

1 BEFORE THE LAND USE BOARD OF APPEALS

2  
3 OF THE STATE OF OREGON

11/21/18 AM 9:43 LUBA

4  
5 FAIRMOUNT NEIGHBORHOOD ASSOCIATION,  
6 BETSY DATRI, LARRY WEINERMAN,  
7 and LAUREL HILL VALLEY CITIZENS,  
8 *Petitioners,*

9  
10 vs.

11  
12 CITY OF EUGENE,  
13 *Respondent.*

14  
15 LUBA No. 2018-088

16  
17 FINAL OPINION  
18 AND ORDER

19  
20 Appeal from City of Eugene.

21  
22 Sean T. Malone, Eugene, filed the petition for review. Charles W.  
23 Woodward, IV, Eugene, argued on behalf of petitioners.

24  
25 Lauren A. Sommers, Assistant City Attorney, Eugene, filed the response  
26 brief and argued on behalf of respondent.

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

30  
31 AFFIRMED

11/21/2018

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

**NATURE OF THE DECISION**

Petitioners appeal a planning commission decision approving with conditions a tentative planned unit development (PUD) and adjustment review.

**FACTS**

The subject property is comprised of 4.48 acres and is zoned Low-Density Residential (R-1). Much of the property is forested and portions of the property contain steep slopes (slopes of 20 percent or greater). Surrounding land uses include single-family dwellings, a golf course, and undeveloped land. The eastern boundary of the property abuts tax lot 301, a city-owned property that is required by deed to be used for public road purposes. Record 15. The terminus of the improved portion of Spring Boulevard is directly to the south of tax lot 301. The northern boundary of the subject property abuts Central Boulevard. Spring Boulevard and Central Boulevard are both public roads.

Furtick Family Limited Partnership (applicant) submitted an application for a tentative PUD under the city’s “needed housing” process set out in Eugene Code (EC) 9.8325 to develop single-family residences on 14 lots on the southern portion of the property and create an open-space tract on the northern portion of the property.<sup>1</sup> The dwellings will be developed on two cul-de-sacs accessed by

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<sup>1</sup> The City of Eugene has adopted a two-track system for processing needed housing applications. *See Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002) (discussing the city’s two-track system).

1 extending the improved portion of Spring Boulevard over the city’s tax lot 301.  
2 The development plan required adjustment review because it does not propose to  
3 extend Spring Boulevard to meet Central Boulevard, as would otherwise be  
4 required by the EC. Record 19–20.

5 The city hearings official held the initial public hearing and approved the  
6 tentative PUD and adjustment review with conditions. Petitioners appealed the  
7 hearings official’s decision to the planning commission, which held a public  
8 hearing on the record. The planning commission adopted the hearings official’s  
9 decision, made additional findings, and approved the tentative PUD and  
10 adjustment review with conditions. This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 In the first assignment of error, petitioners argue that the planning  
13 commission misconstrued applicable law and that its decision is not based on  
14 substantial evidence in determining that the proposed PUD satisfies EC  
15 9.8325(5), which provides: “There shall be no proposed grading on portions of  
16 the development site that meet or exceed 20% slope.”

17 The site plan shows that the open-space tract and five proposed lots include  
18 areas with steep slopes. Record 87. Applicant proposes a development  
19 configuration that requires digging holes to install support posts for cantilevered  
20 dwellings and digging and refilling trenches to install water lines in areas  
21 containing steep slopes. Applicant argued before the city that such development  
22 activity does not constitute “grading,” citing to dictionary definitions indicating

1 that “grading” means leveling or changing the grade. Instead, applicant argued,  
2 the proposed activity constitutes only “excavating,” which is an activity distinct  
3 from “grading” that involves digging, but does not necessarily change the grade  
4 of the soil. The planning commission agreed and concluded that EC 9.8325(5)  
5 was satisfied because no grading was proposed or would occur on steep slopes.

