BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARY MCCOLLOUGH
and ACORN PARK COMMUNITY
FOR WELL BEING,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

HOUSING AND COMMUNITY
SERVICES AGENCY OF LANE COUNTY,
Intervenor-Respondent.

LUBA Nos. 2016-058/059/060/061/062/063

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson Cox.

Emily N. Jerome, City Attorney's Office, Eugene, filed a response brief and argued on behalf of respondent.

Ross M. Williamson, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Local Government Law Group, PC.

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

REMANDED 12/21/2016

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal six building permits authorizing construction of a 54-unit apartment complex housing ex-convicts, along with accessory office space for probation and parole officers.

FACTS

The subject property is a narrow, mostly rectangular-shaped parcel, 1.48 acres in size, zoned R-2 (Medium Density Residential). To the east the parcel has 50 feet of frontage on Oak Patch Road, a major collector. To the northwest, the parcel abuts an unimproved cul-de-sac at the end of W. 14th Avenue, a local street.

In March 2015, intervenor-respondent Housing and Community Services Agency of Lane County (HACSA) sought a zone verification decision from the city to categorize proposed development of the property and determine what land use reviews would be required. The development proposed in the request for zone verification included five, three-story multi-family structures, with 54 total units, and one single-story community building. The community building would include an office for two probation and parole officers, who would provide services to the residents.

On March 30, 2015, the city issued the zone verification decision, concluding that under the Eugene Code (EC) the proposed development qualified as Controlled Income and Rent Housing (CIR), which is a type of

multi-family development that is a permitted use in the R-2 zone, subject to special standards.[1] Record 458. The decision noted that the maximum density on the property for multi-family development in the R-2 zone would be 28 units, but that as CIR development the proposal qualifies for a density bonus and reduced parking requirements, allowing a maximum of 62 units. The zone verification decision also concluded that the proposed probation office would be allowed as an accessory use to the CIR development, if the office is limited to providing services only to the residents. Otherwise the proposed office would require a conditional use permit.

Subsequently, HACSA filed six building permit applications with the city, seeking approval of the six proposed buildings and the proposed accessory probation office. To illustrate compliance with parking, access, grading and other requirements, HACSA submitted a number of plans, including a site plan. The site plan proposes several parking courts and two paved open areas,

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[1] The city's code at EC 9.0500 defines CIR development as follows:

> "**Controlled Income and Rent Housing**. A housing project, or that portion of a larger project, consisting of any dwelling type or types exclusively for low-income individuals and/or families, sponsored by a public agency, a non-profit housing sponsor, a developer, a combination of the foregoing, or other alternatives as provided for in the Oregon Revised Statutes or Federal Statutes to undertake, construct, or operate housing for households that are low-income. For the purposes of this definition, low-income means having income at or below 80 percent of the area median income. (See Map 9.2740 Areas Unavailable for Controlled Income and Rent (CIR) Housing with Increased Density.)"

described as The Plaza and the Courtyard, as well as a stormwater retention facility. HACSA proposed to provide vehicular access to the site via a 20-foot wide driveway connecting to Oak Patch Road, with the remainder of the 50-foot-wide frontage occupied by a sidewalk and a parking lot. Fire access would be provided by connecting a 20-foot-wide fire lane to the unimproved cul-de-sac that abuts the northwest end of the property, with the fire lane closed by bollards. HACSA proposed to pave a portion of the cul-de-sac to connect the fire lane to the existing pavement in W. 14th Avenue.

On April 27, 2016, the city approved the six building permits. Petitioners appealed the six permits to LUBA, and those appeals have been consolidated for review.[2]

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city erred in failing to process the application for the proposed CIR development as a statutory "permit" decision, as defined at ORS 227.160(2), which would have provided for notice to nearby landowners and an opportunity for a public hearing. ORS 227.160(2) in relevant part defines "permit" as the "discretionary approval of a proposed development of land, under ORS 227.175 or city legislation or regulation."[3]

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[2] In a previous order, LUBA rejected HACSA's motion to dismiss these appeals based on the "ministerial" exception to LUBA's jurisdiction, at ORS 197.015(10)(b)(A). *McCollough v. City of Eugene*, __ Or LUBA __ (LUBA Nos. 2016-058/059/060/061/062/063, Order, September 1, 2016).

[3] ORS 227.160 provides, in relevant part:

ORS 227.175 generally requires a city to provide notice and hearing on an application for a "permit."

In *Tirumali v. City of Portland*, 41 Or LUBA 231, 240 (2001), *aff'd* 180 Or App 613, 45 P3d 519 (2002), LUBA held that a decision approving a building permit for a use permitted in the applicable zone did not constitute the "discretionary approval of a proposed development of land," even if the standards that governed approval of the building permit included ambiguous terms that required interpretation. In *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115, 121 (2013), we explained that a building permit approval could potentially constitute a statutory "permit," if the decision requires interpreting ambiguous or discretionary land use standards that go to the nature

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> "As used in ORS 227.160 to 227.186:
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> "* * * * *
>
> "(2) 'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:
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> "(a) A limited land use decision as defined in ORS 197.015;
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> "(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]"

of the proposed use itself, and whether or not the use is correctly categorized as a permitted use.

In the present case, petitioners argue that, for the reasons set out in the second assignment of error, the city was required to conduct site review of the proposed development under EC at EC 9.8425 *et seq*., because the proposed CIR development constitutes "needed housing" as defined by statute. As explained below, we disagree with petitioner that site review is required under the city's code. For that reason alone, petitioners' arguments under the first assignment of error do not provide a basis for reversal or remand. In any case, even if petitioners were correct that the city's code requires site review for the proposed CIR development, that conclusion would not mean that the six building permit decisions before us are "permits" as defined at ORS 227.160(2).

