

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

3
4 1st JOHN 2:17, LLC and JONATHAN TALLMAN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF BOARDMAN,
10 *Respondent.*

11
12 LUBA No. 2022-062

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Boardman.

18
19 Sarah C. Mitchell filed the petition for review and reply brief and argued
20 on behalf of petitioners. Also on the brief was Kellington Law Group, PC.

21
22 Christopher D. Crean filed the respondent's brief and argued on behalf of
23 respondent. Also on the brief was Beery, Elsner & Hammond, LLP.

24
25 RYAN, Board Chair; ZAMUDIO, Board Member, participated in the
26 decision.

27
28 RUDD, Board Member, did not participate in the decision.

29 REMANDED 10/27/2022

30
31
32 You are entitled to judicial review of this Order. Judicial review is
33 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving improvements to an existing intersection and an existing street, and construction of a new collector.

FACTS

Yates Lane is an existing, unpaved street that extends east from Laurel Lane in the Commercial district and the Service Center (SC) subdistrict. Laurel Lane is a north-south arterial that connects to I-84 north of the Laurel Lane/Yates Lane intersection, forming what is referred to as the Port of Morrow Interchange. The Port of Morrow Interchange is subject to the Port of Morrow Interchange Area Management Plan (IAMP), which the city adopted in 2012 as part of its Transportation System Plan (TSP). The IAMP lists as a city transportation project improvements to the Laurel Lane/Yates Lane intersection and the construction of a new collector, Devin Loop. Devin Loop would begin on Yates Lane east of the Laurel Lane/Yates Lane intersection, loop south and west from Yates Lane, and connect to Laurel Lane south of the Laurel Lane/Yates Lane intersection, just north of a Bonneville Power Administration (BPA) transmission easement.

On November 16, 2021, city staff filed an application seeking planning department approval to improve the Laurel Lane/Yates Lane intersection and construct Devin Loop, as described in the IAMP. In addition, the application proposed improving to neighborhood collector standards the Yates Lane right-of-way between the Laurel Lane/Yates Lane intersection and the Yates

1 Lane/Devin Loop intersection. We refer to Devin Loop and Yates Lane, together,
2 as the “Loop Road,” and we refer to the proposed construction, collectively, as
3 the “Loop Road project.”

4 On March 11, 2022, city staff approved a “Zoning Permit” authorizing the
5 Loop Road project. The city provided notice of the Zoning Permit to persons,
6 including petitioners, who own property west of Laurel Lane. After petitioners
7 attempted to file a local appeal of the Zoning Permit, the city chose to proceed
8 under its “Type II” land use procedures, effectively allowing petitioners to appeal
9 the Zoning Permit to the planning commission.

10 The planning commission held a public hearing on May 18, 2022, and
11 ultimately denied petitioners’ appeal, affirming city staff’s approval of the Loop
12 Road project. Petitioners appealed the planning commission’s decision to the city
13 council. The city council conducted a public hearing on June 28, 2022, and denied
14 the appeal, adopting in support of its decision city staff’s findings, the planning
15 commission’s findings, and its own findings. The city council expressly adopted
16 any code interpretations made in city staff’s and the planning commission’s
17 findings. This appeal followed.

18 **FIRST ASSIGNMENT OF ERROR**

19 In its March 11, 2022 decision, city staff noted that the SC subdistrict
20 allows as permitted uses (1) installation of improvements within the existing
21 right-of-way and (2) projects identified in the TSP. Record 11. The city council
22 concluded that the Loop Road project involves uses that are permitted in the SC

1 subdistrict and, therefore, “do not require further land use review.” Record 6. The
2 city council stated:

3 “Because the permit approves a transportation facility that is
4 authorized by and consistent with the IAMP and [Boardman
5 Development Code (BDC)], it is not a land use decision and the city
6 was not required to process the permit application under its land use
7 procedures. Nonetheless, after the City mailed notice of the decision
8 to area property owners, [petitioners] sought to file a local appeal
9 and, out of an excess of caution and to ensure full public
10 participation, the City agreed to process the permit as if it was a
11 Type II land use decision. Accordingly, an appeal was heard before
12 the Planning Commission on May 18, 2022.” Record 5.

