

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

3
4 PAUL NORMAN,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11
12 and

13
14 PIONEER DESIGN GROUP, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-029

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Washington County.

23
24 E. Michael Connors, Portland, filed the petition for review and a reply
25 brief, and argued on behalf of petitioner. With him on the brief was Hathaway
26 Larson LLP.

27
28 Jacquilyn E. Saito, Senior Assistant County Counsel, Hillsboro, filed a
29 response brief and argued on behalf of respondent.

30
31 David C. Allen, Madras, filed a response brief and argued on behalf of
32 intervenor-respondent.

33
34 RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board
35 Member, participated in the decision.

36
37 AFFIRMED

11/27/2019

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

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NATURE OF THE DECISION

Petitioner appeals a county hearings officer’s preliminary review approval of a 10-lot subdivision and exception to public facilities and service standards for half-street improvements.

FACTS

Intervenor-respondent Pioneer Design Group, Inc. (intervenor) sought county approval of his plan to subdivide a 2.04-acre site located on SW Garden Home Road into 10 residential lots. An existing residence is located on proposed Lot 2 of the planned subdivision, and intervenor proposed that Lot 2, along with the remainder of the newly created lots, be accessed via subdivision Tract A. Tract A is a private street that will connect directly to SW Garden Home Road.¹

SW Garden Home Road is an arterial road.² The Washington County Development Code (WCDC) generally restricts direct access to arterial roads and instead requires arterial roads to be accessed from other arterial and collector roads. However, the planning director approved the private street connection to

¹ Washington County Development Code (WCDC) 409 provides “A private street means any way that provides ingress to, or egress from, property by means of vehicles or other means, or that provides travel between places by means of vehicles, and over which the public has no right of use as a matter of public record.”

² “Arterial” and “collector” roads are roadways or streets that have “that functional classification * * * in a city or county comprehensive plan or transportation plan.” Washington County Code 3.17.030(C), (I).

1 SW Garden Home Road as an interim access. The planning director's decision
2 conditioned the approval upon abandonment of the approved private access to
3 SW Garden Home Road at the time alternate access becomes available. Record
4 348.

5 The planning director's decision was appealed to the county hearings
6 officer by the local appellant, Parecki. Petitioner also testified at the appeal
7 hearing that he owned the property to the north of the subject property and was
8 concerned about potential future access to the subdivision through his property.
9 The hearings officer approved the subdivision with conditions, including
10 establishment of a private street for interim access to SW Garden Home Road
11 and closure of that interim access when alternative access becomes available.

12 This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 ORS 197.763(6)(a) provides:

15 "Prior to the conclusion of the initial evidentiary hearing, any
16 participant may request an opportunity to present additional
17 evidence, arguments or testimony regarding the application. The
18 local hearings authority shall grant such request by continuing the
19 public hearing pursuant to paragraph (b) of this subsection or
20 leaving the record open for additional written evidence, arguments
21 or testimony pursuant to paragraph (c) of this subsection."

22 Petitioner alleges that the hearings officer improperly denied his request that the
23 record remain open or the hearing continued. Petition for Review 7.

1 ORS 197.835(9)(a)(B) provides that LUBA will reverse or remand a
2 decision if the local government “[f]ailed to follow the procedures applicable to
3 the matter before it in a manner that prejudiced the substantial rights of the
4 petitioner.” Thus, petitioner must establish both that he made a timely request
5 and that his substantial rights were prejudiced by the hearings officer’s denial of
6 that timely request.

7 In support of his argument, petitioner submitted affidavits executed by
8 Parecki and another individual who also testified at the hearing, Shreve.³
9 Petitioner stated in his affidavit:

10 “When it appeared that the hearings officer was getting ready to
11 conclude the hearing, I stood up and asked the hearings officer when
12 the parties would be given an opportunity to request a continuance
13 or open record. I noted that the hearings officer had advised the
14 parties at the beginning of the Appeal Hearing that any party could
15 exercise that right and indicated my desire to exercise that right at
16 this time. I understood that the opportunity for testifying at the
17 Appeal Hearing was over and I was requesting a continuance or
18 open record, not an opportunity to testify further at the Appeal
19 Hearing.” Petitioner’s Motion to Take Evidence Not in the Record,
20 Affidavit (Aff) of Norman 3.

³ On September 27, 2019, LUBA granted petitioner’s motion to take evidence, which offered the affidavits of Norman, Parecki, and Shreve to resolve a disputed factual allegation concerning a procedural irregularity. OAR 661-010-0045(1).

On September 27, 2019, LUBA granted the county’s motion to take evidence, which offered the transcript of the December 20, 2018 hearings officer proceeding to resolve a disputed factual allegation concerning a procedural irregularity. OAR 661-010-0045(1).

1 Parecki and Shreve stated in their affidavits that petitioner indicated to the
2 hearings officer his desire to “exercise [his] right” to either have the record held
3 open or the hearing continued and “was requesting a continuance or open record
4 [period.]” Petitioner’s Motion to Take Evidence Not in the Record, Shreve Aff
5 2–3; Parecki Aff 2–3. The transcript demonstrates, however, that petitioner did
6 not request that the record be left open or the hearing continued.

7 The following is an excerpt from the verbatim transcript of the exchange
8 between petitioner and the hearings officer (Doughman) concerning the required
9 timing of a request to either keep the record open or continue the hearing:

10 “Mr. Doughman: * * * Thanks for everybody’s time and the
11 thoroughness of the comments. We should talk about the—I’m not
12 going to make a decision on this right now. I do want to take a little
13 bit of a closer look at the issue of that Mr. Norman raised in respect
14 to the future development of his property and the taking issue as it
15 may be. I think there’s a case or two on this and so I just need to
16 kind of go back and look at that and make sure that the way that the
17 applicant and the county had sort of laid this out in terms of how
18 access is provided and where it comes from and whose obligation it
19 is, is indeed accurate and does not result in terms of how this is being
20 laid out and something that would ever be a compensable taking to
21 Mr. Norman. So, I’m going to take a little time on that and I guess I
22 just want to sort of figure out the timing wise in terms of I know
23 that’s not going to happen by January 4th. So, I was hoping if it was
24 something that was amenable to the applicant that I would have until
25 the 25th of January. That’s three weeks beyond the 4th.

