BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEIGHBORS FOR SMART GROWTH
and JAKE MINTZ,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

LENNAR NORTHWEST, INC.,
Intervenor-Respondent.

LUBA No. 2018-059

FINAL OPINION
AND ORDER

Appeal from Washington County.

John A. Rankin, Murrieta, California, filed a joint petition for review and argued on behalf of petitioner Neighbors for Smart Growth.

Jake Mintz, Portland, filed a joint petition for review and argued on his own behalf.

Jacquilyn Saito-Moore, Assistant Washington County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Kelly S. Hossaini, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Miller Nash Graham Dunn LLP.

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

AFFIRMED 01/02/2019

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a decision on remand approving the vacation of a public pedestrian access easement.

REPLY BRIEF

Petitioners request leave to file a seven-page reply brief to respond to what petitioners argue are "new matters" raised in the response briefs. OAR 661-010-0039.[1] However, petitioners do not explain why the contents of the reply brief respond to "new matters" raised in the response briefs. Further, petitioners do not request permission to file an overlength reply brief. Accordingly, the reply brief is denied.

MOTION TO STRIKE; MOTION TO TAKE EVIDENCE

Petitioners attached to their petition for review five appendices that include documents or information outside the record. Intervenor-respondent Lennar Northwest, Inc. (intervenor) objects to consideration of the documents

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[1] OAR 661-010-0039 (2017provides:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies within seven days of the date the respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief, state agency brief, or amicus brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

in Appendices C, D, E and F because those documents are not in the record and not subject to official notice. Appendix G includes a document compiled by petitioners consisting of comprehensive plan and county regulations that have been cut and pasted into the document. Intervenor does not object to consideration of the cut-and-pasted plan and code provisions, but objects to consideration of editorial comments or arguments that petitioners inserted into some of the plan and code language.

In response, petitioners filed a motion to take evidence outside the record under OAR 661-010-0045, requesting that LUBA consider Appendix C, D and E.[2] Petitioners did not file a motion to take evidence with respect to Appendix

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[2] OAR 661-010-0045 provides, in relevant part:

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.
>
> "(2) Motions to Take Evidence:
>
> "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving

F and G or argue that the disputed materials are contained in the record. Intervenor's motion to strike Appendix F and G is well taken and is granted.

With respect to Appendices C, D and E, petitioners argue that a motion to take evidence outside the record is warranted because the documents in those appendices are "necessary to resolve disputes regarding the content of the Record generally and specifically to counter inaccurate factual statements made by the County in its decision, and/or used by the County as the basis for the decision appealed[.]" Motion to Take Evidence 1.

Appendix C is the affidavit of the president of a homeowners' association, which in relevant part disputes the accuracy of a finding in the decision regarding whether the homeowners' association would maintain the "no parking" striping on a sidewalk owned and maintained by the association. However, OAR 661-010-0045 is not a vehicle to submit extra-record evidence for LUBA's consideration in order to controvert evidence or findings in the record. *St. John's Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997). Petitioners impermissibly request that LUBA consider Appendix C in order to controvert evidence and findings in the record. Accordingly, we grant intervenor's motion to strike Appendix C.

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party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

Appendix D consists of an email chain between petitioners and county staff. We understand petitioners to offer Appendix D to support their argument that the county erred in not providing adequate notice and opportunity to rebut the supplemental findings adopted on remand. Appendix E consists of petitioners' testimony and evidence that the county rejected during the remand proceedings. We understand petitioners to offer Appendix E to demonstrate that the county erred in rejecting their testimony and evidence.

OAR 661-010-0045(1) lists the permissible grounds for taking evidence outside the record. The only listed ground that petitioners cite is the last sentence, providing that LUBA "take evidence to resolve disputes regarding the content of the record[.]" However, there is no factual dispute in this appeal about the *content* of the record, *i.e.*, whether a document was or was not included in the record. Petitioners argue that the county erred in failing to provide them notice and opportunity to rebut the supplemental findings, and erred in rejecting their testimony and evidence from the record. However, there is no factual dispute on these points, much less a factual dispute regarding the content of the record. The only disputes are legal ones: whether the county was required to provide petitioners with notice and opportunity to rebut the supplemental findings, and whether the county was required to accept petitioners' testimony and evidence. Because petitioners have not demonstrated a basis under OAR 661-010-0045(1) to consider Appendices D and E, petitioners' motion to take evidence is denied.

