

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JULIE HULME, ROB HANDY,
5 and H.M. SUSTAITA,
6 *Petitioners,*

7
8 vs.

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10 CITY OF EUGENE,
11 *Respondent,*

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13 and

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15 HOME BUILDERS ASSOCIATION OF LANE COUNTY
16 and LOMBARD APARTMENTS, LLC,
17 *Intervenors-Respondents.*

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19 LUBA No. 2018-118

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21 FINAL OPINION
22 AND ORDER

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24 Appeal on remand from the Court of Appeals.

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26 Sean T. Malone, Eugene, represented petitioners.

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28 Lauren A. Sommers, Assistant City Attorney, Eugene, represented
29 respondent.

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31 Bill Kloos, Eugene, represented intervenor-respondent Home Builders
32 Association of Lane County.

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34 Micheal M. Reeder, Eugene, represented intervenor-respondent Lombard
35 Apartments, LLC.

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

1 RUDD, Board Member, did not participate in the decision.

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REMANDED

11/15/2019

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

NATURE OF THE DECISION

Petitioners challenge a city planning commission decision approving with conditions site review, adjustment review, and a Willamette River Greenway permit (Greenway Permit) for a 94-unit apartment complex.

INTRODUCTION

This matter is on remand from the Court of Appeals. *Hulme v. City of Eugene*, 299 Or App 76, 448 P3d 705 (2019). We restate the pertinent facts from our underlying decision. *Hulme v. City of Eugene*, ___ Or LUBA ___ (LUBA No 2018-118, Mar 6, 2019).

The subject property is comprised of approximately 3.59 acres, located between River Road and the Willamette River (the river), and is zoned Medium-Density Residential (R-2). Intervenor-respondent Lombard Apartments, LLC (Lombard) applied to the city for site review approval, adjustment review, and a Greenway Permit to construct four two- and three-story apartment buildings containing 94 multi-family dwelling units, a leasing office, maintenance building, and other site improvements, including parking areas.

The city hearings official held a hearing on the application and approved the development in a written decision. Opponents appealed the hearings official’s decision to the planning commission. The planning commission held a hearing and approved the development in a written decision that adopted and modified parts of the hearings official’s decision.

1 Petitioners appealed the planning commission’s decision to LUBA. As
2 relevant here, in their first assignment of error on appeal to LUBA, petitioners
3 challenged the city’s method for calculating “net density” for purposes of
4 ensuring that the development did not exceed the maximum net density of 28
5 units per acre. We affirmed the planning commission’s decision, concluding that
6 the planning commission properly included in the acreage calculation a leasing
7 office, maintenance building, and internal parking circulation areas. Petitioners
8 sought judicial review of our decision in the Court of Appeals. The court reversed
9 and remanded our decision, as explained further below. We now take up the
10 matter on remand from the court.

11 **FIRST ASSIGNMENT OF ERROR**

12 In the R-2 zone, the maximum net density is 28 dwelling units per acre.
13 Eugene City Code (EC) Table 9.2750. EC 9.2751(1)(b) defines “net density” to
14 mean “the number of dwelling units per acre of land in actual residential use and
15 reserved for the exclusive use of the residents in the development, such as
16 common open space or recreation facilities.” EC 9.2751(1)(c)(1) further provides
17 that “[t]he acreage of land considered part of the residential use shall exclude
18 public and private streets and alleys, public parks, and other public facilities.” In
19 calculating acreage for net density, the city counted the entire 3.59-acre property,
20 and excluded only a 0.21-acre area to be dedicated for an extension of a public
21 street. The city’s calculation allows 94 dwelling units. *See* EC 9.2751(1)(c)(2)
22 (“In calculating the minimum net density required for a specific lot or

1 development site, the planning director shall round down to the previous whole
2 number.”).

3 Before LUBA, in the first assignment of error, petitioners argued that the
4 planning commission misconstrued applicable law in calculating the subject
5 property’s maximum net density. ORS 197.835(9)(a)(D). Petitioners argued that
6 the planning commission improperly included in the acreage calculation a leasing
7 office, maintenance building, and internal parking circulation areas. We
8 concluded that those areas could be included in the net density calculation and
9 affirmed the planning commission’s decision.

10 Petitioners sought judicial review of our decision. In the sole assignment
11 of error, petitioners argued that LUBA’s order is unlawful in substance because
12 it misconstrues EC 9.2751 by affirming the city’s decision to include the leasing
13 office, maintenance building, and internal parking circulation areas in the net
14 density calculation. With respect to the leasing office, petitioners argued that
15 building is not “in actual residential use and reserved for the exclusive use
16 of the residents in the development.” EC 9.2751(1)(b). The court affirmed our
17 decision that the planning commission properly included the maintenance
18 building and internal parking circulation areas in the net density calculation.
19 However, the court agreed with petitioners that the leasing office should have
20 been excluded from the acreage used to calculate net density. The court reasoned:

21 “We conclude that the leasing office is not acreage ‘in actual
22 residential use and reserved for the exclusive use of the residents
23 in the development,’ EC 9.2751(1)(b), and that LUBA therefore

1 erred in affirming its inclusion in the net-density calculation. The
2 acreage may be in ‘actual residential use,’ in that a leasing office is
3 fairly characterized as a use of, relating to, or connected with
4 residence or residences. But it is not ‘reserved for the exclusive use
5 of the residents.’ On the limited record that exists, the leasing
6 office will be used by some combination of residents and
7 nonresidents. Moreover, the nonresidents’ use will be for their own
8 benefit—such as to inquire about available apartments—not at the
9 residents’ invitation or for the residents’ benefit. The leasing office
10 should not have been included in the net-density calculation.”
11 *Hulme*, 299 Or App at 86 (footnote omitted).

12 The court reversed and remanded our decision. *Id.* at 90.

13 Consistent with the court’s decision, we remand the city’s decision. On
14 remand, the city must recalculate maximum net density for the development in a
15 manner consistent with the court’s decision.

16 The first assignment of error is sustained, in part.

17 The city’s decision is remanded.