26 “Mr. Hayson: We would agree to a three-week extension.

27 “Mr. Doughman: Great. Is that date seem okay, does that seem
28 okay? Okay, great. Okay, so this will be under advisement and we
29 will get a decision out no later than the 25th of January. Anything

1 else from staff: I'm sorry I kind of, okay. *So, closing the public*
2 *hearing and the record and January 25 is the deadline. Yes sir.*

3 "Mr. Norman: *You mentioned the possibility of a continuance in*
4 *light of additional testimony.*

5 "Mr. Doughman: *No one requested one so.*

6 "Mr. Norman: *Is it too late to request it?*

7 "Mr. Doughman: *Yeah, yeah, I just closed the hearing, yes. So, no*
8 *one asked. That's why I made a point of making that.*

9 "Mr. Norman: *I thought I would get an opportunity to ask for a*
10 *continuance during the hearing.*

11 "Mr. Doughman: *No, at this point sir, no. Okay, hearing and record*
12 *are closed.*" Respondent's Motion to Take Evidence Not in the
13 Record, Declaration of Saito, Ex-A, Audio Recording Transcript,
14 Hearings Officer Proceeding, Dec 20, 2018 47–48 (emphases
15 added) (Transcript).

16 Petitioner does not challenge the accuracy of the transcript, and the
17 transcript reveals that petitioner did not ask for the hearing to be continued or the
18 record to be left open. After the hearings officer announced that he was closing
19 the hearing, petitioner asked the hearings officer when the right could be
20 exercised, and told the hearings officer that he thought he would get an
21 opportunity to ask during the hearing.⁴ We agree with the county and intervenor

⁴ In his opening statement setting out how the hearing would proceed and advising participants as to the appropriate scope of their testimony, the hearings officer discussed the right to request a continuance or that the record be kept open, explaining:

“Mr. Doughman: * * * The hearing today will proceed as follows. County staff will identify the applicable criteria, summarize the proposed request, and recommend a decision. The applicant or its representative will then have an opportunity to testify to explain the proposal, respond to county staff, or ask any questions. At that point I will open the hearing for public testimony and we do ask that you, when you come forward to give your testimony if you want to do that have your name and address written down so we can make sure that we get you notice of today’s decision. If you don’t want to testify orally that’s okay and you have something written that you want to hand it or even if you want to do both, hand in that material to Louisa, our hearings reporter and we’ll makes sure it gets in the record. The applicable criteria for the application set out in the staff report and recommendation, Paul Schaefer from the county will list those criteria in his presentation. If you do [wish] to speak as I said, come forward to the microphone and state your full name. Please make sure we have your address for the file. If you represent a group, please state which group that is. Please address your testimony to the applicable criteria set out in the staff report or explain why you believe other criteria are applicable. I would appreciate everybody keeping testimony concise and relevant to those criteria. Failure to raise an issue orally or in writing before the close of the record with enough specificity I can respond may preclude you from raising that issue at a later appeal. In addition, the applicant’s failure to raise constitutional or other issues relating to proposed conditions of approval with sufficient specificity to allow me to respond will preclude an action for damages in circuit court. *Any party to today’s hearing has the right to request a continuance of the hearing or ask the record be left open for seven days and that’s a right that anybody can exercise whether there’s additional, if there’s been evidence that you want to respond to, if there’s additional testimony you want to give, you just have to make that request.*” Transcript 2–3 (emphasis added).

1 (respondents) that petitioner did not request that the record remain open or the
2 hearing be continued. Petitioner did not make a request for a continuance or that
3 the record remain open during his public hearing testimony. Petitioner also did
4 not ask the hearings officer to leave the record open or continue the public hearing
5 after the hearings officer closed the hearing. Rather, petitioner asked the hearings
6 officer if it was too late to request a continuance or that the record period remain
7 open, after the hearings officer stated that he was closing the public hearing and
8 record. Transcript 31–33, 48. Given that no request was made, the hearings
9 officer was not required to keep the record open or continue the public hearing.

10 Petitioner emphasizes that ORS 197.763(6)(a) requires the request be
11 made “[p]rior to the conclusion of the initial evidentiary hearing[.]” Petitioner
12 argues that the hearing did not conclude until the hearings officer banged his
13 gavel and that the hearing audio reveals that the hearings officer banged his gavel
14 after his exchange with petitioner and only at that point said that the hearing and
15 record were closed. According to petitioner, that means that the hearing was not
16 concluded prior to that point and the hearings officer should have accepted a
17 request to keep the record open or continue the hearing. Respondents respond
18 that the hearings officer’s *second* reference to the status of the hearing, after he
19 banged his gavel, does not change the fact that he had closed the hearing earlier
20 when he indicated that he was “closing the public hearing and record.” Transcript
21 48. However, we need not resolve the question of whether the hearings officer’s
22 first statement that he was closing the hearing was effective, because we conclude

1 that although petitioner asked a process question about *whether* a request for a
2 continuance or to keep the record open *could be made*, petitioner never requested
3 that the record be kept open or the hearing continued.⁵

4 Petitioner cites *Reed v. Clatsop County*, 22 Or LUBA 548, 554–55 (1992)
5 in support of his argument that the statute does not require “magic words” and
6 that petitioner’s intent to request a continuance or that the record be kept open
7 was clear. Reply 2. In *Reed*, we held that the county’s failure to provide notice of
8 the parties’ right to request either a continuance or that the record be kept open
9 was procedural error where:

10 “In view of the opponents’ comments, it [was] clear they would have
11 availed themselves of those rights had they known about them and,
12 therefore, the failure to provide the required notice prejudiced their
13 substantial right under ORS 197.763(4)(b) to a continuance of the
14 hearing when new evidence was submitted in support of the
15 applications.” 22 Or LUBA at 555.

