> LDC 2.5.10.a.2 describes the differences between a conceptual development plan and a detailed development plan:

“A Conceptual Development Plan provides general concepts for development on a site. A Detailed Development Plan provides the specifics for development on a site and is required following or simultaneously with approval of a Conceptual Development Plan.”

1 Boulevard was required. The city took the position that the 2014 Dedication  
2 did not have the effect of fixing the exact location of the road, and that because  
3 the road had not yet been reviewed for compliance with applicable provisions  
4 of the LDC, review of the road using the planned development review process  
5 was required. The city took the position that the planned development  
6 provisions of the LDC required petitioner to obtain detailed development plan  
7 approval of the location of Kings Boulevard. Petitioner then withdrew the  
8 subdivision and student housing detailed development plan applications.

9       Thereafter, in May, 2015 petitioner applied, under protest, for detailed  
10 development plan approval for the Kings Boulevard extension in the location  
11 of the dedicated right of way. Record 490. The application also proposed  
12 development of storm and sewer facilities outside of the dedicated right of way  
13 on land owned by petitioner. The planning commission denied the application,  
14 and petitioner appealed the decision to the city council. The city council denied  
15 the application, and this appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17       The central issue presented in the first assignment of error is the effect of  
18 the 2014 Dedication on the location of Kings Boulevard through the property.  
19 In its first assignment of error, petitioner argues that the city's decision to deny  
20 petitioner's application to locate Kings Boulevard in the right of way accepted  
21 by the city is outside the range of the city's discretion, because the city  
22 approved the location of Kings Boulevard when it accepted the 2014

1 Dedication. Petitioner asks for reversal of the decision. ORS  
2 197.835(10)(a)(A).<sup>2</sup>

3 Petitioner’s first assignment of error contains multiple arguments that we  
4 treat as subassignments of error.

5 **A. The Effect of the 2014 Dedication**

6 The city and petitioner have very different views about the meaning and  
7 effect of the 2014 Dedication. As explained above, petitioner withdrew its  
8 subdivision and accompanying detailed development application to develop  
9 one of the newly created parcels. Petitioner then filed the application for  
10 detailed development plan approval of the road under protest. *See Recovery*  
11 *House VI v. City of Eugene*, 150 Or App 382, 387-88, 946 P2d 342 (1997)  
12 (where applicant chooses to proceed with application for a conditional use  
13 permit under protest, it preserves the right to challenge, at LUBA, the local  
14 government’s decision that a conditional use permit was required). Petitioner  
15 took the position that no application was required because (1) the city accepted  
16 the 2014 Dedication, and (2) the 2014 Dedication resulted in city ownership of  
17 the dedicated portion of petitioner’s property and petitioner had no authority

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<sup>2</sup> ORS 197.835(10)(a)(A) provides that LUBA shall reverse a decision and order the local government to approve an application when LUBA finds “[b]ased on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]”



1 under the LDC to apply for detailed development plan approval since it no  
2 longer owned the right of way.

3 One of petitioner's subassignments of error takes the position that the  
4 city has already approved the location of Kings Boulevard by accepting the  
5 right of way that petitioner dedicated in 2014, and having done so the city is  
6 now precluded from requiring petitioner to demonstrate that the road complies  
7 with LDC provisions that govern planned developments, or to demonstrate  
8 compliance with those LDC provisions in another consolidated proceeding.  
9 Petitioner cites LDC 4.0.60.b and LDC 4.0.100.e in support of its argument.<sup>3</sup>  
10 Record 309, 573.

11 The city first responds that petitioner failed to raise an issue regarding  
12 LDC 4.0.60.b and 4.0.100.e and is precluded under ORS 197.763(1) from  
13 raising the issue. Petitioner responds, and we agree, that the issue was raised at  
14 Record 309 and 573.

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<sup>3</sup> LDC 4.0.60.b provides in relevant part:

“Location of new Arterial, Collector, and Neighborhood Collector Streets shall conform to the Corvallis Transportation Plan.”

LDC 4.0.100.e provides in relevant part:

“Where street, trail, utility, or other rights-of-way and/or easements in or adjacent to development sites are nonexistent or of insufficient width, dedications may be required. The need for and widths of those dedications shall be determined by the City Engineer.”

