

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

ROGUE ADVOCATES,  
*Petitioner,*

vs.

CITY OF ASHLAND,  
*Respondent.*

LUBA No. 2023-007

FINAL OPINION  
AND ORDER

Appeal from City of Ashland.

Sean Malone filed the petition for review and reply brief and argued on behalf of petitioner.

Douglas M. McGeary, Acting City Attorney, filed the respondent's brief and argued on behalf of respondent.

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

REMANDED 05/09/2023

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

**NATURE OF THE DECISION**

Petitioner appeals a city council decision approving (1) the annexation of two parcels totaling 16.86 acres, a railroad track corridor totaling 7.68 acres, and highway right-of-way totaling 6.6 acres; (2) an exception to the city's street design standards; (3) an outline plan for a subdivision creating 12 lots; (4) a site design for 230 apartments in 10 buildings; and (5) tree removal permits.

**FACTS**

This is the second time that the city has approved the challenged annexation. *Rogue Advocates v. City of Ashland*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2021-009, May 12, 2021) (*Casita I*). We restate the description of the property from our decision in *Casita I*:

“[Casita Developments (Casita)] own[s] two parcels (the property) totaling 16.8[6] acres that are located outside the city limits but within the city's adopted urban growth boundary (UGB). The property is zoned Rural Residential 5-acre minimum (RR-5) by Jackson County and contains an existing dwelling. The property slopes from the southeast to the northwest, with slopes generally between 10 and 15 percent. The portion of the property west of the existing residence contains steep slopes in excess of 35 percent.

“The property is arrow-shaped, with the arrow ‘tip’ at the southeastern end of the property:

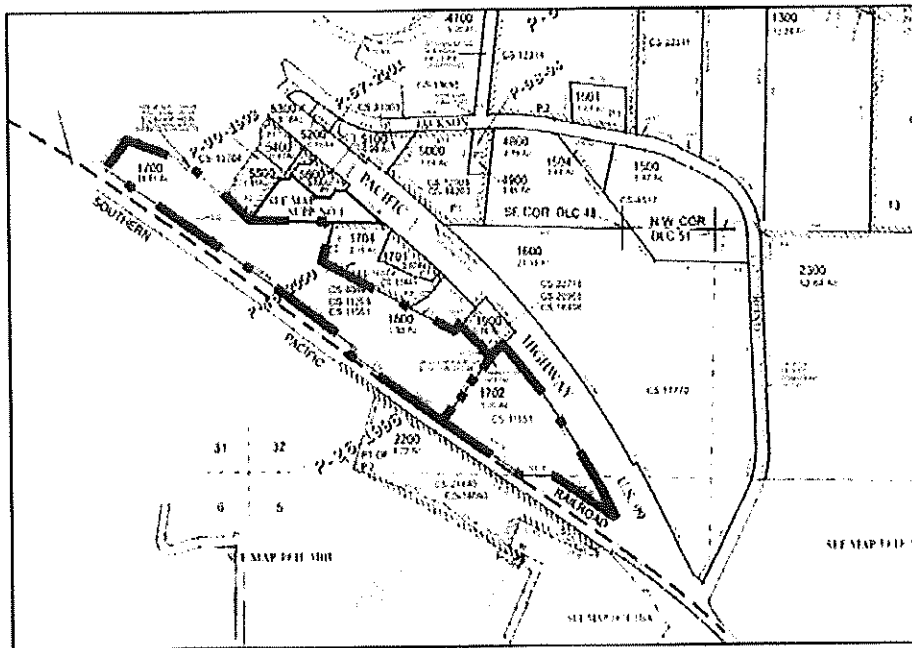


Figure 1: Assessor's Map

“The property is bounded on the west by Central Oregon and Pacific Railroad (COPR) tracks, which separate the property from the existing city boundary; on the south by the junction of the railroad tracks and Highway 99 North; on the east by Highway 99 North and commercial development adjacent to Highway 99 North; and on the north by commercial development on lands that are within the county’s jurisdiction and within the city’s UGB. Highway 99 North is owned and managed by the Oregon Department of Transportation (ODOT).” \_\_\_\_ Or LUBA at \_\_\_\_ (citation omitted) (slip op at 3-4).

In *Casita I*, we explained that Casita applied to the city to annex its property, and city staff subsequently included both the adjacent railroad tracks and the portion of Highway 99 North adjacent to Casita’s property in the annexation proposal. In *Casita I*, we sustained the first assignment of error, and reversed the city’s decision. *Id.* at \_\_\_\_ (slip op at 12-19).

1           In December 2021, in response to our decision in *Casita I*, the city council  
2 amended the Ashland Municipal Code (AMC) to require that annexation  
3 applications be accompanied by planning applications for the annexation area,  
4 and to expressly allow the city to approve an annexation application with an  
5 exception to the city’s street design standards. In July 2022, Casita again applied  
6 to the city to annex the property (and the adjacent railroad corridor and highway  
7 right-of-way) and zone it Residential – Low Density Multiple Family (R-2).  
8 Casita’s application proposed sidewalk improvements along the property’s  
9 frontage on Highway 99 North and beyond the property’s frontage to connect to  
10 existing sidewalks north and south. In addition, the application proposed a new  
11 bus shelter, bus pull-out lane, and rectangular rapid flashing beacon (RRFB)  
12 crosswalk. Because only a portion of the proposed sidewalk improvements would  
13 have met the city’s street design standards, the application requested an exception  
14 to those standards pursuant to AMC 18.4.6.020(B).<sup>1</sup> The application also

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<sup>1</sup> The city council’s decision explains:

“There are some areas where Exceptions to the Street Standards are requested due to topographical difficulties, utility encroachments, and physical encumbrances in the form of the railroad trestle, a drainage ditch, private driveway approaches and other private property encroachments. The proposal seeks Exceptions to the Street Design Standards for the sidewalk and bike lane under the overpass of the railroad trestle where a shared sidewalk will be installed, and where city standard sidewalks are not possible due to physical constraints, ODOT-compliant frontage improvements are proposed. In addition, on-street parking is not proposed.” Record 18.

1 requested approval of an outline plan to subdivide the property into 12 lots, a site  
2 design for 230 apartments in 10 buildings, and tree removal permits.

3 The planning commission held hearings on the application and, at the  
4 conclusion, voted to recommend approval to the city council. The city council  
5 held a hearing and voted to approve the application. This appeal followed.

## 6 **FIRST ASSIGNMENT OF ERROR**

7 Casita sought to subdivide the property under the “performance standards  
8 option” in AMC chapter 18.3.9. “The purpose of [AMC chapter 18.3.9] is to  
9 allow an option for more flexible design than is permissible under the  
10 conventional zoning codes.” AMC 18.3.9.010. Casita’s application requested  
11 approval of an outline plan to subdivide the property.<sup>2</sup>

12 In the first assignment of error, petitioner argues that the city council  
13 improperly construed the outline plan approval criteria. ORS 197.835(9)(a)(D).

### 14 **A. First Subassignment of Error**

15 AMC 18.3.9.040(A)(3) provides, in part:

16 “Approval Criteria for Outline Plan. The Planning Commission  
17 shall approve the outline plan when it finds all of the following  
18 criteria have been met:

19 “\* \* \* \* \*

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<sup>2</sup> There are two required steps under the performance standards option: outline plan approval and final plan approval.

1           “g. The development complies with the street standards.”  
2           (Underscoring in original.)

3   The city council adopted the planning commission’s findings by reference.

4   Record 31. The planning commission found:

5           “[Casita is] requesting Exceptions to the Street Design Standards to  
6           install some portions of the proposed sidewalks at curbside, without  
7           a city-standard parkrow planting strip between the curb and  
8           sidewalk, and to not install on-street parking along the highway.  
9           These Exceptions are discussed in Section E below. The Planning  
10          Commission finds that other than those areas where these  
11          Exceptions have been requested, the street improvements proposed  
12          are to be consistent with the applicable street design standards.”  
13          Record 59.