First, the March 30, 2015 zone verification decision determined that the proposed use is properly categorized as a CIR use under the city's zoning code, which is a permitted use in the R-2 zone, subject to special standards. Petitioner does not dispute that determination (and any dispute on that point advanced in this appeal would be an impermissible collateral attack on the zone verification decision).[4] The March 30, 2015 zone verification decision

[4] The March 30, 2015 zone verification decision constituted what LUBA has described as a "zoning classification" decision, defined at ORS 227.160(2)(b) as a "decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards

answered the posed questions about the nature of the proposed use, and whether it is a permitted use in the R-2 zone, and those answers cannot be collaterally attacked in the present appeals of the building permit decisions. The building permit decisions simply relied upon those prior determinations about the nature and proper categorization of the proposed use, and those questions were therefore not at issue in rendering the building permit decisions. For those reasons, the building permit decisions did not involve or require exercise of the kind of discretion that we noted in *Tirumali* and *Richmond Neighbors* might be sufficient to render a building permit decision a "permit" decision as defined at ORS 227.160(2).

Second, a conclusion that the city's site review standards apply to the proposed development would not support—in fact it would undermine—petitioners' argument that the building permit decisions are "permit" decisions as defined at ORS 227.160(2). That is because ORS 227.160(2)(a) excludes from the definition of "permit" that species of decision known as a limited land use decision. *See* n 3. ORS 197.015(12) defines "limited land use decision" in relevant part as the "approval or denial of an application based on discretionary

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defining the uses permitted within the zone[.]" *See* n 3. A zoning classification decision is appealable to LUBA. ORS 227.175(11). The March 30, 2015 zone verification decision was not appealed to LUBA, and it is a final land use decision that cannot now be challenged in the appeal of the building permit decisions that rely on the March 30, 2015 decision. That said, it is important to recognize that a zoning classification decision is a limited tool that resolves only those land use planning questions regarding a specific proposed development that are actually asked and answered.

standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review." The city's site review standards appear to be standards "designed to regulate the physical characteristics" of permitted uses, which is a common function of site review. Even if some of the city's site review standards are discretionary, as petitioners argue, that would only confirm that a decision applying such standards would constitute a limited land use decision, which is expressly excluded from the definition of "permit."[5] Accordingly, petitioners' argument that the city's site review standards apply undercuts their position that the building permit decisions are "permit" decisions as defined at ORS 227.160(2).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that because the proposed CIR development qualifies as "needed housing" as that term is defined under state law, the EC provisions governing site review at EC 9.8425 *et seq*. require the development to undergo site review. As discussed below, EC 9.8425 provides that site review "shall be applied" to an "application that proposes needed housing."[6] Further, because

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[5] And if none of the city's site review standards are discretionary, then for that reason alone a decision applying only nondiscretionary site review standards could not constitute a "permit" decision, which is defined as the "discretionary approval of a proposed development of land[.]" *See* n 3.

[6] EC 9.8430 provides, in relevant part:

site reviews for needed housing must be processed under "Type II" procedures, which require notice to nearby landowners and an opportunity to comment, petitioners argue that the city failed to follow the correct procedure.

"**Applicability**. Site review provisions shall be applied when any of the following conditions exist:

"(1) Property is zoned with the /SR overlay zone and the proposal would result in either of the following:

(a) New development of vacant sites * * *.

"(b) An expansion of 20 percent or more of the total existing building square footage on the development site.

"(2) The proposed use on the property is identified as a use which requires site review under other provisions of this land use code and the proposal would result in either of the following:

"(a) New development of vacant sites * * *.

"(b) An expansion of 20 percent or more of the total existing building square footage on the development site.

"(3) *The application proposes needed housing, as defined by State statutes.* Applications proposing needed housing shall be reviewed through the Type II site review procedures utilizing the criteria at EC 9.8445 Site Review Approval Criteria - Needed Housing unless the applicant specifically request[s] in the application that the city apply the criteria at EC 9.8440 Site Review Approval Criteria - General." (Emphasis added).

EC 9.8430, entitled "Applicability," requires that site review provisions "shall be applied when any of the following conditions exist[,]" followed by three conditions. *See* n 6. The first condition is where the property is zoned with an /SR overlay, which is not the case here. The second condition is where "proposed use on the property is identified as a use which requires site review under other provisions of this land use code for the property[.]" This second condition appears to apply when EC provisions, such as EC Table 9.2740, which we discuss below, specify that site review is *required* for a particular use category. The second condition also does not apply in this case.

Petitioners argue that the third condition applies in the present case. The third condition is where "[t]he application proposes needed housing, as defined by State statutes." As petitioners argue, ORS 197.303(1) defines "needed housing" in relevant part to include "Government assisted housing[.]"[7]

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[7] ORS 197.303(1) provides:

> "As used in ORS 197.307, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types:
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> "(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
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> "(b) Government assisted housing;
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> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;

Petitioners argue that the proposed CIR development is accurately described as "Government assisted housing," and therefore is "needed housing" as defined by ORS 197.303(1). Because the proposed CIR development is "needed housing," petitioners argue based on the plain text of EC 9.8430(3) that the city's site review provisions "shall be applied" to the proposed CIR development.[8]

The city and intervenor do not dispute that CIR development is "needed housing" as defined at ORS 197.303(1). However, respondents argue in their briefs that EC 9.8430(3), read in context, should not be interpreted, as petitioners do, to require site review for all applications that happen to involve needed housing as defined by ORS 197.303(1).