1           The city next points to findings that the city council adopted that find  
2 that the 2014 Dedication was merely the city engineer’s acknowledgement of  
3 the conceptual location of Kings Boulevard, that the city notified petitioner that  
4 the city’s acceptance of the right of way dedication is not a substitute for  
5 review of the road for compliance with the LDC and applicable provisions of  
6 the CCP. Record 27. The city points to a December, 2013 letter from the city  
7 engineer to petitioner. That letter confirmed the city’s review of the right of  
8 way dedication documents provided to the city engineer by petitioner, and  
9 provided in relevant part:

10           “When these segments of roadway are developed, the alignment  
11 may be changed if the change proves to be more efficient with less  
12 impact to natural features. The proposed alignment can be  
13 dedicated at that time and the original unused right of way can be  
14 vacated.” Record 117.

15           We agree with the city that petitioner has failed to establish that the city  
16 is precluded from requiring review of Kings Boulevard for compliance with  
17 applicable standards and criteria in the LDC merely because the city accepted  
18 the 2014 Dedication. First, the LDC provisions that petitioner cites and relies  
19 on do not provide that dedicated right of ways are exempted from land use  
20 review. They merely set out the procedure and effect of a dedication. Second,  
21 the city put petitioner on notice that the dedication process was not the final  
22 step in fixing the location of the road, and that the location of the road could be  
23 changed “to be more efficient with less impact to natural features.” Record 117.

1 That statement was sufficient to put petitioner on notice that additional review  
2 would likely be required.

3 **B. The City Was Not Required to Join the Application**

4 LDC 2.5.40.01 and LDC 2.5.50.01 provide in relevant part that “[s]igned  
5 consent by the subject property’s owner(s) and/or the owner’s legal  
6 representative(s)” is required for detailed development plan applications. The  
7 term “owner” is not defined in the LDC. In another subassignment of error,  
8 petitioner argues that the city is the “owner” of the property where the road is  
9 proposed to be located because the dedication resulted in transfer of the fee  
10 interest in the property. Accordingly, petitioner argues, because the city has not  
11 joined in the application, the city is without authority to make a decision on  
12 petitioner’s application.

13 The city responds that the city maintains an interest in the nature of an  
14 easement, and therefore petitioner’s argument provides no basis for reversal or  
15 remand of the decision. We agree with the city. The language of the right of  
16 way dedication grants the city a right of way for specific purposes: “road,  
17 pedestrian, drainage, and utility purposes, on, over, across, under, along, and  
18 within” the land described, language that tends to support a conclusion that the  
19 interest conveyed is in the nature of an easement or right to use the property for  
20 those purposes and not a fee interest. Record 133. Accordingly, the city is not  
21 the “owner” for purposes of LDC 2.5.40.01 and 2.5.50.01 and was not required  
22 to join in or file the application.

1           **C.     The City’s Authority to Require the Application**

2           As noted above in *n* 1, the LDC explains the difference between a  
3 conceptual development plan and a detailed development plan (DDP). LDC  
4 2.5.10 explains that:

5           “[d]epending on the level of detail provided in a Planned  
6 Development application, a Planned Development project  
7 proposal is called a Conceptual Development Plan or a Detailed  
8 Development Plan. A Conceptual Development Plan provides  
9 general concepts for development on a site. A Detailed  
10 Development Plan provides the specifics for development on a site  
11 and is required following or simultaneously with approval of a  
12 Conceptual Development Plan.”

13 As noted, in 2000 the city approved a conceptual development plan for the  
14 Timberhill PD - the 2000 CDP. LDC 2.5.10 requires a detailed development  
15 plan for “the specifics for development on a site[,]” and it is required following  
16 approval of the 2000 CDP. Other than its position that the 2014 Dedication  
17 precludes the city from requiring petitioner to submit an application for DDP  
18 approval for Kings Boulevard, a position we reject above, petitioner offers no  
19 other explanation for why the provisions of LDC 2.5.10 do not apply to its  
20 proposal to more specifically locate Kings Boulevard, in accordance with a  
21 previously approved conceptual development plan.

