

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

3  
4 ROYAL BLUE ORGANICS,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF SPRINGFIELD,  
10 *Respondent,*

11  
12 and

13  
14 SPRINGFIELD UTILITY BOARD,  
15 *Intervenor-Respondent.*

16  
17 LUBA Nos. 2019-092/094/095/134

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from City of Springfield.

23  
24 William H. Sherlock, Eugene, filed the petitions for review and reply  
25 briefs. With him on the briefs was Hutchinson Cox. Zack P. Mittge, Eugene,  
26 argued on behalf of petitioner.

27  
28 Kristina Kraaz, Assistant City Attorney, Springfield, filed a response brief  
29 and argued on behalf of respondent.

30  
31 Micheal J. Gelardi, Coburg, filed a response brief and argued on behalf of  
32 intervenor-respondent. With him on the brief was Gelardi Law PC.

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

36  
37 RYAN, Board Member, did not participate in the decision.  
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REMANDED

11/12/2020

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

1  
2 **NATURE OF THE DECISION**

3 In these consolidated appeals, petitioner challenges four related decisions  
4 approving development of an electrical substation and transmission line by  
5 intervenor-respondent Springfield Utility Board (SUB). Those four decisions  
6 include tentative site plan review, tree felling permit, hillside development  
7 permit, and director’s interpretation.

8 **MOTION FOR OVERLENGTH REPLY BRIEF**

9 In an order dated May 11, 2020, we allowed SUB’s motion to file one  
10 overlength response brief in response to petitioner’s briefs.<sup>1</sup> Petitioner moves to  
11 file an overlength reply brief in response to SUB’s response brief. No party  
12 opposes the motion and it is allowed.

13 **FACTS**

14 **A. The Project**

15 SUB proposes to construct the Glenwood Substation (the substation) and  
16 two transmission lines: one connecting the substation to the Bonneville Power  
17 Administration (BPA) substation in Goshen and the other to the Laura Street  
18 Substation in Springfield. Only the Goshen transmission line (the line) is disputed  
19 in these appeals.

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<sup>1</sup> Respondent also filed a consolidated response brief.

1           The subject property is a long, slightly bowed, and mostly undeveloped  
2 site including four contiguous parcels: tax lots 101, 1100, 1000, and 300. The  
3 property is bounded on the southwest side by Interstate 5 (I-5) and on the  
4 northeast side by the Central Oregon Pacific Railroad line (the railroad). The  
5 northwest side of tax lot 101 abuts the terminus of E. 22nd Ave., a public street.

6           The proposed substation site is located on tax lot 101, on the northwest end  
7 of the subject property. Tax lot 101 is relatively flat, contains wetland and  
8 riparian areas, and is developed with a billboard. Tax lots 1100, 1000, and 300  
9 contain rolling hills and steep slopes, and generally slope east, with the uphill  
10 side along the I-5 right-of-way and the downhill side along the railroad right-of-  
11 way. As proposed, the line will extend from the substation site on tax lot 101, to  
12 and across sloped and forested portions of tax lots 1100, 1000, and 300, and tie  
13 into existing transmission lines at an existing three-pole structure on tax lot 300,  
14 on the southeast end of the property. Tax lot 300 is owned by the Eugene Water  
15 & Electric Board (EWEB). Record 394, 909.

16           Twenty pole structures planned to support the line will be directly  
17 embedded in the ground and constructed in pairs along the line corridor, with  
18 heights ranging from 45 feet to 85 feet. The ground below the line will become a  
19 100-foot wide “clear zone,” without trees, and will be reseeded with native forbs  
20 and grasses according to SUB’s revegetation plan. Record 1941-42. To install  
21 and maintain the poles and line, SUB plans to improve and extend an existing  
22 access road (access road), which begins at the terminus of E. 22nd Ave., runs

1 eastward along the northern boundary of tax lot 101, and then turns southeast into  
2 tax lot 1100, and extends to tax lot 300. Record 1687, 1692.

3 **B. Eugene-Springfield Metro Planning for Glenwood Area**

4 The Metro Plan is an acknowledged comprehensive plan for an area that  
5 includes the cities of Springfield and Eugene and part of Lane County (the Metro  
6 governments) and applies to the entire subject property. The subject property is  
7 also subject to the Glenwood Refinement Plan (Glenwood Plan).<sup>2</sup>

8 Glenwood is bounded by I-5 and the Willamette River, and lies between  
9 the University of Oregon in Eugene to the west and downtown Springfield to the  
10 east. Glenwood is entirely within the Springfield urban growth boundary (UGB).  
11 A portion of Glenwood is within Springfield city limits and a portion is in  
12 unincorporated Lane County. Glenwood is developed with a mix of residential,  
13 industrial, and commercial uses, and includes a large area of undeveloped or  
14 underdeveloped land. The Glenwood Plan is designed to promote mixed-use  
15 development.

16 Tax lot 101 and a portion of tax lot 1100 are inside Springfield city limits.  
17 Tax lots 101 and 1100 are zoned Light-Medium Industrial (LMI). Tax lots 1000  
18 and 300 are outside Springfield city limits, but within the city's UGB, and are

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<sup>2</sup> A refinement plan is a comprehensive plan for a specific neighborhood or area and subordinate to the Metro Plan.

1 zoned Glenwood Employment Mixed Use (GEMU) with an Urbanizable Fringe  
2 (UF-10) overlay.

3 SUB is responsible for supplying electricity to Glenwood pursuant to the  
4 Glenwood Plan. SUB has identified the need for an additional substation to  
5 provide electric service to Glenwood as redevelopment or new development  
6 occurs. Glenwood Plan 136-37. The Glenwood Plan requires SUB and the city to  
7 evaluate electrical facility sites and apply siting standards aimed at minimizing  
8 the impact of electric facilities on the visual and natural environment. Glenwood  
9 Plan 136-40.<sup>3</sup>

10 The Eugene-Springfield Metropolitan Area Public Facilities and Services  
11 Plan (PFSP) is another refinement plan for the Metro Plan, adopted pursuant to  
12 Statewide Planning Goal 11 (Public Facilities and Services). In 2015, the Metro  
13 Governments amended the PFSP planning for the substation and line involved in  
14 this appeal. Record 1741-43. In early 2019, SUB applied for land use approvals  
15 to site the substation and line. The city planning director approved SUB's site  
16 plan, hillside development permit, and tree felling permit. Petitioner filed local  
17 appeals.

18 The planning commission has authority over appeals regarding property  
19 that is within city limits (tax lot 101 and a portion of tax lot 1100), while the

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<sup>3</sup> The city adopted the Glenwood Plan policies and implementation strategies at SDC Appendix 3. In this decision, we refer to both the Glenwood Plan and SDC Appendix 3.

1 hearings official has authority over appeals regarding property that is inside the  
2 UGB but outside city limits (tax lots 300, 1000, and a portion of tax lot 1100).  
3 Record 4. The planning commission and the hearings official held joint hearings  
4 and received the same evidence and argument in the local appeals. In September  
5 2019, the planning commission and hearings official affirmed the approvals of  
6 the site plan review, hillside development permit, and tree felling permit.  
7 Petitioners appealed those decisions to LUBA, and we consolidated the appeals.  
8 In November 2019, while those three appeals were pending, the planning director  
9 issued a use interpretation related to the site plan approval. Petitioner appealed  
10 that use interpretation to LUBA, and we consolidated that appeal with the three  
11 pending appeals.

12 **ASSIGNMENTS OF ERROR**

13 Petitioner’s arguments under several assignments of error address similar  
14 issues. We analyze petitioner’s arguments according to the issues.

15 **A. PFSP (2019-092 Second Assignment of Error, 2019-095 Second**  
16 **and Fourth Assignments of Error)**

17 The city is required to evaluate whether the proposed development is  
18 consistent with the Metro Plan, including the PFSP and the Glenwood Plan. The  
19 2015 amendment to the PFSP altered the planned location of the substation and  
20 line and required the city to make findings of compliance with the policies and  
21 implementation strategies in the Glenwood Plan. The Glenwood Plan sets out  
22 siting standards aimed at avoiding or mitigating adverse environmental, visual,

1 and health impacts from electric utility placement. Glenwood Plan 138-40. In  
2 concluding that the 2015 PFSP amendments comply with those siting standards,  
3 the PFSP narrative explains:

4 “The location of the planned [substation and line] is shown generally  
5 on the PFSP maps as intended. The location of the Substation is  
6 outside of the Phase 1 boundary for the [Glenwood Plan]. The  
7 transmission lines will take advantage of existing freeway, street and  
8 railroad right of ways in Glenwood to minimize visual impacts of  
9 the planned facilities. Many of the policies listed in [the Glenwood  
10 Plan] are specific to final location and design decisions that will be  
11 addressed at the time of construction. The intent of the PFSP is to  
12 show the general location of planned utilities. Design level details  
13 are not intended to be provided in the PFSP nor is such detail a  
14 requirement of Oregon Administrative Rule Division 11 Public  
15 Facilities Planning.” Record 1765.

16 A map in the PFSP depicts the line as running generally within the I-5  
17 right-of-way. Record 1753. In the challenged decisions, the city approved a line  
18 location that is different than that depicted on the PFSP map and described in the  
19 narrative. The approved line route runs within the subject property, outside the I-  
20 5 right-of-way. Record 1058. The hearings official found that the PFSP  
21 amendments do not prescribe the exact location of the substation and line.  
22 Instead, the PFSP contemplates that exact locations will be determined through  
23 subsequent land use actions. Record 352.

24 Petitioner argues that the hearings official misconstrued the PFSP. SUB  
25 responds, and we agree, that the PFSP amendments planned a “general location”  
26 for the substation and line, and contemplated that the precise location would be



1 approved through subsequent land use actions including review for compliance  
2 with the Glenwood Plan siting standards, which is what occurred in this case. We  
3 conclude that the hearings official did not misconstrue the PFSP.

