BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TOM DREYER and CYNTHIA DREYER,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

FAIRMOUNT NEIGHBORHOOD ASSOCIATION, LAUREL HILL VALLEY CITIZENS and THE JOINT RESPONSE COMMITTEE OF THE FAIRMOUNT NEIGHBORHOOD ASSOCIATION AND THE LAUREL HILL VALLEY CITIZENS,
Intervenors-Respondents.

LUBA No. 2018-074

FAIRMOUNT NEIGHBORHOOD ASSOCIATION, LAUREL HILL VALLEY CITIZENS and THE JOINT RESPONSE COMMITTEE OF THE FAIRMOUNT NEIGHBORHOOD ASSOCIATION AND THE LAUREL HILL VALLEY CITIZENS,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

TOM DREYER and CYNTHIA DREYER,
Intervenors-Respondents.

LUBA No. 2018-080

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review/cross-petition for review and response brief and argued on behalf of petitioners/intervenors-respondents Tom Dreyer and Cynthia Dreyer.

Sean T. Malone, Eugene, filed a petition for review and response brief and argued on behalf of petitioners/intervenors-respondents Fairmount Neighborhood Association et al.

Lauren A. Sommers, Assistant City Attorney, Eugene, filed a response and argued on behalf of respondent.

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

REMANDED 11/20/2018

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

In these consolidated appeals, the applicant and opponents appeal a hearings official's tentative approval of a 36-unit planned unit development (PUD).

BRIEFING

In LUBA No. 2018-074, the petitioners are the applicants Tom Dryer and Cynthia Dreyer (the Dreyers). In LUBA No. 2018-080, the petitioners are three organizations: Fairmount Neighborhood Association, Laurel Hill Valley Citizens, and the Joint Response Committee of the Fairmont Neighborhood Association and the Laurel Hill Valley Citizens. We refer to the petitioners in LUBA No. 2018-080 as the Neighbors. The Dreyers have intervened on the side of the city in LUBA No. 2018-080. The Neighbors have intervened on the side of the city in LUBA No. 2018-074.

The Dreyers filed a combined petition for review (in their capacity as petitioners in LUBA No. 2018-074) and cross-petition for review (in their capacity as intervenors in LUBA No. 2018-080). The Neighbors filed a petition for review in their appeal. Both the Dreyers and the Neighbors also filed response briefs in their respective capacities as intervenors-respondents. The city filed a single response brief responding to both appeals.

The Dreyers filed a reply brief to address new matters raised in the city's response brief. The Neighbors filed a reply brief to address new matters raised

in the Dreyers' response brief. There are no objections to either reply brief, and they are allowed.

FACTS

The subject property is a 13-acre area consisting of five tax lots, developed with three single-family dwellings and one multifamily dwelling. The property is planned and zoned for low density residential use (R-1), and included in the city's inventory of buildable lands. The property is located in the South Hills portion of the city, in an area of steep slopes (generally, slopes 20 percent or steeper). The western half of the property is part of the top of a ridgeline that is above 900 feet in elevation, where the existing dwellings are located. Capital Drive borders the western boundary and provides access to the property. The eastern half of the property slopes steeply down the ridgeline to the east, with slopes generally exceeding 20 percent and reaching 40 percent in some portions. East of the property is a heavily forested area that includes a public hiking trail, the Ribbon Trail. The 80-acre Hendricks Park borders the property to the north.

In 1974, the city adopted by resolution the South Hills Study (SHS) as a refinement plan to the city comprehensive plan. The SHS studied and offered recommendations with respect to over 8,000 acres of land around the southern perimeter of the city, including some lands then located in the county outside the city limits. In 1974, the subject property was located in the county outside city limits. One of the disputes in this appeal is whether the SHS applies to the

subject property, which was annexed into the city in the early 1980s. One of the SHS recommendations is that vacant property over 900 feet in elevation be preserved from an intensive level of development, with the exception of development under planned unit development procedures, if it can be demonstrated that the proposed development is consistent with the purposes listed in the Ridgeline Park section of the SHS.

On March 3, 2017, the Dreyers filed an application with the city for tentative PUD approval, seeking to develop the subject property with an additional 28-32 dwelling units, consisting primarily of single-family dwellings. There is no dispute that the subject application requests approval of "needed housing" as that term is defined in ORS 197.303(1).[1] As discussed below, ORS 197.307(4) requires local governments to apply only "clear and objective" development standards, conditions and procedures to needed housing. However, ORS 197.307(6) authorizes local governments to adopt an alternative process for approving needed housing under standards that are not clear and objective, as long as the applicant retains the option of proceeding under an

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[1] The needed housing statutes at ORS 197.303 to 197.307 were modified in 2017 by SB 1051 (2017 Or Laws, ch 745), which became effective after petitioners filed their PUD application. As discussed below, petitioners argue that ORS 197.307 (2017) applies directly to the city's decision. As far as we can tell, none of the changes made by SB 1051 impact the analysis of the issues in this appeal, and the same arguments could be made (and were made below) under ORS 197.307 (2015). On appeal, all parties cite and quote to the 2017 ORS, and we do likewise.

approval process that complies with ORS 197.307(4). The City of Eugene has adopted such a two-track system for needed housing applications. For each type of development application that involves needed housing, the Eugene Code (EC) 9.8325 provides for a "general" approval process that includes some discretionary or unclear or subjective standards, and a "needed housing" approval process that includes only clear and objective standards. *See Home Builders v. City of Eugene*, 41 Or LUBA 370 (2002) (discussing the city's two-track system). The PUD "needed housing" track is set out in EC 9.8325. The PUD discretionary "general" track is set out in EC 9.8320. One of the general track PUD approval standards requires a finding that the PUD is consistent with applicable adopted refinement plan policies. EC 9.8320(2).

The Dreyers applied for PUD approval under the general track at EC 9.8320. However, the Dreyers submitted a memorandum arguing that, due to elevations and steep slopes on the subject property, little or no new development is possible on the property under the clear and objective PUD standards in the "needed housing" track at EC 9.8325, which forced the Dreyers to apply under the EC 9.8320 general track in order to gain approval.[2] The

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[2] The most limiting EC 9.8325 standards, the Dreyers argued, are (1) a prohibition on grading of slopes 20 percent or steeper at EC 9.8325(5), and (2) a prohibition on creating any new lots above 900 feet in elevation, at 9.8325(12)(a). The Dryers submitted a diagram, found at App 149 to their petition for review and Record 285, illustrating their argument that these standards in combination would allow little or no new residential development

Dreyers argued that in the present case the option required by ORS 197.307(4) of proceeding under a clear and objective PUD approval track is illusory, because no new development of the subject property with needed housing could be approved under the needed housing track. Consequently, the Dreyers argued that, in order to comply with ORS 197.307(4) and (6), the city must process the PUD application under the general track at EC 9.8320, but cannot apply any of the discretionary or non-clear and objective standards in the general track. The Dreyers supplied the city with a list of EC 9.8320 standards that they argued were not clear and objective, including the EC 9.8320(2) requirement to show consistency with applicable refinement plan policies such as those in the SHS. As noted, the SHS allows intensive development on land above 901 feet in elevation only pursuant to a PUD in which the applicant demonstrates that the PUD is consistent with one or more of the purposes of the Ridgeline Park section of the SHS.