22           **D.     The 2014 Dedication is Not a Standard that Applies to**  
23           **Petitioner’s Application**

24           Petitioner also alleges that having accepted the right of way dedication,  
25 the location of the road is a now a “standard[,]” within the meaning of ORS  
26 227.173(1) and ORS 227.178(3)(a), that applies to petitioner’s application for a

1 permit.<sup>4</sup> We understand petitioner to argue that the CTP that shows the road in  
2 the general location proposed by petitioner in its application, and the city’s  
3 acceptance of the 2014 Dedication together make the 2014 Dedication a  
4 “standard” as that term is used in ORS 227.173(1) and ORS 227.178(3).  
5 Petition for Review 39. We understand petitioner to argue that allowing the city  
6 to refuse to give preclusive effect to the 2014 Dedication amounts to allowing  
7 the city to “articulate standards after the process is underway and an applicant  
8 has made a significant investment[,]” a process that the Court of Appeals  
9 rejected in *State ex rel West Main Townhomes v. City of Medford*, 233 Or App

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<sup>4</sup> ORS 227.173(1) provides:

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

ORS 227.178(3)(a), commonly known as the “goal post rule,” provides:

“If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.”

1 41, 48, 225 P3d 56 (2009), *modified and adhered to on recons* 234 Or App  
2 343, 228 P3d 607 (2010).

3 We disagree with petitioner that the city's acceptance of the 2014  
4 Dedication makes the location of the right-of-way as depicted in the 2014  
5 Dedication a "standard[]" within the meaning of ORS 227.178(3)(a). For  
6 permits, ORS 227.173(1) requires "standards and criteria" to be "set forth in  
7 the development ordinance and \* \* \* relate approval or denial of a  
8 discretionary permit application to the development ordinance and to the  
9 comprehensive plan for the area in which the development would occur and to  
10 the development ordinance and comprehensive plan for the city as a whole."  
11 The 2014 Dedication is not set forth in the LDC, and neither is the CTP figure  
12 that petitioner relies on that shows the general location of the road.  
13 For that reason, the 2014 Dedication is not a "standard" within the meaning of  
14 ORS 227.173(1) or the goal post statute.

15 We understand petitioner to also argue that LDC 2.5.40.04 requires the  
16 city to make land use decisions "consistent with" the CCP, and that making a  
17 decision "consistent with" the CCP where the CTP shows the general location  
18 of the road on petitioner's property requires approving the road in the location  
19 of the 2014 Dedication. Petition for Review 36. While we agree with  
20 petitioner's general premise that the city must make its decision on petitioner's  
21 application consistent with the provisions of its comprehensive plan, including  
22 the CTP and the NCAP, we do not think that LDC provision requires the city to

1 approve the road in the exact location of the 2014 Dedication without review of  
2 that location for compliance with LDC provisions that apply to detailed  
3 development plans.

4 **E. ORS 197.015(10)(b)(D)**

5 ORS 197.015(10)(b)(D) provides that a decision of a local government  
6 that “determines final engineering design, construction, operation,  
7 maintenance, repair or preservation of a transportation facility that is otherwise  
8 authorized by and consistent with the comprehensive plan and land use  
9 regulations[.]” is not a decision that is reviewable by LUBA.<sup>5</sup> In another  
10 subassignment of error, petitioner cites ORS 197.015(10)(b)(D) and argues that  
11 the city’s decision merely involves a determination about final engineering of  
12 an already established road location, and the road is authorized by and  
13 consistent with the CCP and the LDC, and accordingly LUBA lacks  
14 jurisdiction to review the city’s decision.

15 The city responds that the application does not request approval of “final  
16 engineering design” and that the city correctly concluded that the location of  
17 the road proposed by petitioner is not “consistent with [the CCP and the  
18 LDC],” so that the ORS 197.015(10)(b)(D) exclusion does not apply. The

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<sup>5</sup> Although not cited by the parties, ORS 227.160(2)(c) similarly excludes from the definition of “permit” “[a] decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]”

1 challenged decision denying a detailed development application plainly applies  
2 the provisions of the comprehensive plan and land use regulations and is  
3 therefore a land use decision, unless it is subject to the exclusion at ORS  
4 197.015(10)(b)(D). We agree with the city that the decision does not determine  
5 “final engineering design” of a transportation facility. It does not determine  
6 anything other than that petitioner’s proposed detailed development application  
7 fails to meet various LDC and CCP provisions.