6 We must determine whether the planning commission correctly interpreted  
7 the term “grading” in EC 9.8325(5). *Gage v. City of Portland*, 133 Or App 346,  
8 349–50, 891 P2d 1331 (1995); *McCoy v. Linn County*, 90 Or App 271, 275, 752  
9 P2d 323 (1988). Stated in terms of our standard of review, the issue on appeal is  
10 whether the planning commission “[i]mproperly construed the applicable law.”  
11 ORS 197.835(9)(a)(D). In interpreting a land use regulation, we examine text,  
12 context, and legislative history with the goal of discerning the intent of the  
13 governing body that enacted the law. *State v. Gaines*, 346 Or 160, 171–72, 206  
14 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d  
15 1143 (1993). No party provided us any legislative history, so we focus on text  
16 and context.

17 We start with text. According to petitioners, “grading” broadly means  
18 disturbing or moving any dirt and encompasses all development so that EC  
19 9.8325(5) constitutes a general prohibition on any development on steep slopes.  
20 In petitioners’ view, the activity of grading entirely encompasses and includes  
21 the activity of excavation. Petitioners argue that even small areas of excavation  
22 result in some amount of leveling of soil and thus constitute prohibited grading,

1 such as digging a trench to place water pipes and covering the trench with the  
2 excavated soil or digging a hole to place a post. The city contends that “grading”  
3 more narrowly means leveling or changing the grade of the ground to prepare the  
4 area for further development, such as constructing a foundation, driveway, or  
5 road. According to the city, excavating is digging, or creating a cavity, which is  
6 a development activity distinct from leveling ground.

7         The EC does not define the terms “grading” and “excavating.”  
8 Accordingly, we resort to dictionary definitions to determine the ordinary  
9 meaning of those terms. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or  
10 LUBA 193, 202, *aff’d*, 260 Or App 562, 318 P3d 1146 (2013). “Grade,” as a  
11 verb, means “3 : to reduce \* \* \* to an even grade whether on the level or in a  
12 progressive ascent or descent.” *Webster’s Third New Int’l Dictionary* 985  
13 (unabridged ed 2002). “Excavate” is a verb that means “1 : to hollow out : form  
14 a cavity or hole in.” *Id.* at 791. Those definitions describe different actions and  
15 thus provide some support for the city’s interpretation. We are mindful, however,  
16 that dictionary definitions are limited in their helpfulness. “Dictionaries, after all,  
17 do not tell us what words mean, only what words *can* mean, depending on their  
18 context and the particular manner in which they are used.” *State v. Cloutier*, 351  
19 Or 68, 96, 261 P3d 1234 (2011) (emphasis in original).

20         We next examine context, which includes other uses of the terms “grading”  
21 and “excavation” in EC Chapter 9. EC 9.0500 defines “development” and lists  
22 “grading” and “excavation” as separate development activities:

1           **“Development.** The act, process or result of developing. As used in  
2 sections 9.6705 to 9.6709, any man-made change to improved or  
3 unimproved real estate, including but not limited to buildings or  
4 other structures, mining, dredging, filling, *grading*, paving,  
5 *excavation* or drilling operations located within the area of special  
6 flood hazard.” (Boldface in original; italics added.)

7           The EC uses grading and excavation as separate terms; thus, they are  
8 presumed to have different meanings. *Northwest Natural Gas Co. v. City of*  
9 *Gresham*, 359 Or 309, 323, 374 P3d 829 (2016) (if the legislature uses different  
10 terms in related statutes, it likely intended them to have different meanings). As  
11 the hearings official observed, if excavation were encompassed in grading, as  
12 petitioners argue, the definition of the term “development” would not list both  
13 activities because listing grading would be sufficient. Record 26–27.

14           If the city had intended EC 9.8325(5) to prohibit all development activity  
15 on steep slopes, as petitioners argue, the city could have easily prohibited  
16 development by simply using that term. EC 9.0500 defines “develop” broadly,  
17 including “site improvements.”

18           **“Develop.** To bring about growth or availability; to construct or alter  
19 a structure, to conduct a mining operation, to make a physical  
20 change in the use or appearance of land, to divide land, or to create  
21 or terminate rights to access. ‘Develop’ includes, but is not limited  
22 to, new building, building alterations or additions, site  
23 improvements, or a change in use.” (Boldface in original).