13 On appeal to LUBA, petitioners do not dispute that the Loop Road project
14 involves uses that are permitted in the SC subdistrict. However, petitioners
15 dispute the view that the city’s approval of the project is not a “land use decision”
16 and, in particular, the implication that, because the approval is not a land use
17 decision, no land use standards apply to the project.¹ Petitioners argue that it is
18 clear that the project is subject to many land use standards, including the IAMP
19 and a number of city land use regulations.

20 The city responds that petitioners misunderstand the above-quoted
21 findings and that the city does not dispute that the project is subject to land use

¹ ORS 197.015(10)(a) defines “land use decision,” in relevant part, as a “final decision or determination made by a local government” that “concerns” the application of a comprehensive plan provision or land use regulation. The city does not dispute that the challenged decision concerns the application of one or more comprehensive plan provisions or land use regulations, and is a “land use decision,” as defined at ORS 197.015(10)(a).

1 standards, as evidenced by the fact that, in approving the project, the city applied
2 a number of land use standards.

3 We agree with the city that petitioners' arguments under the first
4 assignment of error provide no basis for reversal or remand. The city's
5 characterization of the Loop Road as a "permitted use" and its conclusion that
6 approving an application for a use that is permitted in the SC subdistrict does not
7 result in a "land use decision" or necessarily trigger the city's Type II procedures
8 are merely *dicta* because the city proceeded to apply land use regulations to the
9 application.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 Under the second assignment of error, petitioners advance four
13 subassignments of error that challenge the city's conclusions that the Loop Road
14 project complies with applicable land use regulations.

15 **A. Neighborhood Collector**

16 The IAMP designates the Loop Road as a "City Collector," but it does not
17 determine what kind of collector. The TSP identifies two kinds of collectors:
18 neighborhood and minor. The city concluded that the Loop Road is functionally
19 classified as a "neighborhood collector" and, therefore, subject to standards that
20 apply to that functional classification. Petitioners argued below, however, that
21 the Loop Road is more properly classified as a "minor collector" subject to

1 different, more demanding standards. For example, the minimum right-of-way
2 width for a neighborhood collector is 60 feet; that of a minor collector is 68 feet.

3 The city rejected those arguments, noting that the existing, graveled Yates
4 Lane right-of-way is 60 feet in width and classified as a neighborhood collector,
5 and concluding that Devin Loop will also qualify as a neighborhood collector
6 under the applicable IAMP, TSP, and BDC standards.²

7 On appeal, petitioners argue that the city council’s findings fail to explain
8 why the Loop Road is properly classified as neighborhood collector. Petitioners
9 note that the TSP includes the following descriptions:

10 *“Minor Collectors*

11 “Collector facilities link arterials with the local street system. As
12 implied by their name, collectors are intended to collect traffic from
13 local streets and sometimes from direct land access, and channel it
14 to arterial facilities. Collectors are shorter than arterials and tend to
15 have moderate speeds.

16 “* * * * *

17 *“Neighborhood Collectors*

² The city council’s findings state, in relevant part:

“[Petitioners] argue that the proposed roads ‘on balance’ are a minor collector, not a neighborhood collector. Staff disagrees. Under the applicable standards in the IAMP, TSP and [BDC] described in the findings above, staff concludes that the proposed roadways are a neighborhood collector and comply with all of the relevant standards for a neighborhood collector.” Record 8.

1 “Neighborhood collectors are a subset of collectors serving the
2 objective of penetrating local neighborhoods to provide direct land
3 access serviced and traffic circulation. These facilities tend to carry
4 lower traffic volumes at slower speeds than typical collectors. On-
5 street parking is more prevalent and bike facilities may be exclusive
6 or shared roadways.” (Italics in original.)

7 Petitioners note that the TSP description under the heading “Minor Collectors”
8 mentions linking arterials with the local street system, while the description under
9 the heading “Neighborhood Collectors” does not mention linking to arterials.
10 Because the Loop Road will connect to an arterial, Laurel Lane, at both ends, and
11 because it could carry heavy truck traffic when adjoining properties develop,
12 petitioners argue that, on balance, the Loop Road is more like a minor collector
13 than a neighborhood collector.

14 The city responds that the TSP describes neighborhood collectors as a
15 “subset” of the general category of collectors, and the city suggests that the
16 description under the heading “Minor Collectors” is not limited to that
17 subcategory but, instead, describes the overall category of “collector facilities,”
18 which includes both neighborhood and minor collectors. Under that
19 interpretation, the city argues, both neighborhood and minor collectors are
20 intended to “link arterials with the local street system.”