4 These assignments of error are denied.

5 **B. GEMU (2019-095 Third Assignment of Error; 2019-134 First**  
6 **and Second Assignments of Error)**

7 The line will cross four tax lots and is “high impact,” based on the 115  
8 kilovolt transmission capacity. *See* SDC 6.1-110 (defining “public utility facility”  
9 “high impact,” in part, as “[e]lectric power transmission lines (greater than 69  
10 KV), poles and substations”). As noted, tax lots 101 and 1100 are both zoned  
11 LMI, which explicitly allows high impact facilities designated in the PFSP or  
12 approved under a Type III procedure. SDC 3.2-410, 4.7-160. Tax lots 300 and  
13 1000 are both zoned GEMU and subject to the UF-10 overlay. Although the  
14 GEMU zone does not explicitly allow or prohibit high impact public utility  
15 facilities, the UF-10 overlay allows them under the same criteria as the LMI zone.  
16 SDC 3.3-815.

17 SDC 3.4-250 lists use categories for the GEMU zone as “primary,”  
18 “secondary,” or “not permitted,” and provides, “Uses not specifically listed may  
19 be approved as specified in Section 3.4-260. Prohibited uses are listed in Section  
20 3.4-255.” SDC 3.4-255 lists 22 specific uses prohibited within the GEMU zone,  
21 including big box stores, car washes, marijuana businesses, motels, and

1 freestanding wireless communication towers. SDC 3.4-255 does not list as a  
2 prohibited use high impact public utility facilities.

3 SDC 3.4-260 provides that “[t]he use categories listed in Section 3.4-250  
4 include examples that illustrate permitted uses within the particular category.”  
5 Uses not listed within a category, but that “meet the intent” of a listed category  
6 and have impacts and infrastructure demands that are similar “to the other  
7 permitted uses typical of the category,” may be “permitted by the Director  
8 without a formal review.” SDC 3.4-260(A). “Uses that the Director determines  
9 cannot be readily interpreted \* \* \* will be processed as a formal interpretation”  
10 under the procedure set out at SDC 5.11-100. SDC 3.4-260(B).<sup>4</sup>

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<sup>4</sup> SDC 3.4-260 provides:

“A. The use categories listed in Section 3.4-250 include examples that illustrate permitted uses within the particular category. A specific use not identified within a category will be permitted by the Director without a formal review, as permitted in ORS 227.160(2)(b) and (11), if:

- “1. A finding is made that the proposed use meets the intent of the category as defined in Section 3.4-250;
- “2. The use has impacts to surrounding properties and City infrastructure that are similar in type and magnitude to the other permitted uses typical of the category; and
- “3. The Director enters the decision into a registry on file in the Development Services Department. The registry shall be made available to the public upon request and shall contain the following information:

1           During the initial site plan review, the planning director concluded that the  
2 line is allowed in the GEMU zone based on the UF-10 overlay. Record 463-64.<sup>5</sup>

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“a.   The street address or other easily understood geographic reference to the property upon which the specific use will occur,

“b.   The date of the decision, and

“c.   A description of the decision made;

“4.   Use interpretations made under this Section are subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.

“B.   Uses that the Director determines cannot be readily interpreted as specified in Subsection 3.4-260A. will be processed as a formal interpretation as specified in Section 5.11-100.”

SDC 5.11-115 provides:

“A request for an Interpretation of this Code concerning new uses and terms and phrases is reviewed under Type II procedure, unless the Director determines that the application should be reviewed as a Type III decision by the Planning Commission or Hearings Official due to the complexity of the application or the need for discretionary review. Planning policy issues that include, but are not limited to this Code, adopted refinement plans or the Metro Plan is reviewed under Type IV procedure.”

<sup>5</sup> The director rejected petitioner’s argument that the UF-10 overlay does not apply to the GEMU-zoned properties:

“The uses listed under SDC 3.3-810 apply in underlying residential, commercial, or industrial districts ‘subject to the provisions, additional restrictions and exceptions specified in this Code.’

1 Petitioner challenged that decision on appeal to the hearings official. The  
2 hearings official found that the line is allowed in the GEMU zone based on the  
3 UF-10 overlay and the 2015 PFSP. In addition, the hearings official found that a  
4 high impact transmission line meets the intent of the “Public Facilities and Other  
5 Public Uses” category listed as a primary use in SDC 3.4-250. The hearings  
6 official reasoned:

7 “The best statement of the intent of the ‘Public Facilities and Other  
8 Public Uses’ category of Section 3.4-250 is the 2015 amendment to  
9 the PFSP, a functional plan of the comprehensive plan for the  
10 Eugene and Springfield area. The amendment specifically provides  
11 for the proposed transmission lines on the GEMU-zoned Tax Lots  
12 300 and 1000.” Record 42.

13 Petitioner argued that the hearings official could not make that use interpretation  
14 during the course of site plan review, because SDC 3.4-260(A)(3) authorizes “the  
15 Director” to make that interpretation. In response, the hearings official imposed  
16 Condition 12:

17 “Prior to approval of the Final Site Plan, the Director shall enter the  
18 land use determination that the GEMU District allows high impact  
19 facilities into a registry on file in the Development Services  
20 Department, consistent with SDC 3.4-260.A.3.” Record 40.

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GEMU permits a mix of residential, commercial, and industrial uses and qualifies as an ‘underlying residential, commercial, or industrial district.’ SDC 3.4-245.C.5 states that the UF-10 continues to apply to all property in the Glenwood plan district outside of City limits until the property is annexed to the City. Therefore, the permitted uses in SDC 3.3-810 for the UF-10 apply within unannexed properties that are zoned GEMU.” Record 463.

1           Petitioner appealed the site plan approval to LUBA. While that appeal was  
2 pending, the director issued a use interpretation concluding that a high impact  
3 transmission line meets the intent of the “Public Facilities and Other Public Uses”  
4 category listed as a primary use in SDC 3.4-250. Petitioner challenges that use  
5 interpretation in these consolidated appeals.

6           Petitioner argues that the hearings official erred by allowing site  
7 preparation activities and development of high impact facilities on tax lots 300  
8 and 1000. SUB responds that the UF-10 overlay specifically allows high impact  
9 facilities where authorized by the PFSP. SUB also argues that, independently of  
10 the UF-10 overlay, the hearings official and planning director properly concluded  
11 that the applicable regulations allow the line in the GEMU zone pursuant to a use  
12 interpretation. For the following reasons, we agree with SUB.

13                           **1.     UF-10 Overlay**

14           The UF-10 overlay allows high impact facilities where authorized by the  
15 PFSP. SDC 3.3-815 provides UF-10 schedule of use categories, and allows high  
16 impact facilities, subject to site plan review under SDC 4.7-160. SDC 4.7-160(A)  
17 allows facilities that are designated on the PFSP or “approved in accordance with  
18 a Type III review procedure (Discretionary Use).”

19           Petitioner argues that the hearings official erred by applying the UF-10  
20 overlay to property zoned GEMU. According to petitioner, the UF-10 overlay  
21 only applies—and, thus, only allows uses that are not listed in the underlying  
22 zone—when the underlying zone is residential, commercial, or industrial.

1 Petitioner argues that, because the GEMU is a mixed-use zone, the UF-10 overlay  
2 does not allow any unlisted uses.

3 “The provisions of the UF-10 Overlay District apply to all land between  
4 Springfield’s city limits and the Urban Growth Boundary [*i.e.*, the urban fringe],”  
5 except for “land designated Government and Education on the Metro Plan  
6 diagram.” SDC 3.3-810. The UF-10 ceases to apply when urban fringe land is  
7 annexed to the city. SDC 3.3-810(B)(2). It is uncontested that tax lots 300 and  
8 1000 are in the urban fringe.

9 The SDC does not define “mixed-use zone.” However, the SDC defines  
10 “mixed-use building or development” as including “a mix of uses such as retail  
11 and office uses, residential and commercial uses, or commercial and light  
12 industrial uses.” SDC 6.1-110. The GEMU zone is a mixture of residential,  
13 commercial, and industrial zoning. The hearings official’s conclusion that the  
14 UF-10 overlay applies to tax lots 300 and 1000 is consistent with the SDC. We  
15 reject petitioner’s contention that the UF-10 overlay does not apply to allow high  
16 impact facilities in the underlying mixed-use zone.

17 Petitioner next argues that the city’s application of the UF-10 overlay  
18 conflicts with the GEMU zoning because the GEMU zone allows “[l]ow impact  
19 facilities” as a primary use under the use category “Public Utilities and Other  
20 Public Uses.” Low impact facilities include, but are not limited to, electrical  
21 facilities that “serve individual homes and businesses” and “other utilities that  
22 have minimal olfactory, visual or auditory impacts; street lights; and fire

1 hydrants.” SDC 3.4-250. Petitioner argues that high impact transmission lines are  
2 prohibited in the GEMU zone because high impact facilities are not specifically  
3 listed as a permitted use in the GEMU zone, even though they are explicitly  
4 permitted in some other zones.

5 The GEMU rules neither specifically permit nor prohibit high impact  
6 facilities. The fact that the GEMU category of uses lists low impact facilities does  
7 not compel the conclusion that high impact facilities are prohibited. The city’s  
8 interpretation of the UF-10 overlay as allowing high impact facilities subject to  
9 site plan review is consistent with the city’s planning for that area, the Glenwood  
10 Plan and the PFSP, which specifically provide for development of high impact  
11 facilities in the Glenwood area. The hearings official did not err in concluding  
12 that the line is permitted in the GEMU zone by the UF-10 overlay.

13 **2. Use Interpretation (2019-134 First and Second**  
14 **Assignments of Error)**

15 The hearings official’s use interpretation and subsequent director’s  
16 interpretation provide an additional, alternative basis for approval. During site  
17 plan review, the hearings official made a use determination through a Type III  
18 review process. Petitioner contends that decision is in error because the hearings  
19 official process does not strictly comply with the use interpretation process set  
20 out in SDC 3.4-260.

21 SUB responds, and we agree, that the city’s use interpretation substantially  
22 complies with the substantive standards for a use interpretation in the GEMU

1 zone, and petitioner has not established any prejudice to its substantial rights. The  
2 city's tentative site plan review procedure provided petitioner the opportunity to  
3 argue that a high impact transmission line is not an unlisted, yet permissible use  
4 on the subject GEMU-zoned lots. The hearings official's contrary conclusion  
5 complies with SDC 3.4-260(B) and SDC 5.11-100, which allow a hearings  
6 official to make use interpretations during discretionary review. Any procedural  
7 error in the use interpretation was harmless given the Type III procedure that the  
8 city followed.