Under respondents' view, the starting point for analysis is EC Table 9.2740. EC Table 9.2740 is entitled "Residential Zone Land Uses and Permit

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> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
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> "(e) Housing for farmworkers."

[8] The challenged building permit decisions include no findings or interpretations of the applicable code provisions, so there are no interpretations to review. In such cases, LUBA may interpret the relevant code provisions in the first instance, based on the general template for statutory construction set out in *PGE v. BOLI*, 317 Or 606, 610-12, 859 P2d 1143 (1993). *See also* ORS 197.829(2) (where the local government fails to adopt a reviewable interpretation of a local regulation LUBA may make its own determination whether the local government decision is correct).

Requirements," and it lists the use categories allowed in the city's five residential zones, cross-referenced to each residential zone. At each cross-reference point, the table provides one or more abbreviations denoting how the use is categorized under the code and what reviews are required or available. We refer to these abbreviations as "review types." The text of EC 9.2740 describes the relevant review types as follows:

> "(P) Permitted.
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> "(SR) Permitted, subject to an approved site review plan or an approved final planned unit development.
>
> "(C) Subject to an approved conditional use permit or approved final planned unit development.
>
> "(PUD) Permitted, subject to an approved final planned unit development.
>
> "(S) Permitted, subject to the Special Development Standards for Certain Uses beginning at EC 9.5000."

Table 9.2740 includes a section that lists "Residential" "Dwellings," which range from one-family dwelling to CIR development. Most residential use categories are identified with a single review type in the various residential zones. For example, a one-family dwelling is identified as "P" (permitted) in the R-1, R-2, R-3 and R-4 zones. Notably, none of the residential uses listed in Table 9.2740 identify "SR" (permitted, subject to site review) as a *required* review type in any zone. However, two residential uses in Table 9.2740 present the applicant with a choice between two review types in the R-2 zone,

and for one of those use types, manufactured home park, the applicant has the choice of seeking site review:

Dwellings	R-2 Zone
Manufactured Home Park. Shall comply with EC 9.5400 or site review.	S or SR
Controlled Income and Rent Housing where density is above that normally permitted in the zoning yet not to exceed 150%. (Shall comply with multiple-family standards in EC 9.5500 or be approved as a PUD)	S or PUD see Map 9.2740

Table 9.2740 thus provides that the applicant for a proposed CIR use may choose one of two paths to approval: under "S" (Permitted, subject to the "Special Development Standards for Certain Uses beginning at EC 9.5000"), or PUD (Permitted, subject to an approved final planned unit development). In the present case, HACSA chose the S path rather than the PUD path.

The city and HACSA argue that the fact that Table 9.2740 includes a review type of "SR" (permitted, subject to an approved site review plan), and that the CIR use category does not specify "SR" in the R-2 zone, means that the city did not intend to require that CIR development in the R-2 zone be potentially subject to site review standards. As context, the city also notes that the immediately preceding use category, manufactured home park, offers the applicant the choice of proceeding under the "S or SR" path. The city argues that this context makes it clear that the omission of "SR" from the Table 9.2740 entry for CIR development was not accidental, and had the city intended to

require an applicant for CIR development to obtain site review, or even offer that option, the city clearly knew how to do so.

Further, the city and, at greater length, HACSA, argue that the fact that Table 9.2740 makes site review *optional* for some listed uses, such as manufactured home parks, has implications for the meaning of EC 9.8430(3). Read in this context, respondents argue, EC 9.8430(3) is directed at circumstances where the EC provides the applicant the *option* of seeking site review for proposed needed housing, and the applicant chooses to exercise that option. HACSA argues that this more limited interpretation of EC 9.8430(3) is consistent with its terms, which concerns applications where the applicant "proposes" needed housing. According to respondents, the term "proposes" suggests that the applicant must intend, and deliberately choose, to seek review of the application as needed housing.

Respondents also argue that a more limited interpretation of EC 9.8430(3) harmonizes that code provision with Table 9.2740, and avoids absurd consequences that would flow from adopting petitioners' more expansive interpretation of EC 9.8430(3). Respondents note that even single-family dwellings constitute needed housing as defined at ORS 197.303(1) (*see* n 7), and argues that under petitioners' interpretation a building permit application for any single family dwelling in the city's residential zones would be required to undergo site review under the city's Type II process. According to respondents, mandating site review under Type II procedures for every

possible form of needed housing, including building permit applications for single family dwellings, would be inconsistent with ORS 197.307(4), which prohibits local governments from implementing standards that "have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." Respondents argue that LUBA should not adopt petitioners' expansive interpretation of EC 9.8430(3), because it would force the city's code into unnecessary conflict with ORS 197.307(4).

With respect to Table 9.2740, petitioners argue to the extent Table 9.2740 and EC 9.8430(3) conflict, the city's code provides that the latter controls. Petitioners cite EC 9.8005, entitled "Applicability and Effect of Application Requirements, Criteria, and Concurrent Review," which provides in relevant part:

> "Additional provisions addressing the applicability of sections 9.8000 through 9.8865 are found in EC 9.2000 through 9.3915, which identify various uses that require approval of a particular land use application. Land use applications referred to in EC 9.8000 through 9.8865 are subject to the procedural requirements in EC 9.7000 through 9.7885, Application Procedures, and any additional requirements of EC 9.8000 through 9.8865. **To the extent there is a conflict, the provisions in EC 9.8000 through 9.8865 control**." (bold added).

Thus, petitioners argue, if Table 9.2740 conflicts with EC 9.8430(3) by omitting to specify that CIR development (and presumably other needed housing) is subject to required site review, then Table 9.2740 must give way to EC 9.8430(3).