21 We agree with petitioners that the city’s findings on this point are
22 inadequate. The city council’s finding refer to “applicable standards in the IAMP,
23 TSP and [BDC] described in the findings above.” *See* n 2. However, we see no
24 preceding findings that identify the applicable standards that the city used to

1 determine that the Loop Road is properly classified as a neighborhood collector
2 rather than a minor collector. The respondent's brief also does not identify what
3 criteria city staff used to determine the functional classification of the Loop Road.
4 The interpretation of the TSP descriptions suggested in the respondent's brief
5 might be sustainable, if it were adopted by the city council. However,
6 interpretations of a local code provision offered for the first time in a respondent's
7 brief at LUBA are not interpretations made by the local government. *Munkhoff*
8 *v. City of Cascade Locks*, 54 Or LUBA 660, 665-66 (2007). Because the decision
9 must be remanded in any event, as discussed below, the better course is to also
10 remand under this subassignment of error for the city council to adopt more
11 adequate findings, supported by any necessary local plan or code interpretations,
12 to explain its conclusion that the Loop Road is properly classified as a
13 neighborhood collector.

14 The first subassignment of error is sustained.

15 **B. Street Standards**

16 **1. Minor Collector Standards**

17 The findings address a number of BDC standards that apply to
18 neighborhood collectors and conclude that the Loop Road meets those standards.
19 For example, the findings note that the Yates Lane right-of-way is 60 feet wide,
20 which complies with the 60-foot minimum right-of-way width for a
21 neighborhood collector. Petitioners first argue that these findings are erroneous
22 if, in fact, the proper classification for the Loop Road is minor collector. We agree

1 with petitioners that, if, on remand, the city concludes that minor collector is the
2 appropriate functional classification, then the city must address compliance with
3 the standards for a minor collector.

4 **2. Roadway Width**

5 Alternatively, petitioners argue that, even if neighborhood collector is the
6 appropriate functional classification, the city still erred in two respects.
7 Petitioners cite evidence that the paved roadway width for some portions of the
8 Loop Road will be only 32 feet, and they argue that the minimum paved roadway
9 width for a neighborhood collector under BDC Table 3.4.100(F) is 38 feet. The
10 city does not respond to this argument or cite any findings addressing the
11 minimum roadway width. We agree with petitioners that, on remand, the city
12 must address compliance with the appropriate paved roadway width.

13 **3. Lateral Improvements**

14 Finally, petitioners argue, even if the Loop Road is classified as a
15 neighborhood collector, the city erred in failing to require construction of lateral
16 improvements such as sidewalks, planter strips, bicycle lanes, curbs, streetlights,
17 and other improvements, as required by BDC 3.4.100(J), (O), and (X).

18 BDC 3.4.100(J) provides, “Sidewalks, planter strips and bicycle lanes shall
19 be installed in conformance with the standards in Table 3.4.100, applicable
20 provisions of the [TSP], the Comprehensive Plan, and adopted street plans.
21 Maintenance of sidewalks, curbs, and planter strips is the continuing obligation
22 of the adjacent property owner.” BDC 3.4.100(O) provides, “Concrete curbs,

1 curb cuts, wheelchair, bicycle ramps and driveway approaches shall be
2 constructed in accordance with the standards specified in Chapter 3.1 - Access
3 and Circulation.” BDC 3.4.100(X) provides, “Streetlights shall be installed in
4 accordance with City standards which provides for installation at intervals of 300
5 feet.”

6 The planning commission’s decision explains that the full standards at
7 BDC 3.4.100 will be met when adjoining properties are developed:

8 “The City is purposefully not improving the street to the full
9 standards identified in the BDC leaving those future improvements
10 to be the responsibility of development along the roads being
11 installed to the east of Laurel Lane. Those additional improvements
12 that will be required at the time of development include curb,
13 sidewalk, access cuts, and other associated street improvements. A
14 four-foot-wide paved walking and bicycle path is included in the
15 pavement width to support limited multi-path utilization.” Record
16 21.