16 For example, one opponent testified that, due to work obligations, her husband
17 was unable to attend the hearing but would like to testify if the hearing was
18 continued. She also stated that she would have liked the opportunity to testify
19 further, following her review of newly submitted material, if the hearing were

⁵ Petitioner also argues that he cannot be blamed for not making his request earlier in the proceedings. Petition for Review 11. The three affiants state that the hearings officer did not explain when or how to exercise the right to request a continuance or that the record remain open. Shreve Aff 2, Parecki Aff 2, Norman Aff 2. Again, we need not address this issue because no request was made.

1 continued. Here, however, unlike the circumstances in *Reed*, the county provided
2 notice of the right to request a continuance or that the record remain open at the
3 beginning of the hearing. See n 4. Although petitioner asked a process question
4 about *whether* a request for a continuance or to keep the record open *could be*
5 *made*, petitioner simply failed to exercise the right to request a continuance or
6 that the record remain open.

7 Further, even if a request had been timely made or petitioner’s process
8 question was deemed a request, petitioner has not explained how his substantial
9 rights were prejudiced. In *Pinnacle Alliance Group v. City of Sisters*, 73 Or
10 LUBA 169 (2016), we held that a procedural error in the form of failure to
11 provide a party with the required additional open record period or continuance is
12 not grounds for reversal or remand unless the substantial rights of petitioner have
13 been prejudiced.

14 “Under ORS 197.835(9)(a)(B), reversal or remand is only required
15 and appropriate if a procedural error resulted in prejudice to
16 petitioner’s substantial rights. The ‘substantial rights’ of parties in
17 quasi-judicial land use proceedings, as referenced in ORS
18 197.835(9)(a)(B) are ‘the rights to an adequate opportunity to
19 prepare and submit their case and a full and fair hearing.’” *Id.* at
20 174–75 (citations omitted).

21 In *Pinnacle*, a party was not provided with an open record period or continuance
22 but a local appeal followed the initial evidentiary hearing and the petitioner was
23 able to collect and submit additional evidence to the final decision maker. As a
24 result, petitioner did not establish any prejudice. Here, the hearings officer’s

1 decision was the final decision, but petitioner does not explain how closure of the
2 record and lack of a continuance prejudiced his substantial rights. Petitioner
3 makes no effort in his affidavit or petition for review to explain what additional
4 material he would have submitted or what additional argument he would have
5 made at a continued hearing or during an additional open record period.

6 The first assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 WCDC 409-3.7 provides in part that:

9 “A dead-end private street (includes alleys) exceeding one hundred
10 fifty (150) feet in length shall have an adequate turn around facility
11 designed in accordance with approved Fire Marshal standards
12 unless:

13 “A. The Fire Marshal determines that a turnaround is not needed
14 to provide emergency service vehicle access.”

15 Petitioner’s fourth assignment of error is “[t]he hearings officer erred in
16 concluding that the private street complies with the emergency service
17 requirements in [WCDC] 409-3.7. The hearings officer’s determination is based
18 on an erroneous interpretation of the applicable code provisions, and is not
19 supported by substantial evidence or adequate findings.” Petition for Review 39.

20 The interim private street will exceed 150 feet and dead end. The hearings
21 officer concluded that WCDC “409-3.7 does not specifically prescribe the design
22 elements (*e.g.*, location of the turnaround) but rather defers to the Fire Marshal

1 to determine based on current Fire District design standards.”⁶ Record 33.
2 Petitioner argues that the hearings officer erred in concluding (1) that WCDC
3 409-3.7 does not specifically prescribe turnaround design elements and (2) that
4 there are no Fire District approved standards for emergency turnarounds and, (3)
5 that the hearings officer was required to find that the proposed development
6 complied with Fire District standards. Petition for Review 40–41.

7 First, the plain text of WCDC 409-3.7 does not include turnaround
8 specifications. We agree with the hearings officer that the WCDC does not
9 specifically prescribe the design elements (*e.g.*, the location of the turnaround
10 along the street). Record 33.

11 Second, the hearings officer did not find that there are no Fire District
12 approved standards. Rather, the hearings officer found that:

13 “The private street (Tract A) exceeds a length of 150 feet and is
14 required, therefore, to include an emergency vehicle turnaround.
15 However, Section 409-3.7 does not specifically prescribe the design
16 elements (*e.g.*, location of turnaround) but rather defers to the Fire
17 Marshal to determine *based on current Fire District design*
18 *standards*. As shown on the map insert below (Sheet 5, Preliminary
19 Streets and Utilities Plan), the site plan includes an emergency
20 vehicle turnaround. The Fire District’s written comments, included
21 in the record, approved the proposed turnaround.” Record 33
22 (emphasis added).

⁶ We understand this to mean that the county will defer to the Fire Marshal to determine that the turnaround is designed in a manner consistent with Fire District standards.

1 Petitioner also argues that the hearings officer improperly concluded that
2 WCDC 409-3.7’s turnaround requirement is met by the private street because he
3 deferred to the Fire Marshal’s determination of compliance with approved
4 standards. Petition for Review 41, Reply 5. Respondents argue that this issue was
5 not raised below and that this assignment of error has been waived. ORS
6 197.763(1) requires a party

7 “to have raised an *issue* regarding a proposal’s compliance with an
8 approval criterion with sufficient specificity to afford other parties
9 the opportunity to respond. It does not require a party to have
10 specifically challenged the findings that were adopted as part of a
11 local government’s decision below, or to raise the precise *argument*
12 below that they assert on appeal to LUBA.” *Friends of Linn County*
13 *v. Linn County*, 54 Or LUBA 191, 195 (2007) (emphases in original).