The hearings official held a public hearing on the Dreyers' application on March 7, 2018. Following open record periods, the hearings official approved the application with conditions on April 20, 2018. The hearings official found,

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on the subject property. Planning staff responded to this argument in part by presenting a theoretical development scenario including a three-parcel partition to allow three new dwellings on the property, in addition to the existing dwellings, under the city's needed housing partition track. Record 1652-53. The Dreyers disputed that the staff response was sufficient to demonstrate that the Dreyers had a meaningful option to proceed under the clear and objective EC 9.8325 track to obtain PUD approval. Record 63.

in relevant part, that the SHS did not apply to the subject property or, alternatively, that the PUD application is consistent with at least one of the listed SHS purposes.

Both the Dreyers and the Neighbors appealed the hearings official's decision to the planning commission. The Dreyers argued in relevant part that the hearings official erred in applying discretionary, unclear or subjective standards under the general EC 9.8320 track. The Neighbors challenged findings that the application complied with several general track standards, including the EC 9.8320(2) requirement for consistency with the SHS. On June 14, 2018, the planning commission affirmed and adopted the hearings official's decision and approved the tentative PUD with modified conditions.

These appeals followed.

FIRST AND SECOND ASSIGNMENTS/CONTINGENT CROSS-ASSIGNMENTS OF ERROR (the Dreyers)

As noted, the Dreyers' combined petition for review includes two assignments of error, presented in their capacity as petitioners in LUBA No. 2018-074. The two assignments of error are also labeled as contingent cross-assignments of error, presumably in the Dreyers' capacity as intervenors-respondents in LUBA No. 2018-080.[3] Although the two sets of assignments of

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[3] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal

error are identical in substance, as explained below their posture requires separate treatment.

A. Petition for Review

The first assignment of error argues that the city erred in applying discretionary, unclear or subjective standards to the proposed PUD under the city's general PUD track at EC 9.8320, without carrying its burden of showing that the Dryers had the option to proceed under the clear and objective needed housing track standards at EC 9.8325 with a realistic expectation of gaining PUD approval. The second assignment of error argues that the city erred in applying the SHS to the application, without showing that the SHS has ever been adopted and applied to the subject property by a governing body with planning authority.

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regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

As explained, the hearings official and planning commission approved the PUD application under the EC 9.8320 general track standards. With respect to the SHS, the hearings official concluded that the SHS did not apply to the subject property, although for a different reason than argued by the Dreyers. In the alternative, however, the hearings official found that the application is consistent with the applicable SHS policies.

On appeal, the Dreyers explain in the "Relief Sought" section of the petition for review:

> "[The Dryers] want the benefit of the approval they received. They do not seek remand. In this appeal, however, [the Dreyers] want the benefit of two legal theories they pressed unsuccessfully before the decision makers. If [the Dreyers] are correct about their legal theories, LUBA's correction of the city's legal errors should still result in affirming the city decision, because the City has already concluded that the proposal satisfies the remaining applicable standards. In addition, resolution of the two legal theories should form a basis for LUBA to deny all of the [N]eighbors' anticipated assignments of error. [The Dreyers'] legal theories raised here should have been a more simple and direct route to city approval. [The Dreyers] should not have to defend 60 pages of city findings at LUBA and the Court of Appeals if they are right about the issues they raise here. LUBA should affirm but correct the legal errors by the City." Dreyers' Petition for Review 1-2 (footnote omitted; underscore in original).

The Dreyers cite *Recovery House IV v. City of Eugene*, 156 Or App 509, 965 P2d 488 (1998), for the proposition that an applicant has the right to submit an application under one set of standards while at the same time challenging whether those standards even apply to the proposed development. In *Recovery*

House IV, the applicant for a drug and alcohol addiction recovery facility in a residential zone applied for a conditional use permit for the use, while maintaining before the city and LUBA that the proposed use is a permitted use in the residential zone and no conditional use permit was necessary. *Id.* at 511. On appeal, the applicant raised no challenges to the conditional use permit approval itself, but argued that the city misconstrued the applicable law in requiring it to obtain a conditional use permit, and therefore the city lacked authority to impose any conditions of approval. LUBA rejected the applicant's interpretation of the code, and affirmed. *Recovery House VI v. City of Eugene*, 33 Or LUBA 327 (1997). The Court reversed and remanded, after agreeing with petitioner's code interpretation. 156 Or App 509. On remand, LUBA reversed the city's decision. *Recovery House IV v. City of Eugene*, 35 Or LUBA 419 (1999).

The city responds that LUBA lacks the authority to grant the relief the Dreyers seek, *i.e.*, to "affirm but correct the legal errors by the City." Dreyers' Petition for Review 2. We agree with the city. LUBA may resolve the merits of an appeal only by affirming, reversing, or remanding the decision on review. OAR 661-010-0070(1)(b). Because the Dreyers state they are not seeking reversal or remand in their petition for review, the only other relief the Board can possibly grant is to affirm the decision. However, the Dreyers cite no authority suggesting that LUBA can affirm the city's decision while at the same

time "correcting" the city's alleged errors.[4] *Recovery House IV* does not support that proposition. As explained, in *Recovery House IV* the ultimate conclusion that the city lacked authority to process the application as a conditional use permit meant that the decision must be reversed so that the city could process the application as a permitted use, and without imposing any conditions on the use. 156 Or App at 511. In the present case, the Dreyers do not seek relief from any conditions imposed or any aspect of the city's PUD approval under the general track. Instead, the Dreyers' petition for review asks LUBA to issue what is essentially an advisory opinion regarding the present case. Not only do we lack express statutory or cited judicial authority to issue an advisory opinion on the legal matters presented in the Dreyers' two assignments of error, but issuing such an advisory opinion would be contrary to one of the express statutory purposes of LUBA's review: that our review

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[4] The only statutory authority that would potentially allow LUBA to affirm a decision notwithstanding a substantive error is ORS 197.835(11)(b), which provides that:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

should be consistent with "sound principles governing judicial review." ORS 197.805.