14          In the first subassignment of error, petitioner argues that the city council  
15          improperly construed AMC 18.3.9.040(A)(3)(g) in concluding that it could  
16          approve an exception to the requirement that an outline plan comply with the  
17          “street standards.” Petitioner argues that while AMC 18.4.6.020(B)(1) authorizes  
18          “exceptions to the street design standards in section 18.4.6.040,” neither that  
19          provision nor any provision in AMC chapter 18.3.9 authorizes exceptions to the  
20          “street standards” referenced in AMC 18.3.9.040(A)(3)(g). Petitioner argues that  
21          the city may therefore not approve an exception to those “street standards” in  
22          approving an outline plan.

23          The city responds that the “street standards” referenced in AMC  
24          18.3.9.040(A)(3)(g) are the street design standards in AMC 18.4.6.040. The city  
25          argues that applications for approval of an outline plan under the city’s  
26          performance standards option require a Type II review procedure and public

1 facility improvements. We understand the city to argue that such applications are  
2 “planning actions requiring a Type I, Type II, or Type III review procedure” for  
3 purposes of AMC 18.4.6.020(A), and that the city may therefore approve  
4 exceptions to the referenced “street standards” pursuant to AMC 18.4.6.020(B).<sup>3</sup>

5 Under ORS 197.829(1), as construed in *Siporen v. City of Medford*, 349  
6 Or 247, 259, 243 P3d 776 (2010), LUBA must defer to a local governing body’s  
7 interpretation of its comprehensive plan and land use regulations unless the local  
8 government’s interpretation is inconsistent with the express language, purpose,  
9 or underlying policy of the comprehensive plan or land use regulation. *Crowley*  
10 *v. City of Hood River*, 294 Or App 240, 244, 430 P3d 1113 (2018). In *Crowley*,  
11 an appeal that involved the city council’s interpretation of the city’s  
12 comprehensive plan, the Court of Appeals explained:

13 “Whether the city’s interpretation of its comprehensive plan is  
14 inconsistent with the plan, or the purposes or policies underlying  
15 that plan, depends on whether the interpretation is plausible, given  
16 the interpretive principles that ordinarily apply to the construction  
17 of ordinances under the rules of *PGE v. Bureau of Labor and*  
18 *Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), as modified

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<sup>3</sup> AMC 18.4.6.020(A) provides:

“**Applicability.** This chapter applies to all new development *and planning actions requiring a Type I, Type II, or Type III review procedure* where public facility improvements are required. All public facility improvements within the City shall occur in accordance with the standards and procedures of this chapter.” (Emphasis added.)

1 by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).” *Id.*  
2 (quoting *Friends of the Hood River Waterfront v. City of Hood*  
3 *River*, 263 Or App 80, 88-89, 326 P3d 1229 (2014)) (internal  
4 quotation marks and brackets omitted).

5 The standard of review under ORS 197.829(1) and *Siporen* is “highly deferential”  
6 to the city, and the “existence of a stronger or more logical interpretation does  
7 not render a weaker or less logical interpretation ‘implausible.’” *Mark Latham*  
8 *Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012)  
9 (citing *Siebert v. Crook County*, 246 Or App 500, 509, 266 P3d 170 (2011)). Our  
10 task in this appeal, as it was in *Casita I*, is to determine whether the city council’s  
11 interpretation of the relevant provisions of the AMC plausibly accounts for the  
12 text and context of those provisions.

13 We conclude that an implied interpretation of the interrelationship between  
14 AMC 18.3.9.040(A)(3)(g) and AMC 18.4.6.020 can be understood from the  
15 findings in support of the decision and is adequate for review. *Alliance for*  
16 *Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 266-67, 942 P2d 836  
17 (1997), *rev dismissed as improvidently allowed*, 327 Or 555 (1998). As seen in  
18 the findings quoted above, the planning commission and then the city council  
19 interpreted the “street standards” in AMC 18.3.9.040(A)(3)(g) to be the street  
20 design standards in AMC 18.4.6.040 and that it interpreted the exception  
21 standards at AMC 18.4.6.020(B) as being applicable to applications for approval  
22 of an outline plan under the city’s performance standards option. Petitioner has  
23 not established that that interpretation is implausible.

24 The first subassignment of error is denied.



1        **B.     Second Subassignment of Error**

2        AMC 18.3.9.060(A) provides:

3        **“On-Street Parking Required.** At least one on-street parking space  
4        per dwelling unit shall be provided, in addition to the off-street  
5        parking requirements for all developments in an R-1 zone, with the  
6        exception of cottage housing developments, and for all  
7        developments in R-2 and R-3 zones that create or improve public  
8        streets.” (Boldface in original.)

9        The city council applied the exception standards at AMC 18.4.6.020(B) and  
10       found that “the approval criteria for an Exception to the Street Design Standards  
11       to not provide on-street parking with the limited street improvements proposed  
12       have been satisfied.” Record 70.

13       In the second subassignment of error, petitioner argues that the city council  
14       improperly construed AMC 18.3.9.060(A) in concluding that it could approve an  
15       exception to the requirement that an outline plan provide on-street parking. While  
16       AMC 18.4.6.020(B) authorizes “exceptions to the street design standards in  
17       section 18.4.6.040,” petitioner observes that neither that provision nor any  
18       provision in AMC chapter 18.3.9 authorizes exceptions to the requirement for  
19       on-street parking in AMC 18.3.9.060(A). Petitioner argues that the city may  
20       therefore not approve an exception to that requirement in approving an outline  
21       plan.

22       The city does not dispute that the city council erred in approving an  
23       exception to the requirement for on-street parking in AMC 18.3.9.060(A).  
24       Instead, in the respondent’s brief the city argues that “under Oregon’s Equitable

1 Communities and Climate Friendly Act of 2023, as of January 1, 2023, cities  
2 within Oregon’s [eight] Metropolitan Planning Organizations (MPOs), including  
3 the City of Ashland, can no longer require more tha[n] one parking space per  
4 multi-family unit.” Respondent’s Brief 10. The city argues that because Casita’s  
5 application proposes one off-street parking space per unit, the referenced  
6 legislation prevents it from requiring on-street parking as well. We understand  
7 the city to argue that the issue of whether the city council improperly construed  
8 AMC 18.3.9.060(A) is moot because the city is precluded from applying that  
9 provision by virtue of the described legislation.

10 Petitioner replies that, because the described legislation took effect on  
11 January 1, 2023, and the challenged decision was made on December 20, 2022,  
12 the legislation does not apply to Casita’s application. Neither the city nor  
13 petitioner provides us with a citation to or a reference to the text of “Oregon’s  
14 Equitable Communities and Climate Friendly Act of 2023.” However, we  
15 assume, as the parties appear to agree in their briefs, that the legislation exists  
16 and that it did not take effect before January 2023. Because the challenged  
17 decision was made in December 2022, we agree with petitioner the legislation  
18 does not apply to Casita’s application. The city may or may not be correct that  
19 the legislation prevents it from requiring more than one parking space per multi-  
20 family unit and that, on remand, it will be unable to apply the requirement for on-  
21 street parking in AMC 18.3.9.060(A). However, the city does not develop that  
22 argument sufficiently for our review in the respondent’s brief. We will therefore

1 not conclude that the issue of whether the city council improperly construed  
2 AMC 18.3.9.060(A) is moot.

3 AMC 18.3.9.060(B) provides:

4 **“On-Street Parking Standards.** On-street parking spaces shall be  
5 immediately adjacent to the public right-of-way on publicly or  
6 association-owned land and be directly accessible from public right-  
7 of-way streets. On-street parking spaces shall be located within 200  
8 feet of the dwelling that it is intended to serve. In addition, on-street  
9 public parking may be provided pursuant to minimum criteria  
10 established under subsection 18.4.3.060.A.” (Boldface in original.)

