

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

01/11/18 PM 1:06 LUBA

3
4 PAUL CONTE and BRYN THOMS,
5 *Petitioners,*

6
7 and

8
9 RACHEL STEDMAN,
10 *Intervenor-Petitioner,*

11
12 vs.

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14 CITY OF EUGENE,
15 *Respondent,*

16
17 and

18
19 OAKLEIGH MEADOW CO-HOUSING,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2017-063

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Eugene.

28
29 Paul Conte and Bryn Thoms, Eugene, filed a joint petition for review.
30 Paul Conte argued on his own behalf.

31
32 Rachel Stedman, Eugene, filed a petition for review and argued on her
33 own behalf.

34
35 Lauren A. Sommers, City Attorney's Office, Eugene, filed a response
36 brief and argued on behalf of respondent.

37
38 Zack P. Mittge, Eugene filed the response briefs and argued on behalf of

1 intervenor-respondent. With him on the briefs was Hutchinson Cox Coons
2 DuPriest Orr & Sherlock.

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4 BASSHAM, Board Member; HOLSTUN Board Member, participated in
5 the decision.

6
7 RYAN, Board Chair, did not participate in the decision.

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9 AFFIRMED

01/11/2018

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

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NATURE OF THE DECISION

Petitioners appeal a planning commission decision on remand from LUBA that approves the Oakleigh Meadows planned unit development (PUD).

FACTS

This is the third time the city has approved the Oakleigh Meadows PUD, and the third appeal to LUBA involving this application. In December 2013, the city planning commission tentatively approved a 29-unit PUD on the 2.3-acre subject parcel, with conditions of approval. The only access to the subject parcel is via Oakleigh Lane, an east/west street that runs west from River Road approximately 850 feet to dead-end near the subject property. Oakleigh Lane was dedicated to Lane County in 1927 and constructed to county local access road standards, with a 20-foot paved width. Oakleigh Lane has a dedicated right-of-way that is 45 feet wide at its western end and varies between 30 and 40 feet for most of its length. However, at its eastern end there is a 250-foot-long section where the dedicated right-of-way is only 20 feet wide.

As its exists today, Oakleigh Lane has an oil mat paving surface that for most of the road's length averages a paved width of approximately 19 feet within the right-of-way. However, along the 250-foot eastern stretch where the right-of-way is only 20 feet wide there is only approximately 14 feet of paved width within the right-of-way, with an additional approximately six feet of pavement located outside the right-of-way to the south. Thus within that 250-

1 foot eastern stretch of Oakleigh Lane, the paved area is approximately 20 feet
2 wide, but only 14 feet of that pavement is within the 20-foot right-of-way.

3 Within that same 250-foot narrow stretch of Oakleigh Lane, a fire
4 hydrant is located just within the northern border of the 20-foot right-of-way,
5 three to four feet from the current pavement edge. Oakleigh Lane is otherwise
6 unimproved, and lacks curbs, gutters, storm drainage and sidewalks. The city
7 does not own all of Oakleigh Lane, and does not currently maintain the road or
8 enforce any parking restrictions. Parking of vehicles within and adjacent to the
9 right-of-way, including on paved areas within the right-of-way, is not currently
10 restricted.

11 At present, 25 lots developed with a mix of dwellings and office or
12 commercial structures take access onto Oakleigh Lane. The proposed PUD
13 would add 29 new residential units and 168 new vehicular trips per day to
14 Oakleigh Lane. The total volume of vehicular trips added to Oakleigh Lane,
15 combined with that contributed by existing development, is within the capacity
16 of a low volume local access street.

17 The city's initial 2013 decision required intervenor-respondent Oakleigh
18 Meadow Co-Housing (OMC) to dedicate right-of-way and improve the right-
19 of-way adjacent to the subject property, in part to provide a fire lane and
20 turnaround; but the 2013 decision did not require OMC to improve any portion
21 of Oakleigh Lane other than that immediately adjacent to the subject property.

1 After an initial trip up and down the appellate ladder,¹ in 2015 the planning
2 commission re-opened the evidentiary record to accept additional testimony
3 and evidence regarding the safety and adequacy of the (1) right-of-way width
4 of Oakleigh Lane, (2) pavement width of Oakleigh Lane, and (3) parking on
5 Oakleigh Lane. In response to new evidence, the planning commission's 2015
6 decision imposed a condition of approval, Condition 18, requiring the applicant
7 to pave the entire length of Oakleigh Lane, as necessary, to provide a minimum
8 of 14 feet in width within the existing right-of-way, in order to ensure
9 compliance with Eugene Code (EC) 9.8320(6), which in relevant part requires
10 that the PUD not be an "impediment to emergency response."

11 After a second trip up and down the appellate ladder to correct a new
12 procedural error stemming from the 2015 proceeding,² in 2017 the planning
13 commission conducted new evidentiary proceedings limited to the same issues
14 identified in the 2015 remand. At the conclusion of the 2017 remand

¹ See *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132, 137-38 (2014) (*Oakleigh I*), *rev'd and rem'd* 269 Or App 176, 188, 344 P3d 503 (2015) (*Oakleigh II*), *on remand* 71 Or LUBA 317 (2015) (*Oakleigh III*), which resulted in the first remand to the planning commission.

² The planning commission's 2015 decision was appealed to LUBA, resulting in *Trautman v. City of Eugene*, 73 Or LUBA 209, (*Trautman I*) *rev'd and rem'd* 280 Or App 752, 383 P3d 420 (2016) (*Trautman II*), *on remand* *Trautman v. City of Eugene*, __ Or LUBA __ (2017) (*Trautman III*), which resulted in the second remand proceeding before the planning commission, to correct a procedural error in failing to provide notice of the 2015 evidentiary proceedings. The decision before us in this appeal is the product of that second remand proceeding in 2017.

1 proceedings, the planning commission adopted new findings and imposed a
2 new condition of approval, Condition 20, requiring that the applicant pave
3 Oakleigh Lane to a minimum of 20 feet within the existing right-of-way, in
4 areas where the paving width is currently less than 20 feet within the existing
5 right-of-way. Condition 20 is intended to ensure compliance with EC
6 9.8320(5), which requires that the PUD provide “safe and adequate”
7 transportation systems to connect to nearby areas.

8 This appeal followed.

9 **FIRST ASSIGNMENTS OF ERROR³**

10 As noted, EC 9.8320(5) is a PUD approval standard requiring that the
11 PUD provide “safe and adequate transportation systems through compliance
12 with” three subsections.⁴ EC 9.8320(5)(b) requires that the PUD provide

³ The first, second and third assignments of error in petitioners’ petition for review are very similar to the first, second and third assignments of error in intervenor-petitioner Stedman’s petition for review. We address those three assignments of error together and, for convenience, refer to petitioners and Stedman collectively as “petitioners.”

⁴ EC 9.8320(5) provides:

“The PUD provides safe and adequate transportation systems through compliance with the following:

“(a) EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways * * *.