In sum, because the Dreyers' two assignments of error in the petition for review seek relief that is beyond our authority to grant, we decline to resolve those assignments of error.

B. Cross-Petition for Review

The Dreyers' two assignments of error are also labeled as contingent cross-assignments of error, presented in the Dreyers' capacity as intervenors-respondents in the Neighbors' appeal in LUBA No. 2018-080.[5] A contingent cross-assignment of error, by its nature, is one that LUBA would reach only if LUBA sustains at least one assignment of error in a petition for review and remands the decision under the petition. *See* OAR 661-01-0030(7), n 3; *Young v. Jackson County*, 49 Or LUBA 327 (2005) (under former version of OAR 661-010-0030(7), declining to reach a cross-assignment of error where all assignments of error in the petition for review were denied).

In the present case, we understand the Dreyers to request that LUBA resolve the two contingent cross-assignments of error only if we sustain one or more of the Neighbors' assignments that involve discretionary general track PUD standards, including consistency with the SHS, and where we would

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[5] These arguments are also repeated, in briefer terms, in the Dreyers' response brief to the Neighbors' petition for review.

therefore remand under the Neighbors' petition for review. As discussed below, we deny the Neighbors' first assignment of error, which challenges the findings of consistency with the SHS. Accordingly, we have no need to address the Dreyers' second contingent cross-assignment of error.

However, as discussed below, we sustain portions of the Neighbors' second and third assignments of error, which concern consistency with two general track PUD approval standards that the Dreyers argue are not clear and objective: EC 9.8320(6) and EC 9.9630(3)(c). We understand the Dreyers to argue that we should therefore address the Dreyers' first contingent cross-assignment of error, which argues that the city cannot apply any discretionary general track standards to the PUD application. If we sustain the first contingent cross-assignment of error, then that would necessarily mean that the errors identified under the Neighbors' second and third assignments of error constitute only harmless error, and thus would not warrant remand under the Neighbors' petition for review.

We agree with the Dryers that it is appropriate to address and resolve the first contingent cross-assignment of error, which, if sustained, would have the effect of rendering any errors in applying EC 9.8320(6) and EC 9.9630(3)(c) harmless and not a basis for reversal or remand. However, for the reasons below, we deny the Dreyers' first contingent cross-assignment of error.

1. ORS 197.307

ORS 197.307(4) provides that local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing.[6] ORS 197.307(6) authorizes local governments to adopt an alternative process with approval standards that are not clear and objective, as long as the applicant "retains the option of proceeding under the approval process that meets the requirements of" ORS 197.307(4).[7] As noted,

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[6] ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
>
> "(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

[7] ORS 197.307(6) provides:

> "In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

the city has adopted for all residential development a needed housing track limited to clear and objective standards, consistent with ORS 197.307(4), and a corresponding alternative or "general" track that includes some standards that are not clear and objective, as authorized by ORS 197.307(6). For their PUD application, the Dreyers applied under the general PUD standards at EC 9.8320 rather than the needed housing PUD standards at EC 9.8325. However, the Dreyers argue that they were forced into that choice after they concluded that, due to elevation and slopes on the subject property, they could not obtain approval under the PUD needed housing track standards. As noted, two needed housing track standards, EC 9.8325(5) and 9.8325(12)(a), prohibit grading on slopes over 20 percent, and prohibit creation of new lots or parcels over 901 feet in elevation, respectively. Because roughly half the property is over 901 feet in elevation, and most of the remainder exceeds 20 percent slopes, and because some grading is essential for road and driveway construction and

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> "(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;
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> "(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and
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> "(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section."

individual building pads, the Dreyers argue that as a practical matter little or no further residential development of the subject property can be approved under the needed housing PUD track, and certainly a 36-unit PUD application similar to what they proposed under the general housing track would necessarily be denied.

The Dreyers argue that under ORS 197.307(4) and 197.307(6)(a) the city can apply approval standards that are not clear and objective to proposed housing development of the subject property only if the city "guarantee[s]" that the applicant has "a discretion-free path to residential approval through the code." Dreyers' Petition for Review 19. However, in the present case the Dreyers argue that the option of obtaining approval under the needed housing track is illusory, because the Dreyers contend they cannot obtain approval of the proposed PUD development, or any significant housing development, under the city's needed housing track. Because they have only an illusory right to obtain approval under the needed housing track, the Dreyers argue therefore that ORS 197.307(6) does not authorize the city to apply any general track approval standards to their proposed 36-unit PUD application that are not clear and objective. EC 9.8320(6) and EC 9.9630(3)(c) are among the general track approval standards that the city applied and found compliance with. However, the Dreyers argue (as cross-petitioners) that any errors the city made in finding compliance with those two standards are harmless, because those two standards

are not clear and objective, and therefore cannot be applied to the subject application.

The city responds that nothing in ORS 197.307 or elsewhere guarantees the Dryers that any proposed development of the subject property will be *approved* under clear and objective standards. According to the city, where a city has a two-track system authorized under ORS 197.307(6), under the express terms of that statute the applicant is guaranteed only to have the "option of proceeding" under an approval process that applies only clear and objective standards. The city argues that at all times the Dryers had the option of proceeding under the city's needed housing track. The city contends that even if it is the case that a particular type or intensity of development on the subject property is not approvable under the needed housing clear and objective standards, due to characteristics of the subject property such as elevation and steep slopes, that does not mean that the Dreyers have not been provided the "option of proceeding" under the needed housing track, as ORS 197.307(6)(a) requires.

Resolving the parties' dispute on this point requires interpreting ORS 197.307, examining its text, context and available legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). No party cites any context or legislative history, so we focus on the parties' textual arguments. The city is correct that nothing in the text of ORS 197.307

guarantees approval of any and all applications for housing. ORS 197.307(4) requires the city to apply only clear and objective standards to housing, but does not suggest that noncompliance with applicable clear and objective standards cannot be a basis to deny the application. The only express limitation in that regard is ORS 197.307(4)(b), which provides that clear and objective standards cannot have the effect of "discouraging needed housing through unreasonable cost or delay." However, no party argues that any of the city needed housing track standards that might limit development of the subject property discourage needed housing through unreasonable "cost or delay."

As the city notes, ORS 197.307(6)(a) authorizes the city to apply discretionary standards to housing applications as long as the applicant "retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section." ORS 197.307(6)(a) guarantees only the option of *proceeding* under an approval process that applies only clear and objective standards, not that an applicant proceeding under that process will necessarily obtain approval to develop a particular site.