14 Petitioner argued at the appeal hearing that “[t]here is no turn-around
15 provided at the end of the ‘interim street.’” Record 74. The local appellant,
16 Parecki argued at the hearing:

17 “The applicant is proposing a mid-block turn around since * * *
18 [WCDC 409-3.7] does not specifically prescribe the design
19 elements of the turnaround. In the event the private street ever
20 extends onto 81st Street, the distance to the turnaround from 81st
21 will be approximately 375 feet. So, they’re creating, over twice as
22 long of a situation that potentially exists.” Transcript 30.

23 No issue was raised below concerning consistency with the applicable standards
24 or reliance on the Fire Marshal’s analysis. This is despite the fact that the staff
25 report available to the public prior to the public hearing set forth the analysis

1 concerning the Fire Marshal’s review of the turnaround that was ultimately
2 adopted by the hearings officer. Record 194-95.

3 This element of the assignment of error is waived.

4 Further, even assuming that issue was not waived, contrary to petitioner’s
5 argument, the hearings officer was entitled to rely upon the Fire Marshal’s
6 determination of the relevant standards. The code requires an adequate turn
7 around “designed in accordance with approved *Fire Marshal* standards.” WCD
8 409-3.7. (Emphasis added.) Petitioner improperly replaces the “approved Fire
9 Marshal” standards language in the code with “approved Fire District” standards.
10 In interpreting code language, we will not insert language which has been
11 omitted. ORS 174.010. The hearing officer’s reliance on the Fire Marshal’s letter
12 to determine compliance with the applicable standards is consistent with the
13 provision in WCD 409-3.7(A) that the Fire Marshal may determine that a
14 turnaround is not needed to provide emergency service vehicle access. The
15 conditional endorsement of the subdivision prepared by the Deputy Fire Marshal
16 and included in the record is substantial evidence that the Fire Marshal approved
17 the turn around. Record 83–85.⁷

18 Contrary to petitioner’s argument, the findings are adequate. Findings are
19 required to identify relevant approval criteria, set out the facts relied upon and

⁷ Petitioner does not assert that the Deputy Fire Marshal, the author of the letter, was not able to act on the Fire Marshal’s behalf.

1 explain how the facts lead to the conclusion that the criteria are met. *Heiller v.*
2 *Josephine County*, 23 Or LUBA 551, 556 (1992). The hearings officer’s findings
3 adequately explain the criteria (WCDC 409-3.7), the evidence relied upon (the
4 Deputy Fire Marshal’s written comments) and how the evidence led to the
5 hearings officer’s conclusion that the standard is met (the code provides that the
6 turnaround will be based on Fire Marshal determination). Record 33, 83.

7 The fourth assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioner argues that the hearings officer improperly construed WCDC
10 408-5.1(C) and (D) because the proposed *interim* access is not exempted from
11 the prohibition against dead-end streets. We agree with respondents that the
12 hearings officer properly interpreted the WCDC and that petitioner’s proffered
13 interpretation in this assignment of error reflects an incorrect interpretation of the
14 code.

15 WCDC 408-5.1(C) provides:

16 “Cul-de-sacs and *permanent* dead-end streets shall be prohibited
17 *except where construction of a through street is found to be*
18 *impracticable due to the provisions of Sections 408-5.1D, or*
19 *application of Sections 408-5.5, 408-5.6 or 408-7. When cul-de-sacs*
20 *or closed end streets are allowed under these provisions, they shall*
21 *be limited to two hundred (200) feet and no more than twenty-five*
22 *(25) dwelling units unless impracticable.” (Emphases added.)*

23 The hearings officer found that the prohibition on dead-end streets did not apply
24 because

1 “[t]he proposed private street will not result in a *permanent* dead-
2 end [WCDC 408-5.1](C) because the access is temporary. As
3 properties to the north redevelop over time, the street running
4 through the subdivision will ultimately connect to a new access
5 point that may originate from SW 81st Avenue or SW 78th Avenue
6 or both. Exhibit H-3 provides a reasonable example of one possible
7 version of how future access off of SW 81st or SW 78th could be
8 provided. Record 30–31 (emphasis in original).

9 We will reverse or remand a decision which improperly construes the
10 applicable law. ORS 197.835(9)(a)(D). We will construe the code provision by
11 examining the text, context, and any pertinent legislative history. *State v. Gaines*,
12 346 Or 160, 171–72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and*
13 *Industries*, 317 Or 606, 859 P2d 1143 (1993).

14 Petitioner argues that there is no basis in the WCDC for the conclusion that
15 the prohibition on dead-end streets does not apply to interim access. Petition for
16 Review 37. We agree with respondents that the code’s inclusion of the term
17 “permanent” excludes interim access from the general prohibition on permanent
18 dead-end streets. Thus, the hearings officer did not err in approving interim
19 access that results in a temporary dead-end street.

20 We also reject petitioner’s argument that the hearings officer failed to
21 adopt findings addressing whether the interim access will eventually result in an
22 impermissible permanent dead-end street when alternate permanent access is
23 developed in the future.⁸ Petition for Review 38. The hearings officer explained

⁸ Petitioner argues that when dead end streets are allowed, they are limited to two hundred feet and “[a]ssuming it is extend to the north and closed off at

1 his determination that the approval would not result in an impermissible
2 permanent dead-end street or cul-de-sac by specifically referencing his findings
3 with respect to WCDC 209 of his order. Record 46, 27–29. The hearings officer
4 also found:

5 “When the private street is extended once this future access is
6 provided, the interim access at the southern terminus of the private
7 street and SW Garden Home Road will be a dead-end. However,
8 pursuant to [WCDC 408-5.1]D.(5), this future dead-end is
9 permissible due to the Code’s Arterial access restrictions. The
10 Hearings Officer finds that the development proposal satisfies
11 WCDC Sections 408-5.1(C) and 408-5.1(D).” Record 31.