24           EC 9.8325(5) prohibits “grading” and not all development, site improvements, or  
25 soil disturbance. As the city notes, the city council knows how to prohibit all soil  
26 disturbing activities, as evidenced by EC 9.2530(8), which governs development  
27 in natural resource zones and limits filling, grading, and excavating to drier

1 months.<sup>2</sup> Context supports the city’s interpretation. Petitioners cite no context  
2 that undermines the city’s interpretation.

3 Petitioners do argue that the purpose of the grading prohibition in EC  
4 9.8325(5) is to prevent slope erosion and failure and the city’s interpretation is  
5 inconsistent with that purpose because it allows types of development on steep  
6 slopes that could result in erosion and slope failure. As mentioned, no party has  
7 provided any legislative history for EC 9.8325(5). Instead, petitioners rely on  
8 *Walter v. City of Eugene*, 73 Or LUBA 356, 362, *aff’d*, 281 Or App 461, 383 P3d  
9 1009 (2016), where we opined that the purpose of [EC 9.8325(5)] “is to prevent  
10 development on steep slopes.” We noted that the city in that case had stated that  
11 EC 9.8325(5) is “intentionally rigid to ensure adequate protections related to  
12 erosion and slope failure.” *Id.* at 362 n 6.

13 The purpose of the grading prohibition in EC 9.8325(5) was not at issue in  
14 *Walter*, which involved a challenge to whether the manner of identifying steep  
15 slopes under EC 9.8325(5) was a “clear and objective” standard, as required by

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<sup>2</sup> EC 9.2530(8) provides:

**“Filling, Grading and Excavating.** These activities shall occur between April 15 and October 15 of the same year, unless the planning director or decision-maker authorizes an exception based on dry weather conditions or overriding public need. Exceptions granted due to overriding public need shall require approval of an erosion and sedimentation control plan by the city manager prior to commencement of earth moving activities, and this plan must be implemented throughout the activity.” (Boldface in original.)

1 the needed housing statute. ORS 197.307(4). Thus, any statements by the city or  
2 LUBA regarding the purpose of the grading prohibition in that case are not  
3 controlling in this appeal. Our statements and the city attorney's statement in  
4 *Walter* are not evidence of the city's legislative purpose. Petitioners have not  
5 provided any evidence of the city's intention and purpose in adopting the grading  
6 prohibition in EC 9.8325(5). The information and argument before us in this case  
7 do not demonstrate that in adopting EC 9.8325(5) the city intended to prohibit all  
8 development activities that might arguably lead to slope erosion and failure.

9 Petitioners challenge, as not supported by substantial evidence in the  
10 record, the hearings official's statement that excavation presents less danger of  
11 slope failure than grading. Petition for Review 21. The hearings official's  
12 comment, even if not supported by substantial evidence, provides no basis for  
13 remand because it is extraneous to the dispositive conclusion that grading does  
14 not fully encompass excavation and that the proposed site plan demonstrates that  
15 the distinct activity of grading will not occur on steep slopes.

16 The city did not err in finding that EC 9.8325(5) is satisfied.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 In the second assignment of error, petitioners argued that the city  
20 misconstrued applicable law and that its decision is not supported by substantial  
21 evidence in determining that the application satisfies EC 9.8325(4), which  
22 provides, in part:

1 “For areas not included on the city’s acknowledged Goal 5  
2 inventory, the PUD preserves existing natural resources by  
3 compliance with all of the following:

4 “(a) The provisions of EC 9.6880 to EC 9.6885 Tree  
5 Preservation and Removal Standards, (not subject to  
6 modifications set forth in subsection (11) below).”

7 EC 9.6885(2)(a) provides, in part:

8 “The materials submitted shall reflect that consideration has been  
9 given to preservation in accordance with the following priority:

10 “1. Significant trees located adjacent to or within  
11 waterways or wetlands designated by the city for  
12 protection, and areas having slopes greater than 25%;

13 “2. Significant trees within a stand of trees; and

14 “3. Individual significant trees.”