The Dreyers argue that in *Home Builders v. City of Eugene*, 41 Or LUBA 370 (2002), a legislative challenge to adoption of the city's general and needed housing tracks, LUBA held that a clear and objective approval standard that was impossible for any development to meet on any property in the city is inconsistent with ORS 197.307(4) and (6), because it offers only an illusory option to proceed on the needed housing track, effectively forcing applicants to

apply under the discretionary general track. The Dreyers argue that the holding in *Home Builders* should be extended beyond circumstances where a clear and objective standard is impossible to meet for any development on any property in the city, to the present circumstances, where clear and objective standards arguably make it impossible to approve any significant development on a particular site, due to elevations and slopes present on that site.

We agree with the city that an extension of *Home Builders* is not warranted. As the city notes, clear and objective standards by their nature tend to be more rigid and less flexible than discretionary standards. Clear and objective standards must address in a "one-size-fits-all" way the city's legitimate regulatory interests in public health and safety, as applied to many different properties, each of which may have topographic or other challenges to development under inflexible cookie-cutter standards. Consequently, it may be inherent in a two-track system such as the city's that particular development proposals on particular properties may not be approvable under some clear and objective standards, due to site-specific topographic characteristics such as predominant steep slopes, although such proposals can be approved under more flexible discretionary standards, such as the general track PUD standards. Applicants in such circumstances will either have to modify their development proposal to one that complies with the applicable needed housing standards, or choose to apply under the more flexible general track standards. While there may be a strong incentive in many cases to choose the more flexible general

track, that does not mean that such applicants do not have the "option of proceeding" under clear and objective standards, as required by ORS 197.307(6)(a), or that that the option is only illusory.

Nonetheless, the Dreyers argue that the city has the burden in the present circumstance of demonstrating that *some* development of the subject property under the PUD needed housing track standards is approvable, and that the city has not met that burden. Because the city has not met that burden, the Dreyers argue, the city cannot rely upon ORS 197.307(6) to authorize imposition of discretionary approval standards under the PUD general track. As noted, the Dreyers submitted below a diagram showing that there are few areas of the subject property that (1) are lower than 901 feet in elevation and (2) have slopes lower than 20 percent, intended to show that no PUD application could be approved under EC 9.8325(3) and 9.8325(12)(a), which prohibit grading on slopes over 20 percent, and prohibit creation of new lots or parcels over 901 feet in elevation, respectively. According to the Dreyers, submittal of that evidence shifted the burden to the city to demonstrate that some PUD application with a substantial number of dwellings could be approved under the needed housing track standards. Instead, the Dreyers argue, staff responded only with a theoretical plan for creating three new parcels for three dwellings on a small portion of the property under the city's needed housing partition track.

The city responds that it has no burden under any statute or code provision to submit plans or evidence demonstrating that a theoretical PUD

application or any particular type of development could be approved on the subject property, under the city's needed housing tracks. We agree with the city. The two statutes the Dreyers cite as imposing a burden on the city, ORS 197.831 and ORS 227.173(2), require the city to demonstrate only that the needed housing track standards are "capable of being imposed only in a clear and objective manner," and are "clear and objective on the face of the ordinance."[8] There is no dispute in the present case that the city's PUD needed housing track imposes only clear and objective standards, and that those standards are facially clear and objective. No statute or code provision cited to us imposes on the city the burden of coming forth with a plan for developing housing on the subject property that is guaranteed or likely to gain approval under any of the city's needed housing tracks.

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[8] ORS 197.831 provides:

> "In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner."

ORS 227.173(2) provides:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

The Dryers also argue that a recent enforcement order issued by the Land Conservation and Development Commission (LCDC) provides some support for their position that the city cannot apply discretionary general track standards to the Dreyers' application. *LCDC Enforcement Order 17-ENF-001881* (Record 3054-72) (Corvallis Order). In the Corvallis Order, LCDC concluded that the city erred in applying a PUD overlay zone, with discretionary approval standards, to land on its buildable land inventory, and ordered that the city must allow the owner to seek development approval without application of the discretionary overlay standards. The Corvallis land use code apparently does not include a two-track system, such as the City of Eugene's, but required all housing development within the overlay zone to comply with discretionary overlay standards. Not surprisingly, LCDC concluded that such a single-track system is inconsistent with ORS 197.307(4). LCDC discussed, but did not resolve, a dispute over whether the proposed development can gain approval under clear and objective grading standards that limit cuts and fills on steep slopes, noting testimony that the application could be modified to comply with the grading standards, and also noting but not resolving arguments regarding whether the city could deny the application for noncompliance with the grading standards. Record 3070. Given the different single-track/dual-track schemes at issue in the Corvallis Order and the present case, and the unresolved issues in the Order, we conclude that the Order provides no particular support for the Dreyers' arguments under the first contingent cross-assignment of error.

In sum, ORS 197.307 does not, as the Dreyers' argue, allow the city to apply discretionary standards under its general PUD track only if the city demonstrates that the applicant is able to gain approval for some kind of PUD development on the subject property under its needed housing track. ORS 197.307(6)(a) requires only that the city allow the applicant the "option of proceeding" under the needed housing track, and does not require a guarantee or demonstration of any kind that development is likely to be approved under the clear and objective approval standards in the needed housing track. Even if it is presumed to be the case that, due to topography or other inherent features of the subject property, almost any conceivable application for PUD development of the property would be denied for noncompliance with clear and objective approval standards, in our view that presumption would not, as a consequence, preclude the city from applying discretionary approval standards to a PUD application filed under the general track.

The Dreyers' first contingent cross-assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (The Neighbors)

EC 9.8320(2) is a tentative PUD general track standard requiring a finding that the PUD is consistent with applicable refinement plan policies. As noted, the SHS is one of the city's refinement plans. The Ridgeline Park section of the SHS states, in relevant part:

"Specific Recommendations:

"That all vacant property above an elevation of 901 [feet] be preserved from an intensive level of development, subject to the following exceptions:

"1. Development of individual residences on existing lots; and

"2. Development under planned unit development procedures when it can be demonstrated that a proposed development is consistent with the purposes of this section.

"That the area specified for preservation be protected through a variety of techniques including but not limited to acquisition, scenic easements, density transfers, and dedication."