The city's code is no model of clarity on this point. However, while it is a reasonably close question, we agree with respondents that, read in context, EC 9.8430(3) should not be interpreted to require that all applications for development that falls within the definition of needed housing at ORS 197.303(1) must undergo site review.

There is no dispute that the disputed CIR housing qualifies as "needed housing," under the statutory definition of that term. Therefore, if the phrase "[t]he application proposes needed housing," requires no particular intent on the part of the applicant, and the only question is whether the proposed housing qualifies as "needed housing" as the statutes defines that term, then the application in this case is subject to site review under EC 9.8430(3). But so would a building permit for one single family dwelling if that dwelling qualifies as needed housing under the statute. We seriously doubt the city intended to subject every single building permit for housing that qualifies as needed housing to site review. As respondents point out, such a requirement could easily run afoul of ORS 197.307(4), which prohibits local governments from imposing standards, conditions and procedures that have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

Although the parties do not discuss it, we note that the similar phrase "applications proposing needed housing" is expressly defined earlier in the EC at EC 9.6010, which states:

"(1) As used in EC chapter 9.6000, the term 'applications proposing needed housing' includes:

"(a) Applications that are proceeding (or have proceeded) under EC 9.8100, 9.8220, 9.8325, 9.8445, or 9.8520 [setting out alternative clear and objective tracks for needed housing under chapters governing conditional use permits, PUDs, site review, subdivisions etc.]; or

"(b) Applications for development permits for uses permitted outright in the subject zone *if the applicant has demonstrated that the proposed housing is needed housing as defined by state statutes.*

"(2) The term does not include an application that could have proceeded under EC 9.8100, 9.8220, 9.8325, 9.8445, or 9.8520, but the applicant elected to proceed under the discretionary approval process." (Emphasis added).

EC chapter 9.600 sets forth a number of general development standards that apply to all development. The phrase "applications proposing needed housing" is used several times in EC chapter 9.6000 to flag general development standards that can be waived or avoided if the application proposes needed housing. *See, e.g.*, EC 9.6815(2)(e), EC 9.6845, and EC 9.6865(1) and (2).

Under the above definition of the phrase "applications proposing needed housing," some action on the part of the applicant must be taken to qualify the application for the special treatment that is provided under the EC for needed housing. Importantly, "for development permits for uses permitted outright in the subject zone," the applicant must demonstrate that the proposed housing is needed housing, before the applicant is entitled to differential treatment under EC 9.6000 *et seq*. Without that demonstration, the application for a

development permit for a use permitted outright would not be treated as one for needed housing, even if the development is in fact "needed housing" as defined by statute.

It seems highly likely that the term "permitted outright," as used in EC 9.6010(1)(b) includes what EC 9.2740 calls "(P) Permitted," as well as "(S) Permitted subject to the Special Development Standards for Certain Uses beginning at EC 9.5000." Thus, an application for a P or S use can become an application entitled to the special treatment given to needed housing under EC 9.6000 *et seq.*, if the applicant makes the demonstration required by EC 9.6010(1)(b).

EC 9.8430(3) uses almost the identical phrase as defined in EC 9.6010, "[t]he application proposes needed housing," and it seems highly likely that the city intended that phrase to have a similar meaning and to play a similar role. Under this view, for purposes of EC 9.8430(3) an applicant "proposes" needed housing for permitted uses (*e.g.*, uses categorized on Table 9.2740 as P or S) when the applicant takes positive steps to qualify the development as needed housing. If the applicant chooses to do so, then the applicant can qualify for special treatment not only under EC chapter 9.6000 but also under EC 9.8445, which sets out a special non-discretionary approval track for site review for needed housing.

As evidenced by the cross-references between EC 9.6010 and EC 9.8445, it is clear that the two provisions are intended to work together. In our

view, if an applicant for a permitted use chooses to demonstrate that proposed development qualifies as "needed housing," and thus becomes entitled to special treatment under EC chapter 9.6000, it follows that the development is also treated as "needed housing" for purposes of EC 9.8445, and vice versa. In both cases, the applicant must qualify for the special treatment afforded under those provisions by positively seeking to qualify the development as "needed housing." *See* EC 9.8445(1) (requiring the applicant to "demonstrate[] that the proposed housing is needed housing as defined by State statutes"). If the applicant chooses not to make that demonstration, then the development is subject to all applicable standards in EC chapter 9.6000 and, if site review is otherwise required, also subject to the discretionary and more difficult to satisfy general site review standards at EC 9.8440.

Under the foregoing view, the phrase "[t]he application proposes needed housing" as used in EC 9.8430(3) refers, however imperfectly, to permitted uses for which Table EC 9.2740 or other EC provisions do not require site review, but for which the applicant seeks to qualify as needed housing, in order to take advantage of special treatment for needed housing under several EC provisions. That view perhaps does as much as possible to harmonize Table EC 9.2740, EC 9.6010, EC 9.8430, and EC 9.8445 into a relatively coherent whole, and avoid the alleged code conflicts that petitioners and respondents create by their contrasting interpretations, which tend to focus on isolated code provisions without viewing them in their full context.

Applying our interpretation to the present circumstances, it is undisputed that HACSA did not seek to qualify the proposed CIR development as needed housing, for purposes of EC chapter 9.6000, EC 9.8445, or any other code provision. Had HACSA attempted to make that demonstration for some code purposes, it would necessarily qualify the development as needed housing for all code purposes, including site review. However, we agree with respondents that because HACSA did not attempt to demonstrate that the CIR development qualifies as needed housing for any purpose, including to receive special treatment under EC 9.6000 *et. seq*., the application did not "propose[]" needed housing within the meaning of EC 9.8430(3).