17 The city council also adopted findings rejecting petitioners’ arguments that the
18 requirements of BDC 3.4.100(J) and (X) must be met when the Loop Road is
19 constructed:

20 “Staff finds that [BDC 3.4.100(J)] is intended to apply at the time of
21 site development of the adjacent property; it does not apply to the
22 installation of a public roadway that provides access to the adjacent
23 property. In this case, the ‘applicable standards’ of the TSP is the
24 IAMP which does not include standards for sidewalks, planters and
25 bike lanes. Further, under the Comprehensive Plan and adopted
26 street plans (if any), the location, nature and extent of the sidewalks,
27 planter strips and bike lanes will vary depending on the type and
28 nature of development on the adjacent property. Moreover, any
29 continuous curbs, planter strips or sidewalks that are installed now
30 would be subject to frequent cuts, removal and damage as the

1 adjacent properties develop with driveways, underground utility
2 installations, construction traffic and other related impacts.
3 Accordingly, staff finds that this criterion is intended to apply in
4 coordination with [BDC 3.4.100(O)] concurrent with development
5 of the adjacent property. * * * Finally, staff finds that it would be
6 inappropriate and the city did not intend to impose a maintenance
7 obligation for public improvements on the adjacent property owner
8 until such time as the adjacent property develops. For these reasons,
9 staff finds that this criterion does not apply. It will apply at the time
10 the adjacent property develops and the design, location and
11 installation of the improvements will be determined based on the
12 nature of the development.” Record 7.

13 The city council adopted a similar finding regarding the streetlights required
14 under BDC 3.4.100(X).³

15 Petitioners argue that the city council’s code interpretations are
16 inconsistent with the express language of the relevant code provisions, which

³ The city council’s findings state:

“For the same reasons described in the findings above for [BDC 3.4.100(J)], staff concludes that [BDC 3.4.100(X)] does not apply. Staff interprets this standard to apply at the time the adjacent property develops. Until the site design of development on the subject properties is known, the City cannot determine the proper spacing for streetlights. Simply placing streetlights every 300 feet could conflict with the site plan for development on the adjacent properties (for example, driveway locations), which would then require lights to be removed and replaced. This results in unnecessary costs and potentially wasting public resources. Moreover, until the adjacent properties develop, there will be little need for street lights because there will be few if any pedestrians. Accordingly, staff finds that the city does not intend this criterion to apply to the installation of roadways except when provided in conjunction with development of the adjacent property.” Record 8.

1 provide that certain infrastructure “shall be installed” and “shall be constructed.”
2 Petitioners contend that the required infrastructure may be long delayed, or never
3 installed, if adjoining property owners fail to develop their properties. Petitioners
4 also note that some of the properties that will be served by the Loop Road are
5 already developed, and the city does not explain when and how the infrastructure
6 for those properties will be constructed.

7 The city responds that nothing in the relevant code sections or elsewhere
8 requires that such infrastructure be installed at the same time a roadway is built.
9 We understand the city to argue that the relevant code provisions are silent or
10 ambiguous on this point and that the city council’s interpretation resolving that
11 ambiguity is plausible and should be affirmed under the deferential standard of
12 review that LUBA applies to a governing body’s code interpretations under ORS
13 197.829(1).⁴ *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

⁴ ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- (a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
- (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 We agree with petitioners. Although the relevant code provisions do not
2 explicitly require concurrency between roadway construction and lateral
3 improvements, the code provisions mandate that lateral improvements be
4 constructed, with the strong implication that lateral improvements must be built
5 at the same time as the roadway. As petitioners argue, if adjoining property is
6 never developed, then, under the city council's interpretation, no lateral
7 improvements will be constructed, contrary to the express requirements of the
8 code. The city council's interpretation also provides no mechanism or process to
9 require lateral improvements for already-developed properties that are adjacent
10 to the new roadways. The clear purpose of the relevant code provisions is to
11 require lateral improvements to be constructed along city roadways. The city
12 council's interpretation may not be inconsistent with any *express* language in the
13 cited code provisions, but it is certainly inconsistent with the purpose of those
14 code provisions. Accordingly, we cannot affirm that interpretation. ORS
15 197.829(1)(b).