“(b) Pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby

1 “[p]edestrian, bicycle and transit circulation * * * to adjacent and nearby
2 residential areas, transit stops, neighborhood activity centers, office parks, and
3 industrial parks, provided the city makes findings to demonstrate consistency
4 with constitutional requirements.”

5 As noted, in its 2015 decision, the planning commission had imposed
6 Condition 18, requiring that the applicant improve the paved width of Oakleigh
7 Lane to 14 feet within the right-of-way, in order to satisfy a different criterion,
8 EC 9.8320(6), which requires a finding that the PUD not be an “impediment to
9 emergency response.” In its 2017 decision, the planning commission expressed
10 concern that a 14-foot paved width along the length of Oakleigh Lane, as
11 improved under Condition 18, would not be sufficient to satisfy EC
12 8.8320(5)(b). The specific scenario that troubled the planning commission was
13 a circumstance where bicyclists, wheelchairs or strollers met a passing vehicle
14 or vehicles at a place where there was only 14 feet of paved width within a 20-
15 foot right-of-way, as narrowed by any parked cars, and the bicyclists,
16 wheelchair user or stroller user would have to leave the paved surface and

residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. ‘Nearby’ means uses within a 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.

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

1 traverse the adjoining gravel or dirt surface.⁵ To ameliorate that circumstance,
2 the planning commission imposed Condition 20, requiring the applicant to
3 improve Oakleigh Lane so that it has at least 20 feet of paved width within the
4 right-of-way.

5 In their first assignments of error, petitioners argue that the planning
6 commission's findings quoted at n 5 and its imposition of Condition 20
7 represent a changed interpretation of EC 9.8320(5)(b), and that the city erred in
8 adopting that new interpretation without allowing petitioners the opportunity to
9 present evidence and argument responsive to the new, unanticipated

⁵ The planning commission findings state:

“The PC [planning commission] finds that the existing paved width and use of Oakleigh Lane (with cars sometimes parked on both sides) will not ensure that the PUD provides safe and adequate pedestrian and bicyclist access to River Road to the west (a ‘nearby’ area). For example, the PC notes that bicyclists, wheelchairs or strollers would need to pull over on or traverse a gravel or dirt surface, as opposed to a paved surface if there is vehicular traffic on Oakleigh Lane. The PC finds that the increase in daily vehicle, pedestrian and bicycle trips from the proposed development, paired with the current state of Oakleigh Lane (where paving is approximately 14 feet in width in some locations), will create an environment that is not safe for pedestrians and bicyclists to access nearby residential areas, transit stops, and neighborhood activity centers.

“Based on the above findings, the PC finds that a condition of approval is necessary to increase the paving width along Oakleigh Lane so that it is at least 20 feet to accommodate the vehicular travel lane and intermittently parked vehicles and still provide safe passage for pedestrians and bicycles.” Record 10-11.

1 interpretation, citing *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145
2 (1998).

3 In *Gutoski*, the Court of Appeals held that where the local government
4 adopts an interpretation of a code provision that (1) either significantly changes
5 an existing interpretation or is otherwise beyond the range of interpretations
6 that the parties could reasonably have anticipated at the time of their
7 evidentiary presentations, and (2) the petitioner demonstrates that it can
8 produce evidence at a new hearing that differs in substance from the evidence
9 previously produced and that is directly responsive to the unanticipated
10 interpretation, then remand is warranted to allow the petitioner to present the
11 new evidence made relevant under the new interpretation. 155 Or App at 373-
12 74.

13 The city responds, and we agree, that petitioners have not demonstrated
14 that remand for new evidentiary proceedings is warranted under *Gutoski*. First,
15 petitioners have not established that the planning commission in fact adopted a
16 new interpretation of EC 9.8320(5)(b). In its 2013 and 2015 decisions, the
17 planning commission found in relevant part that no further improvements of
18 Oakleigh Lane (other than improvements along the frontage of the subject
19 property) are necessary to comply with EC 9.8320(5)(b). In its 2017 decision
20 the planning commission found, based on a different evidentiary record that
21 was expressly re-opened to consider issues raised regarding the safety of the
22 entire length of Oakleigh Lane, that compliance with EC 9.8320(5)(b) required

1 some improvement to Oakleigh Lane (widening the paved width to 20 feet),
2 albeit not the same level of improvements (*e.g.* curbs and sidewalks) that
3 petitioners and others argued for. Drawing a different conclusion based on a
4 different evidentiary record does not mean that the planning commission
5 changed its understanding of the meaning of EC 9.8320(5)(b).

6 Second, even assuming that the 2017 decision embodies a changed
7 understanding of the meaning of EC 9.8320(5)(b) from the 2013 or 2015
8 decisions, petitioners and others have, since at least the 2015 proceedings, been
9 arguing and presenting evidence to the effect that Oakleigh Lane is unsafe in
10 its current condition and must be improved in order for the PUD to comply
11 with various approval criteria. In the 2017 decision, the planning commission
12 partially agreed on that point. Petitioners argue, in effect, for the right to
13 present *additional* evidence and argument that Oakleigh Lane must be more
14 *fully* improved. However, they have not established that the evidence they
15 presented in earlier proceedings is irrelevant under any “new” interpretation of
16 EC 9.8320(5)(b) or identified different evidence they would present that is now
17 for the first time relevant under a changed or unanticipated interpretation of EC
18 9.8320(5)(b).

19 Finally, petitioners argue that the planning commission erred in failing to
20 provide them an opportunity to review the findings addressing EC 9.8320(5)(b)
21 and the newly imposed Condition 20, which were adopted following
22 deliberations after the close of the evidentiary record. However, aside from in

1 the limited circumstances discussed in *Gutoski*, a local government is not
2 obligated to provide participants with an opportunity to review and challenge
3 findings of compliance with approval criteria or conditions imposed to ensure
4 compliance with approval criteria, prior to adopting those findings or
5 conditions. If such findings or conditions are inadequate for some reason, the
6 remedy is to appeal the decision locally or to LUBA, and challenge them in that
7 forum, which is precisely what petitioners do in their second assignments of
8 error, discussed below.

9 Petitioners and Stedman's first assignments of error are denied.

10 **SECOND ASSIGNMENTS OF ERROR**

11 Petitioners argue that Condition 20, requiring a minimum of 20 feet of
12 paved width within the Oakleigh Lane right-of-way, is inadequate to
13 demonstrate or ensure compliance with EC 9.8320(5)(b), for six reasons.⁶
14 Further, petitioners argue that given the safety concerns Condition 20 is
15 intended to ameliorate, the city erred in finding that a traffic impact analysis
16 (TIA) is not required under EC 9.8320(5)(c). *See* n 4.

⁶ Condition 20 states:

“Prior to occupancy of any dwellings in the PUD, the applicant shall improve Oakleigh Lane to ensure a minimum of 20 feet of paving width, in any areas where the paving width is currently less than 20 feet within the existing right-of-way. The applicant shall obtain any necessary permits for the required street improvements, and shall provide documentation of compliance upon completion.”
Record 26.

