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

LEONARD EISENBERG, KENT MCLAUGHLIN,
and PAMELA MCLAUGHLIN,
Petitioners,

vs.

CITY OF ASHLAND,
Respondent,

and

BRYAN DEBOER and STEPHANIE DEBOER,
Intervenors-Respondents.

LUBA No. 2025-053

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

William H. Sherlock filed the petition for review and reply brief and argued on behalf of petitioners.

No appearance by City of Ashland.

Christian E. Hearn filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents. Also on the brief was Davis Hearn Anderson & Selvig, PC.

WILSON, Board Member; ZAMUDIO, Board Chair, participated in the decision.

BASSHAM, Board Member, did not participate in the decision.

REMANDED 04/29/2026

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

Opinion by Wilson.

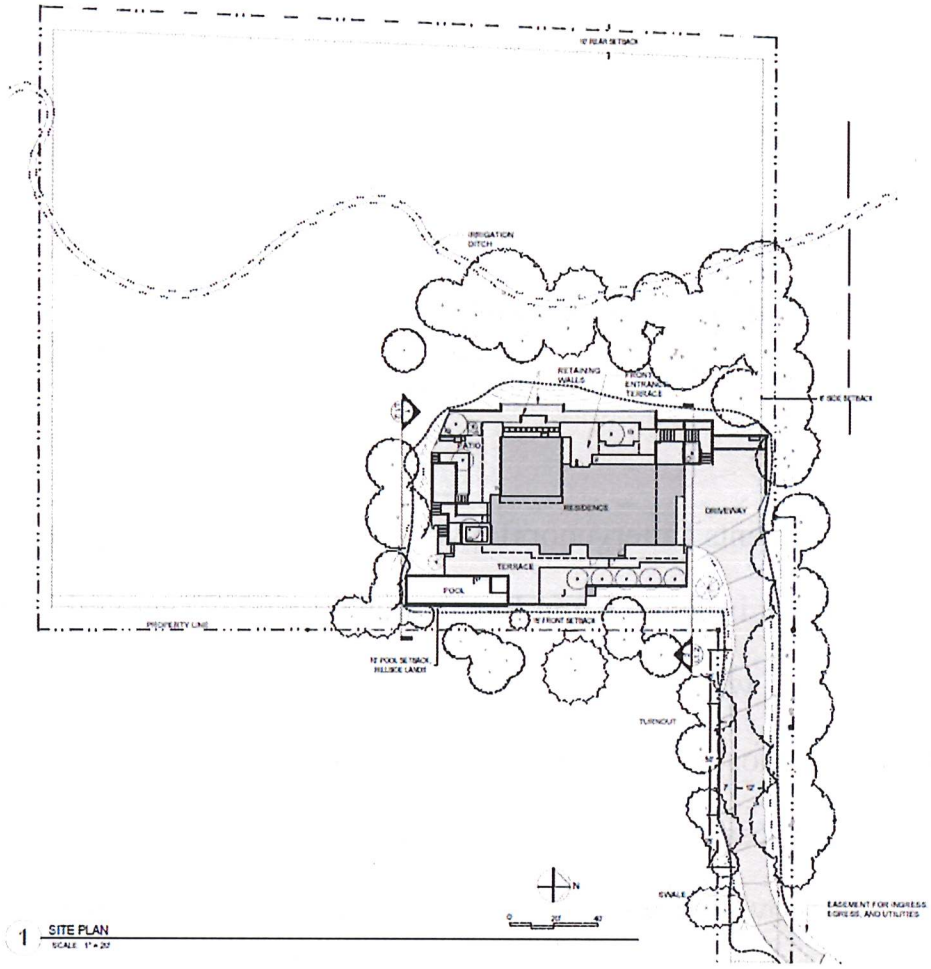
NATURE OF THE DECISION

Petitioners appeal a planning commission decision approving a physical and environmental restraints permit to build a single-family dwelling, variances to exceed the maximum length and maximum grade for driveways, an exception to the development standards for hillside lands, and a tree removal permit.