11 The city asserts that the on-street parking spaces proposed in Casita’s application  
12 will be on association-owned land. We understand the city to argue that, even if  
13 the issue is not moot, Casita’s application satisfies AMC 18.3.9.060(A) because  
14 AMC 18.3.9.060(B) allows the required on-street parking spaces to be located on  
15 association-owned land.

16 The problem with that argument is that the city council did not conclude  
17 that Casita’s application satisfies AMC 18.3.9.060(A) at all, let alone by virtue  
18 of AMC 18.3.9.060(B). Record 69 (expressly concluding that Casita’s  
19 application does not satisfy AMC 18.3.9.060). Rather, the city council approved  
20 an exception to the on-street parking requirement. Because this alternative basis  
21 is not presented in the city council’s findings and appears for the first time in the  
22 respondent’s brief, we will not consider it. The city may choose, on remand, to  
23 consider whether its decision could be justified on that basis. *Anderson v. Coos*  
24 *County*, 51 Or LUBA 454, 472 (2006) (LUBA will remand a decision where an

1 alternative theory for affirming the decision does not appear in the challenged  
2 findings).

3 The second subassignment of error is sustained.

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

## 5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioner's second assignment of error generally relates to the  
7 improvements that the application proposes along and beyond the property's  
8 frontage on Highway 99 North.

### 9 **A. First Subassignment of Error**

10 In the first subassignment of error, petitioner makes a variety of arguments  
11 that the city's findings are inadequate and unsupported by substantial evidence.  
12 Because the parties agree that the challenged decision is legislative, we assume  
13 for purposes of this opinion only that the decision is a legislative decision.<sup>4</sup> There  
14 is no generally applicable requirement that legislative land use decisions be  
15 supported by findings. However, the decision and record must be sufficient to  
16 demonstrate that applicable criteria were applied and "required considerations  
17 were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179  
18 Or App 12, 16 n 6, 38 P3d 956 (2002). In addition, Statewide Planning Goal 2

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<sup>4</sup> AMC 18.5.8.030 provides that all annexations must be processed under the city's Type III procedure, which applies to legislative decisions. The record demonstrates that the city processed the application according to that procedure. Record 579 (staff report explaining that the 120-day rule for quasi-judicial actions at ORS 227.178 did not apply to the application).

(Land Use Planning) requires that a legislative land use decision be supported by “an adequate factual base,” which is an evidentiary standard that is equivalent to the requirement that a quasi-judicial decision be supported by substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff’d*, 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

#### 1. ODOT Standards

The annexation standards at AMC 18.5.8.050(E)(2) and (3) provide:

“2. For bicycle transportation, *safe and accessible bicycle facilities according to the safety analysis and standards of the governing jurisdiction of the facility or street (e.g., City of Ashland, Jackson County, [ODOT]) exist, or can and will be constructed.* Should the annexed area border an arterial street, bike lanes shall be constructed along the arterial street frontage of the annexed area. Likely bicycle destinations within a quarter of a mile from the annexed area shall be determined and the approval authority may require the construction of bicycle lanes or multiuse paths connecting the annexed area to the likely bicycle destinations after assessing the impact of the development proposed concurrently with the annexation.

“3. For pedestrian transportation, *safe and accessible pedestrian facilities according to the safety analysis and standards of the governing jurisdiction of the facility or street (e.g., City of Ashland, Jackson County, [ODOT]) exist, or can and will be constructed.* Full sidewalk improvements shall be provided

1 on one side of all streets bordering on the proposed annexed  
2 area. Sidewalks shall be provided as required by ordinance on  
3 all streets within the annexed area. Where the annexed area is  
4 within a quarter of a mile of an existing sidewalk system or a  
5 location with demonstrated significant pedestrian activity, the  
6 approval authority may require sidewalks, walkways or  
7 multiuse paths to be constructed and connect to either or both  
8 the existing system and locations with significant pedestrian  
9 activity.” (Emphases added.)

10 To demonstrate compliance with AMC 18.5.8.050(E), Casita submitted a  
11 Traffic Impact Analysis (TIA) and an Access Safety Evaluation, both of which  
12 were prepared by Sandow Engineering. Record 1244-505. With respect to AMC  
13 18.5.8.050(E)(2), the city council found:

14 “With regard to bicycle transportation, the application materials  
15 explain that Highway 99 N[orth] which is an arterial street and state  
16 highway, currently has bicycle lanes buffered by striping along the  
17 frontage of the property, with bicycle lanes on both sides of the  
18 highway extending north of Valley View Road and south into  
19 downtown Ashland. The bike lanes are of typical width and the  
20 striped buffer along the frontage provides an additional measure of  
21 safety. The proposal maintains these bicycle lanes in accordance  
22 with City standards along the frontage with two multi-use path  
23 connections into the site. A crossing will be installed on Highway  
24 99 N[orth] at Schofield Street with pedestrian- or cyclist-activated  
25 [RRFBs] to support crossing Highway 99 N[orth] near RVTD’s  
26 northbound flag stop. *The bicycle facilities that exist or will be*  
27 *provided as part of the annexation comply with the design and safety*  
28 *criteria for ODOT as the governing jurisdiction, and [Casita] thus*  
29 *asserts that this criterion is satisfied.*

30 “Bicycle destinations within 1/4-mile include two coffee shops, two  
31 restaurants, a new financial institution now under construction, and  
32 a bicycle shop, and the Bear Creek Greenway is accessible at Valley  
33 View Road within 1/2-mile of the site. The application materials  
34 assert that all of these destinations are easily accessed from the

1 existing protected bicycle lanes which are to be maintained, and that  
2 these bicycle lanes continue the 1 1/4-miles into downtown  
3 Ashland.” Record 20 (emphasis added).

4 With respect to AMC 18.5.8.050(E)(3), the city council found:

5 “In responding to the safe and accessible pedestrian facilities  
6 criterion, [Casita] explains that there are currently no sidewalks  
7 along Highway 99 N[orth] on either side of the street between the  
8 subject properties’ frontage and Schofield Street to the south which  
9 limits pedestrian access and safety for north Ashland residents.  
10 [Casita] proposes street frontage improvements including sidewalk  
11 improvements which comply with the design and safety criteria of  
12 ODOT as the governing jurisdiction, and as such asserts that this  
13 criterion is satisfied.

14 “There are no interior streets proposed within the development,  
15 however the site circulation system includes pedestrian connections  
16 between the public sidewalks along the highway, the apartments,  
17 parking areas and other areas of the site. These include two ADA-  
18 compliant multi-use paths through the landscape open spaces into  
19 the site from the north and the south along the highway frontage for  
20 pedestrians and bicycles, including the main entrance driveway with  
21 adjacent sidewalks that are also ADA-compliant.