For the foregoing reasons, we disagree with petitioners that the city erred in failing to require HACSA to undergo site review and process the building permit applications under Type II procedures.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city erred in failing to impose a condition to ensure that the proposed probation office serves only residents of the development.

As noted, the March 30, 2015 zone verification decision concluded that a parole and probation office could be approved as an accessory use to the CIR development, if services were limited to residents. Otherwise, the decision concluded, conditional use review would be required.

Petitioners argue that at a January 29, 2015 neighborhood meeting on the CIR proposal, a HACSA representative indicated that the probation office would house two officers, and that each officer has a caseload capacity of approximately 65 persons. Supp Record 2. Petitioners argue that this potential capacity of 130 persons far exceeds the maximum number of residents in the CIR development. According to petitioners, a condition of approval limiting services to residents is necessary to prevent the possibility that the probation and parole agency would assign a full case load including some non-residents to the two case officers and that the officers would serve those non-residents from the offices at the site.

The city and HACSA respond, and we agree, that the city is not required to impose a condition of approval limiting parole and probation services to residents. The March 30, 2015 zone verification decision reviewed the proposed accessory use, which was limited to providing services to residents, and carefully noted that the office use qualified as a permitted accessory use to the permitted residential use only if limited to providing services to the residents. In submitting the building permit applications, HACSA proposed the same development evaluated in the zone verification decision, and the city approved the same. We disagree with petitioners that under these circumstances the city must impose a condition of approval to prohibit what is

essentially a different use than that authorized in the challenged decisions.[9] As we noted in our order denying the motion to dismiss, if HACSA in fact develops a different type of office use on the property than the one approved, the city has enforcement authority to limit development to that approved in the building permits.

The third assignment of error is denied.

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[9] The cases petitioners cite for that proposition involve very different circumstances. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992), involved a comprehensive plan amendment that would allow a high density of residential development inconsistent with school capacity. To avoid violating a statewide planning goal, the applicant promised to develop only housing for senior citizens, but the decision did not impose any condition of approval to that effect or limit the type or density of residential development allowed under the plan amendment. Here, the applicant proposed and the challenged building permits approved an accessory office limited to serving residents, an accessory use that has already been determined to be a permitted use in the R-2 zone, and we do not believe that the city was required to anticipate that the applicant might in fact operate a different use, a non-accessory office, that is a conditional use in the R-2 zone. Similarly, in *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001), the county imposed a condition to ensure that truck traffic from a proposed use did not cause intersections to fail, in violation of the statewide transportation planning goal. LUBA concluded that the evidentiary record did not demonstrate that the condition would be effective to ensure compliance with the goal. While it is common to impose conditions to ensure that approved development satisfies applicable criteria, we do not believe it is common, or required, to impose a condition to prohibit an applicant from developing *different* uses than that proposed and approved.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend that the city misapplied several general development standards at EC 9.6000 *et seq*., with respect to site access and required public dedications.

A. Site Access

As noted, the applicant proposed and the city approved taking site access from Oak Patch Road, a major collector, instead of W. 14th Avenue, a local street. EC 9.6735(2) requires that access from a public street to a development site be located in accordance with EC 7.420. In turn, EC 7.4200(1)(c) requires that "[i]f a parcel has frontage on two or more streets with different street classifications, the access connection shall access the street of the lowest classification[,]" unless the applicant can demonstrate that one of three exceptions apply.[10]

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[10] EC 7.420(1)(c) provides:

> "If a parcel has frontage on two or more streets of different street classifications, the access connection shall access the street with the lowest classification. The access connection can access the street with the higher classification if the applicant can demonstrate (1), (2) or (3):
>
> "1. Both of the following conditions are met:
>
> "a. The proposed access connection is abutted by two or more directional travel lanes or an auxiliary deceleration lane; and

Petitioners argue that nothing in the applications or building permit decisions address compliance with EC 7.420(1)(c), or attempt to demonstrate that any of three exceptions in EC 7.420(1)(c) apply to authorize taking access from Oak Patch Road, the higher classification street. Petitioners note that a narrative on the site plan addressing one of the multi-family standards at EC 9.5500(4)(b) states that "[]the frontage on W 14th Avenue is limited by the existing conditions: the cul-de-sac was never developed and supports a wonderful Natural Feature—a mature Oak grove." RE-2. Petitioners speculate that the foregoing was perhaps intended to serve double duty in demonstrating that "[p]hysical conditions preclude locating the access connection on the street with the lower classification," for purposes of EC 7.420(1)(c)(2). However, petitioners argue that, even if so, the narrative fails to demonstrate that "physical conditions preclude locating the access connection" on W. 14th Avenue. Petitioners argue that the undeveloped status of the cul-de-sac is not a

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> "b. The applicant proposes a restricted movement access connection, including but not limited to median barriers or directional in/out barriers.
>
> "2. Physical conditions preclude locating the access connection on the street with the lower classification. Such conditions may include, but are not limited to, topography, trees, existing buildings or other existing development on the subject property or adjacent property.
>
> "3. The access connection for a parcel with frontage on an arterial or major collector can be located consistent with the requirements of EC 7.420(2)(a)-(e)."

"physical condition" that precludes access, because the city could simply require the applicant to develop the cul-de-sac to the extent necessary to provide access. Further, petitioners argue that, as approved, the cul-de-sac will accommodate a 20-foot wide driveway and access point for fire access, the same width as for the proposed 20-foot wide driveway accessing Oak Patch Road, so the "mature Oak grove" located near the cul-de-sac clearly does not "preclude" a 20-foot wide access connection to the cul-de-sac. Petitioner also notes that the applicant proposes to landscape some of the cul-de-sac frontage and to construct a gazebo near the middle of the cul-de-sac frontage, in order to satisfy requirements, discussed below, to locate buildings with a certain distance of street frontage.