FACTS

The challenged decision is on remand from LUBA. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 319 (2017) (*NFSG I*). The county's 2016 decision approved the vacation of a pedestrian easement (the Easement) on the east side of Lot 13, in part based on intervenor's proposal to record and construct a replacement easement on the west side of Lot 13. Attached to this opinion as an appendix is a plat taken from petitioners' Appendix A that illustrates the Easement, the replacement easement, and the surrounding area. As we described the facts in *NFSG I*:

> "Westhaven subdivision was originally approved by the county in 2008. The Easement was not included on the subdivision plat, or required as a condition of subdivision approval. In April 2014, the original subdivision developer entered into a private agreement with a local resident group and petitioner Jake Mintz (Mintz) to dedicate the Easement on the east side of Lot 13, which was dedicated by recording a revised plat in 2015. [ ] The Easement connects Tract D, an open space tract, and Tract C, a pedestrian path. Tract D is part of a planning process to establish a future community trail in the area. The Easement provides the only public access from the Westhaven subdivision to Tract D.
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> "Intervenor-respondent Lennar Northwest, Inc. (intervenor) purchased some of the lots from the original developer after the subdivision had been approved. [ ] In June 2016, intervenor submitted an application to the county to vacate the Easement from the east side of Lot 13, and in the application proposed to dedicate a replacement 12-foot wide easement on the west side of Lot 13. [ ] Like the Easement, the replacement easement connects Tract D to Tract C, but includes a curved portion that runs across the private driveway of the house built on Lot 13.

> "Intervenor submitted the requisite signatures for the vacation under ORS 368.346 to allow the application to be scheduled for a public hearing. The county engineer prepared a written report to the board of county commissioners. The county board of commissioners (the 'Board') provided public notice and two public hearings on the application, at which petitioners appeared in opposition. On November 22, 2016, the Board voted to adopt Resolution and Order 16-155 vacating the Easement, supported by findings in a staff report drafted by the county engineer." 76 Or LUBA 319, 321 (internal citations omitted).

Resolution and Ordinance (R&O) 84-261 provides the county approval criteria for vacating public roads and easements, requiring a demonstration that the vacation is in the "public interest," subject to several criteria.[3] In its 2016

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[3] R&O 84-261, adopted in 1984, sets out four "criteria," each with sub-criteria or considerations. We quote here only what the findings and parties refer to as "Criterion One" and "Criterion Two."

> "Criteria to be addressed in Road Report on a road vacation request to determine if the proposed vacation is in the public interest are as follows:
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> 1) "Conformance with the County's Comprehensive Plan
>
> - "The existing right-of-way proposed for vacation is not designated as a necessary transportation facility in the Comprehensive Plan.
>
> - "The existing right-of-way proposed for vacation is not necessary for traffic or pedestrian circulation in the immediate area.
>
> "* * * * *
>
> 2) "Use of the Right-of-Way

decision, the county relied on the replacement easement to justify vacating the Easement under the R&O 84-261 standards. During the 2016 proceedings, petitioners raised a number of issues regarding the safety and adequacy of the replacement easement, but the findings did not address those issues. We held:

> "The findings rely heavily on the replacement easement to establish compliance with two R&O 84-261 criteria, and it is quite possible that, but for the proposed replacement easement, the county might well have denied the vacation of the Easement. Given the importance of the replacement easement in the county's justifications for the vacation of the Easement, the adequacy and safety of the replacement easement would seem to be a legitimate issue that could be raised under the R&O 84-261 criteria. However, no findings cited to us address any of the issues raised about the replacement easement by opponents. We agree with petitioners that remand is necessary for the county to adopt more adequate findings addressing the issues raised below regarding the safety of the replacement easement and the impact, if any, of those

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- "The right-of-way proposed for vacation is not presently open for traffic or needed in the future for public access or use.
- "The right-of-way proposed for vacation is presently unimproved or its improvement is infeasible due to physical or funding limitations.
- "The right-of-way proposed for vacation is not necessary for legal access to any parcel of land.
- "The approval of the proposed vacation does not create an access configuration which violates present development standards." Intervenor's Response Brief, App 2-3.

issues on compliance with the R&O 84-261 criteria." 76 Or LUBA at 328.

We rejected all other assignments of error.

On remand, the county determined that it would conduct a non-evidentiary remand proceeding, with no new evidence or testimony allowed, at which the commissioners would consider and adopt proposed supplemental findings. The county scheduled a meeting for May 15, 2018. On May 7, 2018, county counsel emailed petitioners a copy of the proposed supplemental findings. On May 11, 2018, county counsel sent to petitioners by email copies of all materials that were distributed to the commissioners. On May 15, 2018, petitioners submitted written testimony and new evidence to the county administrator for inclusion in the record.