22 “To the south of the project, towards Ashland, the width of the  
23 highway is restricted to the single travel lane, bike lane and shoulder  
24 by the railroad overpass. The railroad overpass currently lacks any  
25 sidewalk or lighting, but a shared bicycle and pedestrian path with  
26 overhead lighting is proposed. As an extra measure of caution, a  
27 vertical barrier will be provided at the curb. This will provide a safer,  
28 well-lit area increasing the comfort and safety over what currently  
29 exists. [Casita] *emphasizes that ODOT Engineering staff have been*  
30 *actively involved in this design, and has confirmed that all the*  
31 *improvements conform to ODOT standards.*

32 “The application materials further explain that [Casita] will be  
33 providing a high-visibility crosswalk across Highway 99 N[orth]  
34 with [RRFBs]. The application further notes that mid-block

1 crosswalks are dangerous, and RRFBs increase the safety of  
2 pedestrians and cyclists crossing when compared to a traffic signal.  
3 The application materials go on to indicate that studies have shown  
4 that RRFBs increase motorist yielding rates because the lights are  
5 controlled by the pedestrian's presence and will not go off until they  
6 are safely out of the crosswalk. The proposed RRFB crossing is to  
7 be placed between North Main Street at Schofield Street, between  
8 the north- and south-bound bus stops. The RRFB crossing will  
9 provide a safe pedestrian and bicyclist crossing for all the residents  
10 in north Ashland where none existed before, both to access to Grand  
11 Terrace and to cross the highway to access these bus stops safely.  
12 [Casita] notes that local ODOT authorities have given preliminary  
13 approval to install a crossing with RRFBs in this location, and that  
14 final approval will be subject to review of the final engineered  
15 designs by the regional office in Salem. The developer will be  
16 responsible for the design, cost and installation of the crosswalk and  
17 RRFBs. A condition has been included below requiring that the final  
18 location and design of the RRFB crossing be detailed in the Final  
19 Plan submittal." Record 20-21 (emphasis added).

20 Petitioner argues that the city council's findings that AMC  
21 18.5.8.050(E)(2) and (3) are satisfied are inadequate and not supported by  
22 substantial evidence. Petitioner argues that the city council's findings that the  
23 proposed bicycle and pedestrian facilities satisfy those standards are inadequate  
24 and not supported by substantial evidence where neither Casita's Access Safety  
25 Evaluation nor the findings identify the ODOT standards that they applied to  
26 reach those conclusions.

27 We agree with the city's response that the city council was not required to  
28 list and apply ODOT's standards. In response, the city points to a letter that  
29 ODOT submitted into the record stating that ODOT reviewed Casita's TIA,  
30 stating that the city's street design standards exceed ODOT's standards,



1 acknowledging that exceptions would be required in some areas, and approving  
2 the proposed improvements with certain refinements.<sup>5</sup> Record 481. The city

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<sup>5</sup> ODOT's letter provides, as relevant here:

“ODOT has worked with the City and [Casita] to try to find solutions which work for all parties. ODOT supports the proposal with conditions described below.

“i. ODOT has reviewed the [TIA] prepared by Sandow Engineering and generally agree with the findings, believing that the analysis satisfies the requirements of the Transportation Planning Rule related to Plan and Land Use Amendments (OAR 660-012-0060).

“ii. ODOT supports frontage improvements consistent with City of Ashland standards and the adopted Transportation System Plan, which exceed minimum standards identified in the State Highway Design Manual. We understand Right-of-Way constraints will require exceptions in certain locations.

“iii. The most recent set of civil plans will need to be further refined prior to approval by ODOT. City of Ashland Municipal Code 18.4.6.030 requires installation of public improvements prior to issuance of building permits. No disturbance or construction within the State Right of Way is permitted until [Casita] has obtained an ODOT misc./utility permit. Legal access will not be granted to Highway 99 North until [Casita] has obtained an ODOT reservation indenture and access permit.

“iv. Refined civil plans will need to incorporate:

“a. Access points and curb cuts along the frontage improvements at existing accesses[, and]

1 council also imposed conditions of approval requiring Casita to (1) submit final  
2 civil plans for the street improvements for review and approval by ODOT at the  
3 final plan approval stage, (2) provide engineered construction drawings for the  
4 required street improvements for review and approval by ODOT, and (3) obtain  
5 any necessary permit approvals from ODOT prior to any work within the right-  
6 of-way. Record 34-35, 37. In light of ODOT's letter, a reasonable person could  
7 find that safe and accessible bicycle and pedestrian facilities, according to  
8 ODOT's standards, can and will be constructed. The city council's findings that  
9 AMC 18.5.8.050(E)(2) and (3) are satisfied are adequate and supported by  
10 substantial evidence.

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“b. Details related to the striped pedestrian crossing and [RRFB] in the vicinity of North Main Street.

“v. ODOT has had discussions with the City, [Casita] and Rogue Valley Transit District about the proposed bus pull out and bus stop within the State Right of Way and is supportive pending review and approval of final civil plans.

“vi. ODOT's Region 3 staff supports the proposal for a striped crossing and RRFB. ODOT Region 3 Traffic evaluated a number of potential locations, and recommend a location south of the Subject Property near North Main Street. Approval from the State Traffic Engineer in Salem will be required once civil plans have been reviewed and accepted by local staff.” Record 481.

1                   **2.     *Nollan/Dolan Findings***

2           As explained above, Casita's application proposed sidewalk improvements  
3 along the property's frontage on Highway 99 North and beyond the property's  
4 frontage to connect to existing sidewalks north and south. In addition, the  
5 application proposed a new bus shelter and bus pull-out lane, and an RRFB  
6 crosswalk. The city council imposed conditions of approval incorporating all of  
7 the application's proposals and setting out the required improvements along  
8 different segments of Highway 99 North. Record 32, 35-36.

9           Petitioner argues that the city council's findings are inadequate because  
10 they do not address the requirements of the United States Supreme Court  
11 decisions *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97  
12 L Ed 2d 677 (1987), and *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309,  
13 129 L Ed 2d 304 (1994). In *Nollan*, the Court held that "a permit condition that  
14 serves the same legitimate police-power purpose as a refusal to issue the permit  
15 [is] not \* \* \* a taking if the refusal to issue the permit would not constitute a  
16 taking." 483 US at 836. *Nollan* requires an "essential nexus" between a permit  
17 condition and the public purpose the condition is intended to further. In *Dolan*,  
18 the Court discussed the required relationship between a development and a  
19 proposed exaction, concluding:

20           "[A] term such as 'rough proportionality' best encapsulates what we  
21 hold to be the requirement of the Fifth Amendment. No precise  
22 mathematical calculation is required, but the city must make some  
23 sort of individualized determination that the required dedication is  
24 related both in nature and extent to the impact of the proposed

1 development.” 512 US at 391.

2 In *Koontz v. St. Johns River Water Mgmt. Dist.*, the Court explained that  
3 *Nollan* and *Dolan* “reflect an overarching principle, known as the  
4 unconstitutional conditions doctrine, that vindicates the Constitution’s  
5 enumerated rights by preventing the government from coercing people into  
6 giving them up.” 570 US 595, 604, 133 S Ct 2586, 186 L Ed 2d 697 (2013). In  
7 other words, the requirements of *Nollan* and *Dolan* protect land use permit  
8 applicants from being *coerced* into giving up their Fifth Amendment right to just  
9 compensation for property the government takes.

10 We agree with the city that those requirements do not apply where, as here,  
11 the applicant proposes the improvements themselves and the local government  
12 merely accepts that proposal and memorializes it in the decision as a condition of  
13 approval. Accordingly, petitioner’s *Nollan/Dolan* argument provides no basis for  
14 reversal or remand.

### 15 **3. Inconsistent Findings**

16 We understand petitioner to argue that the city’s findings are inconsistent  
17 because they simultaneously (1) require Casita to construct certain improvements  
18 along and beyond the property’s frontage on Highway 99 North and (2) conclude  
19 that it would be impossible for Casita to construct those improvements. The city  
20 found:

21 “[P]hysical barriers are present for approximately 2,218-feet of the  
22 approximately 3,088-feet of frontage proposed to be improved as  
23 part of this annexation. \* \* \* [T]he combination of unique and

1 unusual aspects makes the installation of city-standard  
2 improvements impossible when private ownership of much of the  
3 abutting property is taken into consideration.” Record 67.

4 Petitioner misreads the above-quoted findings. The city did not find that it  
5 would be impossible for Casita to construct the proposed improvements. Rather,  
6 the city found that it would be impossible for Casita to construct improvements  
7 that comply with the street design standards in AMC 18.4.6.040 in some cases.  
8 That is in part why the city council granted the exception to those standards  
9 pursuant to AMC 18.4.6.020(B). There is no inconsistency.