15 As mentioned above, the subject property is largely forested. A certified  
16 arborist studied the site, inventoried trees, and identified preservation priorities  
17 for each tree. Record 834–35 (application narrative); 933–56 (tree survey). Those  
18 tree preservation priorities were considered in planning the placement of the lots,  
19 open space tract, and access. For example, the open space tract preserves trees  
20 within a stand on slopes greater than 25 percent. Yard size was considered with  
21 respect to critical root zone impacts with larger yards decreasing root impacts and  
22 preserving trees between and around homes. Applicant explained that some high  
23 and moderate priority trees must be removed to develop streets, utilities, and  
24 building pads. Preservation of trees on the residential lots would be left to the  
25 discretion of future lot owners. Record 834–35. The planning commission found

1 that the record demonstrated that applicant had considered tree preservation and  
2 thereby satisfied EC 9.8325(4). Record 11–12. The planning commission also  
3 found that “declining to remove individual moderate and high priority trees in the  
4 northern, southern, and southwestern portions of the site at this time indicates  
5 that the proposal not only considers preservation of those trees, but promotes their  
6 actual preservation.” Record 12.

7 Petitioners advance three arguments related to tree preservation. *First*,  
8 petitioners argue that applicant is not taking positive action to preserve any trees,  
9 but simply following required setbacks and the prohibition of grading on steep  
10 slopes. Petitioners argue that applicant cannot demonstrate compliance with tree  
11 preservation requirements by relying on evidence that it will comply with other  
12 applicable approval criteria such as landscape buffering. *Second*, petitioners  
13 argue that trees that are subject to removal at the discretion of future lot owners  
14 are not “preserved.” *Third* and finally, petitioners argue that applicant cannot rely  
15 on large yard size to preserve individual significant trees.

16 The city responds that petitioners waived the first argument by failing to  
17 raise that issue during the local proceeding. ORS 197.835(3); ORS 197.763(1).<sup>3</sup>

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<sup>3</sup> ORS 197.835(3) provides: “Issues shall be limited to those raised by any participant before the local hearing body as provided by ORS 197.195 or 197.763, whichever is applicable.”

ORS 197.763(1) provides:

1 Response Brief 16 nn 3 & 4. Petitioners did not reply to that waiver argument.  
2 Without some explanation or argument from petitioners explaining how that  
3 issue was preserved, we agree with the city that it was waived.

4 Petitioners’ argument fails even if it was not waived. The city responds,  
5 and we agree, that petitioners’ arguments are not focused on the applicable  
6 approval criteria, which require the applicant submit materials that “reflect that  
7 consideration has been given to preservation.” EC 9.6885(2)(a). Petitioners  
8 incorrectly interpret EC 9.6885(2)(a) to require actual preservation of trees.  
9 Applicant was required only to consider tree preservation and submit evidence to  
10 demonstrate that such consideration occurred.

11 Petitioners also provide no legal support for their proposition that  
12 compliance with the landscape buffer required by EC 9.8325(3)<sup>4</sup> and the  
13 prohibition on grading on steep slopes in EC 9.8325(5), both of which may result

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“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

<sup>4</sup> EC 9.8325(3) provides:

“(3) The PUD provides a buffer area between the proposed development and surrounding properties by providing at least a 30 foot wide landscape area along the perimeter of the PUD according to EC 9.6210(7).”

1 in incidental preservation of trees, negates the evidence that consideration was  
2 given to preservation of trees to satisfy EC 9.8325(4). We reject that argument.  
3 We perceive no principled reason why compliance with the applicable setback  
4 and steep slopes criteria should undermine evidence of compliance with the  
5 criteria that requires consideration of the preservation of trees.