HACSA responds that the existing grove of oak trees at one corner of the cul-de-sac frontage limits full access to the cul-de-sac and therefore the exception at EC 7.420(1)(c)(2) applies. However, physical conditions that may "limit" access is not the test under EC 7.420(1)(c)(2); the test is whether physical conditions "preclude" access to the lower classification street. Nothing in the record establishes that either the applicant or the city considered that question at all, or establishes compliance with EC 7.420(1)(c) in general. We agree with petitioners that remand is necessary for the city to consider compliance with EC 7.420(1)(c) in the first instance.

This sub-assignment of error is sustained.

B. Dedication and Construction of Infrastructure

Several EC 9.6000 general development standards, which apply to all development, require the developer to dedicate land for or to construct public infrastructure improvements. EC 9.6505(3)(b) provides in relevant part that:

> "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."

Similarly, EC 9.6770(1) requires the public transit operator to review site plans and may recommend transit-related facilities for residential development having an average peak hour trip rate of 25 trips or greater,[11] and if so that the city shall require that the transit-related facilities recommended by the transit operator be identified on the site plan and constructed at the time of development, "[t]o the extent [the city] demonstrates consistency with constitutional requirements[.]"

Finally, EC 9.6835(1) provides that the "city shall require within the development site the dedication to the public and improvement of accessways for pedestrian and bicyclist use to connect the development site to adjacent cul-de-sacs * * * provided the city makes findings to demonstrate consistency with constitutional requirements." The site plan at RE-2 appears to show

[11] Petitioners argue that, according to the Institute of Traffic Engineers' manual, apartments such as those proposed generate .58 trips per unit during the p.m. peak hour, or a total of 31 trips.

construction of a sidewalk connecting the proposed development to the W. 14th Avenue cul-de-sac, but nothing in the record indicates that the city considered requiring the dedication of that sidewalk. EC 9.6835(2) imposes a similar obligation with respect to existing unimproved public accessways on properties adjacent to the development site.

Petitioners argue that each of these three code provisions are mandatory and applicable to the proposed development, but that the record does not include any indication that either the applicant or the city considered them in approving the development, or that any attempt was made to address them.

The city responds that each of the cited EC provisions merely *authorizes* the city to require dedications or construction of public improvements, *if* the city makes findings to demonstrate consistency with constitutional requirements. In some cases such findings cannot be made, the city argues, and even if such findings could be made, nothing in the EC requires the city to exact land or improvements in all cases.

HACSA responds that these three EC provisions are not land use standards at all, but rather provisions that simply govern how much property might be dedicated for public infrastructure and how that infrastructure is to be constructed. HACSA also agrees with the city that the three EC provisions authorize, but do not require, the city to impose exactions, if the city chooses to make the necessary findings.

We disagree with HACSA that the cited EC provisions are not land use standards potentially applicable to the proposed development. Land use standards often impose requirements for dedication and construction of required public improvements, and the three EC provisions at issue here are atypical only in expressly recognizing that the city's ability to require dedication of land or construction of public infrastructure may be limited by constitutional constraints, specifically the Takings Clause of the United States Constitution.

EC 9.6505(3)(b), EC 9.6770(1), EC 9.6835(1) each mandate that developers provide specified dedications and public infrastructure, if among other things the city can justify those exactions as being consistent with constitutional limits on unlawful takings. As expressed in its brief, the city takes the apparent position that the requirement to adopt findings to justify exactions means that city staff have the discretion to choose whether or not to pursue the exactions specified by these three code provisions. The city appears to suggest that city staff can simply decide to waive the potential application of EC 9.6505(3)(b), EC 9.6770(1), EC 9.6835(1) in individual cases, without any explanation, standards or authority for such waiver. If that is the city's position, it would seem to invite potentially unequal application of the law in a manner that might create more constitutional problems than it would avoid. No authority that we are aware of would allow city staff to make *ad hoc* decisions

on whether or not to seek to impose specific exactions potentially required by city code.

We do not mean to suggest that EC 9.6505(3)(b) and EC 9.6835(1) require the city to prove a negative, *i.e.*, that required exactions cannot be constitutionally justified. However, in our view, at a minimum EC 9.605(3)(b) and EC 9.6835(1) impose on the city the obligation to *consider* whether it will seek to justify exactions of land or improvements that these provisions potentially require from developers, even if it ultimately decides that some or all potentially required exactions cannot be justified consistent with constitutional limitations, and even if it ultimately decides that an adjustment is warranted for some or all requirements.

EC 9.6770(1) imposes on the city the initial obligation of referring to the local public transit authority the question of whether dedications or exactions for transit-related facilities are warranted, and further obligations if the transit authority recommends such facilities. Even if some uncited authority exists for city staff to waive the potential application of these code provisions prior to conducting an analysis of consistency with constitutional limitations, the record must at a minimum include some evidence that staff consciously exercised that authority, if not a principled explanation of the reasons. The present record includes no such evidence or explanation. Absent such authority, the city must squarely address its obligations under EC 9.6505(3)(b), EC 9.6770(1), and EC 9.6835(1) in the first instance.

This sub-assignment of error is sustained.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the city misapplied several multi-family development standards at EC 9.5500.