9         Petitioner challenges the planning director's subsequent use interpretation,  
10 arguing that the director improperly prejudged the use interpretation because,  
11 according to petitioner, the hearings official compelled the director to issue a  
12 determination that the GEMU zone allows high impact facilities. Condition 12 of  
13 the site plan review, adopted by the hearings official and quoted above, requires  
14 the director to document a determination that the GEMU zone allows high impact  
15 facilities. The director's use interpretation followed, documented, and elaborated  
16 on the use interpretation that the hearings official made during site plan review.  
17 As noted, petitioner participated in the site plan review and opposed the  
18 development of the high impact line. Petitioner complains that the director's  
19 decision was made without a hearing. However, petitioner has not established  
20 that the director's use interpretation process under SDC 3.4-260(A) entitles  
21 petitioner to a hearing. Moreover, as noted, the hearings official's use



1 interpretation was made through a Type III review in which petitioner  
2 participated.

3 Even assuming, for the sake of argument, that the line does not meet the  
4 intent or impact criteria in SDC 3.4-260(A), the city may approve unlisted uses  
5 in the GEMU zone that do not meet those criteria through a Type III procedure  
6 pursuant to SDC 3.4-260(B). The Type III procedure involves a hearing before  
7 the planning commission or hearings official. SDC 5.1-135. The city held two  
8 Type III hearings at which the parties presented argument regarding the city's  
9 interpretation of the GEMU rules to allow the line. Petitioner has not argued or  
10 established that the city erred by approving the line through a Type III procedure.  
11 Thus, petitioner's argument provides no basis for remand.

### 12 **C. Hillside Development**

13 The areas of tax lots 1100, 1000, and 300 on which SUB proposes to  
14 develop the line and access road have slopes greater than 15 percent and, thus,  
15 are subject to a Hillside Development (HD) overlay. *See* SDC 3.3-510 ("The HD  
16 Overlay District is applied in residential zoning districts above 670 feet elevation  
17 or to development areas below 670 feet in elevation where any portion of the  
18 development area exceeds 15 percent slope \* \* \*."). The HD overlay purpose  
19 statement provides:

20 "The Hillside Development (HD) Overlay District is established to  
21 ensure that development in hillside areas: Minimizes the potential  
22 for earth movement and resultant hazards to life and property;  
23 protects water quality by minimizing soil erosion and siltation;

1 retains and protects natural vegetation, natural water features and  
2 drainageways, scenic quality and open space by minimizing  
3 vegetation removal in sloped areas; assures the compatibility of new  
4 development with surrounding areas; encourages site and building  
5 design that is consistent with the natural topography in order to  
6 minimize the cost of providing public infrastructure; provides for  
7 adequate access for emergency services; and otherwise protects the  
8 public health and safety.” SDC 3.3-505.

9 **1. Geotechnical Reports (2019-095 Fifth Assignment of**  
10 **Error; 2019-094 First Assignment of Error)**

11 SUB was required to submit a geotechnical report for the portions of the  
12 project to be developed on steep slopes. SDC 3.3-530(A).<sup>6</sup> SUB’s geotechnical

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<sup>6</sup> SDC 3.3-530(A) provides:

“Where the buildable portion of the land to be developed exceeds 15 percent average slope, the following reports are required and their conclusions applied in order to prevent or mitigate possible hazards to life and property and adverse impacts on the natural environment, consistent with the purpose of this Section. The applicant shall fund peer review of the reports as deemed necessary by the City Engineer.

“A. Geotechnical Report. This report shall include data regarding the geology of the site, the nature, distribution, and strength of existing soils, conclusions and recommendations for grading procedures, design criteria for corrective measures, and options and recommendations to maintain soil and slope stability and minimize erosion of the site to be developed in a manner imposing the minimum variance from the natural conditions. Where geologic conditions of the site indicate that a hazard may exist, the report shall show that the proposed Subdivision or Partition shall result in lots/parcels that are suitable for development. The investigation and report shall

1 consultant, Foundation Engineering, Inc. (FEI), completed a series of subsurface  
2 explorations (borings and test pits) to identify soil and bedrock conditions, visited  
3 the site to observe surface features, and authored three geotechnical reports  
4 evaluating the site and suggesting project design:

- 5 • SUB Glenwood Substation - Geotechnical Investigation and  
6 Seismic Hazard Study (September 19, 2018) (substation  
7 report)
- 8 • Slope Stability Review in Tree Felling Areas (December 27,  
9 2018) (tree felling report)
- 10 • Geotechnical Investigation for Transmission Line Pole  
11 Structures (July 24, 2019) (pole structure report)

12 The tree felling report does not include independent subsurface exploration  
13 or analysis of existing soils on the steep slopes of the property. Instead, that report  
14 relies on soil structure evidence from bore holes on tax lot 101 and test pits on  
15 tax lot 300, and observed surface conditions on the steeply sloped areas. FEI  
16 explained that geologic mapping suggests a similar soil structure throughout the  
17 entire project site and that mapping is consistent with site explorations at the  
18 substation site on tax lot 101 and the terminus of the new transmission lines on  
19 tax lot 300. Record 1008-09.

20 The pole structure report describes the soils by reference to subsurface  
21 explorations at locations on each of the four parcels of the subject property.

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be prepared by a civil engineer/geologist or a geotechnical  
engineer.”

1 Record 647, 655. FEI concluded that two substation area reports confirm that the  
2 soil features observed at the sampling points on the more sloped parcels are  
3 representative of the overall project site. Record 646.

4 During the local proceeding, petitioner submitted its own geotechnical  
5 report from GeoScience, Inc. Record 577-85. The GeoScience report includes an  
6 engineering geologist's review of published geologic maps, soil survey data,  
7 aerial photographs, LiDAR imaging, and Department of Geology and Mineral  
8 Industries (DOGAMI) hazard publications. The report also summarizes  
9 observations from site visits on July 15 and 28, 2019. GeoScience did not conduct  
10 any subsurface explorations. GeoScience noted what it characterized as an  
11 "amphitheater-shaped geomorphic feature in the southern part of the proposed  
12 project[, which] is a classic geomorphic feature indicating a strong possibility of  
13 a deep-seated slope movement origin." Record 582. GeoScience suggested that  
14 development activity on that feature, which is below I-5 and above the railroad,  
15 could result in slope movement. FEI responded to the GeoScience report:

16 "The Geoscience report indicates a 'probable landslide feature' that  
17 could affect the interstate highway (I-5) to the south and west of the  
18 subject property, and the railroad to the east. However, it is  
19 important to reiterate that, while landslide features have been  
20 documented elsewhere in the hillside areas near the site, current  
21 hazard publications do not identify any landslide features within the  
22 property (e.g., scarps, landslide deposits, fan deposits, and/or  
23 colluvium).

24 "Many landslide hazards cannot be identified prior to a slide  
25 occurring. However, [FEI] recently completed explorations in the  
26 vicinity of the area that Geoscience identifies as a landslide feature.

1 Those explorations did not encounter soil layers to indicate potential  
2 slide planes or similar landslide risks. Instead, our explorations  
3 typically encountered stiff to hard residual soil and weathered  
4 bedrock comprised of siltstone, sandstone, or mudstone. We  
5 encountered soft soil conditions in only one exploration, which was  
6 located away from sloping ground and away from the area identified  
7 by Geoscience as the ‘probable slide feature.’ The exploration logs  
8 and boring and test pit locations are provided in the [pole structure  
9 report].” Record 695-96 (underscoring in original).

10 FEI explained that it observed no evidence of any earth movement in the  
11 developed areas adjacent to the project site, which indicates no active or  
12 impending landslide hazards in the area of the amphitheater-shaped feature. For  
13 example, “deep-seated slope movement adjacent to I-5 would manifest itself in  
14 the form of damage to the freeway pavement (e.g., longitudinal cracks).” Record  
15 696. FEI also explained that excavations to construct the railroad have not caused  
16 instability indicative of deep-seated movement. FEI further explained that the  
17 valley floor downslope and east of the “amphitheater-shaped landform” does not  
18 contain geologic evidence of past debris flows. *Id.*

19 The hearings official found that SUB’s geotechnical reports satisfy SDC  
20 3.3-530 and respond to the issues raised by the GeoScience report and found that  
21 the transmission poles will be installed on stable ground based on the FEI reports  
22 and response. Record 121.

23 Petitioner argues that the hearings official improperly construed applicable  
24 law and made a decision that is not supported by adequate findings or substantial  
25 evidence in concluding that SUB’s geotechnical reports conformed to SDC 3.3-  
26 530(A). Petitioner argues that the hearings official’s decision is not based on

1 substantial evidence because, according to petitioner, SUB's geotechnical reports  
2 did not adequately respond to GeoScience's slope stability concerns or criticism  
3 that FEI's subsurface samples are not representative of actual soil conditions.

4 The hearings official found, and we agree, that FEI adequately responded  
5 to GeoScience's concerns. Petitioner provides us no reason to second-guess the  
6 hearings official's decision to give more weight to SUB's geotechnical  
7 evaluation. We conclude that the hearings official did not misconstrue SDC 3.3-  
8 530(A) and the finding that SDC 3.3-530(A) is satisfied is supported by  
9 substantial evidence.

10 In a related argument, petitioner argues that the hearings official erred in  
11 concluding that the site plan review application satisfies SDC 5.17-125(E),  
12 which, in part, requires that "steep slopes with unstable soil or geologic  
13 conditions \* \* \* be protected as specified in this Code." The HD overlay criteria  
14 specify protection measures for steep slopes. Based on SUB's geotechnical  
15 reports, the hearings official found that the steep slopes do not have unstable soil  
16 or geologic conditions. Petitioner's site plan review steep slope argument is based  
17 on petitioner's criticism of SUB's geotechnical reports, which we reject above.  
18 We therefore reject and do not separately analyze petitioner's argument under  
19 SDC 5.17-125(E).

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**2. Grading Plan Report (2019-094 Second Assignment of Error)**

SDC 3.3-530(B) requires a grading plan report that provides, among other things, details of topography and drainage area, proposed or approximate locations of structures, the direction of drainage flow, and detailed plans and locations of all surface and subsurface drainage devices, together with a map. Petitioner argues that the hearings official erred in approving SUB’s grading plans because they fail to properly account for pole placement or drainage impacts.