6 We also reject petitioners' other evidentiary challenges. EC  
7 9.6885(2)(a)(3) does not require applicant to ensure tree preservation when  
8 property is transferred. The fact that some trees that are subject to removal at the  
9 discretion of future lot owners does not undermine the city's conclusion that  
10 applicant considered tree preservation as part of its development plan. Similarly,  
11 EC 9.6885(2)(a)(3) does not require preservation of individual significant trees.  
12 Instead, applicant was required to demonstrate that consideration was given to  
13 preservation of individual significant trees. The record supports the city's  
14 conclusion that applicant considered preservation of individual significant trees.  
15 The materials that applicant submitted, namely its written statement and site plan,  
16 "reflect that consideration has been given to preservation" of trees, including  
17 preservation of individual significant trees. The city did not err in applying EC  
18 9.8325(4) and the city's conclusion that consideration was given to tree  
19 preservation is supported by substantial evidence in the record.

20 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 In the third assignment of error, petitioners argue that the city misconstrued  
3 applicable law and made findings not supported by substantial evidence in  
4 determining that the application satisfies EC 9.8325(6), which provides, in part:

5 “(6) The PUD provides safe and adequate transportation systems  
6 through compliance with all of the following:

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

10 EC 9.6805 provides:

11 “**Dedication of Public Ways.** As a condition of any development,  
12 the city may require dedication of public ways for bicycle and/or  
13 pedestrian use as well as for streets and alleys, provided the city  
14 makes findings to demonstrate consistency with constitutional  
15 requirements. Public ways for pedestrian and bicycle accessways,  
16 streets and alleys to be dedicated to the public by the applicant shall  
17 conform with the adopted Street Right of way Map, and EC Table  
18 9.6870.” (Boldface and underscoring in original.)

19 Petitioners argue that the tentative PUD does not comply with EC  
20 9.8325(6) because the extension of Spring Boulevard on tax lot 301 to provide  
21 access to the PUD does not appear on the city’s adopted street right of way map.  
22 EC 9.6805 requires “streets \* \* \* to be dedicated to the public by the applicant \*  
23 \* \* conform” with the adopted street right of way map. In the present case, the  
24 proposed improvement of Spring Boulevard will be located on tax lot 301, a city-  
25 owned property required by deed to be used for road purposes. The tentative PUD

1 and adjustment review approval does not involve a right of way dedication. Thus,  
2 EC 9.6805 does not apply to the proposed Spring Boulevard extension.

3 EC 9.6805 does not require the street “appear” on the map; it requires that  
4 the street “conform” with the map. Even if EC 9.6805 was applicable, the  
5 planning commission correctly observed that the city’s adopted street right of  
6 way map identifies only higher-volume arterial and collector streets. The  
7 proposed Spring Boulevard extension will be categorized as an access lane, a  
8 low-volume, residential-access street that would not appear on the city’s right of  
9 way map. A street does not fail to “conform” with a street map that does not  
10 depict that category of street.

11 Finally, petitioners assert that the Spring Boulevard extension may be  
12 inconsistent with the city’s current transportation plan because Lane County  
13 Commissioner’s Order No. 81-1-21-15, dated January 21, 1981, states that the  
14 north and south spurs of Spring Boulevard are not to be connected. Petition for  
15 Review 32; Record 599. The city responds that issue of whether the approval in  
16 this proceeding is consistent with the city’s current transportation plan was not  
17 raised below and is waived. See n 3. Petitioners did not reply to that waiver  
18 argument. Without some explanation or argument from petitioners explaining  
19 how that issue was preserved, we agree with the city that it was waived.<sup>5</sup>

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<sup>5</sup> Record 503–504, which petitioners cite, is a letter petitioners’ attorney submitted into the record stating that petitioners oppose the potential connection

1           Petitioners’ argument fails even if it was not waived. Lane County Order  
2 No. 81-1-21-15 is an order adopted by the county that relates to transportation  
3 planning “through 2000” and concerns the 30th Avenue-Spring Boulevard  
4 interchange. Record 599. Petitioners’ argument regarding the import or continued  
5 viability of Order No. 81-1-21-15 is undeveloped and provides no basis for  
6 reversal or remand. *Deschutes Development Co. v. Deschutes County*, 5 Or  
7 LUBA 218, 220 (1982).

8           The third assignment of error is denied.

9           The city’s decision is affirmed.

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of Spring Boulevard north and south spurs. The letter cites Order No. 81-1-21-15 but does not present any argument about the city’s current transportation plan.