At the May 15, 2018 meeting, the commissioners rejected petitioners' testimony and, after discussion, adopted the supplemental findings, and reapproved vacating the Easement. This appeal followed.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county committed procedural error on remand by (1) failing to give petitioners inadequate notice and opportunity to rebut the supplemental findings adopted on remand, (2) accepting new evidence at the May 15, 2018 meeting without providing petitioners an opportunity to respond to that new evidence, and (3) rejecting petitioners new testimony and evidence.

A. Notice and Opportunity to Rebut Supplemental Findings

Petitioners contend that the city erred in failing to provide them with adequate notice and opportunity to rebut the proposed supplemental findings. However, petitioners cite no authority that required the county to provide them with notice of or an opportunity to rebut the proposed supplemental findings. As the county argues, nothing in LUBA's remand or the county code required the county to conduct evidentiary proceedings on remand, or provide notice and an opportunity to rebut the supplemental findings the county adopted on remand.

B. New Evidence in the Supplemental Findings

Petitioners contend that the supplemental findings include new evidence. The supplemental findings state, in relevant part:

> "The Board agrees with opponents that the short length of the driveway could contribute to vehicles blocking the sidewalk. To mitigate this issue, Lennar has agreed to stripe the sidewalk in front of the driveway as a no-parking area. *The Homeowners Association will maintain the condition of said striping*. The Board finds that this striping will adequately address that safety concern and will provide for adequate user safety." Record 33 (italics added).

Petitioners argue that the italicized statement that the "Homeowners Association will maintain the condition of said striping" must be based on new evidence that was submitted during the remand proceedings. *Id.*

Intervenor responds that the italicized statement is based on statements made during the 2016 evidentiary hearing, to the effect that the homeowners

association (HOA) maintains a portion of the replacement easement, the sidewalk that crosses the driveway, and that the association has budget reserves to pay for anything that will deteriorate over time. Record 36 (LUBA No. 2016-122); *see also* Record 228 (LUBA No. 2016-122) (planning director's memorandum stating that the HOA owns and maintains the sidewalk and that the HOA could potentially develop and enforce its own parking rules).

We agree with intervenor that petitioners have not established that the italicized statement is based on new evidence submitted during the remand proceeding. The evidentiary record included statements from which the commissioners apparently inferred that the HOA, which owns and maintains the sidewalk to be striped and which has agreed to the proposed striping, will also undertake to maintain the striping. Petitioners confuse the issue of whether that inference is *correct* with the issue of whether that inference is based on new evidence improperly submitted during the remand proceedings.

To the extent petitioners argue that the county's findings on this point are not supported by substantial evidence in the record, a reasonable person could conclude that because the HOA owns and maintains the sidewalk, and agreed to stripe the sidewalk, the HOA is also legally responsible for maintaining the striping. ORS 197.835(9)(a)(C); *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) ("Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding). That conclusion may or may not survive contact with the real

world, but petitioners have not established that that conclusion is unsupported by substantial evidence in the record. Petitioners cite to no countervailing evidence in the record, and we have rejected petitioners' attempt to submit evidence outside the record to controvert the evidence and findings on this point.

C. New Evidence in Deliberations

Petitioners next argue that "new evidence" entered the record during deliberations, when a commissioner asked county counsel who would be responsible for enforcing the parking restriction on the striped sidewalk. County counsel offered a response based on what she believed "was already in the record." Petition for Review, Appendix B-26-27. After an inconclusive discussion, the question was dropped, and the commissioners went on to vote to approve the supplemental findings, which say nothing on the question of who enforces the parking restriction. We understand petitioners to argue that the county counsel's response constitutes "new evidence." However, county counsel's response was expressly based on her recollection of what was already in the record. Even if her recollection was inaccurate, that would not constitute "new evidence." Finally, even if county counsel's response represented "new evidence" on the issue of enforcement, the county's final decision includes no findings regarding the question of enforcement. Any error in accepting "new evidence" in such circumstances would be procedural error that can provide a basis for reversal or remand only if the error prejudiced petitioners' substantial

rights. ORS 197.835(9)(a)(B). Because the alleged procedural error played no apparent role in the decision, the error cannot possibly have prejudiced petitioners' substantial rights.

D. Evidentiary Hearing

Finally, petitioners argue that the county erred in failing to provide an evidentiary hearing on remand. Petitioners do not contend that LUBA's remand or any other authority required the county to provide an evidentiary hearing on remand. Petitioners' argument on this point is based on their assertions, rejected above, that the county accepted new evidence into the record on remand. However, even if we agreed with petitioners that the county accepted new evidence and doing so was prejudicial to petitioners, the remedy would not be to require the county to provide a full-blown evidentiary hearing, as petitioners request. The remedy would be to remand for the county to either (1) make a decision without considering the improperly accepted new evidence or (2) allow the parties the opportunity to rebut the improperly accepted evidence. In any case, because we rejected petitioners' arguments regarding new evidence, petitioners' related arguments regarding an evidentiary hearing provide no basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under the third assignment of error, we understand petitioners to argue that the county misconstrued the applicable law in vacating the Easement based

on a replacement easement that was constructed without required county approvals.