FACTS

Intervenors-respondents (intervenors) own a 2.18-acre undeveloped lot in the hills of the city. The lot is zoned Rural Residential with a half-acre minimum lot size (RR-.5). The lot was legally created in 1995, and due to the steep topography of the lot the most feasible access is from Granite Street by extending a shared driveway that crosses petitioners' property. The parties' predecessors recorded an easement providing the lot with driveway access to Granite Street via the shared driveway.

Intervenors applied for an environmental constraints permit, variances to allow a driveway that exceeds length and grade standards, an exception to hillside development standards, and a tree removal permit to construct a house. The house would be located on the eastern edge of the property closest to Granite Street in order to minimize the length of the driveway and avoid steep slopes, existing trees, and an irrigation ditch on the remaining parts of the property.



Record 972.[1]

The application was initially approved by the planning commission, and petitioners appealed the decision to the city council. The city council denied the appeal but remanded the decision back to the planning commission to adopt new findings. The planning commission adopted a new decision approving the application. This appeal followed.

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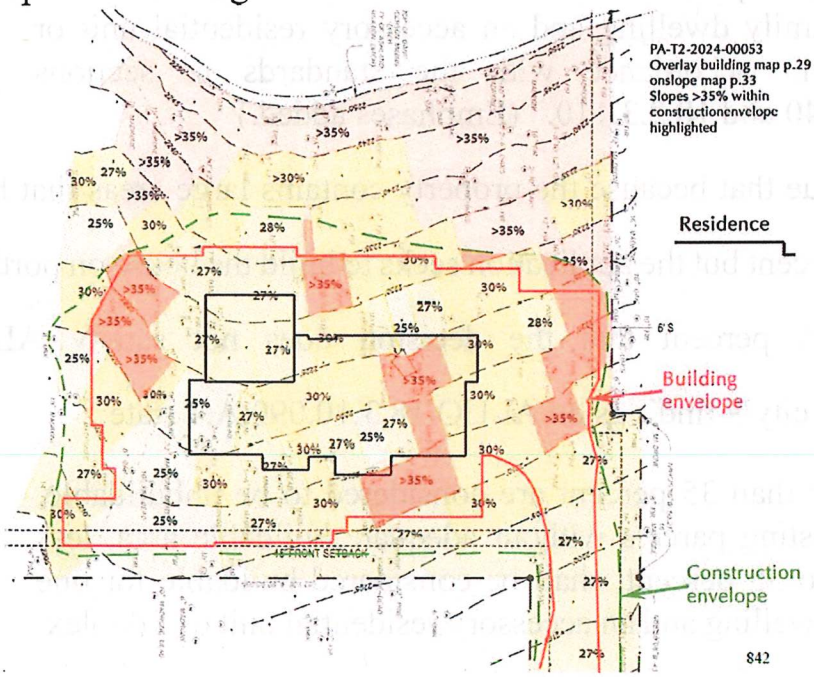
[1] All record citations are to the amended record.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the decision is not supported by adequate findings, misconstrues the applicable law, and is not supported by substantial evidence in determining that the application satisfies the applicable hillside development standards. The property is considered Hillside Lands as defined by the Ashland Land Use Ordinance (ALUO).[2] The image below depicts the topography of the subject property and highlights the slope of the construction envelope for the proposed dwelling.



Record 842.

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[2] Hillside Lands are classified by ALUO 18.3.10.060.B and include: "All areas defined as Hillside Lands on the Physical and Environmental Constraints Hillside Lands and Severe Constraints map and which have a slope of 25 percent or greater." There is no dispute that the subject property qualifies as Hillside Lands.

ALUO 18.3.10.090 establishes special development regulations for the development of Hillside Lands. ALUO 18.3.10.090.A.1 provides, in pertinent part:

> "Buildable Area. All development shall occur on lands defined as having buildable area. *Slopes greater than 35 percent shall be considered unbuildable except as allowed below.* Exceptions may be granted to this requirement only as provided in subsection 18.3.10.090.H.
>
> "a. *Existing parcels without adequate buildable area* less than or equal to 35 percent shall be considered buildable for one single-family dwelling and an accessory residential unit or duplex in accordance with the standards in sections 18.2.3.040 and 18.2.3.110." (Emphases added.)