8 **F. De Facto Moratorium**

9 In another subassignment of error, petitioner argues that the city’s denial  
10 of its application is a moratorium on development adopted without compliance  
11 with ORS 197.520 *et seq.* ORS 197.524(1) provides:

12 “When a local government engages in a pattern or practice of  
13 delaying or stopping the issuance of permits, authorizations or  
14 approvals necessary for the subdivision or partitioning of, or  
15 construction on, any land, including delaying or stopping issuance  
16 based on a shortage of public facilities, the local government shall:

17 “(a) Adopt a public facilities strategy under ORS 197.768; or

18 “(b) Adopt a moratorium on construction or land development  
19 under ORS 197.505 to 197.540.”

20 ORS 197.524(2) provides an exception to ORS 197.524(1):

21 “The provisions of subsection (1) of this section do not apply to  
22 the delay or stopping of the issuance of permits, authorizations or  
23 approvals because they are inconsistent with the local  
24 government’s comprehensive plan or land use regulations.”

25 Petitioner argues that denying the road in the location proposed by petitioner  
26 without identifying a road location that could satisfy the applicable criteria



1 amounts to a moratorium that prevents residential development of the  
2 Timberhill PD.

3 The city responds that the city’s determination that petitioner’s  
4 application failed to satisfy applicable provisions of the LDC and the CCP does  
5 not fall within the definition of a moratorium and is allowed under ORS  
6 197.524(2). We agree with the city. The city’s denial of petitioner’s application  
7 for a permit because the city concluded the application was not consistent with  
8 the LDC does not come within the definition of a moratorium, and is allowed  
9 under ORS 197.524(2). In addition, petitioner, who as far as we can tell has had  
10 one permit application denied, has not attempted to establish that the city has  
11 engaged in a “pattern or practice” of denying permits.

12 **G. Comprehensive Plan Provisions Apply**

13 In another subassignment of error, petitioner argues that the city erred in  
14 applying various comprehensive plan policies to its application because the  
15 notice of the January 4, 2016 city council hearing and the notices of the  
16 planning commission hearing state that “[CCP] Policies are not considered to  
17 be decision criteria, per se.” Record 3325, 3346; Petition for Review 43. The  
18 city responds that the applicable CCP policies were specifically referenced in  
19 the notice of hearing at Record 3325. We agree with the city.

20 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2       ORS 197.307(4) requires the city to apply only clear and objective  
3 standards, conditions, and procedures “regulating the development of needed  
4 housing on buildable land[.]” In its second assignment of error, petitioner  
5 argues that its application for detailed development plan approval of Kings  
6 Boulevard is an application for “needed housing” as defined in ORS  
7 197.303(1). According to petitioner, the Timberhill PD is “needed housing,”  
8 and petitioner’s application for detailed development plan approval of Kings  
9 Boulevard is an application for “the development of needed housing on  
10 buildable land[.]” because Kings Boulevard is necessary in order to develop the  
11 Timberhill PD with that needed housing.

12       **A. Kings Boulevard is not “needed housing”**

13       ORS 197.303(1) defines “needed housing” as used in ORS 197.307 as:

14       “[H]ousing types determined to meet the need shown for housing  
15       within an urban growth boundary at particular price ranges and  
16       rent levels, including at least the following housing types:

17       “(a) Attached and detached single-family housing and multiple  
18       family housing for both owner and renter occupancy;

19       “(b) Government assisted housing;

20       “(c) Mobile home or manufactured dwelling parks as provided in  
21       ORS 197.475 to 197.490;

22       “(d) Manufactured homes on individual lots planned and zoned  
23       for single-family residential use that are in addition to lots  
24       within designated manufactured dwelling subdivisions; and

25       “(e) Housing for farmworkers.”

1 The city and intervenor-respondent respond that the application does not  
2 propose “needed housing” as defined in the statute and accordingly ORS  
3 197.307(4) does not apply. We agree.

4       ORS 197.303(1)’s definition of “needed housing” is phrased entirely in  
5 terms of descriptions of “housing types.” The definition includes a non-  
6 exclusive list of “housing types” in subsections (a) through (e). Even applying  
7 the principle of *ejusdem generis*, however, in determining whether an open-  
8 ended statutory list includes something not expressly listed, the determination  
9 is limited by the common characteristics of those things already in the list. *See*  
10 *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 193, 211 P3d  
11 297 (2009) (under principle of *ejusdem generis*, a statute that lists what a parcel  
12 “includes” is not an exclusive list, although items not expressly listed are  
13 limited by the common characteristics of the listed items). The common  
14 characteristic of the things in subsections (a) through (e) is that they all  
15 describe “housing types.” A road is simply not a “housing type[;]” it is a road.  
16 The application that led to the challenged decision was not consolidated with  
17 other applications for residential development that may be applications for  
18 “needed housing.”<sup>6</sup> The fact that the road may one day serve residential

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<sup>6</sup> In referring to future applications for residential development, we express no opinion on whether future applications would be applications for “needed housing on buildable land” within the meaning of ORS 197.307(4), and thus fall within the proscription in ORS 197.307(4) that such development be subject only to clear and objective standards.