Intervenor responds, and we agree, that this issue could have been, but was not, raised in the initial appeal leading to *NFSG I*, and therefore this issue is waived under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). LUBA's remand in *NFSG I* was limited to a single issue: the adoption of findings addressing the safety of the already constructed replacement easement. If petitioners wished to argue that the county erred in approving the vacation based on a replacement easement that was allegedly constructed without required county approvals, petitioners should have raised that issue in *NFSG I.* Petitioners' failure to do so means that the issue is not within LUBA's scope of review under the reasoning in *Beck.*

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

In *NFSG I* we remanded the original decision to the county for the limited purpose of adopting more adequate findings regarding the safety and adequacy of the replacement easement. The county adopted three pages of supplemental findings on those points. In the first assignment of error, petitioners argue that the key findings in the supplemental findings are inadequate, misconstrue the applicable law, or are not supported by substantial evidence.

A. Functional Equivalent

Based on the city engineer's report, the county found that the connectivity provided by the replacement easement is "functionally equivalent" to the existing Easement.[4] Record 32. Petitioners argue that this finding is conclusive, because it does not explain why the connectivity provided by the replacement easement is functionally equivalent to the existing easement. According to petitioners, the finding ignores several qualitative and safety differences between the two easements, and fails to identify any current development standards that might support a finding that the two easements are "functionally equivalent." *Id.*

Remand was limited to the issue of the safety of the replacement easement, not whether it is functionally equivalent to the existing Easement. In addition, no criteria require a finding that the replacement easement be "functionally equivalent" to the existing Easement, so the county's findings on this point do not appear to be critical to the decision. In any case, the findings

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[4] The supplemental findings state, as relevant:

> "As set forth in the engineer's report, the Board finds the connectivity provided by the relocated easement is functionally equivalent to that of the existing easement, as the relocated easement preserves the north-south pedestrian connection through this part of Westhaven Estates. The Board believes this north-south connection is important, and the provision of a new easement is necessary to meet R&O 84-261, Criteria 1 and 2, for that reason." Record 32.

explain that the two easements are functionally equivalent with respect to connectivity because both easements preserve "the north-south pedestrian connection through this part of Westhaven Estates," a point which petitioners do not dispute. Record 32. Petitioners' concerns with the safety of the replacement easement and similar matters have little to do with connectivity, which is the focus of this finding. Safety and similar matters are addressed in other findings discussed below.

B. Superior Alternative

The findings go on to conclude that the replacement easement is superior in four respects to the existing Easement.[5] Petitioners contend that three of the four cited superior aspects of the replacement easement are inaccurate. Petitioners argues that the fence was constructed after the Easement was dedicated and so should not be weighed against the Easement. Petitioners also argue that both easements are sloped and do not provide good Americans with Disabilities Act (ADA) access, and it is not clear that either easement is

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[5] The findings state:

> "The Board also finds the connection provided by the relocated easement is superior to the existing easement, because it does not cross through a home's fence backyard, the gentler slope will make it easier to ensure ADA [Americans with Disabilities Act] accessibility, and it is not obstructed by any large trees or other vegetation, and it is more readily visible from the nearest public roadway." Record 32.

"superior" to the other with respect to ADA access. Finally, petitioners argue that the 12- to 18-inch diameter tree located in the existing Easement does not prevent the easement from being developed as a pedestrian trail, and in fact the tree should be viewed as an amenity.

No criteria requires a finding that the replacement easement be "superior" to the existing Easement, so the county's findings on the relative superiority of the replacement easement are not critical to the decision. In any case, we agree with intervenor that petitioners have not demonstrated that the findings on this point are inaccurate or not supported by the record. A reasonable person could conclude that an easement that runs along a side yard between two houses rather than through a backyard, that has a somewhat gentler slope, and that avoids a large tree within the easement is "superior" in those respects to an easement that lacks those qualities.

C. Impact on Pedestrian System

The findings go on to reject arguments that the replacement easement is located 80 feet to the west of the existing Easement, and thus would be more difficult to access from east.[6] The findings point out that the replacement

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[6] The findings state:

> "Several opponents argued the relocated easement is inferior and inadequate because it is 80 feet further to the west, which will require those coming from the east to walk 80 feet further to reach the easement. Even so, the easement will be 80 feet closer for pedestrians and bicyclists coming from the west. So the overall

easement will be closer and easier to access from the west, and thus the net impact on accessibility is "negligible." Petitioners fault this finding for failure to address other arguments presented below regarding the adequacy and safety of the replacement easement. However, this finding is focused on a particular argument raised below regarding access from one direction. Other findings, discussed below, address safety and similar issues.