1 **A. Condition 20**

2 **1. Ambiguity of Condition 20**

3 As noted, Condition 20 states in relevant part that “the applicant shall
4 improve Oakleigh Lane to ensure a minimum width of 20 feet of paving width,
5 in any areas where the paving width is currently less than 20 feet within the
6 existing right-of-way.” *See* n 6. Petitioners argue that Condition 20 is
7 ambiguous regarding which areas of Oakleigh Lane must be improved and
8 which improvements are required.

9 First, petitioners contend that the meaning of “paving” is ambiguous, and
10 could mean either (1) oil-mat paving like the existing paving on Oakleigh
11 Lane, or (2) paving that meets the current thickness and construction standards
12 required under city code for new street construction. If the former, then
13 Condition 20 requires only that the applicant increase the width of the current
14 substandard oil-mat paving to 20 feet in places where there is less than 20 feet
15 of oil-mat paving within the right-of-way. If the latter, then compliance with
16 Condition 20 will necessarily require that the entire length of Oakleigh Lane be
17 re-paved to provide 20 feet of pavement that fully conforms to city standards.
18 Petitioners argue that only the second interpretation would provide a road
19 surface that is durable, and therefore the planning commission must have
20 intended that meaning of “paving.” However, petitioners argue that if it is not
21 clear which interpretation the planning commission intended, remand is
22 necessary for the planning commission to clarify the intent of Condition 20.

1 Second, petitioners argue that the meaning of “improve” is ambiguous,
2 and could refer to either (1) pavement alone, or (2) pavement, plus full street
3 improvements such as gutters, curbs, sidewalks, etc. Petitioners argue that only
4 the second interpretation ensures that Oakleigh Lane is safe for pedestrians and
5 bicyclists, and therefore that must be the interpretation that the planning
6 commission intended. Again petitioners argue that, if it is unclear which
7 interpretation the planning commission intended, remand is necessary for the
8 planning commission to clarify its intent.

9 The city and OMC respond, and we agree, that Condition 20 is not
10 ambiguous with respect to whether the required improvements are limited to
11 pavement or also include full street improvements such as gutters, curbs and
12 sidewalks. The planning commission’s findings, including the findings
13 addressing whether the required improvements to Oakleigh Lane’s paving are
14 “roughly proportional” to the impacts of the PUD, make it reasonably clear that
15 the planning commission intended only to require pavement to 20 feet, and did
16 not intend to also require OMC to construct full street improvements.⁷

⁷ For example, the city’s “Constitutional Findings for Required Improvement” state, in relevant part:

“The record shows that there is already 20 feet of paving within the dedicated right-of-way for almost the entire length of Oakleigh Lane. The requirement to improve Oakleigh Lane to 20 feet amounts to an improvement of [a] very small fraction of the entire length of Oakleigh Lane. Given that the proposed PUD will generate an additional 168 new trips on Oakleigh Lane and will

1 We also agree with the city and OMC that Condition 20 is not
2 particularly ambiguous regarding the meaning of “paving.” Condition 20 itself
3 does not specify the thickness or other qualities of the required paving.
4 However, the findings quoted at n 7 characterized the required improvements
5 as involving only a “very small fraction of the entire length of Oakleigh Lane”
6 and thus clearly the planning commission did not intend to require that the
7 entire length and breadth of right-of-way be re-paved. Condition 20 requires
8 that the applicant obtain “necessary permits for the required street
9 improvements,” which as petitioners argue below presumably includes permits
10 required from the city engineer pursuant to EC 7.140. EC 7.140(1) provides
11 that

12 “Prior to the construction of any privately engineered public
13 improvement a person must obtain a permit from the city engineer.
14 Permits shall be issued in accordance with the Public Improvement
15 Design Standards Manual [PIDS].”

16 We address below petitioners’ challenges regarding that city engineer permit
17 process. For present purposes, it is reasonably clear that the planning
18 commission left resolution of technical construction details, including the
19 thickness or other qualities of the widened pavement, to the required city

increase the pedestrian and bicycle use of Oakleigh Lane, and given the small amount of improvement that will be necessary, the requirement to improve Oakleigh Lane to a minimum of 20 feet within the right-of-way is roughly proportionate to the impact the proposed development will have on the City’s transportation facilities.” Record 12.

1 engineer permit process. Condition 20's silence on technical construction
2 details does not mean that it is ambiguous regarding the meaning of "paving,"
3 or that the lack of specificity on such details means that the condition is
4 inadequate to accomplish its intended purpose.

5 **2. Feasibility of Condition 20.**

6 Petitioners next argue that if Condition 20 is understood to require that
7 the applicant construct full street improvements to city standards, then
8 implementation of Condition 20 is not feasible, because there is insufficient
9 room within a 20-foot right-of-way to provide 20 feet of pavement, plus curbs,
10 gutters, sidewalks, etc. However, as discussed above, Condition 20 is not
11 reasonably interpreted to require full street improvements, and hence this
12 argument does not provide a basis for reversal or remand.

13 **3. Adequacy of Condition 20 to Ensure Compliance with EC**
14 **9.8320(5)(b).**

15 Petitioners contend that only if Condition 20 is interpreted to require full
16 street improvements, or at least a sidewalk or other dedicated travel lane to
17 separate pedestrians and bicyclists from motorized traffic, can the condition be
18 adequate to comply with EC 9.8320(5)(b)'s requirement for a "safe and
19 adequate" transportation system. Under any other interpretation that does not
20 provide for a segregated travel lane for bicycles, pedestrians, etc., petitioners
21 argue that Condition 20 is insufficient to comply with EC 9.8320(5)(b).

22 The planning commission rejected similar arguments below that
23 Oakleigh Lane must be improved to full city standards in order to comply with

1 applicable PUD approval standards. Record 10 (finding that the applicable EC
2 standards do not require that an existing street meet city street standards in
3 order to serve proposed development). To the extent petitioners argue that EC
4 9.8320(5)(b) itself must be interpreted to require that existing streets serving
5 the PUD must be improved to full city standards in order to provide “safe and
6 adequate transportation,” the planning commission essentially rejected that
7 argument, and petitioners have not established any error in doing so. To the
8 extent petitioners argue that Condition 20 must be interpreted to require that
9 Oakleigh Lane be improved to full city standards, the planning commission
10 necessarily rejected that contention as well, by finding that widening the
11 pavement to 20 feet within the Oakleigh Lane right-of-way is sufficient to
12 ensure that the PUD complies with EC 9.8320(5)(b). Petitioners’ disagreement
13 with that conclusion does not provide a basis for reversal or remand.

14 **4. Prior to Occupancy of Any Dwellings.**

15 Petitioners next argue that the city erred in requiring fulfillment of
16 Condition 20 at the last possible moment, “prior to occupancy of any
17 dwellings,” instead of prior to final PUD approval or issuance of building
18 permits, as it required for other conditions. According to petitioners, once the
19 PUD is fully constructed and ready for occupancy, the city will be under
20 pressure to minimize or waive the paving requirements of Condition 20.
21 Petitioners argue that such pressure can be avoided if Condition 20 is rewritten

1 to require compliance at an earlier stage, before the city issues final PUD
2 approval or building permits.