16 The second subassignment of error is sustained.

17 **C. Other City Land Use Regulations**

18 Petitioners argue that the city erred in failing to apply a number of other
19 city land use regulations, including BDC chapter 4.2 (Development Review and
20 Site Design Review); BDC chapter 3.1 (Access and Circulation); BDC chapter
21 3.2 (Landscaping, Street Trees, Fences and Walls); BDC 3.4.100(A)
22 (Development Standards); BDC 3.4.100(G) (Traffic Signals and Traffic Calming

1 Features); BDC 3.4.100(I) (Street Alignment and Connections); BDC 3.4.100(K)
2 (Intersection Angles); BDC 3.4.100(L) (Existing Rights-of-Way); BDC
3 3.4.100(Q) (Development Adjoining Arterial Streets); BDC 3.4.100(T) (Street
4 Names); BDC 3.4.100(U) (Survey Monuments); BDC 3.4.100(V) (Street Signs);
5 BDC 3.4.100(W) (Mail Boxes); BDC 3.4.100(Y) (Street Cross-Sections); BDC
6 3.4.400 (Storm Drainage); BDC 3.4.500 (Utilities); and BDC chapter 3.5
7 (Stormwater Management).

8 To explain why petitioners believe the foregoing are applicable approval
9 criteria for the challenged decision, petitioners direct us to the jurisdictional
10 section of the petition for review and to unspecified arguments in the first
11 assignment of error. However, the jurisdictional section simply lists the same
12 code provisions, in a footnote, without providing any basis to conclude that the
13 cited code provisions are applicable approval criteria. Petition for Review 10 n 4.
14 The only argument we can find in the first assignment of error that bears on any
15 of the cited code provisions is a single paragraph arguing that transportation
16 improvements are subject to site design review standards at BDC chapter 4.2.
17 Petition for Review 27. The planning commission adopted findings rejecting this
18 contention. Record 21. Petitioners do not challenge that finding or provide any
19 basis to conclude that site design review standards or the other cited code
20 provisions apply to the Loop Road project.

21 The third subassignment of error is denied.

1 **D. BPA Subdistrict**

2 Petitioners argue that the city erred in finding that the Loop Road is located
3 entirely within the SC subdistrict.⁵ According to petitioners, a portion of Devin
4 Loop would be located within the BPA easement south of the Loop Road.
5 Petitioners argue that property located within the BPA easement is subject to an
6 entirely different subdistrict, the BPA Transmission Easement (BPA) subdistrict,
7 which has its own regulations that the city did not apply.

8 The city responds first that petitioners failed to raise any issue during the
9 proceedings below that the BPA subdistrict regulations apply, and petitioners are
10 precluded from raising that issue for the first time at LUBA. ORS 197.835(3);
11 ORS 197.797(1). In the reply brief, petitioners respond that ORS 197.835(4)(a)
12 allows them to raise the issue raised in the fourth subassignment of error because
13 the notices for the city’s hearings failed to list the criteria that apply to the BPA

⁵ Again, rather than supply argument in support of this subassignment of error, petitioners direct us to unspecified arguments made in the jurisdictional section of the petition for review. Simply directing LUBA to unidentified arguments made in other sections of a brief runs the risk that LUBA will fail to locate those arguments. In addition, relying on arguments in the jurisdictional section of a petition for review to establish a basis for reversal or remand on the merits, especially in an appeal where jurisdiction is undisputed, runs the risk that such arguments will be overlooked. *See Regency Centers, L.P. v. Washington County*, 265 Or App 49, 61, 335 P3d 856 (2014) (LUBA was not required to scour the petition for review for material that potentially could have supported an argument that the county’s decision involved a “proposed development of land” when the petitioners did not make that argument for themselves).

1 subdistrict.⁶ The waiver question depends on whether the provisions of the BPA
2 subdistrict are applicable criteria. We therefore turn to that question.

3 We agree with the city's response to the substance of the fourth
4 subassignment of error that petitioners are mistaken and that the BPA easement
5 is not subject to the BPA subdistrict, which is located a mile to the west. The city
6 attaches to its brief a zoning map showing the different locations of the subject
7 property and the BPA subdistrict.

8 The city is correct that the BPA easement south of the Loop Road is not
9 subject to the BPA subdistrict. Petitioners' unsupported arguments under this
10 subassignment of error do not provide a basis for reversal or remand.

11 The fourth subassignment of error is denied.

12 The second assignment of error is sustained, in part.

13 The city's decision is remanded.

⁶ ORS 197.835(4)(a) provides that a petitioner at LUBA may raise new issues that were not raised below if "[t]he local government failed to list the applicable criteria for a decision under ORS * * * 197.797(3)(b)[.]"