SUB submitted two grading plans: one that covers the substation site on tax lot 101 and another for the access road along the hillside area. The access road grading plan explains, “Utility pole installation shall be direct-embed monopoles and minimal grading is anticipated.” Record 1138. The hearings official found that “the grading plan does not address the placement of the transmission poles as the foundation of those facilities are not required to be engineered as they will merely be placed within an augured hole.” Record 119.

Petitioner argues that the hearings official misconstrued the applicable law in concluding that the grading plan was not required to account for the placement of transmission poles. We agree. A grading plan must describe the “approximate locations of structures relative to adjacent topography.” SDC 3.3-530(B)(3). SUB does not dispute that the transmission poles are “structures” under the SDC definition. SDC 6.1-110 (defining “structure,” in part, as “[a]nything constructed or built, any edifice or building or any kind or any piece of work artificially built

1 up or composed of parts joined together in some definite manner”). SUB also  
2 does not dispute, and its own grading plan explains, that installation of the  
3 transmission poles will require some “minimal grading.” Record 1138.

4 SUB responds that the access road grading plan references the  
5 transmission poles and explains that they will be built to specifications in the FEI  
6 geotechnical reports. *Id.* SUB explains that the tree felling report shows the  
7 locations of the poles. Record 1016. The pole structure report explains that the  
8 poles will be directly embedded into the ground and provides specific  
9 recommendations for pole installation based on rural utility service standards and  
10 foundation soil conditions at the various pole locations. Record 650-53. The pole  
11 structure report does not specifically address drainage impacts due to pole  
12 installation. The pole structure report notes that FEI did not encounter  
13 groundwater in the site explorations, but observes that “[s]hallow, perched  
14 ground water may be present year-round in the immediate vicinity of the  
15 drainage,” and particularly during periods of prolonged rainfall. Record 649-50.

16 We agree with petitioner that the hearings official’s finding that the  
17 transmission pole installation does not require a grading plan report misconstrues  
18 SDC 3.3-530(B). Thus, remand is required for the city to apply SDC 3.3-530(B)  
19 to the development of transmission pole structures.

20 We also agree with petitioner that the hearings official’s findings of  
21 compliance with SDC 3.3-530(B) are inadequate and not supported by substantial  
22 evidence. The grading plan must provide details of terrain and area drainage,



1 including direction of drainage flow, proposed drainage channels, and detailed  
2 plans and locations of all surface and subsurface drainage devices “to be  
3 constructed with, or as a part of, the proposed work, together with a map showing  
4 drainage areas, the complete drainage network, including outfall lines and natural  
5 drainageways which may be affected by the proposed development, and the  
6 estimated run-off of the area served by the drains.” SDC 3.3-530(B). The access  
7 road grading plan indicates that the “site generally drains from south to north”  
8 with “[a]ll runoff [] directed toward the railroad tracks to the northeast.” Record  
9 1138. The access road grading plan does not provide details of on-site drainage  
10 and drainage impacts from transmission pole placement and access road  
11 improvement.

12 This assignment of error is sustained.

13 **3. Development Plan Report (2019-094 Third Assignment of**  
14 **Error)**

15 Petitioner argues that the hearings official misconstrued SDC 3.3-530(E)  
16 by failing to require SUB to submit a development plan report. The hearings  
17 official concluded that SUB was not required to submit a development plan report  
18 because such a report is only required when the application is for a partition or  
19 subdivision. SDC 3.3-530(E)<sup>7</sup>; Record 120. Differently, the planning

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<sup>7</sup> SDC 3.3-530(E) provides:

“Development Plan Report. A proposed development plan shall be submitted, depicting building envelopes for each lot/parcel,

1 commission found that SUB supplied a development plan through its site plan  
2 review application materials. Record 109.

3 SUB responds, and we agree, that SUB submitted all the substantive  
4 information that would be required by a development plan for the project through  
5 SUB's site plan review and tree felling permit application materials. Petitioner  
6 does not explain what additional information would be required in a development  
7 plan report that SUB did not already provide for the city to review. Accordingly,  
8 any error in failing to require a distinct development plan report under SDC 3.3-  
9 530(E) is harmless and provides no basis for remand.

10 This assignment of error is denied.

11 **D. Tree Removal and Environmental Issues**

12 **1. Tree Felling**

13 "The site proposed for tree felling comprises part of a wooded hillside that  
14 runs generally parallel with I-5 at the southern edge of Glenwood, and a scattering  
15 of native and planted ornamental trees within a previously disturbed industrial

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including driveway approaches and all other associated impervious surface areas. The applicant shall specify whether trees will be felled under one Tree Felling Permit, as specified in Section 5.19-100, as part of the subdivision construction process or by separate Tree Felling Permit for each individual lot/parcel prior to the issuance of a Building Permit. The plan shall be based upon the findings of the required reports in this Section and the lot/parcel coverage standards of Section 3.2-215. Building envelopes shall be specified in Covenants, Conditions, and Restrictions recorded with the Subdivision Plat."

1 parcel.” Record 247. SUB proposed and the city approved removal of 272 trees  
2 as part of site preparation and maintenance of the substation site, access road, and  
3 line corridor. Trees that do not pose an obstruction or potential hazard to ongoing  
4 operation of the facility will be retained, including in the areas along both sides  
5 of the line corridor and in the vicinity of the substation. SUB submitted a tree  
6 survey, identifying tree genus, species, size, and condition. Existing tree species  
7 include evergreen and deciduous trees, including Douglas fir, Oregon ash, black  
8 cottonwood, and big leaf maple. Record 250. The tree removal areas that are not  
9 developed with structures or road will be reseeded with native forbs and grasses  
10 according to SUB’s revegetation plan. Record 1941-42.

11 SDC 5.19-125(A) allows removal of diseased and dangerous trees and  
12 removal of other trees to prevent “interference with utility services.” SDC 5.19-  
13 125(C) allows tree removal as necessary to construct improvements under an  
14 approved development plan. When no specific development plan has been  
15 approved, SDC 5.19-125(D) allows tree removal “on a limited basis” if it  
16 preserves the development potential of the property and preserves certain wooded  
17 areas. SDC 5.19-125(B) requires the city to consider:

18 “Whether the proposed felling is consistent with State standards,  
19 Metro Plan policies and City Ordinances and provisions affecting  
20 the environmental quality of the area, including but not limited to,  
21 the protection of nearby trees and windbreaks; wildlife; erosion, soil  
22 retention and stability; volume of surface runoff and water quality  
23 of streams; scenic quality; and geological sites.”

24 On appeal of the director’s decision, petitioner argued:

1 “The approval also violates SDC 3.4-270(F)(5), which requires that  
2 trees ‘be retained to the maximum extent practicable’ for erosion  
3 control and other purposes. The proposed tree removal would  
4 authorize the removal of over 120 trees which are not necessary for  
5 the construction of the substation, road or transmission lines. Many  
6 of these trees are located on steep slopes on Tax Lots 300 and 1000.  
7 Accordingly, this provision is violated.” Record 1925.

8 SUB suggested, and the hearings official adopted, the following  
9 interpretation of the tree felling criteria in SDC 5.19-125:

10 “SDC 5.9-125 provides the applicable criteria for approval of a tree  
11 felling permit. The section includes eight separate approval criteria,  
12 SDC 5.9-125(A)-(H), which are set forth and separately analyzed  
13 below. The language of SDC 5.9-125 does not make it clear whether  
14 the listed criteria are considerations, independent approval criteria  
15 that each must be satisfied, or are meant to be applied in some other  
16 manner. In its July 16, 2019 letter, [SUB] provided an interpretation  
17 of those criteria. According to [SUB], the city’s tree felling criteria  
18 recognize three different ‘justifications’ for the issuance of a tree  
19 felling permit: subsections (A, C, and D). First, subsection A  
20 addresses removal of diseased trees or trees that present a hazard to  
21 life or property. Subsection C allows for trees removal that is  
22 necessary to construct improvements that have been approved by the  
23 City. Finally, subsection D allows for removal of trees, even where  
24 there is no approved development plan, in order to preserve the  
25 development potential of the property.

26 “The other five criteria, subsections (B) and (E)-(H), address the  
27 impacts of tree removal rather than the need for tree removal. These  
28 criteria apply equally to each of the alternative tree removal  
29 scenarios in subsections (A), (C) and (D). The Hearings Official  
30 agrees with [SUB] regarding the mechanics of SDC 5.9-125.”  
31 Record 83.

32 The hearings official agreed with SUB that SDC 5.19-125(A), (C), and (D)  
33 provide alternate circumstances that can justify a tree felling permit. The hearings

1 official concluded that subsection (A) is satisfied and that it was not necessary to  
2 address subsections (C) and (D). In the alternative, the hearings official found  
3 that subsection (D) is satisfied. The hearings official found that subsection (C)  
4 was inapplicable because SUB’s site plan review was not yet final due to the  
5 pending local appeal. Record 87.

6 **a. Tree Hazard to Transmission Lines (2019-092 First**  
7 **Assignment of Error)**

8 Both the planning commission and the hearings official found that SUB’s  
9 proposed tree felling is permissible to prevent “interference with utility services”  
10 under SDC 5.19-125(A). The city found that trees need to be removed within a  
11 100-foot wide “clear zone” along the line corridor to prevent hazards to the line.  
12 SUB explained that “all of the trees to be removed for the transmission line are  
13 either within the corridor of the transmission line, or, if outside the corridor, must  
14 be removed to create a buffer space around the transmission lines to minimize  
15 the potential for damage due to tree fall in the event of windthrow, natural  
16 mortality, or weather events.” Record 84.

17 Petitioner argues that the record does not support tree removal in the 100-  
18 foot clear zone because the record does not contain substantial evidence that all  
19 of the trees within that zone pose a hazard to the line. Petitioner quotes testimony  
20 in which an arborist concludes that SUB did not submit sufficient information for  
21 the city to determine whether the 100-foot clear zone will remove more trees than  
22 is necessary to protect the line. Record 392.