#### 10 **4. Curb Cuts and RRFB Crosswalk**

11 The city council relied on Casita’s proposal to construct an RRFB  
12 crosswalk on Highway 99 North to conclude that AMC 18.5.8.050(E)(3) is  
13 satisfied. Petitioner argues that certain drawings in the record do not depict the  
14 RRFB crosswalk among the proposed improvements. Petition for Review 20  
15 (citing Record 707-08). Petitioner also argues that the drawings show a  
16 continuous sidewalk along Highway 99 North with no curb cuts, which,  
17 petitioner argues, will cut off access to several existing businesses. We  
18 understand petitioner to argue that, for those reasons, the city’s conclusion that  
19 the proposed pedestrian facilities will be safe and accessible, as required by AMC  
20 18.5.8.050(E)(3), is not supported by substantial evidence.

21 First, AMC 18.5.8.050(E)(3) does not require that pedestrian facilities be  
22 “safe and accessible” generally. Rather, the provision requires that pedestrian  
23 facilities be safe and accessible “according to the safety analysis and standards

1 of the governing jurisdiction of the facility or street.” We conclude above that  
2 substantial evidence supports the city’s conclusion that safe and accessible  
3 pedestrian facilities, according to ODOT’s standards, can and will be constructed.  
4 Accordingly, any arguments that the proposed pedestrian facilities will not be  
5 safe and accessible, as a general matter, provide no basis for reversal or remand.

6 Second, to the extent that petitioner is arguing that curb cuts and an RRFB  
7 crosswalk are required by ODOT’s standards, we agree with the city that a  
8 reasonable person could find that they can and will be constructed. We agree with  
9 the city that the drawings to which petitioner refers are preliminary. As petitioner  
10 itself concedes, the drawings contain a note which reads, “Plan created by others  
11 during annexation applicant and approval process. Shown for reference only.”  
12 Record 707-08. The drawings also contain text which reads, “Not for  
13 construction.” Record 707-09. In addition, unlike other drawings in the record,  
14 the drawings to which petitioner refers are not stamped by a registered  
15 professional engineer. As explained above, ODOT submitted a letter approving  
16 the proposed improvements with certain refinements. That letter provides:

17 “ODOT supports the proposal with conditions described below.

18 “\* \* \* \* \*

19 “iv. Refined civil plans will need to incorporate:

20 “a. Access points and curb cuts along the frontage  
21 improvements at existing accesses[, and]

1           “b. Details related to the striped pedestrian crossing and  
2           [RRFB] in the vicinity of North Main Street.” Record  
3           481.

4   The city council imposed conditions of approval setting out the required  
5   improvements along different segments of Highway 99 North, including an  
6   RRFB crosswalk. Record 35. The city council also imposed conditions of  
7   approval requiring Casita to (1) submit final civil plans for the street  
8   improvements for review and approval by ODOT at the final plan approval stage,  
9   (2) provide engineered construction drawings for the required street  
10   improvements for review and approval by ODOT, and (3) obtain any necessary  
11   permit approvals from ODOT prior to any work within the right-of-way. Record  
12   34-35, 37. In order to satisfy the conditions of approval, Casita will be required  
13   to construct ODOT-approved curb cuts and an RRFB crosswalk. The city  
14   council’s conclusion that the proposed pedestrian facilities satisfy AMC  
15   18.5.8.050(E)(3) is supported by substantial evidence.

## 16           **5. Effectiveness of RRFB Crosswalks**

17       With respect to the proposed RRFB crosswalk, the city council found:

18       “The application materials further explain that [Casita] will be  
19       providing a high-visibility crosswalk across Highway 99 N[orth]  
20       with [RRFBs]. The application further notes that *mid-block*  
21       *crosswalks are dangerous, and RRFBs increase the safety of*  
22       *pedestrians and cyclists crossing when compared to a traffic signal.*  
23       The application materials go on to indicate that studies have shown  
24       that RRFBs increase motorist yielding rates because the lights are  
25       controlled by the pedestrian’s presence and will not go off until they  
26       are safely out of the crosswalk. The proposed RRFB crossing is to  
27       be placed between North Main Street at Schofield Street, between

1 the north- and south-bound bus stops. The RRFB crossing will  
2 provide a safe pedestrian and bicyclist crossing for all the residents  
3 in north Ashland where none existed before, both to [provide] access  
4 to Grand Terrace and to cross the highway to access these bus stops  
5 safely. [Casita] notes that local ODOT authorities have given  
6 preliminary approval to install a crossing with RRFBs in this  
7 location, and that final approval will be subject to review of the final  
8 engineered designs by the regional office in Salem. The developer  
9 will be responsible for the design, cost and installation of the  
10 crosswalk and RRFBs. A condition has been included below  
11 requiring that the final location and design of the RRFB crossing be  
12 detailed in the Final Plan submittal.” Record 21 (emphasis added).

13 In concluding that RRFB crosswalks are more effective than traffic lights, the  
14 city council relied on Casita’s representation that

15 “RRFB’s increase the safety of pedestrians and cyclists crossing  
16 when compared to a traffic signal, and mid-block crosswalks are  
17 dangerous. Studies have shown that RRFB’s increase motorist  
18 yielding rates because the lights are controlled by the pedestrians[’]  
19 presence and will not go off until they are safely out of the  
20 crosswalk.”<sup>6</sup> Record 1176.

21 Petitioner argues that the city council’s conclusion that RRFB crosswalks  
22 are more effective than traffic lights is not supported by substantial evidence.  
23 Petitioner points to studies that it submitted into the record indicating that traffic  
24 lights have higher yield rates than RRFB crosswalks and that the former are  
25 therefore more effective than the latter. Given those studies, petitioner argues that

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<sup>6</sup> As far as we know, the studies to which Casita referred were not submitted into the record.



1 a reasonable person would not rely on Casita's mere representations to conclude  
2 that RRFB crosswalks are more effective than traffic lights.

3 As explained above, AMC 18.5.8.050(E)(3) requires that pedestrian  
4 facilities be safe and accessible "according to the safety analysis and standards  
5 of the governing jurisdiction of the facility or street." Petitioner does not explain  
6 how the city council's finding that RRFB crosswalks are more effective than  
7 traffic lights is necessary to support its conclusion that the proposed pedestrian  
8 facilities will be safe and accessible according to ODOT's standards. *Krueger v.*  
9 *Josephine County*, 17 Or LUBA 418, 421 (1989) (citing *Pardee v. City of Astoria*,  
10 17 Or LUBA 226, 240 (1988); *Bonner v. City of Portland*, 11 Or LUBA 40, 52  
11 (1984)). Accordingly, absent any argument that the city's finding is necessary to  
12 support its conclusion, petitioner's argument provides no basis for reversal or  
13 remand.

#### 14 **6. Suggestion in Access Safety Evaluation**

15 The RRFB crosswalk is proposed to be located southeast of the property's  
16 frontage on Highway 99 North. According to petitioner, Casita's Access Safety  
17 Evaluation assumes that bicyclists wishing to access the property from the  
18 southeast will dismount when they reach the crosswalk, walk their bikes south  
19 through the crosswalk, and then walk their bikes northwest on the sidewalk for  
20 .3 miles until they reach the property. Petitioner argues that that assumption is  
21 unsupported by substantial evidence and that bicyclists are more likely to ride  
22 their bikes through the crosswalk and then continue until they reach the property

1 either (1) going the wrong way in the bike lane or (2) riding their bikes on the  
2 sidewalk, both of which are dangerous.