3 The city and OMC respond that petitioners identify no law or authority
4 mandating that the city require compliance with Condition 20 prior to seeking
5 occupancy permits. We agree with respondents.

6 **5. Deferral of Compliance with EC 9.8320(5)(b).**

7 Next, petitioners argue that Condition 20 potentially defers ultimate
8 findings of compliance with EC 9.8320(5)(b) to the city engineer's permit
9 process. According to petitioners, the city engineer's permit process for
10 approving Privately Engineered Public Improvements (PEPI) includes criteria
11 that would allow the city engineer to approve deviations from the city street
12 standards set out in the Public Improvement Design Standards (PIDS) manual.
13 Petitioners argue that if the city engineer did approve deviations from PIDS
14 manual as part of the PEPI process, such deviations would essentially allow the
15 city engineer to substitute his or her judgment regarding compliance with EC
16 9.8320(5)(b) for that of the planning commission. Under these circumstances,
17 petitioners argue, Condition 20 represents a deferral of determination of
18 compliance with EC 9.8320(5)(b), a deferral that is impermissible because the
19 PEPI process does not include provisions for notice or a hearing. *See Rhyne v.*
20 *v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (requiring that if a
21 local government defers a finding of compliance with permit standards to a

1 subsequent proceeding, the subsequent proceeding must include the statutorily
2 required notice and hearing that applied to the initial proceeding).

3 The city and OMC respond, and we agree, that the planning commission
4 did not defer findings of compliance with EC 9.8320(5)(b). The planning
5 commission found the proposal complies with EC 9.8320(5)(b), based in part
6 on Condition 20. That Condition 20 includes a requirement to obtain all
7 required permits to improve Oakleigh Lane, potentially including a city
8 engineer permit issued pursuant to the PEPI process, does not mean that the
9 city engineer will evaluate or re-evaluate compliance with EC 9.8320(5)(b) as
10 part of that process. At most, the city engineer would apply whatever
11 PEPI/PIDS standards apply to a city engineer permit. That the city engineer
12 might have the authority to grant a variance to whatever PEPI/PIDS standards
13 would apply to the city engineer permit, and might or might not exercise that
14 authority in a future permit process has nothing to do with compliance with EC
15 9.8320(5)(b), and certainly does not represent a potential deferral of a
16 determination of compliance with EC 9.8320(5)(b). Stated differently,
17 determining whether 20 feet of pavement is sufficient to comply with EC
18 9.8320(5)(b) does not require the planning commission to evaluate or resolve
19 technical construction details, such as those that are resolved in the PEPI
20 process.

1 **6. Maintaining Improvements in Perpetuity.**

2 Finally, petitioners argue that the planning commission erred in failing to
3 require that Oakleigh Lane’s improved pavement be maintained in perpetuity.
4 Petitioners note that the city does not currently maintain Oakleigh Lane and has
5 no plans to maintain it. Absent some provision for perpetual maintenance,
6 petitioners argue that Condition 20 is inadequate to ensure that the paving
7 improvements will continue to serve their intended function.

8 Respondents argue, and we agree, that petitioners do not identify the
9 source of any legal requirement that the city impose on OMC or any other
10 entity the obligation to maintain Oakleigh Lane’s improvements in perpetuity.

11 **B. Traffic Impact Analysis (TIA)**

12 EC 9.8320(5)(c) requires a finding that a proposed PUD provides safe
13 and adequate transportation systems through compliance with the “provisions
14 of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680 where
15 applicable.” See n 4. EC 9.8670 specifies four conditions that trigger the
16 requirement for a TIA, including EC 9.8670(2):

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

23 In the city’s 2013 and 2015 decisions, and again in the 2017 decision, the
24 planning commission concluded that none of the four conditions that trigger

1 the requirement to submit a TIA, including EC 9.8670(2), were met, and
2 accordingly did not require OMC to submit a TIA.

3 Petitioners argue that, because the planning commission concluded that
4 paving improvements to Oakleigh Lane are needed in order to render Oakleigh
5 Lane safe for pedestrians and bicyclists, the planning commission necessarily
6 must also conclude that Oakleigh Lane is an “identified location[] where
7 pedestrian and/or bicyclist safety is a concern by the city that is documented,”
8 within the meaning of EC 9.8670(2), and therefore the planning commission
9 erred in failing to require OMC to provide a TIA. Petitioners contend that the
10 planning commission’s 2017 decision constitutes “document[ation]” of a
11 location where pedestrian and bicyclist safety is a concern.

12 The city responds, and we agree, that the planning commission’s
13 response to safety concerns raised by neighbors does not constitute
14 “document[ation]” by the city that Oakleigh Lane is a location where
15 pedestrian and bicyclist safety is a concern, within the meaning of EC
16 9.8670(2). Under EC 9.8670(2), it is clear that the city “document[ation]” that
17 triggers the requirement to submit a TIA as part of the PUD application must
18 exist prior to the PUD application or at least prior to the close of the
19 evidentiary proceedings on the PUD application; the reference to concerns that
20 are “documented” cannot logically or possibly refer to the *findings* adopted in
21 the city’s final decision on the PUD application. Stated differently, the
22 findings regarding EC 9.8670(2) in the city’s final decision on the disputed

1 PUD application cannot possibly constitute the city “document[ation]” that is a
2 trigger for requiring a permit applicant to submit a TIA under that code
3 provision. If it were otherwise, the carefully sequenced statutory process for
4 making decisions on land use permit applications (filing of the application,
5 deeming the application complete, producing a staff report on the complete
6 application, conducting one or more public hearings to gather comment on that
7 complete application, and issuing a final decision within 120 or 150 days from
8 the date the application is deemed complete, etc.) simply would not work.

9 Petitioners’ second assignments of error are denied.

10 **THIRD ASSIGNMENTS OF ERROR**

11 EC 9.8320(12) requires a finding that:

12 “The proposed development shall have minimal off-site impacts,
13 including such impacts as traffic, noise, stormwater runoff and
14 environmental quality.”

15 In its 2013 and 2015 decisions, and again in its 2017 decision, the planning
16 commission found the proposal complies with EC 9.8320(12), based on the
17 hearings officer’s 2013 findings.

18 Petitioners argue that the planning commission erred in failing to
19 reevaluate its findings of compliance with EC 9.8320(12), in light of the newly-
20 acknowledged impacts the planning commission describes in its 2017 findings
21 addressing EC 9.8320(5)(b). Petitioners note that in its 2017 decision the
22 planning commission found that traffic from the PUD, combined with the
23 existing condition of Oakleigh Lane, would create an environment that is “not

1 safe for pedestrians and bicyclists[.]” Record 11. The planning commission
2 also adopted proportionality findings, quoted at n 7, concluding that the
3 requirement to provide a paved width of 20 feet is proportional to the “impact
4 of the proposed development.” Record 10-11. Petitioners argue that the
5 planning commission failed to recognize that these same newly-acknowledged
6 impacts must prompt the city to re-evaluate its findings under the “minimal off-
7 site impact” standard at EC 9.8320(12). Petitioners contend that impacts that
8 create an unsafe environment for pedestrians and bicyclists cannot possibly
9 constitute “minimal” off-site impacts, and that remand is necessary to evaluate
10 the newly-identified impacts under EC 9.8320(12) and resolve the apparent
11 inconsistency between the findings addressing EC 9.8320(12) and EC
12 9.8320(5)(b). Petitioners also argue that the newly acknowledged “impacts”
13 should trigger the requirement to submit a TIA, under EC 9.8670(2).