1 In response, SUB points to a letter submitted by SUB's electrical  
2 engineering manager that explains that the 100-foot clear zone is necessary to  
3 prevent hazards to the line and is consistent with industry best practices:

4 "Not creating a clear zone and relying on annual inspections to trim  
5 trees would be a safety hazard. Establishing and maintaining a clear  
6 zone, or clearance, around power lines prevents flashover between  
7 vegetation and energized conductors in a variety of unpredictable,  
8 but not unanticipated situations. These unpredictable situations  
9 include conductor movement due to wind and ice loading on the  
10 conductors as well as vegetation, such as trees, failing and falling  
11 into the lines." Record 1829.

12 SUB also submitted documents from BPA recommending 100-foot wide clear  
13 zones for 115 kilovolt transmission lines and explaining the need for those clear  
14 zones. Record 1906-15.

15 Relying on that evidence, the hearings official found that a 100-foot clear  
16 zone is the industry standard, "is advisable to maintain reliability of the electric  
17 system," and "prevents flashover between vegetation and energized conductors."  
18 Record 85. The hearings official explained their reasoning:

19 "Much of [petitioner's] appeal rests on an assertion, whether  
20 explicitly stated or implied, that [SUB] has not demonstrated that  
21 the removal of the trees it proposes to remove is 'necessary.'  
22 Subsection (C) is the only criterion that includes the word  
23 'necessary,' and as explained below, Subsection (C) does not apply.  
24 Subsection (A) merely requires the applicant to demonstrate that the  
25 proposed construction 'warrants' the tree felling being proposed.  
26 The Hearings Official concludes that the term 'warrants' is not  
27 synonymous with the term 'necessary,' or the city council would  
28 have used that term when it adopted the provision. The burden on  
29 the applicant in this case is something short of proving that it is

1 'necessary' to remove the requested trees. One definition of the  
2 word 'warrants' is 'justifies.'

3 "Subsection (A) requires only that an applicant justify the removal  
4 of identified trees. It does not require an applicant to demonstrate  
5 the necessity of removing each tree sought to be removed. It does  
6 not require a one-for-one tree replacement. It does not address or  
7 require a certain number or percentage of trees to be left on site.  
8 With regard to the issues outlined above, the Hearings Official  
9 agrees with [SUB's] responses, and concludes that [petitioner's]  
10 expert testimony does not provide evidence sufficient to contradict  
11 [SUB's] evidence that the proposed tree removal is warranted under  
12 the circumstances. The Hearings Official finds that, while the  
13 opponents retained an arborist to provide expert testimony regarding  
14 the tree felling request, Mr. Schrosk has no particular expertise in  
15 the electric or utility industry. [SUB], supported by expert testimony  
16 from BPA, provides valid rationale for the proposed tree felling,  
17 given the specific needs and safety considerations for placement of  
18 transmission lines." Record 85.

19 We agree with SUB that a reasonable person would rely on that evidence  
20 to conclude that a 100-foot clear zone is justified to prevent interference with the  
21 line, consistent with the tree felling criterion in SDC 5.19-125(A). Additionally,  
22 the hearings official explained their reasoning for how the evidence supports  
23 approval. We reject petitioner's argument that the decision is not supported by  
24 substantial evidence or adequate findings.

25 This assignment of error is denied.

26 **b. Wooded Area Preservation (2019-092 Fourth**  
27 **Assignment of Error)**

28 When no development plan has been approved by the city, the city will  
29 permit tree felling on a limited basis, provided it is "consistent with the

1 preservation of the site’s future development potential” and provided wooded  
2 areas along ridgelines and property lines are retained. SDC 5.19-125(D). As  
3 explained above, the hearings official construed SDC 5.19-125(A) as an  
4 independently sufficient basis to permit tree felling, and we affirmed the hearings  
5 official’s conclusion that SDC 5.19-125(A) is satisfied. In addition, and in the  
6 alternative, the hearings official found that SDC 5.19-125(D) is satisfied. Record  
7 87-92. Petitioner argues that the hearings official misconstrued SDC 5.19-125(D)  
8 and made a decision not supported by adequate findings or substantial evidence  
9 regarding future development potential and wooded area retention.

10         Petitioner does not assign error to the hearings official’s conclusion that,  
11 because SDC 5.19-125(A) is satisfied, SDC 5.19-125(D) need not also be  
12 satisfied. Petitioner contends, in a footnote under a different assignment of error,  
13 that tree felling approved under subsection (C) or (D) must also comply with  
14 subsection (A). 2019-092 Petition for Review 10 n 1. We do not understand  
15 petitioner to argue that tree felling approved under subsection (A) must also  
16 comply with subsection (D). If petitioner does make that argument, it is  
17 undeveloped for our review. *Deschutes Development Company v. Deschutes*  
18 *County*, 5 Or LUBA 218, 220 (1982); *see also Falls v. Marion County*, 61 Or  
19 LUBA 39, 46 (2010) (LUBA will not consider an assignment of error that is  
20 presented only in a footnote). Accordingly, even if we agreed with petitioner that  
21 the hearings official erred in finding that SDC 5.19-125(D) is satisfied, that error  
22 provides no basis for remand.



1 This assignment of error is denied.

2 **c. Retention of Mature Vegetation and Healthy Trees**  
3 **(2019-092 Third Assignment of Error)**

4 Petitioner argues that the hearings official’s decision does not contain  
5 required findings that evaluate existing mature vegetation and healthy trees on  
6 tax lots 300 and 1000, or find that the tree removal is consistent with private  
7 property landscaping standards, including the requirement that “[e]xisting mature  
8 vegetation and healthy trees \* \* \* shall be retained to the maximum extent  
9 practicable.” SDC 3.4-270(F)(5). Petitioner argues that remand is required for the  
10 hearings official to evaluate that standard.

11 SUB does not dispute that SDC 3.4-270(F)(5) is applicable. Instead, SUB  
12 emphasizes that the planning commission and the hearings official both found  
13 that all of the proposed tree removal is needed for the project. SUB argues that  
14 those findings and SUB’s evidence supporting SDC 5.19-125(A) demonstrate  
15 that it is not practicable to retain additional trees because they would present a  
16 hazard to the line and the access road. SUB argues that the hearings official’s  
17 findings that SUB’s tree removal is justified under SDC 5.19-125(A) addresses  
18 the substance of the “maximum extent practicable” standard in SDC 3.4-  
19 270(F)(5). Intervenor-Respondent’s Response Brief 23. In other words, SUB  
20 does not argue that SDC 3.4-270(F)(5) is not applicable; instead, SUB argues that  
21 SDC 3.4-270(F)(5) is satisfied because SDC 5.19-125(A) is satisfied.

1 As quoted above, the hearings official found that SDC 5.19-125(A)  
2 “requires only that an applicant justify the removal of identified trees.” Record  
3 85. In the context of SDC 5.19-125(A), the hearings official observed that SUB  
4 considered and rejected increasing the height of the poles to increase tree  
5 retention

6 “because the increased height would also increase visual impacts;  
7 taller poles have greater stress; taller poles would be significantly  
8 more expensive, and that cost would be passed on to the ratepayer,  
9 a result that is not favored by [SUB]; poles taller than those proposed  
10 are contrary to industry standards; and construction of taller poles  
11 would require [SUB] to purchase new equipment.” Record 85.

12 SUB explained that vegetation maintenance (pruning instead of clearing) “is not  
13 consistent with industry standards because the clear zone prevents flashover  
14 between vegetation and energized conductors.” *Id.*

15 The hearings official’s finding that tree removal is justified to prevent  
16 interference with the line does not compel a conclusion that SUB’s tree felling  
17 plan retains mature vegetation and healthy trees “to the maximum extent  
18 practicable.” For example, SUB points to no evidence or analysis regarding  
19 alternative line alignments on the subject property, or alternative treatments to  
20 prevent vegetation from interfering with the line that could increase tree  
21 retention. We agree with petitioner that remand is necessary for the hearings  
22 official to determine whether SUB’s tree felling plan retains trees “to the  
23 maximum extent practicable,” as required by SDC 3.4-270(F)(5).

24 This assignment of error is sustained.

1                                    **d.     Glenwood Plan Siting Standards (2019-095 Third**  
2                                    **Assignment of Error)**

3             Glenwood Plan siting standards for electric facilities and services utility  
4 placement require the city to “[c]onsider views, visual pollution, public health,  
5 natural environment, and noise pollution in locating and obscuring transmission  
6 facilities.” Glenwood Plan 139; SDC Appendix 3, § E.7.b. Petitioner submitted  
7 testimony that the approved line alignment will impact views from the Eugene  
8 Mobile Village, Franklin Boulevard, and I-5. Record 2131. The hearings official  
9 did not address the asserted visual impacts of the proposal on the Eugene Mobile  
10 Village or Franklin Boulevard, and relied on the backdrop of the hillside and the  
11 lower elevation of a portion of the route to mute visual impacts on I-5. Record  
12 46.

13             The hearings official noted that SUB and petitioner submitted competing  
14 photo simulations of the line, and that petitioner’s simulation appeared to  
15 digitally remove more trees than proposed. *Id.* The hearings official reasoned:

16             “Both simulations are informative but not determinative as certain  
17 incontrovertible facts drive the location and visibility of the  
18 transmission lines. First, as dictated by the PFSP, the transmission  
19 line must be sited along I-5 corridor. Second, as a practical and legal  
20 matter, the line cannot be within the I-5 right-of-way or within the  
21 railroad easement. That leaves three other viable locations. One, on  
22 top of the ridge where it would be have the most visual impact and  
23 would become a significant aspect of the skyline. This location

1 would be the antithesis of the intent of Subsection E.7.b.3<sup>[.8]</sup> Two,  
2 it could be located immediately adjacent to the I-5 right-of-way  
3 where there is less screening vegetation; which would have to be  
4 removed anyway. This location would make the poles and lines  
5 most visible to the traveling public and would result in extensive  
6 modifications to the existing access road; probably to the detriment  
7 of additional trees. Finally, the transmission line could be located as  
8 proposed; where it would be partially screened by existing trees and  
9 where it could be served by the existing access road with minor  
10 improvements. In terms of aesthetics and visibility concerns, the  
11 proposed location appears to have the least significant impact.” *Id.*

12 Petitioner argues that the hearings official’s failure to address visual  
13 impacts on the Eugene Mobile Village and Franklin Boulevard requires remand.  
14 Moreover, petitioner argues, the hearings official’s conclusion that the  
15 topography or retained vegetation will diminish visual impacts is not supported  
16 by substantial evidence since the line will be located at the top of the hill and on  
17 poles that are above the natural elevation. Petitioner argues that the hearings  
18 official’s finding that retained trees will “minimize the silhouette of transmission  
19 lines against the sky,” under E.7.b.3, and “interrupt[] views”<sup>8</sup> of line segments,  
20 under E.7.b.4, are not based on substantial evidence because SUB did not provide  
21 a survey of the trees to be retained or the height of any of the trees on the property.