D. Safety of the Driveway Crossing

The findings then address safety issues raised by opponents, based on the fact that the replacement easement runs for a short distance along an existing sidewalk, which crosses a driveway to the single-family dwelling on Lot 13.[7]

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impact on the pedestrian system is negligible. Further, the Board finds an additional 80 feet one or the other will not cause future potential users to avoid the trail, and the relocation does not make the easement in any way inadequate or inferior as a connection between the Westhaven Estates and Creekside neighborhoods and the destinations to the north or south, including the future east-west North Johnson Creek Community Trail. The Board finds that the relocated easement provides comparable connectivity to the existing easement both locally as well as within the larger pedestrian network." Record 32.

[7] The first finding addressing safety states:

"The relocated easement requires users to cross a single-family driveway to connect from Tract C to the northern entrance of the easement area. The existing easement area avoids this single-family driveway. Opponents of the relocated easement point to the single-family driveway as a safety hazard and a reason to deny the proposed alternate easement location. The Board notes that pedestrian facilities, such as trails and sidewalks, may cross

The first finding concludes that a pedestrian and bicycle path crossing a driveway is "neither inherently dangerous nor unusual." Record 33. Petitioners challenge that conclusion as not supported by evidence in the record. The findings cite testimony that the proposed trail that the replacement easement will be a part of crosses Valeria View Drive, but petitioners argue that the import of that testimony is that the trail crosses over *only* one street, Valeria View Drive, suggesting that street and driveways crossings are in fact unusual, at least for this trail. Intervenor responds, and we agree, that based on undisputed testimony that the trail at issue crosses one street, the county could reasonably conclude that such crossings are not "unusual."

The findings also cite testimony that users from the Creekside neighborhood cross a number of alleys along Mozart Terrace. Petitioners argue that this testimony is "new evidence" improperly introduced on remand, but intervenor cites to evidence submitted on this point during the original evidentiary proceeding. Record 10, 236, 238-39 (LUBA No. 2016-122).

> driveways, streets, and alleys. Such crossings are neither inherently dangerous nor unusual. In his testimony, Mr. Charles Flaxel noted the trail at issue crosses Valeria View Drive, for example. Further, trail users will often have to cross driveways, streets, and alleys to be able to access trails. Users from the Creekside neighborhood, for example, are already required to cross a number of alleys along Mozart Terrance to reach the existing pedestrian easement and future trail to the south." Record 33.

Finally, petitioners argue that the conclusion that a driveway crossing is not "inherently dangerous" ignores petitioners' arguments that the replacement easement does not comply with a number of code development standards. Record 32. We address below petitioners' arguments regarding compliance with code development standards. For present purposes, petitioners have not demonstrated that the county committed any error in concluding that trail that runs briefly along an existing sidewalk that crosses a driveway is "neither inherently dangerous nor unusual." *Id.*

E. Measuring Safety

Petitioners next challenge the finding that "no opponent has pointed to a relevant approval criterion providing some measure by which to evaluate the safety of a pedestrian path[.]" Record 33.[8] Petitioners argue that to the

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[8] The findings state, in relevant part:

> "Opponents argue this driveway-crossing situation presents particular risk because the driveway on Lot 13 is substandard in length due to the sidewalk that will have to be installed along the front of Lot 13 to connect Tract C with the relocated easement. Opponents' concern is that if the homeowner or a guest parks in the driveway, the parked vehicle may not fit between the garage and the backside of the sidewalk and so could obstruct the sidewalk. First, the Board notes that no opponent has pointed to a relevant approval criterion providing some measure by which to evaluate the safety of a pedestrian path or that would provide the Board with an ability to deny the vacation petition on that basis. (The Board agrees with the November 18, 2016, memorandum from Andrew Singelakis that the existing public pedestrian

contrary they repeatedly argued to the county that under the R&O 84-261 Criteria One and Two the vacation must be consistent with the comprehensive plan and not "create an access configuration which violates present development standards." We address below petitioners' specific arguments regarding R&O Criteria One and Two. For present purposes, petitioners have not demonstrated that the county inaccurately stated that no approval criterion has been identified that provides "some measure by which to evaluate the safety of a pedestrian path[.]" Record 33. Neither Criteria One nor Two, nor any applicable development standards cited to us, provide a way to measure the safety of a pedestrian path, and the county's finding on that point is therefore accurate.