3 Petitioner does not explain how the assumption in Casita's Access Safety  
4 Evaluation was necessary to support the city council's conclusion that the  
5 proposed bicycle and pedestrian facilities will be safe and accessible according  
6 to ODOT's standards. Accordingly, petitioner's argument provides no basis for  
7 reversal or remand. *Krueger*, 17 Or LUBA at 421.

8 The first subassignment of error is denied.

9 **B. Second Subassignment of Error**

10 The improvements beyond the property's frontage on Highway 99 North  
11 are proposed to be located within the Highway 99 North right-of-way, which is  
12 owned and managed by ODOT. In the second subassignment of error, petitioner  
13 argues that the city's conclusion that safe and accessible bicycle and pedestrian  
14 facilities, according to ODOT's standards, can and will be constructed, as  
15 required by AMC 18.5.8:050(E)(2) and (3), is not supported by substantial  
16 evidence because there is no evidence in the record that it is feasible for Casita  
17 to obtain ODOT's approval to construct improvements within the right-of-way.

18 In *Bouman v. Jackson County*, we explained:

19 "[W]here a local government finds that approval criteria will be met  
20 if certain conditions are imposed, and those conditions are  
21 requirements to obtain state agency permits, \* \* \* a decision  
22 approving the subject application simply requires that there be  
23 substantial evidence in the record that the applicant is not precluded  
24 from obtaining such state agency permits as a matter of law. There

1 does not have to be substantial evidence in the record that it is  
2 feasible to comply with all discretionary state agency permit  
3 approval standards because the state agency, which has expertise  
4 and established standards and procedures, will ultimately determine  
5 whether those standards are met.” 23 Or LUBA 628, 646-47 (1992).

6 The city council imposed conditions of approval (1) setting out the  
7 required improvements along different segments of Highway 99 North and (2)  
8 requiring Casita to obtain any necessary permit approvals from ODOT prior to  
9 any work within the right-of-way. Record 35-36, 37. If Casita is unable to obtain  
10 ODOT’s approval, it will be unable to proceed with the development. As  
11 explained in *Bouman*, the record need not demonstrate that it is feasible for Casita  
12 to obtain ODOT’s approval to construct the improvements, only that Casita is not  
13 precluded as a matter of law from obtaining such approval. Petitioner does not  
14 contend that Casita is precluded as a matter of law from obtaining ODOT’s  
15 approval. Accordingly, petitioner’s argument provides no basis for reversal or  
16 remand.

17 The second subassignment of error is denied.

18 **C. Third Subassignment of Error**

19 In the third subassignment of error, petitioner argues that “[t]he street  
20 design standards are intended to provide safe pedestrian and bicycle facilities,  
21 and the exception creates dangerous conditions for those same pedestrian and  
22 bicycle facilities[.]” Petition for Review 25-26. Petitioner does not develop this  
23 argument further. AMC 18.4.6.020(B)(1)(a) allows the city to grant an exception  
24 to the street design standards where, as relevant here, “the exception is consistent

1 with the purpose, intent, and background of the street design standards in  
2 subsection 18.4.6.040.A[.]” The city adopted findings addressing that criterion.<sup>7</sup>  
3 Record 70. To the extent that petitioner argues that those findings misconstrue

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<sup>7</sup> The city found:

“AMC 18.4.6.040.A details the purpose and intent of the standards as, *‘This section contains standards for street connectivity and design as well as cross sections for street improvements. The standards are intended to provide multiple transportation options, focus on a safe environment for all users, design streets as public spaces, and enhance the livability of neighborhoods, consistent with the Comprehensive Plan.’* The Planning Commission here finds that the exception is consistent with the intent of providing for multiple transportation options focused on a safe environment for all users and designing streets as public spaces which enhance livability. As noted, both jurisdictional limitations and physical constraints in the form of a larger than normal separation between the development and the right-of-way and the presence within that separation of other properties, significant grade changes, and an identified wetland pose difficulties in providing on-street parking immediately adjacent to the roadway as envisioned in the standard street cross-section, however such on-street parking here would also conflict with the bus pull-out lane being required as a condition of the annexation, and with the desire to better accommodate bicycles along the frontage. The proposal seeks to provide needed housing in the form of smaller and more affordable rental units along a transit corridor with a focus on providing increased connectivity not just for motor vehicles, but also for pedestrians, cyclists and transit users. The Planning Commission concludes that this is in keeping with the purpose and intent of the street standards, consistent with the Comprehensive Plan vision, and ultimately in line with the recently passed Climate Friendly and Equitable Communities rulemaking just adopted by the State of Oregon.” Record 70 (italics in original).

1 AMC 18.4.6.020(B)(1) or AMC 18.4.6.040(A), are inadequate, or are  
2 unsupported by substantial evidence, petitioner does not develop that argument  
3 sufficiently for our review. We will not develop that argument for petitioner.  
4 *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

5 The third subassignment of error is denied.

6 The second assignment of error is denied.

### 7 **THIRD ASSIGNMENT OF ERROR**

#### 8 **A. Feasibility**

9 AMC 18.4.6.020(B) provides:

10 **“Exceptions and Variances.** Requests to depart from the  
11 requirements of this chapter are subject to chapter 18.5.5, Variances,  
12 except that deviations from section 18.4.6.040, Street Design  
13 Standards, are subject to subsection B.1, Exception to the Street  
14 Design Standards, below.

15 “1. Exception to the Street Design Standards. The approval  
16 authority may approve exceptions to the street design  
17 standards in section 18.4.6.040 if the circumstances in either  
18 subsection B.1.a or b, below, are found to exist.

19 “a. There is demonstrable difficulty in meeting the specific  
20 requirements of this chapter due to a unique or unusual  
21 aspect of the site or proposed use of the site; and the  
22 exception is the minimum necessary to alleviate the  
23 difficulty; and the exception is consistent with the  
24 purpose, intent, and background of the street design  
25 standards in subsection 18.4.6.040.A; and the  
26 exception will result in equal or superior transportation  
27 facilities and connectivity considering the following  
28 factors where applicable:

1                   “i. For transit facilities and related improvements,  
2                   access, wait time, and ride experience.

3                   “ii. For bicycle facilities, feeling of safety, quality of  
4                   experience (i.e., comfort level of bicycling along  
5                   the roadway), and frequency of conflicts with  
6                   vehicle cross traffic.

7                   “iii. For pedestrian facilities, feeling of safety,  
8                   quality of experience (i.e., comfort level of  
9                   walking along roadway), and ability to safely  
10                  and efficiently cross roadway; or

11                “b. There is no demonstrable difficulty in meeting the  
12                specific requirements, but granting the exception will  
13                result in a design that equally or better achieves the  
14                stated purposes, intent, and background of the street  
15                design standards in subsection 18.4.6.040.A.”  
16                (Boldface and underscoring in original.)

17                Again, the improvements beyond the property’s frontage on Highway 99  
18                North are proposed to be located within the Highway 99 North right-of-way,  
19                which is owned and managed by ODOT. In the third assignment of error,  
20                petitioner argues that the city’s conclusion that the application satisfies the  
21                exception standards at AMC 18.4.6.020(B) is not supported by substantial  
22                evidence because there is no evidence in the record that it is feasible for Casita  
23                to obtain ODOT’s approval to construct those improvements. Petitioner argues  
24                that without ODOT’s approval to construct those improvements, the city’s  
25                decision will result in an “island of sidewalk” along the property’s frontage on  
26                Highway 99 North, which will not “result in equal or superior transportation  
27                facilities and connectivity” considering “feeling of safety,” “quality of

1 experience,” “frequency of conflicts with vehicle cross traffic,” and “ability to  
2 safely and efficiently cross roadway,” as required by AMC 18.4.6.020(B).  
3 Petition for Review 28.