1 development or other roads that serve residential development does not convert  
2 petitioner’s unitary application for a road into an application for “needed  
3 housing.” For the above reasons, the provisions of ORS 197.307(4) do not  
4 apply to the city’s decision.

5 **B. Motions to Take Official Notice**

6 As set out above, ORS 197.307(4) requires the city to apply only clear  
7 and objective standards, conditions, and procedures “regulating the  
8 development of needed housing on buildable land[.]” Accordingly, in order to  
9 be protected from application of standards, conditions and procedures that are  
10 not “clear and objective,” an applicant must establish that its application is for  
11 “needed housing on buildable land.” Findings adopted by the city conclude that  
12 the Timberhill PD is not “buildable land” within the meaning of ORS  
13 197.307(4).

14 Petitioner filed two separate motions to take official notice under OEC  
15 202(7). The first asks that LUBA take official notice of certain documents that  
16 are part of the city’s comprehensive plan. The second asks that LUBA take  
17 official notice of the city’s 1966 and 1980 zoning ordinances. The city opposes  
18 the motions.

19 Petitioner’s motions support arguments in the petition for review that  
20 challenge the city’s alternative finding that the Timberhill PD is not “buildable  
21 land.” Because we determine above that Kings Boulevard is not “needed  
22 housing,” we need not address petitioner’s argument that the Timberhill PD is

1 “on buildable land” within the meaning of ORS 197.307(4). Accordingly,  
2 petitioner’s motions to take official notice are denied, as moot.<sup>7</sup>

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 ORS 227.173(3) requires that “[a]pproval or denial of a permit  
6 application \* \* \* shall be based upon and accompanied by a brief statement that  
7 explains the criteria and standards considered relevant to the decision, states  
8 the facts relied upon in rendering the decision and explains the justification for  
9 the decision based on the criteria, standards and facts set forth.”

10 As we explained in *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA  
11 387, 394 (2008) (*citing Commonwealth Properties v. Washington County*, 35  
12 Or App 387, 400, 582 P2d 1384 (1978)), when a local government denies a  
13 permit application, a “local government’s findings must be sufficient to inform  
14 the applicant either what steps are necessary to obtain approval or that it is  
15 unlikely that the application will be approved.” In *Commonwealth Properties*,  
16 the Court of Appeals held that the board of commissioners’ findings explaining

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<sup>7</sup> This case has involved an unusual amount of post-briefing and post-oral argument activity. Petitioner and the city each filed multiple post-briefing and post-oral argument motions, responses to motions, and replies to responses to motions. Because all of the motions, responses to those motions, and replies to those motions relate to petitioner’s argument in its second assignment of error that the needed housing statutes at ORS 197.303 *et seq* apply to petitioner’s application, we deny all of them as moot and we do not consider the motions, responses, or replies to those motions.

1 its denial of a subdivision application in that case were insufficient to give an  
2 applicant for tentative subdivision approval “reasonably definite guides as to  
3 what it must do to obtain final plat approval, or inform the subdivider that it is  
4 unlikely that a subdivision will be approved.”

5 In its third assignment of error, petitioner argues that the city’s findings  
6 are inadequate to give petitioner direction as to what is needed to obtain  
7 approval of a detailed development application for the road. Petitioner argues  
8 that the CTP, the NCAP, and the 2000 CDP all show the road through  
9 petitioner’s property in a location that is consistent with the location set out in  
10 petitioner’s application. Petitioner argues that the record includes the three  
11 alignments and the three additional modified slope alignments that were part of  
12 the alternatives study that petitioner submitted to the city engineer in 2014,  
13 from which the 2014 Dedication was chosen. Petitioner maintains that all of the  
14 alignments that were studied place the road in a location that is consistent with  
15 the conceptually approved location in the 2000 CDP. Petitioner also points to  
16 the city engineer’s testimony that there is no alignment of the road through the  
17 Timberhill PD that would comply with all city standards, and that a variance to  
18 some cut and fill standards will be required in order to locate the road as shown  
19 in the CTP, the NCAP, and the 2000 CDP.<sup>8</sup> Record 1745. Petitioner argues that

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<sup>8</sup> The city’s findings acknowledge that pursuant to LDC 4.12.70 and LDC 4.13.50.b.2, the city engineer has deemed impacts to natural features necessary to maintain a functional system based on the proposed location of the road. Record 19.