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<sup>8</sup> SDC Appendix 3, section E.7.b.3 provides that SUB should “[u]tilize trees to provide a backdrop to minimize the silhouette of transmission lines against the sky.” SDC Appendix 3, section E.7.b.4 provides that SUB should “[r]educe the length of visible segments of transmission lines by interrupting views with trees or offsetting the location of segments behind trees and other topographic features where long views of the transmission lines would otherwise occur.”

1 SUB and the city do not provide a focused response to petitioner’s  
2 argument regarding Glenwood Plan siting standards for electric facilities. We  
3 remand for the hearings official to determine whether SUB’s tree felling plan  
4 retains mature vegetation and healthy trees “to the maximum extent practicable,”  
5 as required by SDC 3.4-270(F)(5). On remand, it is likely that SUB and the city  
6 will consider alternative line alignments. The city is likely to adopt new findings  
7 on remand regarding compliance with the siting standards. Accordingly, we do  
8 not address petitioner’s arguments under the Glenwood Plan siting standards.

9 **e. Significant Tree Clusters (2019-095 Fifth**  
10 **Assignment of Error)**

11 Site plan review approval criterion SDC 5.17-125(E) provides, in part, that  
12 “[p]hysical features, including, but not limited to[,] \* \* \* significant clusters of  
13 trees and shrubs \* \* \* shall be protected as specified in this Code or in State or  
14 Federal law.” The tree felling standards govern protection of significant clusters  
15 of trees. The hearings official found that, although SUB’s tree felling plan calls  
16 for the removal of 272 trees within the clear zone and access road, most existing  
17 trees will be retained, including clusters of trees in the northern and eastern  
18 portions of the subject property and along the I-5 right-of-way, as well as large,  
19 intact stands of trees along the hillside. The hearings official found that the trees  
20 planned to be removed are not “significant” because “they are located within  
21 areas necessary to serve a transmission line that has been mandated by the  
22 comprehensive plan.” Record 52.

1           Petitioner argues that the hearings official misconstrued the term  
2 “significant” in SDC 5.17-125(E). SUB responds, simply, that the hearings  
3 official correctly found that SDC 5.17-125(E) is satisfied because the hearings  
4 official also found that the tree felling criteria in SDC 5.19-125 are satisfied. SUB  
5 does not defend the hearings official’s interpretation of the term “significant.”

6           The SDC does not define “significant.” Petitioner suggests that  
7 “significant” means having an important influence. *See Stop the Dump Coalition*  
8 *v. Yamhill County*, 364 Or 432, 447, 435 P3d 698 (2019) (citing *Webster’s Third*  
9 *New Int’l Dictionary* 2116 (unabridged ed 2002) (“**3 a** : having or likely to have  
10 influence or effect : deserving to be considered : IMPORTANT, WEIGHTY,  
11 NOTABLE[.]”). An arborist submitted an opinion that that the tree clusters SUB  
12 plans to remove are significant in terms of impacts to views, slope slippage or  
13 failure, erosion, drying out of the remaining fragmented forest, increased water  
14 stress, and subsequent increased risk of fire. Record 2131-32. Petitioner argues  
15 that those clusters of trees are clearly likely to have influence or effect and are  
16 deserving of consideration, and that LUBA should remand for the hearings  
17 official to evaluate whether they are protected under the SDC.

18           We agree with petitioner that the hearings official misconstrued the term  
19 “significant” in SDC 5.17-125(E). The fact that the substation and line are  
20 planned for in the PFSP does not negate the requirement that the city consider  
21 whether significant clusters of trees and shrubs are protected as specified in the  
22 SDC during site plan review. As we explain above, the 2015 PFSP amendments

1 do not prescribe the exact location of the substation and line. Instead, the PFSP  
2 provides a general location and contemplates that exact locations will be  
3 determined through subsequent land use actions, including site plan review.  
4 Remand is required for the city to consider and explain whether and how  
5 significant clusters of trees and shrubs are protected, as required by site plan  
6 review criterion SDC 5.17-125(E).

7 This assignment of error is sustained.

8 **2. Water Quality Protection (2019-095 Fifth Assignment of**  
9 **Error)**

10 The city's water quality protection standards create conservation areas  
11 around "watercourses shown on the Water Quality Limited Watercourses  
12 (WQLW) Map." SDC 4.3-115(A). Site plan review approval criterion SDC 5.17-  
13 125(E) provides, in part, that "[p]hysical features, including, but not limited to[,]  
14 \* \* \* watercourses shown on the WQLW Map and their associated riparian areas  
15 [and] other riparian areas and wetlands specified in Section 4.3-117[,] \* \* \* shall  
16 be protected as specified in this Code or in State or Federal law." SDC 4.3-115  
17 protects water quality by protecting wetlands riparian areas around wetlands.  
18 SDC 4.3-115(C)(3). SDC 4.3-115 requires the city to avoid development or  
19 redevelopment in "[u]nsuitable areas, including, but not limited to, unstable  
20 slopes, wetlands and riparian areas." SDC 4.3-115(C)(1)(a). "For new  
21 development and redevelopment, existing riparian area functions shall be  
22 protected and preserved." SDC 4.3-115(C)(7)(a). Repair, replacement, or

1 improvement of utility facilities are permitted in riparian areas as long as they do  
2 not diminish riparian functions and the riparian area is restored to its original  
3 condition. SDC 4.3-115(B)(9).

4 The 50-foot riparian area may be reduced to 35 feet if the applicant  
5 establishes functionally equivalent wetlands elsewhere on the property. The  
6 applicant must demonstrate “to the satisfaction of the Public Works Director,  
7 equivalency in relation to both the amount of pervious land \* \* \* and riparian  
8 area function (as specified in Section 4.3-110G.)” SDC 4.3-115(A)(2)(a).  
9 “Where a watercourse divides a lot/parcel and the existing riparian area along  
10 that watercourse is degraded in riparian function, the applicant may relocate the  
11 watercourse to another portion of the property as approved by the Public Works  
12 Director and applicable State or Federal agency.” SDC 4.3-115(A)(3).

13 Tax lot 101 contains an approximately 2.84-acre area that is shown on the  
14 WQLW Map. Record 492-93. Nearly half of the acreage of tax lot 101 is a  
15 delineated wetland that is approximately in the center of the tax lot with wetland  
16 boundaries near the south, northeast, and north property boundaries. Record 1256  
17 (wetland delineation map); 1258-59 (wetland area site assessment maps). The  
18 substation site and substation access road overlay the delineated wetland, which  
19 will be filled to allow that development. Record 1260. Portions of the wetland  
20 will not be impacted. *Id.*

21 Before the planning commission, SUB argued:

22 “[T]he Planning Commission should find that SUB has avoided



1 development of wetlands and protected wetlands within the meaning  
2 of SDC 4.3-115 through the development plan and mitigation plan  
3 that SUB has proposed to the Army Corps of Engineers and the  
4 Oregon Department of State Lands ('DSL'). \* \* \*

5 “[Petitioner] suggests that SDC 4.3-115 entirely prohibits  
6 development in wetlands, which would be a more stringent standard  
7 than required by federal and state environmental law. This  
8 interpretation is contrary to the PFSP, which specifies that SUB will  
9 place its proposed substation in a wetland area. This interpretation  
10 would also jeopardize other city infrastructure located in wetland  
11 areas.

12 “The federal Clean Water Act and the Oregon Removal-Fill law  
13 both require an applicant for a wetland development permit to avoid  
14 and minimize impacts to wetlands to the extent practicable, taking  
15 into account the purpose of the applicant’s proposed development.  
16 All impacts that cannot be avoided or minimized must be fully  
17 mitigated. The Planning Commission should find that SDC 4.3-115  
18 sets a similar standard for impact avoidance and wetland protection.  
19 The Planning Commission should find that this interpretation is  
20 required in order to avoid a conflict with the PFSP and a result that  
21 would prohibit development of critical infrastructure at other  
22 locations throughout the city.” Record 705 (footnotes omitted).

23 The planning commission adopted SUB’s suggested findings:

24 “The existing wetland features on Tax Lot 101 have been heavily  
25 disturbed by activities of previous landowners or neighbors and are  
26 not considered locally or nationally significant. However, the  
27 wetland feature is shown on the City’s local wetland inventory as a  
28 Water Quality Limited Watercourse within the City of Springfield.  
29 Therefore, certain provisions of SDC 4.3-115 pertain to the wetland  
30 features on Tax Lot 101. The City is accepting of [SUB’s] wetland  
31 delineation report and, once obtained by [SUB], wetland  
32 fill/removal permits issued by state and federal agencies as  
33 sufficient mitigation for proposed development on this site. The  
34 City’s water quality protection regulations found in SDC 4.3-115  
35 apply to non-significant wetlands and other waters, although

1 nonsignificant wetlands do not have the same level of protection  
2 through the City's Development Code as locally and nationally  
3 significant wetlands. The condition and 'significance' of the  
4 wetland features present on Tax Lot 101 notwithstanding, the state  
5 and federal permitting requirements for wetland fill/removal remain  
6 the same. SUB has avoided development of wetlands to the extent  
7 practicable and has protected wetlands within the meaning of SDC  
8 4.3-115 through the development plan and mitigation plan  
9 submitted to the Army Corps of Engineers and the Oregon  
10 Department of State Lands ('DSL') for permits." Record 139.