In discussing the above-quoted SHS language, the hearings official noted that the purpose statement of the Ridgeline Section of the SHS states that "any areas recommended for preservation or park usage should serve at least one of" seven listed purposes.[9] Because the "purposes of this section" appear to relate

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[9] The Ridgeline Park section of the SHS states, in relevant part:

"The south hills constitute a unique and irreplaceable community asset. The strong dominant landforms and wooded character present there combine to provide distinct areas of contrast in terms of texture and color from the normal pattern of urban development. By virtue of this contrast, the south hills function as a strong visual boundary or edge to the city. The ridgeline of the south hills also marks the most southerly extension of the urban service area. Further, there are areas within the south hills that are especially suitable for park sites for recreational use by present and anticipated population. In view of these factors, any areas recommended for preservation or park usage should serve at least one of the following purposes:

"1. To insure preservation of those areas most visibly a part of the entire community;

only to "areas recommended for preservation or park usage," and because the hearings official concluded that the subject property is not an area that is "recommended for preservation or park usage," the hearings official found that the above-quoted SHS recommendation did not apply to the proposed PUD.

In the alternative, the hearings official evaluated whether the proposed PUD is consistent with at least one of the seven listed "purposes of this section," and concluded that the PUD is consistent with three of the seven listed purposes. Accordingly, the hearings official found that the PUD is consistent with the applicable SHS policies. The planning commission concurred with the hearings official's findings, quoting with approval a statement in a staff report that the "Ridgeline Park section of the [SHS] is primarily intended for areas

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> "2. To protect areas of high biological value in order to provide for the continued health of native wildlife and vegetation;
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> "3. To insure provision of recreational areas in close proximity to major concentrations of population;
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> "4. To provide connective trails between major recreational areas;
>
> "5. To provide connective passageways for wildlife between important biological preserves;
>
> "6. To contribute to Eugene's evergreen forest edge;
>
> "7. To provide an open space area as a buffer between the intensive level of urban development occurring within the urban service area and the rural level of development occurring outside the urban service area."

within the south hills suitable as recreational parks[.]" Record 13. The planning commission also adopted the hearings official's alternative findings that the PUD is consistent with at least one of the purposes of the Ridgeline Park section.

On appeal, the Neighbors first challenge the hearings official's primary finding that the subject property is not in an area "recommended for preservation."[10] According to the Neighbors, the above-quoted SHS language itself constitutes an express designation that "all vacant property above an elevation of 901 [feet] be preserved from an intensive level of development," and therefore the portions of the subject property above 901 feet in elevation are "recommended for preservation." The Neighbors cite a LUBA opinion, *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13, 34 (1999), and legislative history of the SHS, to support their argument that the SHS is intended to preserve land above 901 feet in elevation, with the two exceptions listed, for a variety of purposes, *e.g.*, visual impacts, not limited to recreational or park use. The Neighbors note that the hearings official does not identify

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[10] The Neighbors focus their arguments mostly on EC 9.9630(1), which codifies the above-quoted language from the SHS Ridgeline Park section in a code provision that applies refinement plan policies specifically to "subdivisions, partitions, and site review." EC 9.9500. The city argues that nothing in the EC codifies or applies the SHS Ridgeline Park section language with respect to a tentative PUD application. However, the city agrees with the Neighbors that the SHS policies apply directly to a tentative PUD application, pursuant to EC 9.8320(2).

anything in the SHS that expressly designates some areas, but not others, for preservation or park usage, except the language stating that land above 901 feet in elevation "be preserved." Finally, the Neighbors also challenge the hearings official's alternative findings that the proposed PUD is consistent with at least one of the seven purposes listed in the Ridgeline Park section of the SHS.

In its response brief, the city does not defend the hearings official's primary conclusion that the subject property is not designated for preservation and therefore the above-quoted SHS recommendation does not apply to the proposed PUD. The city argues, however, that the hearings official and planning commission correctly found that the PUD is consistent with at least one of the listed purposes of the SHS Ridgeline Park section, and thus consistent with the SHS.

Given the city's apparent reluctance to defend the hearings official's primary finding, we will assume without deciding that that finding is erroneous, and that the above-quoted SHS language has the effect of designating land above 901 feet in elevation for preservation, subject to the two listed exceptions, which require a finding of consistency with SHS purposes. However, that presumed error is harmless, because we agree with the city and the Dreyers that the Neighbors have not demonstrated that the hearings official erred in her alternative findings of consistency with at least one of the seven listed SHS purposes.

As noted, the western half of the subject property is above 901 feet in elevation, representing the relatively flat top of a ridgeline, where the existing dwellings are located and 21 of the proposed new dwellings will be located. The heavily-wooded eastern half of the property drops steeply to the east, and much of the eastern half will be protected as an open space tract and as buffer areas from the adjoining Ribbon Trail. The hearings official relied primarily upon the open space tract and buffer areas in the eastern half of the property, below the 901-foot elevation,[11] to find that the proposed PUD is consistent with

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[11] The hearings official's findings state, in relevant part:

> "In order to buffer the proposed residential development from the Ribbon Trail, the proposed PUD designates 2.33 acres along the entire east property line of the proposed PUD (Tract A) for preservation. Additionally, a portion of each individual lot that borders Tract A, totaling approximately 2.08 acres, is also required to be preserved. Combined, the proposed development preserves a total of 4.41 acres of [land] along the eastern property line as a buffer between the residential development and the Ribbon Trail. The preserved areas will help to ensure the preservation of existing trees and vegetation while providing a continuous visual buffer between the adjacent Ribbon Trail and the future home sites. Preservation of Tract A and the preserved areas of the individual lots bordering Tract A are consistent with Policy 1.
>
> "In addition to the preservation areas in Tract A and on adjacent individual lots, the proposed PUD designates several smaller areas of land throughout the site (Tracts B, C and D) for preservation, bringing the total preservation area of the PUD site to approximately 4.54 acres. * * * These described preservation areas will be protected from any future construction and removal

Purposes 1, 2 and 5 listed in the Ridgeline Park section of the SHS, which we repeat here:

> "1. To insure preservation of those areas most visibly a part of the entire community;
>
> "2. To protect areas of high biological value in order to provide for the continued health of native wildlife and vegetation; [and]
>
> "* * * * *
>
> "5. To provide connective passageways for wildlife between important biological preserves."