> easement as not a condition of approval of the Westhaven subdivision and no Community Development Code provisions apply as approval criteria to this vacation request.) That said, the Board finds the overall requirement that the proposed vacation be in the public interest is broad enough to encompass at least the general notion the proposed vacation provide for a reasonable level of user safety.
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> "The Board agrees with opponents that the short length of the driveway could contribute to vehicles blocking the sidewalk. To mitigate this issue, [intervenor] has agreed to stripe the sidewalk in front of the driveway as a no-parking area. The Homeowners Association will maintain the condition of said striping. The Board finds that this striping will adequately address that safety concern and will provide for adequate user safety." Record 33.

F. Public Interest

As quoted in n 8, the county found that overall requirement in R&O 84-261 that "the proposed vacation be in the public interest is broad enough to encompass at least the general notion the proposed vacation provide for a reasonable level of user safety." Record 33. Petitioners argue that this finding is inadequate because it is not "supported by carefully analyzed specific findings of fact with an explanation of how all applicable criteria can be met by those facts[.]" Petition for Review 32. We do not understand the argument. The above-quoted finding is an interpretation of R&O 84-261, an interpretation that petitioners apparently do not dispute. The finding is not a finding of fact or an application of approval criteria to found facts. Petitioners' arguments do not provide a basis for reversal or remand.

G. Tract B

The replacement easement briefly adjoins Tract B, which is a private street serving several homes. The county rejected arguments that Tract B and, by extension, the adjoining replacement easement, is unsafe due to its dimensions or configuration:

> "Some opponents also argued the relocated easement area will be inferior and unsafe due to the dimensions and configuration of Tract B, which is the private street serving several homes, including the home on Lot 13. The Board does not find these arguments persuasive. Tract B meets County code standards for such private streets and the opportunity to address these concerns was provided during the Westhaven Estates land use review." Record 33.

On appeal, petitioners argue that this finding is inadequate because it does not "offer any citations and findings of fact and explanation" to support its conclusions. Petition for Review 32. However, the above-quoted finding rejects petitioners' arguments that Tract B is unsafe, because Tract B complies with all code standards, which if accurate seems more than adequate to reject petitioners' argument that Tract B is unsafe. We address below and reject petitioners' arguments that Tract B does not comply with present development standards.

H. Present Development Standards

As noted, R&O 84-261 sets out criteria for determining whether a proposed vacation is in the public interest, including "conformance with the comprehensive plan" and whether the proposed vacation creates "an access configuration which violates present development standards[.]"[9] The county

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[9] We repeat here the relevant language of R&O 84-261:

> "Criteria to be addressed in Road Report on a road vacation request to determine if the proposed vacation is in the public interest are as follows:
>
> 1) "Conformance with the County's Comprehensive Plan
>
> - "The existing right-of-way proposed for vacation is not designated as a necessary transportation facility in the Comprehensive Plan.

concluded both in its initial decision and the decision on remand that no comprehensive plan provisions or land use regulations apply to the replacement easement *as approval criteria*. However, as noted, the county concluded that the overarching "public interest" standard requires an evaluation of whether the proposed vacation creates unsafe conditions.

1. Criterion One

R&O 84-261 Criterion One requires the county to address whether the vacation is in the public interest only with respect to three sub-criteria or

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- "The existing right-of-way proposed for vacation is not necessary for traffic or pedestrian circulation in the immediate area.

"* * * * *

2) "Use of the Right-of-Way

- "The right-of-way proposed for vacation is not presently open for traffic or needed in the future for public access or use.
- "The right-of-way proposed for vacation is presently unimproved or its improvement is infeasible due to physical or funding limitations.
- "The right-of-way proposed for vacation is not necessary for legal access to any parcel of land.
- "The approval of the proposed vacation does not create an access configuration which violates present development standards."

considerations. The county's initial decision adopted findings addressing those three sub-criteria or considerations at Record 39 (LUBA No. 2016-122), and LUBA's remand did not require the county to revisit those findings. On appeal, petitioners appear to suggest that the county is also required to consider whether the road vacation conforms to comprehensive plan elements such as the Pedestrian & Bicycle Plan, a subset of the Transportation System Plan. However, petitioners do not develop that suggestion, and we reject it. As intervenor argues, Criterion One does not require conformance with any and all comprehensive plan provisions.

2. Criterion Two

One of the considerations under Criterion Two is whether approval of the proposed vacation creates an access configuration that violates present development standards. *See* n 9. Petitioners argue that Tract B, a private street that is adjacent to the portion of the replacement easement that runs along an existing sidewalk, does not comply with three Washington County Community Development Code (CDC) development standards that would apply if the county were approving Tract B as part of an application for development. Petitioners also argue that portions of the replacement easement itself do not comply with four CDC standards.