12 WCDC 408-5.1(D) provides:

13 “The Review Authority may approve a modification to the review
14 standards of Section 408-5.1 A., B., or C. above based on findings
15 that the modification is the minimum necessary to address the
16 constraint and *the application of the standard is impracticable* due
17 to the following:

18 “(1) Topography, although grades that may be too steep for a street
19 are not necessarily too steep for an accessway;

20 “(2) Drainage hazard areas, wetlands, flood plains, or a Significant
21 Natural Resource area;

22 “(3) Existing development patterns on abutting property which
23 preclude the logical connection of streets or accessways;

24 “(4) Abutting undeveloped or underdeveloped property is not
25 designated R-5, R-6, R-9, R-15, TO:R9-12, TO:R12-18,
26 TO:R18-24, FD-20, FD-10 or an urban reserve area;

Garden Home Road in the future, the street will be significantly longer than 200 feet.” Petition for Review 38.

1 “(5) Arterial access restrictions; or

2 “(6) Railroads.” (Emphasis added.)

3 Thus, the general prohibition on permanent dead-end streets may be modified
4 when construction of a through street is impracticable due to arterial access
5 restrictions and based on findings that the modification is the minimum necessary
6 to address the constraint. Pursuant to WCDL 408-5.1(D), the county may in the
7 future avoid the prohibition against permanent dead-end streets by making the
8 appropriate findings and approving a modification when a permanent access is
9 approved.

10 The third assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioner’s second assignment of error is that the hearings officer erred in
13 approving the interim access. Petition for Review 13. Petitioner argues that “[t]he
14 hearings officer’s determination under [WCDL] 501-8.5(E) is based on an
15 erroneous interpretation of the applicable code provisions, is not supported by
16 substantial evidence or adequate findings, and improperly deferred compliance
17 with approval criteria.” Petition for Review 13. This assignment of error is
18 divided into four subassignments.

19 **A. First Subassignment of Error**

20 WCDL 501-8.5(B)(4) provides that generally, “[d]irect access to arterial
21 roads shall be from collector or other arterial streets.” Petitioner’s first
22 subassignment of error alleges that the hearings officer erred in approving interim

1 access from a private street in the subdivision directly to SW Garden Home Road,
2 an arterial street. Petition for Review 18; *see* nn 1, 2 (defining private street and
3 arterial road). We agree with respondents that the hearings officer did not err in
4 concluding that a private street may be used to provide interim access from the
5 subdivision to an arterial road.

6 LUBA reverses or remands a decision if the local government improperly
7 construes the applicable law. ORS 197.830(9)(D). *Gaines*, 346 Or at 171–72;
8 *PGE*, 317 Or 606. We do not afford deference to the hearing officer’s
9 interpretation of the local code. *Gage v. City of Portland*, 133 Or App 346, 349–
10 50, 891 P2d 1331 (1995).

11 Petitioner maintains that under the code, intervenor was required to submit
12 an access management plan in order to avoid the general prohibition on private
13 street access to arterials. WCD 501-8.5(C)(3) provides that:

14 “An access management plan shall address the safety and
15 operational problems which would be encountered should a
16 modification to the access spacing standards be granted. An access
17 management plan shall be prepared and certified by a traffic or civil
18 engineer registered in the State of Oregon. An access management
19 plan shall at minimum contain the following:

20 “(a) The minimum study area shall include the length of the site’s
21 frontage plus the distance of the applicable access spacing
22 standard, as set forth in Section 501-8.5 B., measured from
23 the property lines or access point(s), whichever is greater. For
24 example, a property with five hundred (500) feet of frontage
25 on a minor arterial (required six hundred [600] foot access
26 spacing standard) shall have a minimum study area which is
27 one thousand seventeen hundred (1700) feet in length.

1 “(b) The access management plan shall address the potential
2 safety and operational problems associated with the proposed
3 access point. The access management plan shall review both
4 existing and future access for all properties within the study
5 area as defined above.

6 “(c) The access management plan shall include a comparison of
7 all alternatives examined. At a minimum, the access
8 management plan shall evaluate the proposed modification to
9 the access spacing standard and the impacts of a plan utilizing
10 the county standard for access spacing. Specifically, the
11 access management plan shall identify any impacts on the
12 operations and/or safety of the various alternatives.

13 “(d) The access management plan shall include a list of
14 improvements and recommendations necessary to implement
15 the proposed access modification, specifically addressing all
16 safety and operational concerns identified.”

17 We agree with respondents that an access management plan was not
18 required. The introductory paragraph of WCDL 501-8.5(B) provides that “[n]o
19 use will be permitted to have direct access to a street or road except as specified
20 below, *or* as provided in section 501-8.5(E). (Interim Access), exceptions to
21 access criteria are provided for in subsection C below.” (Emphasis added.) At the
22 outset, the code sets out an exception track and an interim access track.

23 “As specified below,” WCDL 501-8.5(B)(4) provides that under the
24 exception track, “[e]xceptions for local streets and private accesses may be
25 allowed through a Type II process when collector access is found to be
26 unavailable and impracticable by Director.” In setting forth the exception
27 approval criteria, WCDL 501-8.5(C)(1) provides that “[a]lternate points of
28 access may be allowed if an access management plan which maintains the

1 classified function and integrity of the applicable facility is reviewed and
2 approved by the Review Authority.” Neither of these provisions establish that an
3 access management plan is the only means of legally permitting a private access
4 to an arterial.