The Neighbors challenge those findings, arguing that findings of consistency with one or more of the seven listed purposes must be based on the portions of the PUD above 901 feet in elevation. With respect to Purpose 1, the Neighbors argue that the proposed PUD will remove almost all trees on the top of the ridgeline and replace them with a dense cluster of housing, which is not consistent with "preservation of those areas most visibly a part of the entire community." That a number of trees will be preserved on lower slopes to the east, the Neighbors argue, does nothing to hide the denuded ridgeline and new

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> of trees, therefore providing for the continued health of the native wildlife and vegetation, consistent with Policy 2.
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> "In furtherance of Policy 5, the combined preservation areas of Tract A and the preserved areas of the eastern lots also act as an uninterrupted natural wildlife corridor, enhancing the existing wildlife corridor that the Ribbon Trail provides from the south of the site to Hendricks Park to the north." Record 68-69.

dwellings from view from other parts of the city. Similarly, with respect to Purposes 2 and 5, the Neighbors argue that preserving lower elevation trees while cutting down nearly all trees on top of the ridgeline is not consistent with those purposes. The Neighbors argue that these purposes are focused only on protecting habitat and wildlife connections on lands above 901 feet in elevation.

The Dreyers respond that nothing in the text of the SHS cited by the Neighbors limits evaluation of the purposes listed in the Ridgeline Park section to lands above 901 feet in elevation. The Dreyers note that the Final Joint Parks Committee report, a document adopted as part of the SHS, explains that the exceptions to the recommendation to preserve lands above 901 feet "should make provision for larger developments where the purposes of the basic recommendation may be satisfied more adequately through preservation of areas other than those above 901 feet." Dreyers' Response Brief, App 77.

We agree with the Dreyers that the Neighbors have not demonstrated that, in evaluating whether proposed PUD development is consistent with one or more of the listed purposes, the evaluation must be limited to lands above 901 feet in elevation. Nothing cited to us in the text of the SHS or elsewhere indicates that development of land that includes areas that are over 901 feet in elevation must consider only the portions of the property over 901 feet in evaluating consistency with the purposes of the Ridgeline Park section of the SHS. The Final Joint Parks Committee report cited by the Dreyers suggests that the city contemplated that preservation of areas below 901 feet might

suffice to show consistency with the listed purposes. Depending on the topography and other circumstances, preservation of trees on lower elevation slopes could limit impacts on the viewshed as well or better than concentrating development on lower elevation portions. And it is possible that concentrating development on a partially developed ridgeline away from existing lower elevation habitat and wildlife connective areas could be more consistent with Purposes 2 and 5 than concentrating development in lower elevation habitat and wildlife connective areas. The Neighbors have not demonstrated that, as a matter of law, evaluation of consistency with the listed purposes is confined to portions of the property with elevations above 901 feet.

Finally, the Neighbors argue that the record lacks substantial evidence to support the findings of consistency with Purposes 1, 2 and 5. The Neighbors' evidentiary arguments are premised on their view, rejected above, that only preservation of land above 901 feet in elevation can be evaluated in determining consistency with Purposes 1, 2 and 5. The Dreyers cite to the evidence that the hearings official and planning commission relied upon to find that the PUD is consistent with Purposes 1, 2 and 5. We agree with the Dreyers that the Neighbors have not established that the findings addressing consistency with Purposes 1, 2 and 5 are not supported by substantial evidence.

The first assignment of error (the Neighbors) is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR (The Neighbors)

Under the second and third assignments of error, the Neighbors challenge findings and conditions primarily related to EC 9.8320(6). We address both assignments of error together.

A. Significant Risk to Public Health and Safety

EC 9.8320(6) is a general track tentative PUD approval standard requiring a finding that "[t]he PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response." EC 9.9630(3)(c) requires that "adequate review of both on-site and off-site impacts of any development by a qualified engineering geologist occur under" specified conditions, including development on steep slopes.

To address EC 9.8320(6) and EC 9.9630(3)(c), the Dreyers submitted a "Geotechnical Investigation" by an engineering geologist, which was reviewed by the city public works department. The Geotechnical Investigation concluded that the subject property was suitable for development without significant risk to public health and safety, if specified measures are implemented in the design and construction of the PUD. The Geotechnical Investigation is based in part on 10 test pits dug at the site. The 10 test pits are located in the approximate center of the subject property, encompassing roughly 20 percent of the property. The Geotechnical Investigation noted two areas of moderate landslide activity in the steeper eastern portion of the site, and identified an "exclusion area"

encompassing the eastern portion of the property where no roads should be built and where residential construction should be subject to special consideration. Consequently, the site plan was revised to eliminate a private road in the vicinity of the two identified landslide areas. Among other recommendations, the Geotechnical Investigation recommended that within the "exclusion area" specific building foundation plans "should be reviewed on a case by case basis by qualified professionals prior to design and construction." Record 4758. As discussed below, the hearings official and planning commission ultimately found compliance with EC 9.8320(6) and EC 9.9630(3)(c), but based on the recommendation of the city public works department also imposed Condition of Approval 10, which requires that any application to construct public improvements or for a building permit include a geotechnical analysis by a certified engineer. We quote Condition of Approval 10, as modified by the planning commission, below.

The Neighbors' geotechnical consultant criticized the Geotechnical Investigation on a number of grounds, including the number and location of the test pits, arguing that the test pits were concentrated on the gentler slopes near the ridgeline and not located on the steeper portions of the property, or near the two identified slide areas. The consultant argued that the Geotechnical Investigation was therefore incomplete and essentially recommended deferring site-specific analysis to the building permit stage. For these reasons among others the geotechnical consultant argued that the Geotechnical Investigation

was inadequate to demonstrate compliance with EC 9.8230(6) and EC 9.9630(3)(c).

The hearings official considered the Geotechnical Investigation, as supplemented, and the criticisms of the Neighbors' geotechnical consultant, and chose to rely on the former to conclude that EC 9.8320(6) and EC 9.9630(3)(c) are met. The hearings official explained that choice by noting that the Neighbors' consultant failed to take into account the numerous, specific recommendations in the Geotechnical Investigation. Record 104. However, the hearings official agreed with the city public works department that a condition of approval was appropriate "to ensure that the PUD will not create any significant risk of slope failure." *Id.* The hearings official imposed Condition of Approval 10, requiring that any applications for public improvements or building permits must be accompanied by a site-specific geotechnical analysis from a certified engineer and must adhere to the recommendations in the Geotechnical Investigation and the site-specific analyses.