1 given the above legal and factual considerations, the city does not have the  
2 discretion to deny the road in a location that complies with the CTP, the NACP,  
3 and the 2000 CDP. Petitioner invites the city to pick one of those locations or  
4 specify another location that is consistent with the 2000 CDP. Petition for  
5 Review 69.

6 The city and intervenor respond that the city’s findings adequately  
7 explain the bases for the city’s denial. In sum, the city denied the application  
8 because the city concluded that petitioner’s proposed location for the road (1)  
9 does not minimize to the greatest extent practicable impacts to protected  
10 natural features; (2) does not provide “compensating benefits” under LDC  
11 2.5.40.a.1 to offset the impacts of the required variance to cut and fill  
12 standards; and (3) petitioner failed to include a road and utility plan for the  
13 entire 222-acre Timberhill PD.

14 We have reviewed all of the city’s findings, and we do not agree with the  
15 city that the findings are adequate to inform petitioner what is required to  
16 obtain approval of the road that has already been given conceptual approval in  
17 the CTP, the NACP, and the 2000 CDP. First, a previous land use decision, the  
18 2000 CDP, approved an arterial road in the location shown in the 2000 CDP.  
19 Second, the CTP and the NCAP show an arterial road running through the  
20 property. Third, the city engineer’s testimony makes clear that in order for the  
21 road to be built in the location shown in the CTP, the NCAP and the 2000  
22 CDP, variances to LDC cut and fill standards will be required. Record 1745

1 (“Engineer Reese said that there possibly were some unintended consequences  
2 with this piece of code language; this arterial roadway - which shows up in all  
3 of the City’s master plans and other documents – simply could not be built to  
4 City standards and meet the code requirements.”) Stated differently, precise  
5 siting of the road in anywhere in the location already approved in the CTP, the  
6 NACP, and the 2000 CDP will require variances to cut and fill standards or  
7 maximum roadway slope standards.

8         The 2000 CDP is a final land use decision that is binding on the city.  
9 Given that prior decision, the city is obligated to give petitioner a better idea of  
10 how the city council would go about approving a road in the location shown in  
11 the 2000 CDP, either by choosing the road location from one of the alternatives  
12 proposed to the city engineer prior to the 2014 Dedication, by advising  
13 petitioner which protected natural features the city believes are most important  
14 and should be avoided, or by some other method. The city council may not  
15 simply conclude that petitioner’s proposed alignment does not satisfy the  
16 applicable approval criteria, without providing better guidance to petitioner  
17 about an alignment that is both consistent with the 2000 CDP, and that would  
18 satisfy the applicable detailed development plan approval criteria. Whatever  
19 method it chooses, a decision by the city not to approve any road that is located  
20 in the conceptual location shown in the CTP and the NACP (and approved by  
21 the 2000 CDP) would likely not be a land use decision that is “in compliance  
22 with the acknowledged plan and land use regulations.” ORS 197.175(2)(d).



1 **CONCLUSION**

2           Petitioner seeks reversal of the city’s decision. ORS 197.835(10)(a)(A)  
3 requires LUBA to reverse a local government decision and order the local  
4 government to grant approval of an application for development denied by the  
5 local government if the board finds:

6           “Based on the evidence in the record, that the local government  
7 decision is outside the range of discretion allowed the local  
8 government under its comprehensive plan and implementing  
9 ordinances[.]”

10 Although it is a reasonably close call, petitioner has not established that the  
11 city’s decision to deny petitioner’s application for approval of the specific  
12 alignment that was accepted by the city in the 2014 Dedication is outside the  
13 range of its discretion allowed under the CCP and the LDC. Thus, consistent  
14 with our resolution of the third assignment of error, remand is the appropriate  
15 remedy.

16           The city’s decision is remanded.