Petitioners argue that because the property contains large areas that have slopes less than 35 percent but the application seeks to build the house on portions with slopes over 35 percent that the decision does not satisfy ALUO 18.3.10.090.A.1. The city's findings on ALUO 18.3.10.090.A.1 state:

> "Slopes greater than 35 percent are considered to be unbuildable, except that existing parcels without adequate buildable area, less than or equal to 35 percent, shall be considered buildable for one single-family dwelling and an accessory residential unit or a duplex.
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> "The Commission finds that the subject parcel was created prior to the adoption of the hillside regulations and the standard [ALUO] 18.3.10.090.A.1. The Commission finds that the subject property does not have adequate building area of less than or equal to 35 percent when considering the need to minimize broader disturbance by limiting development of the site to an area as near the existing driveway location as possible while also providing for site access and vehicular circulation." Record 37.

Initially, petitioners argue that the findings are inadequate because they fail to explain how the fact that much of the lot is less than or equal to 35 percent slope may allow a dwelling to be built on slopes of 35 percent or more. Findings must: (1) identify the applicable standards; (2) set out the facts relied upon; and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). "[T]o be sufficient for review, findings need only 'establish the factual and legal basis for the particular conclusions drawn in a challenged decision.'" *Niederer v. City of Albany*, 79 Or LUBA 305, 314 (2019) (quoting *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 229-30 (1990)).

The findings identify the applicable standard – ALUO 18.3.10.090.A.1. The findings set out the facts relied upon – that the property does not have adequate buildable area on less than 35 percent slopes when considering the need to minimize broader disturbances. The findings explain how these facts lead to the conclusion that ALUO 18.3.10.090.A.1 is satisfied – limiting development to the area nearest the driveway while providing for site access and circulation limits what can be considered buildable area. The findings are adequate.

Petitioners next argue that the city misconstrued the law by interpreting adequate buildable area to allow consideration of factors such as access and effects on other portions of the property. The parties disagree on the standard of review for the city's interpretation. Petitioners argue that the challenged decision was made by the planning commission so the interpretation is not entitled to

deference. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994) (LUBA does not defer to interpretations of local land use regulations made by those other than the governing body when interpreting the governing body's own land use regulations). Intervenors argue that the governing body – the city council – denied the appeal and only sent the decision back to the planning commission for additional findings. According to intervenors, the city council therefore was the final decision maker and the interpretation is entitled to deference. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (LUBA must defer to a governing body's interpretation if the interpretation is plausible).

While this is an unusual situation, we agree with petitioners that the decision before us was made by the planning commission and is not entitled to *Siporen* deference. Intervenors argue that because the city council directed the planning commission to adopt more detailed findings without reopening the record, the planning commission final decision was merely a "clerical fulfillment" of the city council's interpretations. Intervenors-Respondents' Brief 8. According to intervenors, when a governing body affirms a lower body's interpretation that interpretation is entitled to deference. Intervenors cite cases where boards of commissioners adopted a lower body's decision on appeal as its own. *Gutoski v. Lane County*, 141 Or App 265, 268, 917 P2d 1048, *rev den*, 324 Or 18 (1996) (deference applies where the governing body affirms a decision and expressly agrees with or is silent concerning a lower body's interpretation); *Derry v. Douglas County*, 132 Or App 386, 391-92, 888 P2d 588 (1995) (same). In

Derry, however, the governing body adopted the lower body's decision as its own and no further action occurred. In *Gutoski*, "[a]lthough the governing body made explanatory statements that [the] respondent regard[ed] as endorsing the hearings officer's interpretation" of the relevant land use policy, it ultimately declined to review the hearings officer's decision. 141 Or App at 267. In those cases, the decisions were not remanded back to the lower body for further proceedings. Furthermore, in the present case, intervenors do not point to any express interpretations made by the city council in its decision. The interpretation at issue in the first assignment of error was made by the planning commission. Therefore, *Siporen* deference does not apply.