On appeal to the planning commission, the Neighbors argued in relevant part that the hearings official improperly deferred findings of compliance with applicable criteria, including EC 9.8320(6), to a subsequent proceeding that does not provide an opportunity for notice or public participation, contrary to *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). In response to arguments regarding compliance with EC 9.8230(6), to the effect that the Geotechnical Investigation was only a "preliminary" analysis that did not

adequately consider both on-site and off-site impacts, the planning commission modified Condition of Approval 10 to state:

> "A geotechnical analysis from a certified engineer, with specific recommendations for design and construction standards, shall be provided with any applications for Privately Engineered Public Improvements (PEPI) permits, as well as building permits and site development permits for the initial construction of infrastructure and residences on individual lots. The development proposed with each permit shall adhere to the recommended standards for design and construction as contained in the ~~related~~ *preliminary* geotechnical analysis *approved for the tentative PUD, as well as any additional geotechnical analyses required for individual permits. The geotechnical analyses required for individual permits shall also address potential off-site impacts*." Record 17. (Strikethrough text deleted by the planning commission; italicized text added by the planning commission).

Under the second assignment of error, the Neighbors argue that the hearings official and planning commission's findings of compliance with EC 9.8320(6) based on the Geotechnical Investigation are not supported by substantial evidence in the record. Relatedly, under the third assignment of error, the Neighbors argue that the planning commission erred in imposing Condition of Approval 10, because the condition represents an impermissible deferral of finding compliance with EC 9.8320(6) to a subsequent building permit approval process that does not provide notice or public participation, contrary to *Rhyne*, 23 Or LUBA 442.

The city's response brief adopts the Dreyers' response to the second assignment of error, but makes no response of its own. The Dreyers argue that

the Neighbors' findings and evidentiary challenges represent a classic battle of the experts, and that the hearings official is entitled to choose which expert testimony to believe, as long as the testimony chosen constitutes substantial evidence. The Dreyers argue that the hearings official adequately explained why she chose to rely on the Geotechnical Investigation. That explanation cited the measures recommended by the Geotechnical Investigation, one of which was for a "case-by-case" professional evaluation of specific building foundations on the steeper lots.

As noted above, the Neighbors' expert consultant criticized the Geotechnical Investigation as inadequate or incomplete, in part because it relied upon a cluster of 10 test pits located in the more gently sloped center of the property, encompassing only 20 percent of the property, and did not dig test pits or evaluate soil stability on the steeper slopes, including on or near the two sites identified as showing evidence of landslide activity. The Geotechnical Investigation acknowledges that the test pits "represent a very small portion of the site" (Record 4757), but elsewhere states that it assumes that the 10 test pits "are representative of the subsurface conditions throughout the site." Record 4754. However, the basis for that assumption is not explained. As noted, the site plan was subsequently revised to eliminate a private road near an identified landslide area, but as the Neighbors point out the revised site plan still proposes a private driveway and residential development in that area. Although the Dreyers' expert later submitted supplemental information, the Dreyers do not

cite us to any expert response to criticisms regarding the location or adequacy of the test pits to evaluate conditions over the entire area proposed for development. The hearings official and planning commission adopted no findings addressing that issue, or explaining why it need not be addressed. However, the planning commission seemed to recognize the incomplete nature of the Geotechnical Investigation in modifying Condition 10.

The decision-maker is entitled to choose between conflicting expert testimony, as long as the testimony relied upon constitutes substantial evidence, *i.e.*, evidence a reasonable person would rely upon. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, *aff'd* 258 Or App 534, 311 P3d 527 (2013). However, if the expert relied upon fails to respond to a critical issue raised by other expert testimony, there may be no conflicting expert evidence on that particular issue. Depending on the nature of the issue, the failure to rebut or provide any response regarding a critical issue may so undermine the expert testimony relied upon that the testimony as a whole does not constitute evidence a reasonable person would rely upon.

In our view, a reasonable decision maker would not have relied upon the Geotechnical Investigation to find compliance with EC 9.8320(6) and EC 9.9630(3)(c). We conclude this based in part on the apparently unrebutted expert testimony of the Neighbors' consultant that no reliable conclusions can be drawn regarding potential for slope failure on the site, based on test pits clustered on the least steep portion of the property, encompassing only 20

percent of the property, and some distance from two identified areas of soil instability on which development is proposed. Our conclusion is also based on the unexplained assumption that the test pit locations are representative of the subsurface conditions on the remainder of the property. Moreover, we agree with the Neighbors that Condition of Approval 10 appears to represent an attempt to overcome acknowledged evidentiary inadequacies in the Geotechnical Investigation. As such, the city erred in specifying that the more detailed and comprehensive geotechnical analyses required by Condition of Approval 10 be reviewed and approved outside of the scope of any public proceeding on the application. *Rhyne*, 23 Or LUBA 442.

The Neighbors' consultant also criticized the Geotechnical Investigation for failing to address off-site impacts of PUD development. As noted, EC 9.9630(3)(c) requires an "adequate review of both on-site and off-site impact[.]" The Neighbors appear to be correct that the Geotechnical Investigation provides at best conclusory statements regarding off-site impacts. The hearings official and planning commission rejected all challenges to the Geotechnical Investigation, including criticism regarding inadequate consideration of off-site impacts. But the findings do not cite to any evidence addressing off-site impacts or explain why the Geotechnical Investigation provides an adequate review of off-site impacts. The apparent lack of evidence on this point may be the reason that the planning commission felt compelled to modify Condition of Approval 10, to require that all public improvement and

building permits include a site-specific geotechnical analysis that addresses, among other things, "potential off-site impacts." A condition of approval that requires that additional or confirming information be submitted at the building permit stage could, in other circumstances, represent a permissible "belt and suspenders" approach to ensuring compliance with an approval criterion, if the local government adopts an adequate finding, supported by substantial evidence, that the approval criterion is satisfied. In the present case, however, the apparent lack of specific evidence and findings in the present record regarding off-site impacts suggests that the modification to Condition of Approval 10 was intended to overcome evidentiary insufficiencies in determining compliance with EC 9.8320(6) and EC 9.9630(3)(c).

For the foregoing reasons, we agree with the Neighbors that remand is required for the city to adopt more adequate findings, based on substantial evidence, regarding compliance with EC 9.8320(6) and EC 9.9630(3)(c). If the city cannot determine based on substantial evidence in the record that EC 9.8320(6) and EC 9.9630(3)(c) are complied with, and the city chooses to defer that issue to a subsequent proceeding, that subsequent proceeding must provide notice and opportunity for public participation, consistent with *Rhyne*, 23 Or LUBA 442; *see also Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007).