5 In construing a statute, we will not “insert what has been omitted[.]” ORS
6 174.010. “Exceptions for local streets and private accesses *may* be allowed
7 through a Type II process when collector access is found to be unavailable and
8 impracticable by Director.” WCD 501-8.5(B)(4). (Emphasis added.) Access
9 management plans are reviewed through a Type II process whereas the
10 preliminary application for the subdivision, and therefore the interim access, was
11 processed as a Type III application.⁹ WCD 204-3.1(B)(3); Record 169. The

⁹ WCD 605-2.1 provides in part:

“Partitions and subdivisions shall be processed through a two-step process consisting of a preliminary review and a final review.

“A. Preliminary Review:

“The preliminary review of a partition or subdivision shall:

“(1) Be through a Type I procedure when in an approved Special Industrial Overlay District (SID) and in conformance with the approved SID-Section 377;

“(2) Be through a Type II procedure when no variance from the standards of this Code is required; or

“(3) Be through a Type III procedure when a variance from the applicable standards of this Code is required or

1 code does not provide, however, that a Type II process or an access management
2 plan is the only means to gain approval of private access to an arterial. Rather,
3 the code provides that interim access may be provided to an arterial. A use may
4 have direct access to an arterial through a Type II process as specified in the
5 provisions governing exceptions, or through interim access as provided in
6 WCDL 501-8.5(E). WCDL 501-8.5(B), B(4), (C).

7 WCDL 501-8.5(E) provides in part:

8 “No development shall be denied a Development Permit for the sole
9 reason that the parcel for which it is sought cannot physically
10 accommodate the access spacing requirements of this Code. In such
11 an event, the use may be issued an interim access permit which shall
12 expire when access as required under Article V becomes available.”

13 Petitioner argues that an interim access is only allowed when the sole reason
14 access standards are not met is because access spacing requirements are not met.
15 Petition for Review 18. The code does not, however, state that an interim access
16 is only available to address issues of access spacing. WCDL 501-8.5(B) provides
17 that a use may have direct access to a street as provided in the WCDL 501-8.5(E)
18 interim use provisions. ORS 174.010 provides in part that “where there are
19 several provisions or particulars such construction is, if possible, to be adopted
20 as will give effect to all.” The ability to provide access to an arterial via a private
21 street is reinforced by the provision identifying signage requirements for interim

when required by the applicable Community Plan or
when in conjunction with a Type III development.”

1 access points to arterials. WCDC 501-8.5(E)(4). We agree with respondents that
2 the signage provision would have no purpose if interim access could only be used
3 to address spacing deficiencies and could never provide access to an arterial.

4 For the foregoing reasons, we conclude that the hearings officer did not
5 misconstrue the law.

6 This subassignment of error is denied.

7 **B. Second Subassignment of Error**

8 Petitioner argues that the hearings officer erred in concluding that the
9 proposed access qualifies as *interim* access. Petitioner argues that the approved
10 access is not confined to a certain timeframe for use, and thus, is not “*interim*
11 access.” Petition for Review 23 (emphasis added).

12 The hearings officer found that access to the north and west to SW 81st
13 Avenue would comply with dimensional standards and petitioner does not argue
14 that a future connection is not physically feasible.¹⁰ Record 29. The hearings
15 officer determined that “[t]he Code does not impose a time frame measured in
16 months or years as to when ‘interim’ access must end.” Record 27.

¹⁰ This appears to be consistent with the record. The record includes evidence that “[t]he properties between SW 78th and 81st Avenues consist of several of the remaining larger rural sized lots. Consequently, further land divisions are anticipated to the north of the subject site.” Record 431. The county has designated lands north of the subject property as “Local Streets connectivity lands[.]” Record 127.

1 Petitioner argues that the hearings officer’s conclusion is based on an
2 erroneous interpretation of the code and is not supported by substantial evidence
3 or adequate findings. Petitioner directs us to the dictionary definition of “interim”
4 in as “3: * * * done, made or occurring for an interim or meanwhile:
5 TEMPORARY.” Petition for Review 23; *Webster’s Third New Int’l Dictionary*
6 1179 (unabridged ed 2002). “Temporary” is defined as “1 a: * * * existing or
7 continuing for a limited time: IMPERMANENT, TRANSITORY.” *Webster’s* at
8 2353. We agree with the hearings officer that the time limit applicable to the
9 interim access may be determined by the occurrence of an event rather than a
10 specific date. Record 27. An interim access required to be closed when alternative
11 access is available is not permanent. We agree with the hearings officer that the
12 occurrence of an event, in this case the availability of alternative access, may
13 trigger the closure of the interim access. Petitioner argues, however, that the
14 conditions of approval governing when the access must be closed are inadequate.
15 Petition for Review 25.

16 The conditions of approval require closure of the access when “alternate
17 access becomes available.” Record 12. Petitioner argues that the conditions of
18 approval fail to indicate when intervenor will be required to close the access or
19 what constitutes “available” alternative access. Petitioner maintains that
20 “[a]bsent a more specific and clear explanation of the conditions that will trigger
21 the requirement to close the interim access, there is no certainty when Intervenor
22 will be required to close the interim access.” Petition for Review 25.

1 Respondents respond that:

2 “Washington County Planning Staff will continue to have
3 jurisdiction to determine when such access is available and to insist
4 on closure of the interim access when they determine alternative
5 access is available. Further, the County required Intervenor to pay
6 Trust and Agency money to the County to ensure the cost of closing
7 the access has already been paid by Intervenor and the access will
8 be closed.” Intervenor Response Brief 16.