14 OMC responds initially that the issue of whether the findings addressing
15 EC 9.8320(12) conflict with those of EC 9.8320(5)(b) was resolved in
16 *Oakleigh Meadows I*, and that resolved issues cannot now be raised again,
17 under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992).
18 Petitioners reply, and we agree, that because in 2017 the city accepted new
19 evidence and adopted new findings addressing EC 9.8320(5)(b), the issue of
20 whether those new findings conflict with its unchanged findings addressing EC
21 9.8320(12) were not, and could not have been, resolved in *Oakleigh Meadows*
22 *I*. However, as explained below, the *Beck* “law of the case” principle

1 significantly limits the scope of petitioners' arguments regarding alleged
2 conflicts between the findings addressing EC 9.8320(12) and EC 9.8320(5)(b).

3 On the merits, the city and OMC dispute petitioners' contention that the
4 2017 findings addressing EC 9.8320(5)(b) compel the city to re-evaluate its re-
5 adopted 2015 findings addressing EC 9.8320(12), or that the two sets of
6 findings conflict with each other. We agree with respondents. The planning
7 commission's re-adopted findings of compliance with EC 9.8320(12) are based
8 almost entirely on the hearings officer's findings from the city's initial decision
9 in 2013. LUBA has rejected challenges to those 2013 findings. *See, e.g.,*
10 *Oakleigh Meadows I*, 70 Or LUBA at 151-52. The 2013 hearings officer's
11 findings, subsequently adopted and re-adopted by the planning commission in
12 2013, 2015 and again in 2017, embody an interpretation of the "minimal offsite
13 impacts" standard in EC 9.8320(12) that sets a fairly high bar for what
14 constitutes an "impact" under that standard. Essentially, the hearings officer
15 rejected arguments that "minimal off-site impacts" means *any* impact, and
16 instead interpreted EC 9.8320(12) to the effect that there is more than "minimal
17 off-site impact" only if traffic from the PUD gives rise to or aggravates
18 conditions similar to those specified in EC 9.8670 for a TIA study. Record 78-
19 79. Right or wrong, that interpretation has long been the law of the case, and
20 petitioners do not, and cannot, challenge it in this appeal.

21 Under that interpretation, there could be a conflict between the re-
22 adopted findings of compliance with EC 9.8320(12) and the 2017 findings of

1 compliance with EC 9.8320(5)(b) only if conditions that would require a TIA
2 study under EC 9.8670 are present. We have already affirmed the planning
3 commission's adopted and re-adopted findings that none of the conditions that
4 trigger a TIA under EC 9.8670 are present, and rejected petitioners' arguments
5 to the contrary. We reject those again: petitioners have not demonstrated that
6 any of the triggers for a TIA under EC 9.8670 are present, or otherwise
7 demonstrated that remand is necessary to resolve the alleged conflict between
8 EC 9.8320(12) and EC 9.8320(5)(b).

9 Petitioners' third assignments of error are denied.

10 **FOURTH ASSIGNMENT OF ERROR (Petitioners)⁸**

11 EC 9.8320(6) requires a finding that:

12 "The PUD will not be a significant risk to public health and safety,
13 including but not limited to soil erosion, slope failure, stormwater
14 or flood hazard, or an impediment to emergency response."

15 In its 2017 decision, the planning commission adopted new findings
16 concluding that subject to Condition 18 imposed in its 2015 decision, the PUD
17 is not a significant risk to public health and safety, and is not an "impediment
18 to emergency response." As noted, Condition 18 requires OMC to improve the
19 pavement width within the right-of-way to 14 feet for the length of Oakleigh
20 Lane. The planning commission's findings rely primarily on testimony
21 submitted by OMC's traffic engineer, Weishar, and a city deputy fire marshal,

⁸ As used under this fourth assignment of error, "petitioners" refers to petitioners Conte and Thoms.

1 Dahl. The planning commission chose not to rely on the testimony of the
2 opponents' two traffic engineers, Nemariam and Saberian.

3 Under their fourth assignment of error, petitioners challenge the planning
4 commission's 2017 findings, arguing that the planning commission (1) failed to
5 address new conflicting findings made under EC 9.8320(5)(b), (2) ignored the
6 testimony of the opponents' traffic engineers, Nemariam and Saberian, (3)
7 erred in relying on the testimony of Weishar and Dahl, and (4) adopted findings
8 that are not supported by substantial evidence.

9 **A. Conflict with Findings under EC 9.8320(5)(b).**

10 Petitioners argue that the planning commission's findings under EC
11 9.8320(5)(b), that the current 14-foot paved width of Oakleigh Lane is unsafe
12 for pedestrians and bicyclists (and which prompted imposition of Condition
13 20), conflicts with the planning commission's findings under EC 9.8320(6) that
14 with a paved width of 14 feet as required under Condition 18 Oakleigh Lane is
15 not a "significant risk" to safety and not an "impediment to emergency
16 response." According to petitioners, the planning commission's finding that
17 Oakleigh Lane is unsafe for purposes of EC 9.8320(5)(b) compels a similar
18 conclusion under EC 9.8320(6). Following that logic, petitioners argue that the
19 planning commission should have imposed a similar condition under EC
20 9.8320(6), requiring a minimum 20-foot paved width within the right-of-way.
21 However, even if the planning commission had imposed such a condition under
22 EC 9.8320(6), petitioners argue that a 20-foot paved width would be

1 inadequate to prevent the PUD from constituting a “significant risk” to safety
2 and an “impediment to emergency response,” for the same reasons argued
3 under the second assignment of error.

4 Petitioners’ Catch-22 argument—that the planning commission erred in
5 failing to impose a condition of approval that would have been inadequate if it
6 had been imposed—is of no avail to petitioners. EC 9.8320(5)(b) and EC
7 9.8320(6) are differently worded standards, and it does not automatically
8 follow that because the planning commission concludes that a 20-foot
9 pavement width is necessary to provide safe and adequate transportation
10 system for purposes of EC 9.8320(5)(b), that a 20-foot pavement width is also
11 necessary to ensure that the PUD is not a “significant risk” to safety or an
12 “impediment to emergency response,” for purposes of EC 9.3820(6). The
13 provision of a 14-foot paved width under one standard and the provision of a
14 20-foot paved width under a differently-worded standard do not mean that the
15 findings addressing those two standards necessarily conflict.