4 Again, the city council imposed conditions of approval (1) setting out the  
5 required improvements along different segments of Highway 99 North and (2)  
6 requiring Casita to obtain any necessary permit approvals from ODOT prior to  
7 any work within the right-of-way. Record 35-36, 37. If Casita is unable to obtain  
8 ODOT’s approval, it will be unable to proceed with the development at all. As  
9 explained in *Bouman*, the record need not demonstrate that it is feasible for Casita  
10 to obtain ODOT’s approval to construct the improvements, only that Casita is not  
11 precluded as a matter of law from obtaining such approval. 23 Or LUBA 628.  
12 Petitioner does not contend that Casita is precluded as a matter of law from  
13 obtaining ODOT’s approval. Accordingly, petitioner’s argument provides no  
14 basis for reversal or remand.

#### 15 **B. Contradictory Statements in Application**

16 Petitioner argues that Casita’s application simultaneously states that (1)  
17 various impediments, including physical constraints and private property issues,  
18 limit Casita’s ability to construct sidewalk improvements beyond the property’s  
19 frontage on Highway 99 North and (2) constructing those improvements  
20 nevertheless “can be done.” Petition for Review 28-29. We understand petitioner  
21 to argue that those statements are contradictory and that, given that contradiction,  
22 the city’s conclusion that there is “demonstrable difficulty” in meeting the street

1 design standards, as required by AMC 18.4.6.020(B), is unsupported by  
2 substantial evidence.

3 The statements to which petitioner refers appear in Casita's submittal.  
4 Record 681-82, 1116-17, 1197-98. Petitioner misreads those statements. Casita  
5 did not state that there were physical and legal impediments to constructing the  
6 *proposed* sidewalk improvements. Rather, Casita stated that there were physical  
7 and legal impediments to constructing sidewalk improvements *that comply with*  
8 *the street design standards in AMC 18.4.6.040*. There is no contradiction.

9 The third assignment of error is denied.

#### 10 **FOURTH ASSIGNMENT OF ERROR**

11 Petitioner's fourth assignment of error generally relates to the affordable  
12 units that will be provided as part of the development.

##### 13 **A. First Subassignment of Error**

14 The annexation standards at AMC 18.5.8.050(G)(1) and (2) provide:

- 15 "1. The total number of affordable units provided to qualifying  
16 buyers, or to qualifying renters, shall be equal to or exceed 25  
17 percent of the base density as calculated using the unit  
18 equivalency values set forth herein. The base density of the  
19 annexed area for the purpose of calculating the total number  
20 of affordable units in this section shall exclude any  
21 unbuildable lots, parcels, or portions of the annexed area such  
22 as existing streets and associated rights-of-way, railroad  
23 facilities and property, wetlands, floodplain corridor lands,  
24 water resource areas, slopes greater than 35 percent, or land  
25 area dedicated as a public park.



- 1           “a.    Ownership units restricted to households earning at or  
2                   below 120 percent of the area median income shall  
3                   have an equivalency value of 0.75 unit.
- 4           “b.    Ownership units restricted to households earning at or  
5                   below 100 percent of the area median income shall  
6                   have an equivalency value of 1.0 unit.
- 7           “c.    Ownership or rental units restricted to households  
8                   earning at or below 80 percent of the area median  
9                   income shall have an equivalency value of 1.25 unit.
- 10        “2.    As an alternative to providing affordable units per section  
11                   18.5.8.050.G.1, above, the applicant may provide title to a  
12                   sufficient amount of buildable land for development  
13                   complying with subsection 18.5.8.050.G.1.b, above, through  
14                   transfer to a non-profit (IRC 501(3)(c)) affordable housing  
15                   developer or public corporation created under ORS 456.055  
16                   to 456.235.
- 17           “a.    The land to be transferred shall be located within the  
18                   project meeting the standards set forth in sections  
19                   18.5.8.050.G.5 and 18.5.8.050.G.6.
- 20           “b.    All needed public facilities shall be extended to the area  
21                   or areas proposed for transfer.
- 22           “c.    Prior to commencement of the project, title to the land  
23                   shall be transferred to the City, an affordable housing  
24                   developer which must either be a unit of government, a  
25                   non-profit 501(c)(3) organization, or a public  
26                   corporation created under ORS 456.055 to 456.235.
- 27           “d.    The land to be transferred shall be deed restricted to  
28                   comply with Ashland’s affordable housing program  
29                   requirements.
- 30           “e.    Transfer of title of buildable land in accordance with  
31                   this subsection shall exempt the project from the

development schedule requirements set forth in  
subsection 18.5.8.050.G.4.”

With respect to AMC 18.5.8.050(G)(1), the city council found:

“The application materials explain that the proposed annexation has a density of more than four residential units, that the development proposal demonstrates that minimum density can be met with the future development of the residentially zoned land, and that 25 percent of the base density shall be dedicated as affordable housing. The proposed units will be rentals under item ‘c’. The application further asserts that the proposal provides the necessary land area for the development for the affordable housing required, as the ordinance stipulates that when utilized as rentals, the affordable units would be restricted to households earning 80 percent or less of the area median income (AMI), with an equivalency value of 1.25 units. Twenty-five percent of the 185.625 base density is 46.406 units, which the application equates to 37 affordable units being required ( $46.406/1.25 = 37.125$ ).” Record 25-26.

With respect to AMC 18.5.8.050(G)(2), the city council found:

“The application materials indicate that [Casita] intends to create separate lots for legally separate title to provide the flexibility to transfer a legal lot to a non-profit. These lots are to have in place all the infrastructure, driveways, parking and open space. [Casita] indicates that the land area will be provided and thus the criterion is satisfied. The application materials further explain that the land to be transferred is located within the project and the affordable units will meet the standards set forth in AMC 18.5.8.050.G.5 and G.6 below. The land area is proposed as two of the building pads in the proposed Grand Terrace development as illustrated on the preliminary property boundary map provided. The necessary facilities for the area of the affordable housing units to be transferred will be extended to the building pad area. The common area improvements include the utility infrastructure, sidewalks, curbs, gutters, parking lot improvements, shade trees for the development of the affordable housing units. The building pad areas for the affordable housing are to be the same as the building pad areas of

1 the market rate building areas. The title to the land area for  
2 development of the affordable housing units will be transferred to  
3 the city, an affordable housing development or other appropriate  
4 non-profit organization or public corporation that meets the ORS  
5 456.055 to 456.235 prior to the commencement of the project, and  
6 the land transferred will be deed restricted to comply with the  
7 affordable housing program requirements.” Record 26-27.

8 The city council explained:

9 “[U]ncertainty over whether the developer will provide the required  
10 affordable units themselves or dedicate the required land area to an  
11 affordable housing provider poses some potential complication  
12 \* \* \*. \* \* \* The City Council has included a condition of approval  
13 requiring that the Final Plan submittal make clear how the  
14 affordability requirements are to be addressed, and that if [Casita]  
15 opts to dedicate land to an affordable housing provider, rather than  
16 constructing them themselves or with a provider partner, that the  
17 dedication comply with the requirements of AMC 18.5.8.050.G.2  
18 and include adequate land area to accommodate the required number  
19 of 47 affordable ownership units at 100 percent AMI on the final  
20 plat. A condition has also been included below to require that a deed  
21 restriction be recorded on the property to require that the  
22 affordability requirements for annexation be addressed with any  
23 future development of the site.” Record 30.

24 Condition 7 provides, in part:

25 “[P]rior to final approval and annexation of the property, [Casita]  
26 shall provide:

27 “\* \* \* \* \*

28 “e. A deed restriction agreement that development of the  
29 property shall comply with the affordability requirements for  
30 annexations in AMC 18.5.8.050.G including that where the  
31 required number of affordable units is fractional it shall be  
32 rounded up, and that should [Casita] opt to dedicate land area  
33 to an affordable housing provider, it will require that the  
34 dedication comply with the requirements of AMC

1 18.5.8.050.G.2 and dedicate sufficient land area to  
2 accommodate 47 ownership units affordable at 100 percent  
3 AMI.” Record 33-34.