Under these circumstances, the appropriate standard of review is whether the interpretation is legally correct, applying the general rules of statutory construction set out at ORS 174.010[3] and in cases such as *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

Under ALUO 18.3.10.090.A.1, all development must occur on lands defined as having buildable area. Slopes greater than 35 percent are generally

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[3] ORS 174.010 states:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

considered unbuildable. Existing parcels – such as the subject property – without adequate buildable area, in other words those parcels that would otherwise not have buildable area because of slopes greater than 35 percent, are considered buildable for a single-family dwelling. The planning commission interpreted "adequate buildable area" to mean not just slopes of less than 35 percent anywhere on the property, but slopes of less than 35 percent considering the need to minimize broader disturbances to the property. In this case, the need to minimize broader disturbances to the property include limiting development of the site to an area near the existing driveway and allowing access without disturbing other heavily sloped areas of the property.

Petitioners argue that there are areas of less than 35 slopes so the property is not without "adequate buildable area."[4] According to petitioners, by considering broader disturbances to the property, the planning commission's interpretation violates ORS 174.010 by inserting language into ALUO 18.3.10.090.A.1 that is not in the ordinance. "Adequate buildable area" is an inherently subjective standard. We agree with intervenors that in determining whether there is "adequate buildable area" the planning commission's interpretation is consistent with ALUO 18.3.10.090.A.1 in considering factors

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[4] Petitioners also argue that the planning commission's interpretation is inconsistent because the decision discusses "adequate building area" instead of "adequate buildable area." Petition for Review 13 (citing Record 7). The decision is clear that it is discussing the standard of ALUO 18.3.10.090.A.1 and that the reference to "adequate building area" is the same as "adequate buildable area."

other than just whether it is possible to site a house on less than 35 percent slopes anywhere on the property. As the ALUO does not define "adequate buildable area" it is likely that any interpretation will "insert" language to one degree or another. *See Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261, 269 (2015) ("When trying to determine the intended meaning of an ambiguous land use regulation, on some level the interpreter can almost always be accused of inserting what has been omitted."). The planning commission's interpretation is not inconsistent with ALUO 18.3.10.090.A.1 in considering that locating the dwelling on another portion of the property would result in significantly more cuts and fills for construction and that the proposed location would preserve a substantial area in a natural state.

Finally, petitioners argue that the city's decision is not supported by substantial evidence. Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgement for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed, and determine whether, based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 725 P2d 262 (1988).

Petitioners' substantial evidence argument is based on the premise that if there are slopes anywhere on the property that are less than 35 percent then there is not substantial evidence to support the conclusion that the property is without

adequate buildable area. As explained earlier, however, we agree with the city and intervenors that the city may consider other factors in determining whether there is "adequate" buildable area. Given that the city may consider such additional factors, a reasonable person could conclude that there is not adequate buildable area.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the decision is not supported by adequate findings, misconstrues the applicable law, and is not supported by substantial evidence in determining that the application satisfies the applicable development standards regarding driveways.

A. Driveway Grade

Driveways serving a single-family dwelling on a flag lot, such as the subject property, are required to conform to the design requirements of ALUO 18.5.3.060.[5] The design standards include restrictions on maximum grade for flag drives. ALUO 18.5.3.060.F provides:

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[5] ALUO 18.4 contains the site development and design standards and ALUO 18.4.3.080.D provides, in pertinent part:

> "Driveways and Turn-around Design. Driveways and turn-arounds providing access to parking areas shall conform to the following provisions:
>
> > "1. A driveway for a single-family dwelling or duplex shall be a minimum of nine feet in width except that

> "Flag drives shall not exceed a maximum grade of 15 percent. *Variances may be granted for flag drives for grades in excess of 15 percent but no greater than 18 percent*; provided that the cumulative length of such variances across multiple sections of the flag drive does not exceed 200 feet. Such variances shall be required to meet all of the criteria for approval in chapter 18.5.5, Variances." (Emphasis added.)