9 Condition D of the challenged decision requires intervenor to execute recorded
10 agreements “to abandon use of the existing private access way when an adequate
11 alternative access becomes available” and “stating that the interim access shall
12 ultimately be removed.” Record 12–13. Intervenor is also required to execute “[a]
13 waiver of the right to remonstrate against the formation of a Local Improvement
14 District or similar financing mechanism for the primary purpose of constructing
15 a public road or right-of-way providing access to the arterial or collector road;
16 such access shall meet the minimum applicable county standard.” Record 12. The
17 conditions require closure of the access when an access connecting to an arterial
18 or collector road and meeting minimum county standards is provided.
19 Nonetheless, petitioner argues that the interim access may never be closed
20 because:

21 “The hearings officer imposed a condition of approval requiring
22 Intervenor to participate in the street extension that ‘would not result
23 in new or more severe traffic operations or safety problems.’ * * *
24 Therefore, if the street extension does result in new or more severe
25 traffic operation or safety problems Intervenor will not be required
26 to close the interim access. Such a scenario would convert the
27 interim access to a permanent access in violation of [WCDC 501-

1 8.5](E). At a minimum, the hearings officer was required to evaluate
2 and adopt findings addressing whether or not the street extension
3 would result in new or more severe traffic operation or safety
4 problems.” Petition for Review 25 (citations omitted).

5 Respondents respond that petitioner misstates the condition of approval because
6 the condition “speaks in terms of ‘consolidating access,’ not extending the private
7 road” and that this challenge is a restatement of prior arguments that a date and
8 time certain is required. Intervenor Response Brief 16–17.

9 The challenged condition incorporates WCDC 501-8.5(E)(6) which
10 provides that one of the requirements for issuance of an interim access permit is
11 that “[t]he property owner record[] an agreement to participate in any project
12 that would consolidate access points where such project would not result in new
13 or more severe traffic operation or safety problems.” We agree with respondents
14 that this condition limits the requirement that intervenor participate in an access
15 consolidation project, to participation in such projects that do not create or
16 exacerbate traffic operation or safety problems. It does not nullify the other
17 conditions requiring closure of the interim access when adequate alternative
18 access is available.

19 Petitioner also argues that the interim access will never be closed and must
20 be viewed as a permanent access because the private road may never be extended
21 across petitioner’s property. According to petitioner, petitioner may not be
22 required to dedicate the property necessary for a road extension as a precondition
23 to redevelopment of petitioner’s property. Petitioner argues that he would obtain
24 no benefit from extension of the interim street across his property, would have

1 less developable property as the result of such an extension and that such an
2 extension would thus be a taking of his property. Petitioner argues that closure of
3 interim access would result in an unconstitutional taking of his property “because
4 it would require Petitioner to extend the private street across his property for the
5 sole purpose of providing permanent access to Intervenor’s property.” Petition
6 for Review 26. Petitioner argues that there is not substantial evidence that the
7 county will be able to force extension of the private street across his property and
8 that the decision otherwise lacks findings.

9 The hearings officer correctly concluded that constitutionality of requiring
10 petitioner to dedicate property for the extension of the road in a manner to serve
11 intervenor’s property could only be determined at the time petitioner seeks to
12 develop his property. We agree with respondents that a takings claim is not ripe
13 for adjudication. Nothing has been taken from petitioner at this time. In *Nike, Inc.*
14 *v. City of Beaverton*, 35 Or LUBA 57, 65, *aff’d*, 157 Or App 397, 972 P2d 1230
15 (1998) we held that the “[p]etitioner ha[d] not established that [a comprehensive
16 plan policy requiring public access to a light rail station platform] require[d] the
17 city to acquire property without compensation or without relating or
18 proportioning that acquisition to any future development proposal” and that the
19 claim was not ripe. Similarly, this decision does not require or impose an
20 unconstitutional taking.

21 This subassignment of error is denied.

1 **C. Third Subassignment of Error**

2 WCDC 501-8.5(E)(2) requires that “[t]he interim access * * * meet
3 minimum county traffic safety and operational requirements, including sight
4 distance.” Petitioner’s third subassignment of error is that the hearings officer’s
5 conclusion that this part of the code is satisfied is not supported by adequate
6 findings or substantial evidence. This subassignment has four parts.

7 First, petitioner argues that the hearings officer erred because he did not
8 explain what “prevented him from concluding that [the access] *is* designed and
9 constructed” to meet county traffic safety and operational requirements. Petition
10 for Review 30 (emphasis in original). Rather, petitioner argues that the hearings
11 officer concluded that “the interim access *can be* designed and constructed to be
12 operationally safe.” Petition for Review 30 (emphasis in original). We agree with
13 respondents that the access was not constructed prior to approval of the
14 application and the hearings officer was not required to find that the interim
15 access is currently designed and constructed in accordance with the standards. As
16 discussed below, the hearings officer concluded that compliance was feasible and
17 imposed conditions of approval to ensure that the criteria are met.

18 Second, the petitioner argues that the hearings officer erred because he
19 “relied on ‘[a]dditional findings regarding safety requirements, operational
20 requirements and sight distance’ in the Transportation Report (Attachment D)
21 that do not exist. The Transportation Report addressed sight distance, but it did
22 not address any safety or operational requirements.” Petition for Review 30;

1 Record 149. Petitioner argues that the hearings officer was required to identify
2 what portions of the Transportation Report he relied upon.

3 Based on the hearings officer’s statement that “[a]dditional findings
4 regarding safety requirements, operational requirements and sight distance are
5 found in Attachment D and conditions of approval will ensure that the interim
6 access meets the County’s operational and sight distance standards,” we
7 understand the hearings officer to have adopted all of the findings in Attachment
8 D. Record 28. Attachment D includes the direction to: “*See [WCDC] Sections*
9 *408 and 409 of the Staff Report for findings regarding the proposed private street*
10 *and Neighborhood Circulation.*” Record 149 (emphasis in original). WCDC
11 sections 408 and 409 address Neighborhood Circulation and Private Streets and
12 are discussed in the staff report on Record pages 125 through 133. Staff report
13 conclusions incorporated as findings include:

14 “The applicant proposes to construct a 28-foot wide paved private
15 street with curbs and sidewalks on both sides. The paved portion of
16 the street *and portions of each curb* area proposed to be within a 29
17 foot wide Private Street Tract (Tract A). The proposed design
18 complies with Section 409-3.3 A. (9) except for placement of the
19 property line mid-curb.