11 The planning commission disagreed with petitioner that SDC 4.3-115  
12 entirely prohibits new development in wetlands, which, the planning commission  
13 observed, "would be a more stringent standard than required by federal and state  
14 environmental law." *Id.* Instead, the planning commission found that SDC 4.3-  
15 115 "sets a similar standard for impact avoidance and wetland protection" as the  
16 federal Clean Water Act and the Oregon Wetland Removal-Fill law, which "both  
17 require an applicant for a wetland development permit to avoid and minimize  
18 impacts to wetlands to the extent practicable, taking into account the purpose of  
19 the applicant's proposed development. All impacts that cannot be avoided or  
20 minimized must be mitigated." *Id.* The planning commission found that its  
21 interpretation "is required in order to avoid a conflict with the PFSP and a result  
22 that would prohibit development of critical infrastructure at other locations  
23 throughout the City." *Id.*

24 The planning commission also found that the wetland is not a  
25 "watercourse" because it has no measurable flow or defined channel "and, even  
26 if there was, [SUB] can submit for necessary state and federal permits to modify

1 or eliminate said watercourse.” *Id.* Thus, the planning commission found that  
2 “SUB has demonstrated compliance with all relevant water quality-related  
3 requirements based on the evidence in the record and the City’s site plan review  
4 condition of approval requiring SUB to obtain the required federal and state  
5 environmental permits for its proposed wetland fill/removal.” *Id.*

6 Petitioner argues that the planning commission misconstrued the city’s  
7 water quality protection standards in SDC 4.3-115 and made inadequate findings  
8 not supported by substantial evidence. We agree. As a threshold matter, we agree  
9 with petitioner that the planning commission erred in finding that the wetland is  
10 not a watercourse subject to protection. The SDC defines “watercourse” as

11 “[r]ivers, streams, sloughs, drainages including intermittent stream  
12 and seeps, ponds, lakes, aquifers, *wetlands* and other waters of the  
13 State. This definition also includes any channel in which a flow of  
14 water occurs, either continuously or intermittently, and if the latter  
15 with some degree of regularity. Watercourses may be either natural  
16 or artificial. Specific watercourses that are protected by this Code  
17 are those shown on the [WQLW] Map.” SDC 6.1-110 (emphasis  
18 added).

19 Wetlands are listed in the SDC definition of “watercourse,” and nothing cited to  
20 us in the SDC requires that a wetland have a defined flow or channel to be  
21 considered a “watercourse.” Wetlands are specifically shown on the WQLW Map  
22 and protected by SDC 4.3-115. The planning commission misconstrued the SDC  
23 in finding that the wetland is not a watercourse and, thus, not subject to protection  
24 under SDC 4.3-115.

1           The development of a new electrical substation and access road is not  
2 permitted within the wetland or riparian area. “Repair, replacement or  
3 improvement of utility facilities” is permitted “as long as the riparian area is  
4 restored to its original condition.” SDC 4.3-115(B)(9). The approval also  
5 conflicts with SDC 4.3-115(C)(1)(a) which requires that an applicant “[a]void  
6 development” of “[u]nsuitable areas,” including “wetlands and riparian areas.”

7           SUB responds that requiring compliance with SDC 4.3-115 conflicts with  
8 the PFSP, which SUB argues specifies that SUB will place its proposed  
9 substation in a wetland area. There are at least two problems with that argument.  
10 First, as we explain above, the PFSP planned general locations for the substation  
11 and line. The PFSP did not specify that the substation must be sited in a wetland  
12 area.<sup>9</sup> Accordingly, even if the planning commission were correct that it could  
13 not apply SDC 4.3-115 in a manner that conflicts with the PFSP, the planning  
14 commission erred in concluding that a conflict exists. Second, to the extent that  
15 the city’s current water quality protection standards may create problems for the  
16 city in developing new public infrastructure, the city council may attempt to  
17 amend the city code to avoid those problems. However, it is improper for the  
18 planning commission to refuse to apply the existing water quality protection  
19 criteria by adopting an overly narrow interpretation that is not consistent with the

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<sup>9</sup> Petitioner asserts that the PFSP sites the substation on tax lot 200 to the west of tax lot 101, which does not contain mapped wetlands.

1 language of the code in a quasi-judicial land use decision. We agree with  
2 petitioner that the planning commission improperly construed SDC 4.3-115 in  
3 approving the substation. We remand based on misconstruction of SDC 4.3-115.

4 As quoted above, the planning commission found that SUB demonstrated  
5 compliance with the city's water quality protection standards based on a  
6 condition of approval that requires SUB to obtain federal and state environmental  
7 permits for its proposed wetland fill/removal. It may be that compliance with  
8 state and federal standards could provide a basis for the city to conclude that SDC  
9 4.3-115 will be satisfied. Differently, as petitioner argues, city water quality  
10 protection standards under SDC 4.3-115 may be more restrictive and protective  
11 than those imposed by state and federal law. The problem is that the city's  
12 decision does not cite any specific state or federal standards, or explain how those  
13 standards will ensure that the city's water quality protection standards are  
14 satisfied. We agree with petitioner that the city's findings supporting its  
15 conclusion that SDC 4.3-115 is satisfied are inadequate. *Lundeen v. City of*  
16 *Waldport*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2019-046, Oct 24, 2019) (slip op  
17 at 10).

18 Petitioner asserts that the city's approval of the substation violates SDC  
19 4.3-115 and that "reversal is appropriate." 2019-095 Petition for Review 44.  
20 LUBA will reverse a decision that "violates a provision of applicable law and is  
21 prohibited as a matter of law." OAR 661-010-0071(c). We agree with petitioner  
22 that SDC 4.3-115 generally prohibits development of a new substation in wetland

1 and riparian areas shown on the WQLW Map, including the wetland and riparian  
2 area on tax lot 101, except as otherwise provided in SDC 4.3-115.<sup>10</sup> However,  
3 petitioner has not developed an argument that the substation is prohibited as a  
4 matter of law on the subject property. Accordingly, remand, and not reversal, is  
5 the proper remedy. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115,  
6 129 (2013).

7 This assignment of error is sustained.

8 **3. Revegetation Plan (2019-092 Fifth Assignment of Error)**

9 SDC 5.19-125(E) requires the city to consider “[w]hether the applicant’s  
10 proposed replanting of new trees or vegetation is an adequate substitute for the  
11 trees to be felled.” The tree removal areas that are not developed with structures  
12 or road will be reseeded with native forbs and grasses according to SUB’s  
13 revegetation plan. Record 1941-42. During the local appeal, petitioner argued  
14 that grasses and forbs are an inadequate substitute in terms of natural function,

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<sup>10</sup> SDC 4.3-115(A)(3) provides:

“Where a watercourse divides a lot/parcel and the existing riparian area along that watercourse is degraded in riparian function, the applicant may relocate the watercourse to another portion of the property as approved by the Public Works Director and applicable State or Federal agency.”

SUB did not propose to relocate the impacted wetland to another portion of the property.

1 habitat, carbon sequestration, shallow erosion, aesthetics, or buffering. Record  
2 95.

3 The hearings official reasoned that SDC 5.19-125(E) does not prescribe  
4 how to evaluate whether proposed replanting is an “adequate substitute” for  
5 removed trees and reasoned that

6 “the extent to which substitute vegetation is ‘adequate’ will depend  
7 upon the nature of the proposal. For instance, where the proposed  
8 development includes a building, the replanting plan could not  
9 include any type of planting in the footprint of the structure.  
10 Although the removal of trees in that area would certainly affect  
11 natural function and ‘carbon sequestration,’ it would not be said that  
12 the failure to replant in that area would require denial based on a  
13 failure to satisfy this approval criterion.

14 “[SUB] has explained that trees cannot be replanted in the  
15 transmission line corridor. The very purpose of removing the trees  
16 is to provide a safe corridor for locating the transmission line.  
17 [SUB’s] planting plan for the transmission line corridor proposes  
18 replanting the corridor with native, non-irrigated grasses, shrubs and  
19 forbs that will help stabilize the hillside and prevent erosion.”  
20 Record 95.

21 The hearings official reasoned that SDC 5.19-125(E) does not specifically require  
22 a developer to plant new trees to replace removed trees or require a carbon offset.

23 The hearings official observed that impacts on erosion, aesthetics, and buffering  
24 are all addressed through other approval criteria in the site plan review and  
25 hillside development applications. In those circumstances, the hearings official  
26 concluded that SUBs revegetation plan is “an adequate substitute” and SDC 5.19-  
27 125(E) is satisfied. Record 96.

1           Petitioner argues that “replanting of new trees or vegetation is an adequate  
2 substitute for the trees to be felled” must be read in the context of the purpose  
3 statement for the tree felling criteria in SDC 5.19-105, which provides:

4           “This Section ensures that tree felling is as specified in Metro Plan  
5 policies which call for the retention of natural vegetation, natural  
6 water features and drainageways, scenic quality, wildlife habitat and  
7 archaeological sites to the maximum extent possible within the city  
8 limits and the City’s urban services area. Timber harvesting is  
9 secondary to preservation of other natural resources and cultural  
10 values within the [UGB]. The natural amenities of developable  
11 properties shall be retained to enhance their future urban use in the  
12 Metro Plan, until these properties are ready for urban development.  
13 Significant tree removal shall be permitted only when specific  
14 development plans have been approved by the City, consistent with  
15 plan policies and City development regulations. Interim removal of  
16 trees may be permitted if the removal does not significantly detract  
17 from the natural and cultural amenities that make a particular site  
18 attractive for future urban development.”

19           Petitioner argues that the hearings official misconstrued SDC 5.19-125(E)  
20 by refusing to consider whether the proposed revegetation plan accounts for the  
21 natural function of the removed trees. While we agree with SUB that the purpose  
22 statement does not constitute criteria for a tree removal permit, it does provide  
23 useful context for the construction of the evaluation required by SDC 5.19-  
24 125(E).

25           SDC 5.19-125(E) requires the city to evaluate “[w]hether the applicant’s  
26 proposed replanting of new trees *or vegetation* is an *adequate* substitute for the  
27 trees to be felled.” (Emphases added.) “Adequate,” which is not defined in the  
28 SDC, is an inherently subjective term. *See Webster’s Third New Int’l Dictionary*



1 25 (unabridged ed 2002) (defining “adequate” as “equal to, proportionate to, or  
2 fully sufficient for a specified or implied requirement; *often* : narrowly or barely  
3 sufficient : no more than satisfactory”). By its express terms, SDC 5.19-125(E)  
4 does not require felled trees to be replaced with new trees. Instead, felled trees  
5 may be replaced with vegetation.