16 There is also no intrinsic conflict or error in (1) concluding that a 14-foot
17 paved width within the right-of-way is sufficient to avoid impeding emergency
18 services and thus satisfy EC 9.3820(6), while (2) noting in support of that
19 conclusion that the actual paved width will exceed 14 feet, as required under a
20 different condition of approval required to satisfy a different approval

1 standard.⁹ Conditions of approval almost always reflect a prediction or
2 judgment call regarding the probability of future events or conditions.
3 Condition 18 reflects the planning commission’s informed judgment that the
4 current paved width of Oakleigh Lane within the right-of-way is not sufficient
5 to ensure that the PUD complies with EC 8.3820(6), but if Oakleigh Lane is
6 improved to a minimum 14-foot paved width within the right-of-way,
7 compliance with EC 9.3820(6) is reasonably assured. If the planning
8 commission is right about that, a dispute we address below, then nothing more
9 is *required* to establish compliance with EC 9.8320(6). But nothing in life or
10 land use is ever completely certain. If there are additional circumstances that
11 can be cited to add confidence to the planning commissions’ predictions about
12 the future effectiveness of Condition 18—such as the fact that Condition 20
13 independently requires 20 feet of paved width—we see no error in citing that

⁹ The planning commission’s findings under EC 9.8320(6) are quoted extensively below in footnotes 10 and 11. The most relevant of those findings for purposes of this subassignment of error is the following:

“The PC finds that the expert testimony of Mr. Weishar is credible and reliable. There is no evidence submitted by the opponents that outweighs or contradicts this expert testimony. The City’s street design standards, adopted by the City Council, indicate that a 14 [foot] travel lane will ensure unimpeded emergency response. Although not required to find compliance with this criterion, the PC also notes that a new condition of approval imposed [to address EC 9.8320(5)] will require the applicant to pave Oakleigh Lane to a minimum width of 20 feet within the existing right-of-way.” Record 14.

1 circumstance in the findings of compliance with EC 9.8320(6), and no error in
2 failing to impose Condition 20 based not only on EC 9.8320(5)(b) but also on
3 EC 9.8320(6).

4 **B. The Planning Commission's Findings are Adequate.**

5 The planning commission adopted extensive findings addressing
6 compliance with EC 9.8320(6), in which the planning commission chose to rely
7 primarily on the testimony of OMC's traffic engineer, Weishar, and the city
8 Deputy Fire Marshal, Dahl, over the testimony of the opponents' two traffic
9 engineers, Nemariam and Saberian.¹⁰

¹⁰ The planning commission's findings state, in relevant part:

"The PC has reviewed all of the evidence and testimony submitted during the open record periods, including * * * a traffic assessment from professional traffic engineer Haregu Nemariam * * *, a letter from professional traffic engineer Massoud G. Saberian, [and] letters from professional traffic engineer Michael Weishar on behalf of the applicant[.] * * * The record reflects that the current paving width varies along the length of Oakleigh Lane, but that the paving width is approximately 19 feet at most places. The survey shows that approximately 5-6 feet of the paving on the south side of Oakleigh Lane lies outside the dedicated right-of-way. Although the existing paving and the amount of paving that lies outside the dedicated right-of-way varies along the length of Oakleigh Lane, the paving width that lies within the dedicated right-of-way measures at least 14 feet at most places. Mr. Weishar provides expert testimony that, even assuming that only 13 feet of paving is available for travel by the public, this would adequately accommodate emergency vehicles. In support of his opinion, Mr. Weishar relies on the following language found in the Design Standards and Guidelines for Eugene Streets, Bikeways and Accessways:

1 Petitioners first argue that the findings are inadequate because they
2 completely ignore opposing testimony, including the testimony of Nemariam
3 and Saberian, and fail to explain why the planning commission chose to rely on
4 the testimony of Weishar and Dahl instead of the opposing testimony.

5 The city's findings state that it reviewed all the relevant evidence,
6 including the testimony of the opposing traffic engineers. *See* n 10. While the
7 local government decision maker must consider all the pertinent evidence, the
8 local government is not generally required to adopt findings that address all the

“On local residential streets with traffic volumes less than 750 vehicles per day, a single 14[-foot] traffic lane may be permitted for both directions of vehicular traffic. The single lane is intended to create a ‘queuing street,’ such that when opposing vehicles meet, one of the vehicles must yield by pulling into a vacant portion of the adjacent parking lane. This queuing effect has been found to be an effective and safe method to reduce speeds and non-local traffic.’

“Evidence in the record * ** demonstrate[s] that, for most of the length of Oakleigh Lane, there are gravel parking areas that provide opportunities for vehicles to pull over and allow other vehicles to pass, as called for in the language quoted above. These gravel areas and the approximately 6 feet of paving that lies outside the right-of-way on the south side of Oakleigh Lane can function as the necessary ‘parking lanes.’

“The survey also reflects that there is a small area at the east end of Oakleigh Lane that only has 13.7 feet of paving within the right-of-way. In order ensure unimpeded emergency vehicle response pursuant to EC 9.8320(6), the following condition of approval is required: [quoting previously imposed Condition 18, requiring that Oakleigh Lane be improved to a minimum of 14 feet of paving within the right-of-way].” Record 13-14.

1 evidence, or explain how the local government balanced conflicting evidence,
2 or explain why it chose not to rely on evidence that conflicts with the evidence
3 it did choose to rely upon. *Sanders v. Yamhill County*, 34 Or LUBA 69, 103,
4 *aff'd* 154 Or App 448, 963 P2d 755 (1998). The findings discuss and quote
5 Weishar's testimony, including Weishar's clarifications in response to the
6 opponents' expert testimony, and explain why the city found Weishar's
7 testimony to be credible and reliable.¹¹ Petitioners disagree with that

¹¹ The city's findings continue:

“The PC finds that the expert testimony of Mr. Weishar is credible and reliable. There is no evidence submitted by the opponents that outweighs or contradicts this expert testimony. The City's street design standards, adopted by the City Council, indicate that a 14[-foot] travel lane will ensure unimpeded emergency response. Although not required to find compliance with this criterion, the PC also notes that a new condition of approval imposed [to address EC 9.8320(5)] will require the applicant to pave Oakleigh Lane to a minimum width of 20 feet within the existing right-of-way.

“[In response to rebuttal testimony] Mr. Weishar clarified:

“By pointing to a queuing street example, I was not suggesting and certainly did not say that Oakleigh Lane met all of the City of Eugene's standards for a 'queuing street.' Instead, I was providing an example to the Planning Commission of how narrow lanes with unsegregated travel actually improve safety by reducing travel speeds.’

“Mr. Weishar further states:

1 conclusion, and we address below their arguments that the city’s findings are
2 not supported by substantial evidence. However, petitioners’ disagreement
3 with how the city addressed the conflicting expert testimony in its findings
4 does not demonstrate that the city’s findings are inadequate.

5 **C. The Planning Commission’s Findings are Supported by**
6 **Substantial Evidence.**

7 Petitioners argue that the overwhelming weight of the evidence in the
8 record, including the testimony of the opposing experts Nemariam and
9 Saberian, undermine the testimony the city relied upon, including that of

“While some on-street parking occurs on the shoulders of Oakleigh Lane, this parking does not adversely impact the safety or capacity of the road. Ms. Nemaria[m]’s site visit notes identifies one or possibly two vehicles parked on the gravel parking strip on the north side of the road. Exhibit F.1. This is consistent with my own experience at the site, where I have seen some intermittent parking along the road. However, as I noted in my prior letter ‘[p]arking on the shoulder that incidentally obstructs a portion of the improved surface would not pose a safety issue as drivers would simply drive around the obstruction.’ Ms. Nemaria[m] does not dispute that drivers can safely drive around temporary obstructions caused by parked cars.’