A. Street Frontage

As noted, the subject property has 50 feet of frontage on Oak Patch Road, and at least 145 feet of frontage, perhaps more, along the W. 14th Avenue cul-de-sac. EC 9.5500(4) requires that for sites with 100 feet or more of street frontage, at least 60 percent of the street frontage must be occupied by a building or enhanced pedestrian space within 10 feet of the front yard setback line.[12] For sites with less than 100 feet of street frontage, at least 40 percent of

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[12] EC 9.5500(4)(b) provides, in relevant part:

> "Street Frontage. On development sites that will result in 100 feet or more of public or private street frontage, at least 60 percent of the site frontage abutting the street (including required yards) shall be occupied by a building(s) or enhanced pedestrian space with no more than 20 percent of the 60 percent in enhanced pedestrian space, placed within 10 feet of the minimum front yard setback line. **(See Figure 9.5500(4)(b) Multiple-Family Minimum Building Setback Along Streets.)** On development sites with less than 100 feet of public or private street frontage, at least 40 % of the site width shall be occupied by a building(s) placed within 10 feet of the minimum front yard setback line. * * * 'Site width,' as used in this standard, shall not include areas of street frontage that have significant natural resources as mapped by the city, delineated wetlands, slopes greater than 15%, recorded easements,

the site width must be occupied by buildings within 10 feet of the front yard setback. However, petitioners argue that HACSA proposed a 20-foot wide driveway and a parking lot, and no buildings, within 10 feet of the front yard setback within the Oak Patch frontage. Further, petitioners argue that HACSA did not satisfy the requirement that at least 60 percent of the W 14th Avenue frontage be occupied by buildings or enhanced pedestrian space within 10 feet of the setback.

With respect to Oak Patch Road, HACSA responds that the 50-foot frontage along that street is not actually "frontage" within the meaning of EC 9.5500(4). HACSA argues that the subject property is effectively a flag lot, with a relatively narrow 50-foot wide "pole" and a wider "flag" portion in the interior.

EC 9.0500 defines Lot Frontage" as "[t]hat portion of a single lot abutting a street." Nothing cited to us in the record or EC suggests that the subject property was created as a "flag lot," or even if it is, that a 50-foot wide "pole" does not constitute "frontage" on the abutting street for purposes of EC 9.5500(4).[13] There is nothing in the record cited to us that suggests the city

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> required fire lanes or other similar non-buildable areas, as determined by the planning director."

[13] EC 9.0500 defines "Flag Lot" as

> "A lot located behind another lot except for a narrow portion extending to the public street which is suitable for vehicular, bicycle and pedestrian access. The 'flag pole' of a flag lot is the access corridor to the buildable 'flag portion' of the lot."

made a considered decision with respect to compliance with EC 9.5500(4) and the frontage on Oak Patch Road, or that the city approved an adjustment to that code provision. We agree with petitioners that remand is necessary for the city to consider compliance with EC 9.5500(4) with respect to Oak Patch Road in the first instance.

With respect to the W. 14th Avenue frontage, the site plan at R-2 indicates that HACSA calculated the site's frontage along the cul-de-sac by drawing a straight line, 145 feet in length, from the property line at one end of the cul-de-sac to the other, without following the contours of the site's actual property line with the cul-de-sac. The site plan includes the following note:

> "The street frontage, including a straight line across the cul-de-sac, is 145 linear feet minus the 20' access driveway = 125 linear feet @ 60 percent = 75 feet. Building 1 occupies 37 [linear feet within 10 feet of the front yard setback], the Gazebo another 26 [linear feet]—leaving 12 feet for pedestrian amenity around the gazebo."

The city presumably accepted that calculation. However, petitioners argue that the frontage measured along the actual property line with the cul-de-sac is approximately 167.4 feet. Record 32. HACSA does not offer any explanation or cite to any basis in the EC to measure frontage of a cul-de-sac based on drawing a straight line across the cul-de-sac, rather than along the property line. The accurate measurement of frontage has significant consequences for

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We note that the fact that HACSA proposed a parking lot within the 50-foot wide "pole" of the property suggests that at least a portion of that "pole" is buildable and not needed for access.

how much of the land within 10 feet of the frontage must be occupied by buildings or enhanced pedestrian amenities. We agree with petitioners that remand is necessary for the city to address this issue in the first instance.

This sub-assignment of error is sustained.

B. Primary Orientation and Building Entrances

EC 9.5500(5)(a) requires that multiple family buildings within 40 feet of a front lot line "shall have their primary orientation toward the street."[14] As proposed, Building 1 is located within 40 feet of the W. 14th Avenue frontage, but its long axis, with ground-floor entrances and staircases to upper units, is oriented eastward toward a courtyard, while its short northern side faces W. 14th Avenue. Petitioners argue that Building 1 does not comply with EC 9.5500(5)(b).

Relatedly, EC 9.5500(5)(b) requires that main entrances of ground-floor units within 40 feet of a front lot line must face the street, with an exception for buildings that may be "side-oriented" "due to access requirements and/or dimensional constraints not created by the applicant[.]"[15] Petitioners argue that

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[14] EC 9.5500(5)(a) provides:

> "Building Orientation. Multiple-family residential buildings located within 40 feet of a front lot line shall have their primary orientation toward the street."

[15] EC 9.5500(5) continues, providing, in relevant part:

> "(b) Ground Floor Building Entrances. The main entrance(s) of ground floor units of any residential building located within

the applicant made no effort to establish that a side orientation is necessary "due to access requirements and/or dimensional constraints not created by the applicant[.]"