6 We conclude that the hearings official’s interpretation does not conflict  
7 with the tree felling purpose statement, which provides that natural amenities  
8 “shall be retained” until the properties are “ready for urban development.” SDC  
9 5.19-105. The substation and line are planned for in the PFSP and Glenwood Plan  
10 to allow urban development in Glenwood. The city has determined that those  
11 areas are “ready for urban development.”

12 As the hearings official observed, impacts on erosion, aesthetics, and  
13 buffering are all addressed through other approval criteria in the site plan review  
14 and hillside development applications. Petitioner argues that conclusion is  
15 erroneous because the other tree felling and site plan review criteria do not  
16 specifically require revegetation in tree removal areas. The hearings official did  
17 not err in concluding that SDC 5.19-125(E) does not require a finding that the  
18 revegetation plan will result in erosion control, aesthetics, and buffering  
19 equivalent to what the removed trees provided. The hearings official’s  
20 observation that those issues are addressed in other applicable review criteria was  
21 not essential to the conclusion that the revegetation is an adequate substitute for  
22 the trees to be felled. In addition, the hearings official’s reasoning that other

1 applicable review criteria address erosion, aesthetics, and buffering is consistent  
2 the purpose of the tree felling permit requirement, which is to allow significant  
3 tree removal “only when specific development plans have been approved by the  
4 City, consistent with plan policies and City development regulations.” SDC 5.19-  
5 105.

6 We agree with SUB that the city did not err in concluding that SUB’s  
7 replanting plan is “adequate” given the evidence of the benefits of SUB’s  
8 proposed vegetation and the need for a clear zone around the line.

9 This assignment of error is denied.

10 **E. Access Issues (2019-095 First Assignment of Error; 2019-092**  
11 **Sixth Assignment of Error)**

12 Petitioner argues that the decisions are flawed because the record does not  
13 contain required evidence of legal access to portions of the project site. The SDC  
14 requires that development sites be accessible by public street or private easement  
15 at the time of development. SDC 5.17-125(B).<sup>11</sup> In addition to that general

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<sup>11</sup> SDC 5.17-125(B) provides:

“The Director shall approve or approve with conditions: a Type II Site Plan Review application upon determining that approval criteria in Subsections A. through E., below have been satisfied. If conditions cannot be attached to satisfy the approval criteria, the Director shall deny the application.

“\* \* \* \* \*

1 development standard, the GEMU zone development standards require that lots  
2 have frontage on a public street, “unless the proposed development has been  
3 approved as part of a Master Plan, Site Plan or land division, and access has been  
4 guaranteed via a private driveway with an irrevocable joint use/access easement  
5 agreement as specified in Subsection 4.2-120A.” SDC 3.4-265(2). SDC 4.2-  
6 120(A) requires that all developed lots and parcels have approved direct access  
7 to either a public street or alley, or a private street or easement that provides  
8 access to the public street system. We refer to SDC 3.4-265(2), 4.2-120(A), and  
9 5.17-125(B) collectively as the access criteria.

10 The planning and ownership history of the subject property is relatively  
11 complex and provides necessary context for the parties’ arguments and our  
12 resolution of petitioner’s access assignments of error. The subject property  
13 previously included a portion of former tax lot 3701. Current tax lot 3701 is  
14 generally north of the subject property. However, as previously configured, tax  
15 lot 3701 extended south, creating a peninsula of land that divided tax lots 101  
16 and former tax lot 1100. Tax lots 3701, 1100, and 1000 were previously owned

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“B. Capacity requirements of public and private facilities, including, but not limited to, water and electricity; sanitary sewer and stormwater management facilities; and streets and traffic safety controls shall not be exceeded and the public improvements shall be available to serve the site at the time of development, unless otherwise provided for by this Code and other applicable regulations. The Public Works Director or a utility provider shall determine capacity issues.”

1 by Miranda. SUB attempted to acquire an easement for the project across  
2 Miranda's property, but SUB and Miranda were unable to reach an agreement  
3 and SUB ultimately filed a condemnation action in circuit court. Record 1946.  
4 SUB and Miranda eventually reached a settlement and Miranda conveyed to SUB  
5 all of tax lot 1000, all of former tax lot 1100, and the portion of former tax lot  
6 3701 that lay between tax lot 101 and former tax lot 1100. Record 1946, 820-21.  
7 In 2019, while the local proceedings in this appeal were ongoing, that portion of  
8 former tax lot 3701 was incorporated into tax lot 1100 through a property line  
9 adjustment administratively approved by the city. SDC 5.1-125. Record 412-17.  
10 Accordingly, SUB owns tax lots 101, 1100, and 1000, which in their current  
11 configuration constitute a contiguous tract. Miranda continues to own adjusted  
12 tax lot 3701, which southern boundary abuts SUB's tax lots 101 and 1100. As  
13 noted, tax lot 300 is owned by EWEB. As part of the settlement agreement, SUB  
14 conveyed to Miranda an access easement over the existing access road, which  
15 straddles the property boundary between tax lot 101 and adjusted tax lot 3701  
16 (the 2019 Access Easement). Record 820, 1807-15.

17 The hearings official found that SUB has direct access to the entire  
18 property via the existing access road beginning at the terminus of E. 22nd Ave.  
19 The hearings official also found that the 2019 Access Easement "affords legal  
20 and physical access to Tax Lots 101 and 3701 from the public street system."  
21 Record 49.

1           On appeal, petitioner disputes that SUB has legal access under the 2019  
2 Access Easement. Petitioner argues that the 2019 Access Easement benefits tax  
3 lot 3701, burdens tax lot 101, and does not benefit tax lots 1100, 1000, or 300.  
4 The hearings official noted that it was unclear whether the 2019 Access Easement  
5 aligned with the easement shown on SUB’s tentative site plan. Accordingly, the  
6 hearings official imposed Condition 5, which requires SUB to record an access  
7 easement across tax lots 101, 3701, 1100, 1000, and 300, “for their mutual use  
8 and benefit,” prior to approval of the final site plan and initiation of  
9 construction.<sup>12</sup>

10           The tentative site plan proposes access on the existing access road. No  
11 party disputes that the existing access road is partially on tax lot 3701. Record  
12 1249, 1258-59. As we understand it, petitioner argues that Miranda has not  
13 granted SUB an access easement to use the portion of the road on tax lot 3701 to  
14 access the subject property. That is, according to petitioner, SUB owns a part of

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<sup>12</sup> Condition 5 provides:

“Prior to approval of the Final Site Plan, [SUB] shall execute and record an access easement across Tax Lot 101, 3701, 1100, 1000 and 300 for the maintenance access driveway, as generally depicted on the tentative site plan, and provide evidence thereof to the City. Alternatively, [SUB] shall provide clear and convincing evidence satisfactory to the City that access easement(s) conveying the right to construct and operate the maintenance access driveway across Tax Lots 101, 3701, 1100, 1000 and 300 already exist and will continue to remain in effect.” Record 472.

1 the access road on tax lot 101, but does not have the right to use the portion of  
2 the road that is on tax lot 3701 to access tax lot 101 or the other tax lots in the  
3 subject property. Petitioner argues that Condition 5 does not satisfy the access  
4 criteria because it requires SUB to acquire and record an easement that crosses  
5 property that SUB does not own (tax lot 3701). Petitioner argues that the record  
6 does not demonstrate, and the hearings official did not find, that it is feasible for  
7 SUB to obtain the easement required by the condition.

8         The parties do not dispute that tax lot 101 has frontage on E. 22nd Ave., a  
9 public street, or that all of the lots in the subject property are contiguous with tax  
10 lot 101. SUB argues that tax lot 1000 can be accessed directly from E. 22nd Ave.  
11 over SUB's tax lots 101 and 1100. We understand SUB to argue that it need not  
12 rely on any easement rights to enter or cross property that it owns. Alternatively,  
13 SUB contends that the evidence in the record supports a conclusion that it is  
14 feasible for SUB to comply with Condition 5.<sup>13</sup> SUB argues that Condition 5  
15 allows SUB to make minor adjustments to the actual location of the access road  
16 because it requires evidence of legal access "as generally depicted on the tentative  
17 site plan." Record 472. SUB argues that the city did not err in concluding that the  
18 access criteria could be satisfied by conditions of approval and that final site plan

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<sup>13</sup> SUB explains that part of the city's reason for requiring SUB to record easements on its own property is to establish SUB's right to maintain and access the substation and line in the event that SUB later conveys the tax lots.

1 review is the appropriate proceeding to establish the exact location of the access  
2 and confirm SUB's compliance with Condition 5. We agree.

3 The proposed development is approved as part of a site plan approval. SDC  
4 5.17-125(B) provides that a site plan may be approved with conditions imposed  
5 to satisfy the access criteria. Condition 5 requires SUB to provide the city proof  
6 of legal access prior to final site plan approval. Where a local government  
7 imposes a condition of approval requiring the applicant to obtain easement rights,  
8 the local government is not required to adopt a finding that it is feasible for the  
9 applicant to obtain such easements, absent some indication that there is a legal or  
10 practical impediment to obtaining the easements. *Gardener v. Marion County*, 56  
11 Or LUBA 583, 599 (2008). The fact that SUB does not own tax lot 3701 is not,  
12 in itself, a legal impediment to obtaining the easement contemplated in Condition  
13 5. In addition, we agree with SUB that, if SUB is not able to obtain the  
14 contemplated easement to satisfy Condition 5, the SDC site plan process may be  
15 flexible enough for SUB to modify its site plan to propose access that is entirely  
16 on its own property. In all events, the city did not err in concluding that, as  
17 conditioned, SUB can satisfy the access criteria.

18 This assignment of error is denied.

19 Petitioner also argues that the lack of proof of legal access invalidates the  
20 tree felling permit because, according to petitioner, the record lacks substantial  
21 evidence that SUB has the legal right to use the access road to remove trees and  
22 slash. Those arguments are derivative of the underlying argument regarding legal

1 access and Condition 5 that we reject above. We reject those arguments for the  
2 same reasons and do not address them separately.

3 These assignments of error are denied.

4 The city's use interpretation is affirmed. The city's site plan review  
5 approval, tree felling permit, and hillside development permit are remanded.