“The PC accepts the clarification regarding queuing streets, but finds that additional paving to a width of 20 feet is necessary along the length of Oakleigh Lane in order to ensure safe and adequate bicycle and pedestrian circulation [pursuant to EC 9.8320(5), and citing to Condition 20]. * * * The PC nonetheless accepts Mr. Weishar’s 2015 and 2017 letters as expert testimony that can be relied upon. There is no evidence submitted by opponents that outweighs this expert testimony.” Record 14.

1 Weishar and Dahl, to the extent that no reasonable person could conclude, as
2 the planning commission did, that the PUD is not an “impediment to
3 emergency response.”

4 Petitioners level a number of critiques at the testimony of Weishar and
5 Dahl supporting the city’s conclusion that the PUD is not an “impediment to
6 emergency response.” Petitioners’ critiques focus on the 250-foot long section
7 of Oakleigh Lane near its eastern end where the right-of-way is only 20 feet
8 wide, and the current paved width within that 20-foot right-of-way is at one
9 point only 13.7 feet wide. Weishar noted that under city design standards for
10 constructing low-volume residential streets, a so-called “queuing street” with a
11 single 14-foot travel lane in both directions is permitted if an adjoining parking
12 aisle is available so when opposing vehicles meet, one of the vehicles can pull
13 aside. Weishar opined that even with as little as 13 feet of paved width,
14 Oakleigh Lane could adequately accommodate emergency vehicles in the same
15 manner of a queuing street, because there are adjoining parking areas on either
16 side of the paved travel lane where opposing traffic could pull over. Record
17 297-305.

18 The opposing expert Nemariam submitted testimony evaluating whether
19 Oakleigh Lane met the standards for a “queuing street” under the city street
20 standards, and concluded it did not. Record 609-25. Nemariam ultimately
21 concluded in relevant part that “Oakleigh Lane, in the configuration approved
22 by the [planning commission in 2015], cannot safely accommodate emergency

1 response vehicles because of the potential for parked vehicles to obstruct the
2 travel lane[,]” unless Oakleigh was improved to conform to all standards for a
3 queuing street. Record 625. Weishar responded to clarify that he did not
4 mean that Oakleigh Lane as it currently exists meets the standards of a queuing
5 street, only that it can function in the same manner as a queuing street by using
6 paved and graveled areas adjoining the existing paved travel lane within the
7 right-of-way to allow vehicles to pull over so that emergency vehicles could
8 pass. Record 298. The planning commission ultimately agreed with Weishar,
9 finding that the “gravel areas and the approximately [six] feet of paving that
10 lies outside the right-of-way on the south side of Oakleigh Lane can function as
11 the necessary ‘parking lanes.’” Record 13; *see* n 10.

12 The essence of the dispute between Weishar and Nemariam, as far as we
13 can tell, concerns whether Oakleigh Lane with a 14-foot paved width, and
14 nonconforming “parking lanes” on the sides for opposing traffic to pull over to
15 allow emergency vehicles to pass, represents an “impediment to emergency
16 response.” Nemariam took the position that full conformance to “queuing
17 street” standards is necessary (e.g., a 14-foot travel lane plus a marked and
18 signed 7-foot wide parking lane, all within the right-of-way, as well as other
19 improvements) to avoid impeding emergency response. Weishar took the
20 position that the existing graveled and paved areas adjoining a single travel
21 lane could serve the same function to allow opposing traffic to pull over for
22 emergency vehicles to pass, notwithstanding that Oakleigh Lane does not meet

1 the standards for constructing a queuing street. The planning commission
2 essentially agreed with Weishar on that dispute.

3 Based on the evidence cited to us in the record, petitioners have not
4 demonstrated that the planning commission erred in agreeing with Weishar's
5 position that something less than full compliance with the standards for
6 constructing a queuing street is sufficient to ensure that the PUD is not an
7 impediment to emergency response. A reasonable person could conclude that a
8 single 14-foot paved travel lane can suffice to allow emergency responders to
9 pass unimpeded, if adjoining paved or gravel parking spaces are available for
10 opposing vehicles to pull over.

11 Petitioners, however, argue that a single 14-foot travel lane is not large
12 enough to allow *two* emergency responders to pass each in opposite directions,
13 without one pulling over (and thus one being impeded). Petitioners argue, for
14 example, that it is possible that an ambulance could be leaving the PUD site
15 while a fire truck is approaching, or that a fire truck is parked near the fire
16 hydrant partially or wholly within the travel lane while another fire truck
17 attempts to move past it. According to petitioners, emergency responders such
18 as a fire truck can be eight to 10 feet wide. Petitioners argue that it is
19 impossible for two emergency responders to pass each other on a single 14-foot
20 travel lane, without one of them having to pull over out of the travel lane, and
21 thus becoming at least temporarily impeded. For that reason alone, petitioners

1 argue, a reasonable person can only conclude that Oakleigh Lane with a 14-
2 foot travel lane is an impediment to emergency response.

3 Further, petitioners argue that vehicles parked in or adjoining to the
4 paved travel lane may preclude even a single emergency response vehicle from
5 reaching the PUD. Petitioners argue that it is common (and legal given the
6 current apparent absence of city or county parking restrictions) for vehicles to
7 park within the 20-foot right-of-way itself, and also for vehicles to park on both
8 sides of Oakleigh Lane. Petitioners posit that if two six-foot-wide vehicles are
9 parked opposite each other on both sides of Oakleigh Lane within the 20-foot
10 right-of-way, they will necessarily take up the majority of the right-of-way,
11 leaving insufficient room for a 10-foot wide emergency response vehicle to
12 pass.

13 For this reason, petitioners argue that Condition 20, requiring that OMC
14 improve the paved width to 20 feet within the 20-foot right-of-way, does not
15 provide any support for the city's findings addressing EC 9.8320(6).
16 Improving the pavement width to 20 feet within the 20-foot right-of-way does
17 not alter the fact that cars can and do legally park on both sides of Oakleigh
18 Lane within the 20-foot right-of-way, and in such circumstances there may not
19 be enough room for even a single emergency vehicle to pass, much less two.

20 OMC responds that EC 9.8320(6) does not require a PUD applicant to
21 ensure that access streets are wide enough so that two emergency response
22 vehicles can pass each other at the same time, pointing out that if that were the

1 case, EC 9.8320(6) would be difficult to reconcile with city street design
2 standards, which as noted permit a “queuing street” with a 14-foot travel lane
3 and a parking aisle, which under petitioners’ argument would not be sufficient
4 to allow two emergency response vehicles to pass each other without one of
5 them pulling over into the parking aisle. We agree with OMC that avoiding an
6 “impediment” as used in EC 9.8320(6) does not require, as petitioners argue, a
7 travel lane wide enough for two emergency response vehicles to pass each
8 other without one pulling over, as otherwise any “queuing street” allowed
9 under the city street design standards would necessarily be inconsistent with
10 EC 9.8320(6).