4 In *Rhyne v. Multnomah County*, we explained:

5 “Where the evidence presented during the first stage approval  
6 proceedings raises questions concerning whether a particular  
7 approval criterion is satisfied, a local government essentially has  
8 three options potentially available. First, it may find that although  
9 the evidence is conflicting, the evidence nevertheless is sufficient to  
10 support a finding that the standard is satisfied or that feasible  
11 solutions to identified problems exist, and impose conditions if  
12 necessary. Second, if the local government determines there is  
13 insufficient evidence to determine the feasibility of compliance with  
14 the standard, it could on that basis deny the application. Third, if the  
15 local government determines that there is insufficient evidence to  
16 determine the feasibility of compliance with the standard, instead of  
17 finding the standard is not met, it may defer a determination  
18 concerning compliance with the standard to the second stage. In  
19 selecting this third option, the local government is not finding all  
20 applicable approval standards are complied with, or that it is feasible  
21 to do so, as part of the first stage approval (as it does under the first  
22 option described above). Therefore, the local government must  
23 assure that the second stage approval process to which the decision  
24 making is deferred provides the statutorily required notice and  
25 hearing, even though the local code may not require such notice and  
26 hearing for second stage decisions in other circumstances.” 23 Or  
27 LUBA 442, 447-48 (1992) (footnotes and citation omitted).

28 In the first subassignment of error, petitioner argues that, by imposing  
29 Condition 7(e), which allows Casita to determine whether it wishes to comply  
30 with AMC 18.5.8.050(G)(1) or (2) at a later time, the city council improperly  
31 deferred findings of compliance with either AMC 18.5.8.050(G)(1) or (2) to a  
32 subsequent proceeding that does not provide an opportunity for notice or public

1 participation, contrary to *Rhyne*. The city responds, initially, that petitioner failed  
2 to preserve this argument below and is precluded from raising it for the first time  
3 at LUBA. ORS 197.835(3); ORS 197.195(3); ORS 197.797(1). The so-called  
4 “raise or waive it” doctrine applies only to quasi-judicial proceedings. *Columbia*  
5 *Pacific v. City of Portland*, 76 Or LUBA 15, 24-25 (2017), *rev’d and rem’d on*  
6 *other grounds*, 289 Or App 739, 412 P3d 258, *rev den*, 363 Or 390 (2018); *DLCD*  
7 *v. Columbia County*, 24 Or LUBA 32, 36, *aff’d*, 117 Or App 207, 843 P2d 996  
8 (1992); *Parmenter v. Wallowa County*, 21 Or LUBA 490, 492 (1991).  
9 Throughout its brief, the city takes the position that the challenged decision is  
10 legislative. We explained above that we assume for purposes of this opinion that  
11 the decision is legislative. Accordingly, we agree with petitioner that it is not  
12 precluded from raising this argument for the first time at LUBA.

13       However, we reject petitioner’s argument on the merits. We do not  
14 understand the city council to have concluded, as petitioner argues, that there is  
15 insufficient evidence to determine Casita’s compliance with either AMC  
16 18.5.8.050(G)(1) or (2). We do not understand Condition 7(e) to be the city  
17 council’s attempt to defer a determination of the feasibility of Casita’s  
18 compliance with either AMC 18.5.8.050(G)(1) or (2) to a second stage. Rather,  
19 we understand the city council to have concluded that “the evidence \* \* \* is  
20 sufficient to support a finding that the standard is satisfied, or that feasible  
21 solutions to identified problems exist” under the first *Rhyne* option. 23 Or LUBA  
22 at 447. In other words, we understand the city council to have concluded that it

1 is feasible to meet either AMC 18.5.8.050(G)(1) or (2) and to leave it to Casita  
2 to choose the path.

3 The first subassignment of error is denied.

4 **B. Second Subassignment of Error**

5 AMC 18.5.8.050(G)(3) provides:

6 “The affordable units shall be comparable in bedroom mix with the  
7 market rate units in the development.

8 “a. The number of bedrooms per dwelling unit in the affordable  
9 units within the residential development shall be in equal  
10 proportion to the number of bedrooms per dwelling unit in the  
11 market rate units within the residential development. This  
12 provision is not intended to require the same floor area in  
13 affordable units as compared to market rate units. The  
14 minimum square footage of each affordable unit shall comply  
15 with the minimum required floor area based as set forth in  
16 Table 18.5.8.050.G.3, or as established by the U.S.  
17 Department of Housing and Urban Development (HUD) for  
18 dwelling units developed under the HOME program.”

19 The minimum floor area in AMC Table 18.5.8.050(G)(3) for studios is 350  
20 square feet, and the minimum floor area in AMC Table 18.5.8.050(G)(3) for one-  
21 bedroom units is 500 square feet.

22 Casita’s application proposes 230 apartments in 10 buildings. “Each of the  
23 buildings are proposed to have twenty, 499-square foot, one-bedroom units and  
24 three, 250 square foot studio units.” Record 1506. The city council found:

25 “The application materials indicate that the required affordable units  
26 are proposed to be developed by the developer or by others, and that  
27 in either case the units will be comparable to the proposed one  
28 bedroom deluxe and micro-studio units. The proportion of

1 affordable units and the unit types and sizes will be similar in  
2 proportion to the market rate units as detailed in Table  
3 18.5.8.050.G.3.” Record 27.

4 In the second subassignment of error, petitioner argues that the city council  
5 improperly construed AMC 18.5.8.050(G)(3) in concluding that Casita’s  
6 application satisfies that provision. Petitioner argues that an application that  
7 proposes affordable units with square footages lower those set forth in AMC  
8 Table 18.5.8.050(G)(3) does not comply with AMC 18.5.8.050(G)(3).

9 The city does not dispute that an application that proposes affordable units  
10 with square footages lower than those set forth in AMC Table 18.5.8.050(G)(3)  
11 does not comply with AMC 18.5.8.050(G)(3). Instead, the city responds that  
12 Casita will be required to demonstrate compliance with AMC 18.5.8.050(G)(3)  
13 at the final plan approval stage under the city’s performance standards option.  
14 The city also argues that Casita “will be required to meet the conditions of  
15 approval included in the final decision of Respondent’s Council with respect to  
16 the minimum square footage required by Respondent’s code.” Respondent’s  
17 Brief 37.

18 We do not understand either of the city’s arguments. Under AMC  
19 18.3.9.040(B)(5), final plan approval requires the city to demonstrate “substantial  
20 conformance with the outline plan.” The city does not identify a provision of the  
21 AMC, or a condition of approval, that requires Casita to demonstrate compliance  
22 with AMC 18.5.8.050(G)(3) at the final plan approval stage, and we are aware of  
23 none.

1           Moreover, the city council did not, as the city argues, conclude that Casita  
2   will be required to demonstrate compliance with AMC 18.5.8.050(G)(3) at the  
3   final plan approval stage. The city council concluded that Casita’s application  
4   satisfied AMC 18.5.8.050(G)(3) because it proposed affordable units with square  
5   footages “comparable” or “similar” to those set forth in AMC Table  
6   18.5.8.050(G)(3). Record 27. Accordingly, we agree with petitioner that the city  
7   council’s interpretation of AMC 18.5.8.050(G)(3) as being satisfied where the  
8   proposed square footages are “comparable” or “similar” to those set forth in  
9   AMC Table 18.5.8.050(G)(3) is inconsistent with the express language of AMC  
10   18.5.8.050(G)(3), which provides that the proposed square footages “shall”  
11   comply with those set forth in AMC Table 18.5.8.050(G)(3). ORS 197.829(1)(a).

12           The second subassignment of error is sustained.

13           The fourth assignment of error is sustained, in part.

14           The city’s decision is remanded.