The EC does not define "primary orientation," and it is not clear to us how the primary orientation standard in EC 9.5500(5)(a) differs from and interacts with the building entrance standards in EC 9.5500(5)(b) and (c). HACSA argues that Building 1's side orientation is authorized by EC 9.5500(5)(b)(3) and is sufficient to satisfy or obviate the primary orientation

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> 40 feet of a street must face the front lot line. Main entrances may provide access to individual units, clusters of units, courtyard dwellings, or common lobbies. The following exceptions shall apply:
>
> "* * * * *
>
> "3. For buildings proposed to be 'side oriented' to public streets due to access requirements and/or dimensional constraints not created by the applicant, main entries may face up to 90 degrees away from the street provided both of the following apply:
>
> "a. They are visible from the street.
>
> "b. The building side facing the street shall not include windows or views into a parking area or garage and shall contain windows that occupy a minimum of 15% of the facade.
>
> "(c) Upper Story Building Entrances. The main entrance of upper story units shall be provided from the interior of the building or from an exterior walkway that serves no more than 2 units. * * * Access to upper-story units may be provided at the front, side or rear of a building."

standard in EC 9.5500(5)(a). However, HACSA does not argue that a side orientation is necessary due to access requirements and/or dimensional constraints, or cite to any place in the record where a demonstration to that effect was made to the city. We agree with petitioners that remand is necessary for the city to consider in the first instance the relationship between, and the proposal's compliance with, EC 9.5500(5)(a), (b) and (c).

This sub-assignment of error is sustained.

C. Parking Drives and Parking Courts

The proposed site plan includes several "parking courts," each comprised of rows of parking spaces strung out along a "parking drive" that provides access from Oak Patch Road. The parking drive is blocked by bollards from reaching the W. 14th Avenue cul-de-sac.

EC 9.5500(11)(b)(2) provides that parking drives for multiple-family developments with more than 20 units shall be designed so as to permit no through-motor vehicle movements, as illustrated by Figure 9.5500(12).[16] The

[16] EC 9.5500(11)(b)(2) provides:

> "Parking Drives. Parking drives are driveways lined with head-in parking spaces, diagonal parking spaces, garages, or any combination thereof along a significant portion of their length. Parking drives for multiple-family developments with more than 20 units shall be designed so as to permit no through-motor vehicle movements. **(See Figure 9.5500(12) Multiple-Family Parking.)**"

site plan narrative states that this criterion is met, because the bollards prevent through-motor-vehicle movement to W. 14th Avenue. RE-2.

Petitioners argue that the parking drive does not comply with EC 9.5500(11)(b)(2), but we do not understand the argument. Petitioners appear to argue that each individual parking court must connect directly to a street, and cannot consist of a linear series of parking courts connected by a parking drive. The cited source for that argument is Figure 9.5500(12), referenced in EC 9.5500(11)(b)(2). However, as far as we can tell Figure 9.5500(12) provides no support for that argument. Petition for Review App 5 (drawing showing three parking courts serially connected by a single parking drive to the closest street).

Further, EC 9.5500(12)(b)(1) provides that "[n]o more than 3 individual parking courts may be connected by an aisle or driveway[,]" which indicates that parking courts can be connected in a linear series by a common driveway.[17] Petitioners argue that there are in fact four or more parking courts,

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[17] EC 9.5500(12)(b) provides, as relevant:

> "1. Maximum Size of Parking Courts. Individual parking courts shall be no more than 9,000 square feet in size and shall be physically and visually separated by a landscape area a minimum of 20 feet in width. No more than 3 individual parking courts may be connected by an aisle or driveway. **(See Figure 9.5500(12) Multiple-Family Parking and Multiple-Family Parking[)]**.

but does not explain that assertion. The site plan shows three parking courts, each separated by the required 20-foot-wide planting island. RE-2.

Next, petitioners argue that the middle parking court violates EC 9.5500(12)(b)(2) because it consists of more than one "double-loaded parking aisle." *See* n 17. A "double-loading parking aisle" is apparently a parking drive with parking spaces on either side of it. The middle parking court is located where the parking drive takes a 90-degree bend to the north, and then another 90 degree bend to the west, with parking stalls located on both sides of the drive between each bend. Because of the bends, petitioners argue, the middle parking court is actually quadruple-loaded, with parking spaces on four sides, north, south, east and west. We reject the argument. The middle parking court consists of a single parking drive with a row of parking spaces on each side, consistent with EC 9.5500(12)(b)(2). That the drive bends twice, causing the parking spaces to face four different directions, is not a violation of EC 9.5500(12)(b)(2).

These subassignments of error are denied.

D. Limits on Parking Areas within Frontage

Finally, petitioners argue that the eastern parking court, located adjacent to the Oak Patch Road frontage, violates EC 9.5500(12)(c), which prohibits (1) "parking and vehicle use areas" from extending across more than 50 percent of

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2. Parking Court Width. A parking court of any length shall consist of no more than one 1 double-loaded parking aisle."

any street frontage, and (2) locating parking areas between buildings and the street.[18] According to petitioners, the driveway and eastern parking court together occupy more than 50 percent of the Oak Patch frontage, and further the eastern parking court is located between Building 5 and Oak Patch Road.

HACSA's only response to this argument is that the 50-foot-long property line along Oak Patch Road is not "frontage" within the meaning of EC 9.5500(12)(c), but only the "pole" of a flag lot. We have already rejected a similar argument under the first sub-assignment of error. HACSA does not cite us to any place in the record where either the applicant or the city considered whether the proposed parking lot complies with EC 9.5500(12)(c). We conclude that remand is necessary for the city to consider that question in the first instance.

This sub-assignment of error is sustained.

The fifth assignment of error is sustained, in part.

The city's decision is remanded.

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[18] EC 9.5500(12)(c) provides, in relevant part:

> "Limitation on Parking Frontage. To strengthen the presence of buildings on the street, parking and vehicle use areas and garages adjacent to any public or private street frontage shall extend across no more than 50 percent of any street frontage. No parking spaces, with the exception of underground parking, shall be placed within any required front yard area. Parking areas shall not be located between buildings and the street."