11 As to the possibility that vehicles parking on the shoulders of Oakleigh
12 Lane may make it difficult to find a space for an opposing vehicle to pull over
13 to allow an emergency responder to pass, or the possibility that parking on both
14 shoulders and within the right-of-way could narrow the travel lane to preclude
15 passage by even a single emergency response vehicle, OMC argues substantial
16 evidence in the record indicates that parking along Oakleigh Lane is
17 “intermittent,” in Weishar’s words, and that there is no basis in the record to
18 conclude that parking along both sides of Oakleigh Lane is likely to occur in a
19 way that narrows the travel lane to effectively block passage of an emergency
20 response vehicle, as petitioners speculate.

21 We agree with OMC. As Weishar stated, all dwellings along Oakleigh
22 Lane have private driveways, and the PUD itself will provide off-site parking

1 for its residents and guests, so the PUD itself should not contribute to any
2 existing parking issues along the 250-foot narrow stretch of Oakleigh Lane.
3 The site visits by both Weishar and Nemariam described an existing on-street
4 parking pattern that Weishar characterized as “intermittent.” *See* n 11.
5 Petitioners cite to no evidence in the record indicating that existing parking
6 along Oakleigh Lane has ever been or is likely to be so continuous that
7 opposing vehicles can find no space whatsoever to pull over to allow an
8 emergency response vehicle to pass by.

9 Petitioners also cite to no evidence in the record that parking on both
10 sides of Oakleigh Lane has ever occurred, or is likely to occur, in a manner that
11 narrows the travel lane to the extent that a single emergency response vehicle
12 could not pass through at all, even in the absence of opposing traffic. That
13 argument appears to be based solely on petitioners’ speculation that that
14 circumstance could *theoretically* occur, because there are no currently enforced
15 city or county restrictions that preclude cars from parking anywhere within the
16 right-of-way.

17 However, simply because there are currently no restrictions enforced
18 against parking on Oakleigh Lane that would legally restrict cars from parking
19 in the travel lane in a manner that effectively blocks the travel lane does not
20 mean that that is in fact what happens or is likely to happen. It seems far more
21 likely that cars would tend to park on the margins of the perceived travel lane.
22 As discussed above, the margins of the existing paved areas include a graveled

1 strip north of the existing pavement that is used for parking, and a six-foot
2 wide strip of pavement that is outside the right-of-way on the south side of
3 Oakleigh Lane that has historically been used for parking. The planning
4 commission found that “approximately [six] feet of paving that lies outside the
5 right-of-way on the south side of Oakleigh Lane can function as necessary
6 ‘parking lanes.’” Record 13. We do not understand petitioners to challenge
7 that finding. We understand petitioners to speculate that car owners will begin
8 ignoring the existing paved area south of the right-of-way that has long been
9 used for parking,¹² and instead will start parking cars six feet from the margins
10 of the existing paved area on the south side of Oakleigh Lane, within the
11 adjoining right-of-way and opposite a car that is parked on the north side in the
12 right-of-way, narrowing the 14-foot paved travel lane within the right-of-way
13 enough that an eight to 10-foot wide emergency vehicle could not pass.
14 Nothing cited to us in the testimony of the opponents’ experts, or elsewhere,
15 supports that speculation.

¹² Presumably the people who tend to park on the south side of Oakleigh Lane within the 250-foot-long narrow stretch are the owners of the adjoining property or their guests. Whether there is a legal right for the *public* to park on the six-foot wide paved strip outside the right-of-way is unknown. The record includes what we understand to be disputed assertions that the public has a prescriptive easement to travel and park on the six-foot wide paved strip. The city adopted no findings on that point.

1 In sum, petitioners have not demonstrated that the city erred in relying
2 on Weishar's testimony to provide substantial evidence to support the city's
3 finding of compliance with EC 9.8320(6).

4 **D. Testimony of Deputy Fire Marshal Dahl**

5 The planning commission also cited and relied upon the testimony of
6 Mark Dahl, the Deputy Fire Marshal, to find compliance with EC 9.8320(6).¹³
7 Petitioners argue that Dahl's testimony that the PUD does not present a
8 significant risk to emergency response actions, given the turnaround and other
9 measures required by the PUD approval, is conclusory and does not constitute
10 substantial evidence. In addition, petitioners argue that the testimony of their
11 traffic engineer Saberian, who critiqued Dahl's testimony, undermines Dahl's
12 testimony. Record 432-33. Further, petitioners allege that Dahl's testimony

¹³ The planning commission findings state, in relevant part:

“During the 2017 remand open record period, the Eugene/Springfield Deputy Fire Marshal provided a memo dated April 12, 2017 that was entered into the record. The PC also finds the Deputy Fire Marshal's letter to be reliable expert testimony. After visiting Oakleigh Lane in its existing condition, the Fire Marshal did not identify a significant risk to emergency response actions, and found that due to improvements including installation of a fire apparatus access road turnaround that eliminates a dead end situation, ‘[t]he proposed development accounts for actual safety improvements regarding emergency response for both fire related and medical related responses.’ The PC finds this is as supplemental evidence that supports the PC's previous finding that the PUD itself would not be a significant impediment to emergency response.” Record 14-15.

1 was produced “fraudulently,” apparently because (1) city planning staff
2 solicited Dahl’s testimony regarding Oakleigh Lane to respond to opposing
3 testimony, and (2) planning staff allegedly misrepresented the content of Dahl’s
4 testimony to the planning commission. Petition for Review 50.

5 We reject without discussion petitioners’ claims that Dahl’s testimony
6 was “fraudulently” produced. On the merits, petitioners are correct that Dahl’s
7 letter at Record 409-10 is somewhat conclusory, and for example includes no
8 discussion of whether the narrow 250-foot long section of Oakleigh Lane that
9 is the focus of petitioners’ challenges represents an “impediment to emergency
10 response.” Dahl focused mostly on the fact that the PUD approval requires
11 OMC to provide a turnaround and other measures to improve access to the site
12 for emergency responders. The testimony of a deputy fire marshal that access
13 to a PUD does not represent a significant risk to emergency response has some
14 evidentiary value, even if that testimony is conclusory or contradicted by other
15 expert testimony. Nonetheless, if Dahl’s testimony were the only evidence
16 supporting the planning commission’s findings of compliance with EC
17 9.8320(6), we might well agree with petitioners that those findings are not
18 supported by substantial evidence. However, as discussed above, the planning
19 commission’s findings of compliance with EC 8.8320(6) are supported by other
20 expert evidence in the record that, we have concluded, constitutes substantial
21 evidence. Accordingly, petitioners’ evidentiary challenges to Dahl’s testimony
22 do not provide a basis for reversal or remand.

- 1 The fourth assignment of error is denied.
- 2 The city's decision is affirmed.