B. Impediment to Emergency Response

As noted, EC 9.8320(6) requires a finding that the PUD will not be "an impediment to emergency response." Access to the PUD is via Capital Drive, a narrow winding street, 18-feet wide, that dead-ends just past the subject property at Hendrickson Park. The Fire Marshal's original comments expressed several concerns, including: (1) the roads leading up to the PUD are narrow and windy, with potential for delayed response times if there are collisions, road construction, downed trees, heavy traffic, etc.; and (2) the need for an emergency vehicle turnaround triggered by the dead-end status of Capital Drive. To improve response times, the Fire Marshal recommended that no parking signs be posted on the streets leading to the area. Subsequently, the city Traffic Engineer issued an order placing no parking signs along the approach route. In addition, the applicants proposed a loop road through the PUD that allows an emergency vehicle turnaround. On February 20, 2018, the Fire Marshal issued an updated comment noting these two improvements, and commenting in relevant part that the no-parking signs provide "improved emergency access and evacuation capabilities along this route." Record 2932. Based on the Fire Marshal's updated comments, the hearings official found that the PUD would not be an impediment to emergency response.[12]

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[12] The hearings official found:

> "[T]he Fire Marshal's office comments indicate that the parking prohibition [on streets] leading to the proposed PUD could

On appeal, the Neighbors argue that the no-parking signs do not completely address the Fire Marshal's larger concerns with the narrow and windy nature of the approach route, and that the Fire Marshal's updated comments, although noting that the no-parking signs improved emergency access, did not retract all of the original concerns with the approach route or positively state that the PUD is not an impediment to emergency response. Accordingly, the Neighbors argue that the hearings official's findings on this point are not supported by substantial evidence.

Substantial evidence is evidence that a reasonable person would rely upon to support a finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). In our view, a reasonable person could conclude from the Fire

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> alleviate current issues in navigating the existing street system. The [updated] February 20, 2018 comments do not state that, with the addition of no-parking signs, the proposed development would create an impediment. Moreover, to the extent the emergency response issues relate to the ability of trucks to maneuver and turnaround, the proposed PUD could improve the existing situation. By providing a loop road (Cupola Drive) near the end of Capital Drive, emergency vehicles can more efficiently maneuver the streets. Eliminating the need to turnaround, the vehicles can negotiate the existing street system more efficiently.
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> "Based on the Fire Marshal's updated comments, and with the addition of a loop street that allows greater maneuverability of emergency vehicles, the evidence in the record indicates the proposed PUD will not be an impediment to emergency response[.]" Record 105.

Marshal's updated comments that the Fire Marshal was not (or no longer) asserting that the PUD was an impediment to emergency response. The original comments requested two specific measures to improve emergency access. After two responsive measures were put in place or proposed, the Fire Marshal issued updated comments noting the two measures and the improved emergency access. The improved comments did not expressly state, one way or another, whether the Fire Marshal believed that the PUD constituted an impediment to emergency response, considering the two measures in place. Nonetheless, a reasonable person could conclude that with the two measures in place, responding to the only two specific requests made by the Fire Marshal, and in the absence of an express statement otherwise, that the Fire Marshal did not claim (or no longer claimed) that the PUD is an impediment to emergency response. Accordingly, the Neighbors have not demonstrated that the hearings official's findings on this issue are unsupported by substantial evidence.

C. Adequate Screening

EC 9.8320(3) requires a finding that the PUD "will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height." The hearings official found compliance with EC 9.8320(3), based on: (1) the proposed open space tracts on the property, which the hearings official found would provide substantial screening; (2) the proposed residential development on the western half of the property would be mostly obscured from view from the adjacent residential area to the

west due to slopes and trees; and (3) a condition of approval requiring any trees in buildable areas that are removed must be replaced at a one-to-one ratio. The hearings official also noted that while lot locations and configuration must be evaluated under EC 9.8320(3), no future buildings must be evaluated.[13] The hearings official noted that future building construction will be subject to review for compliance with R-1 zone development standards, as part of building permit review, including any bulk or height standards, and that if the applicant proposes to adopt Covenants, Conditions or Restrictions (CC&Rs)

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[13] The hearings official's decision states, in part:

> "The [Neighbors] note that, to the extent the applicant relies upon future CC&Rs [Covenants, Conditions and Restrictions] to establish compliance with this (or any other) approval criterion, the applicant has failed to establish compliance with the criterion. However, neither EC 9.8320(3) nor any other PUD approval criterion requires that the PUD include proposed buildings. While the proposed lot locations and configurations must be evaluated for compliance with this criterion, future buildings are not subject to this review, and evaluation for compliance with this criterion does not include consideration of those future buildings. At the time residential dwellings are proposed for any of the approved lots, they must be evaluated for compliance with the R-1 zone development standards, and the bulk and height must be consistent with those development standards. To the extent the developer requests any deviations or modifications to those standards, those requests would be subject to the city's review process. Thus, compliance with this criterion does not rely on any specifications that may be included in future CC&Rs." Record 82-83.

that modify any R-1 developments standards, such modifications must undergo city review and approval.

Under the third assignment of error, the Neighbors argued that the hearings official erred in "deferring" a finding of compliance with EC 9.8320(3) to a subsequent proceeding that does not provide notice or opportunity for public participation. According to the Neighbors, whether the PUD provides "adequate screening" for purposes of EC 9.8320(3) depends in part on the bulk and height of the particular future dwellings that will be proposed at the building permit stage, and the permissible bulk and height of those dwellings could be subject to future-adopted CC&Rs that could include modified bulk and height standards, modifications that would be reviewed and approved by city staff in a discretionary, but non-public process.

We disagree with the Neighbors. The hearings official correctly noted that nothing in EC 9.8320(3) or any other tentative PUD approval requires that the city evaluate any particular dwellings that might be applied for at the future building permit stage. Because the PUD application did not propose any particular buildings, EC 9.8320(3) does not require that in evaluating whether the PUD provides "adequate screening" the city must also evaluate the bulk or height of the actual dwellings that would be proposed at the building permit stage. The Neighbors do not argue that subjecting building permit approvals to R-1 development standards that govern bulk and height represents a "deferral" of any aspect of finding compliance with EC 9.8320(3). Instead, the Neighbors

speculate that the applicant might in the future request that the city approve CC&Rs that include bulk or height standards that vary from the R-1 development standards. That possibility also does not represent a potential "deferral" of findings of compliance with EC 9.8320(3), as any such review proceeding to approve CC&Rs or modification of R-1 development standards would not concern the application of EC 9.8320(3) at all, and the hearings official did not rely (indeed, expressly rejected any reliance) on such a future review proceeding in order to establish compliance with EC 9.8320(3). The Neighbors' arguments on this point do not provide a basis for reversal or remand.

D. Conclusion

For the reasons stated above, the Neighbors' second and third assignments of error are sustained in part and denied in part.

The city's decision is remanded.