20 “On street parking is permitted on both sides of a 28-foot wide Local
21 street (L-3 standard) but not within 50 feet of the private street
22 intersection with SW Garden Home Road (noting that any on-street
23 parking shall also be setback from the future emergency access gate
24 to be installed once the interim access is closed).

25 “* * * * *

1 “The proposed Private Street Tract (Tract ‘A’) satisfies the
2 applicable criteria of this section, as conditioned. The paved Private
3 Street measures 28 feet (24 feet is required). *Noting that the private*
4 *street tract shall be revised to encapsulate the entire curbing on*
5 *either side of the private street pursuant to Section 409-3.5.”* Record
6 130 (emphasis in original).

7 Petitioner does not explain why the staff report findings incorporated by
8 reference into the [final] hearings officer’s decision are inadequate. As
9 respondents observe, “[p]etitioner does not specify which safety requirements or
10 operational requirements needed to be addressed.” Intervenor Response Brief 19.
11 This portion of the subassignment is inadequately developed for our review.
12 *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982)
13 (“It is not our function to supply petitioner with legal theories or to make
14 petitioner’s case for petitioner.”).

15 Third, petitioner argues that the decision does not contain conditions of
16 approval to ensure that operational and sight distance requirements will be met.
17 We disagree. With respect to sight distance, the hearings officer found “the
18 interim access can be designed and constructed to be technically safe. For
19 instance, the interim access will be illuminated and sight distance provided prior
20 to occupancy of the first dwelling unit.” Record 28. Further, the Transportation
21 Report incorporated by reference states: “The required sight distance at SW
22 Garden Home Road is 300 feet based upon the future posted speed of 30 m.p.h.
23 Sight distance will be adequate upon vegetation removal.” Record 150. The
24 conditions of approval require removal of vegetation as needed to provide

1 adequate sight distance. Record 11. This is a determination of feasibility and an
2 imposition of a condition to ensure that the standard is met.

3 Petitioner argues that a finding that an access can satisfy a criteria, without
4 an explanation or requirement to ensure that it will be met, is insufficient. Again,
5 petitioner does not address the staff report findings incorporated by reference into
6 the final decision or the various conditions of approval. Conditions of approval
7 include:

8 •Submission of a geotechnical/pavement report prepared by a
9 licensed Oregon engineer supporting the roadway sections. Record
10 9.

11 •Submission of a Washington County road engineering plan and
12 checklist signed and completed in accordance with Road Design
13 Standards Appendix E. Record 9.

14 •Submission of engineering plans for a commercial driveway
15 serving the interim private street. Record 10.

16 •Requirement that illumination be provided pursuant to R&O 86-95.
17 Record 11.

18 •Requirement that vegetation removal occur as necessary to provide
19 adequate sight distance. Record 11.

20 •Requirement that Preliminary Certification of Sight Distance be
21 verified by a licensed professional engineer. Record 11.

22 •Requirement for Private Street Certification from engineer
23 demonstrating street constructed in accordance with certified final
24 construction plans. Record 14.

25 •Requirement that development be constructed in accordance with
26 the conditions of the decision. Record 16.

1 We agree with respondents that the hearings officer’s decision need not include
2 a resolution of all the technical details. Petitioner has failed to address the
3 findings incorporated by reference and has not established that the hearings
4 officer failed to adopt adequate findings or that the findings are not supported by
5 substantial evidence.

6 This subassignment of error is denied.

7 **D. Fourth Subassignment of Error**

8 Petitioner argues that the hearings officer failed to adequately address
9 WCDC 501-8.5(6). WCDC 501-8.5(E)(6) requires that “[t]he property owner
10 record[] an agreement to participate in any project that would consolidate access
11 points where such project would not result in new or more severe traffic operation
12 or safety problems.” The hearings officer adopted a condition of approval reciting
13 the language of the criterion. Petitioner argues that the condition is too vague and
14 imprecise to know what is required in order for intervenor to have participated in
15 an underlying project consolidating access points as required by the condition of
16 approval and that this places an improper burden on petitioner.

17 WCDC 501-8.5 concerns access to public roads.¹¹ As approved, the access
18 point from the subject property to a public road is on SW Garden Home Road

¹¹ WCDC 501-8.5 provides in part:

“All developments shall have legal access to a public road. Except for interim access as provided in Section 501-8.5 E. (Interim Access), access onto any public road in the unincorporated or

1 until such time as alternative access becomes available. As respondents point out,
2 intervenor's future participation in any projects consolidating access points to
3 public roads is expanded upon in other conditions of approval. Intervenor must
4 make a Trust and Agency deposit to cover costs of interim access closure. Record
5 10. Intervenor must dedicate property for expansion of the SW Garden Home
6 right-of-way. Record 9. Intervenor is required to participate in costs related to
7 "constructing a public road or right-of-way providing access to the arterial or
8 collector road; such access shall meet the minimum applicable county standard."
9 Record 12. To the extent petitioner argues that the condition is flawed because it
10 does not explain what intervenor must do to facilitate petitioner's development
11 of an alternate access, petitioner has failed to show that the code requires such an
12 explanation.

13 This subassignment of error is denied.

14 The second assignment of error is denied.

15 The county's decision is affirmed.

incorporated urban area shall be permitted only upon issuance of an access permit upon demonstration of compliance with the provisions of the county road standards and the standards of Section 501."