Initially, we note that this provision of Criterion Two is focused solely on whether vacating a right-of-way creates an access configuration that violates present development standards, not on whether a *replacement* right-of-way

creates an access configuration that violates present development standards. In addition to that problem, this provision is limited to consideration of development standards that address *access configurations*. As discussed below, some of the CDC standards petitioners cite address matters other than access configurations. Finally, we note that this provision of Criterion Two is expressly focused on vacations that *create* or cause noncompliance with a development standard governing access configurations. This provision is not concerned with pre-existing noncompliant access configurations.

With respect to Tract B, petitioners argue that Tract B as approved and constructed does not comply with CDC standards that would require (1) curbs and sidewalks on both sides of the street, not just one side, (2) a planter strip with trees between the sidewalk and the curb, and (3) on-street parking. However, even if Tract B is noncompliant in these respects, neither the vacation of the existing Easement nor the construction of the replacement easement causes or creates these alleged examples of noncompliance. Further, we note that none of these alleged examples of Tract B's noncompliance with current approval standards has any obvious bearing on the *safety* of the replacement easement, which was the only issue on remand.

With respect to the replacement easement itself (assuming this provision under Criterion Two can be interpreted to encompass not only the proposed vacation of an easement but a replacement easement), petitioners have not demonstrated that the replacement easement causes or creates any

noncompliance with current standards governing access configurations. The first CDC criterion cited, CDC 408-9.4, provides that fencing along an accessway is permitted, if no more than five feet in height and non-opaque. Petitioners contend that intervenor built a six-foot tall opaque fence along one portion of the replacement easement between Lot 13 and the adjoining lot. However, petitioners have not demonstrated that the allegedly noncompliant fence has anything to do with an "access configuration."

The second CDC provision cited, CDC 408-10.3(B) (Internal Pedestrian Circulation) requires in relevant part that where pedestrian connections cross a driveway the connection must be clearly identifiable through the use of striping or other similar methods. As noted, the county required that the sidewalk crossing Lot 13's driveway be striped. Petitioners argue that striping is inadequate and additional safety mitigation is required. That argument is based apparently on CDC 431-4.2(D)(11), which states that in transit-oriented districts "striping alone is not an acceptable way to identify connections." However, petitioners do not explain why noncompliance with a provision concerned with "identify[ing] connections" has anything to do with access configurations.

The third CDC provision cited, CDC 408-10.3(C), provides that connections shall be at least 10 feet in paved unobstructed width when bicycles are intended to share the connection. As noted, the replacement easement connects to an existing five-foot-wide sidewalk and the path briefly follows that sidewalk across the existing driveway for lot 13. We understand petitioners to

argue that the existing five-foot-wide sidewalk is noncompliant with CDC 408-10.3(C). However, the replacement easement does not create or cause the alleged noncompliance.

Finally, petitioners argue that several CDC provisions, read together, require that in a transit-oriented district driveways must be at least 18 feet long, with five feet of sidewalk, and a four-foot landscape strip, for a total of 27 feet from garage door to street. According to petitioners, the existing driveway for Lot 13 is less than 18 feet in length, and there is no landscape strip. However, again, the replacement easement does not create or cause the alleged noncompliance.

In sum, petitioners have not demonstrated that the county erred in concluding that the proposed vacation does not create an access configuration that violates present development standards.

I. Discussion of Supplemental Findings

Penultimately, petitioners contend that the county erred in failing to read aloud or discuss the supplemental findings at the May 15, 2018 meeting. However, petitioners cite to no authority that requires the commissioners to read the supplemental findings aloud or discuss them at the meeting.

J. General Inadequacy of Findings

Finally, petitioners argue generally that the supplemental findings are inadequate because they do not satisfy the requirement at ORS 215.416(9) that findings on a permit application explain "the criteria and standards considered

relevant to the decision," state the "facts relied upon," and explain "the justification for the decision based on the criteria, standards and facts[.]" However, ORS 215.416(9) applies only to applications for a "permit," and petitioners make no effort to establish that the proposed vacation is a "permit" application for purposes of ORS 215.416(9).[10] In any case, the supplemental findings are just that: supplemental, intended to supplement the original findings in order to resolve the single issue remaining on remand, which was to address the issues raised by petitioners regarding the safety of the replacement easement. Petitioners have not demonstrated that the supplemental findings are inadequate for that limited purpose.

The third assignment of error is denied.

The county's decision is affirmed.

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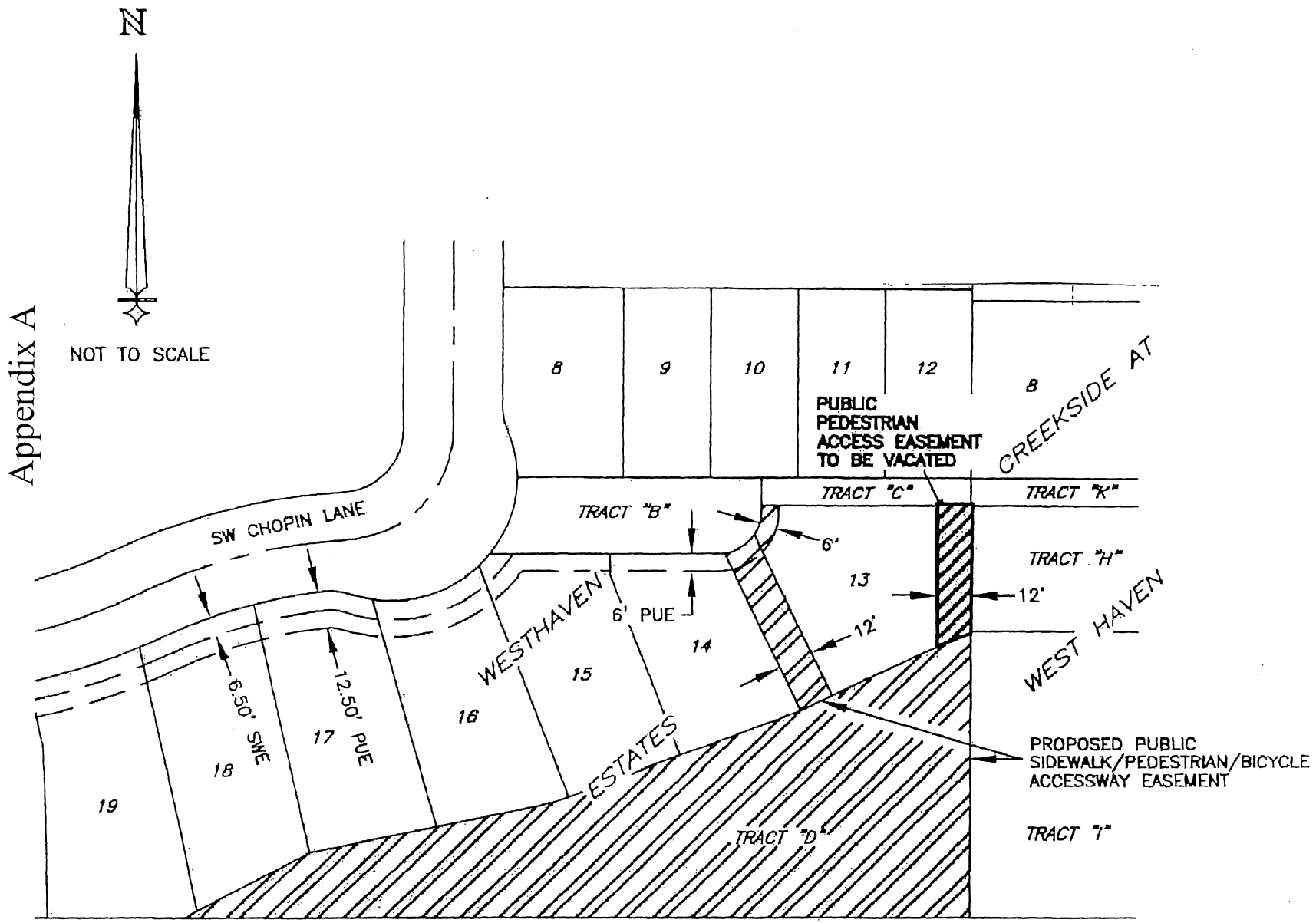
[10] ORS 215.402(4) defines "permit" for purposes of the relevant ORS chapter 215 provisions to mean the "discretionary approval of a proposed development of land under" a number of listed ORS chapter 215 sections or county legislation adopted thereto.

Appendix A


N
NOT TO SCALE
SW CHOPIN LANE
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CREEKSIDE AT
PUBLIC
PEDESTRIAN
ACCESS EASEMENT
TO BE VACATED
TRACT "C"
TRACT "K"
TRACT "B"
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13
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12.50' PUE
ESTATES
WEST HAVEN
PROPOSED PUBLIC
SIDEWALK/PEDESTRIAN/BICYCLE
ACCESSWAY EASEMENT
TRACT "D"
TRACT "I"