Petitioners explain that ALUO 18.5.3.060.F generally restricts the grade for flag drives to 15 percent, under certain circumstances allows a variance to grades of 18 percent, but categorically prohibits grades of over 18 percent. According to petitioners, the city recognized that the average grade of the proposed drive is significantly greater than 18 percent – 24 percent – but nonetheless granted the variance. The city's findings state:

> "The Planning Commission finds that the proposed driveway is via an existing shared access easement to utilize an existing long, steep, partially paved private driveway. The proposed driveway extension to serve the subject property is approximately 197 feet in total length from the terminus of the existing driveway and has an average slope of approximately 24 percent.
>
> "The Planning Commission finds that the lot configuration, site topography, existing driveway grade and existing natural features are unique circumstances that prevent meeting the standard. The existing driveway serving the lot and the adjacent properties to the east exceeds a 15 percent grade and is a legal, non-conforming situation. The average existing property grade before driveway construction is 27 percent, and there is no feasible area to mitigate

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> driveways over 50 feet in length or serving a flag lot shall meet the width and design requirements of section 18.5.3.060. Accessory residential units are exempt from the requirements of this subsection."

> the driveway grade with switchbacks, given the narrow 33.04-width of the flagpole portion of the lot configuration and the location of the access easement to the property. The Commission finds that no alternative driveway access is available." Record 10.

Initially, petitioners argue the findings are inadequate. The findings identify the applicable standard – ALUO 18.5.3.060.F. The findings set out the facts relied upon – that there are unique circumstances on the property, the average grade is 24 percent, there is no way feasible way to mitigate the grade, and that no alternative driveway access is available.[6] The findings explain how those facts lead to the conclusion that the standard is met – given the unique circumstances on the property no alternative driveway access is available. The findings establish the factual and legal basis for the particular conclusions drawn in a challenged decision. *Niederer*, 79 Or LUBA at 314. The findings are adequate.

Petitioners argue the city misconstrues the applicable law by approving a variance to allow a flag driveway grade of at least 24 percent when ALUO 18.5.3.060.F does not allow variances for grades of over 18 percent. According to petitioners, while a variance can increase the allowable grade for a flag driveway to 18 percent, there is nothing in the ALUO that would allow for a grade of 24 percent. Intervenors initially stated that the grade is actually 15.23 percent. Intervenors-Respondents' Brief 17. As petitioners explain in their reply brief,

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[6] The decision sometimes states that the grade is 24 percent and sometimes states it is 27 percent. In any event, the grade is over 18 percent.

however, and as intervenors acknowledged at oral argument, the 15.23 percent grade measurement came from a mistake in the March 11, 2025 staff report. Record 870. The error was subsequently corrected by staff. Record 755, 805 ("on page 4 of the Staff Report '15.23-percent' needs to be corrected to '23-percent.'").

There is now no dispute that the grade of the proposed flag driveway is significantly more than 18 percent. The plain terms of ALUO 18.5.3.060.F do not allow a variance of over 18 percent grade. Intervenors do not offer any argument as to how the city may approve a variance of over 18 percent grade when ALUO 18.5.3.060.F specifically limits variances to no more than 18 percent. Intervenors also do not offer any alternative theory for how the city could approve a grade of over 18 percent for the driveway.[7] The city's only justification for granting the variance is that "no alternative driveway is available." Record 10. The city has not identified and intervenors have not cited any legal exception

[7] The petition for review addresses arguments apparently made by staff that a greater than 18 percent grade could be approved as a Type II variance pursuant to ALUO 18.5.3.060 or that the limitations can only be applied to Type I variances. Petition for Review 22-23. Intervenors-respondents' brief does not advance this argument, and even if it did, we agree with petitioners that staff's position is inconsistent with ALUO 18.5.3.060.

under which the city must or may allow a driveway over 18 percent grade based on necessity. We agree with petitioners that the city misconstrued the law.[8]

The first subassignment of error is sustained.

B. Driveway Length

ALUO 18.5.3.060.F only allows variances of up to 18 percent grade for flag driveways "provided that the cumulative length of such variances across multiple sections of the flag drive does not exceed 200 feet." Here, all sections of the driveway exceed 18 percent, so the overall length of the driveway may not exceed 200 feet. The decision states that the proposed flag driveway is 197 feet in length, but does not explain how that figure was determined. Record 10. Petitioners argue that the city's findings that the proposed flag drive is less than 200 feet are inadequate and not supported by substantial evidence. According to petitioners, the proposed flag driveway is 223 feet in length.

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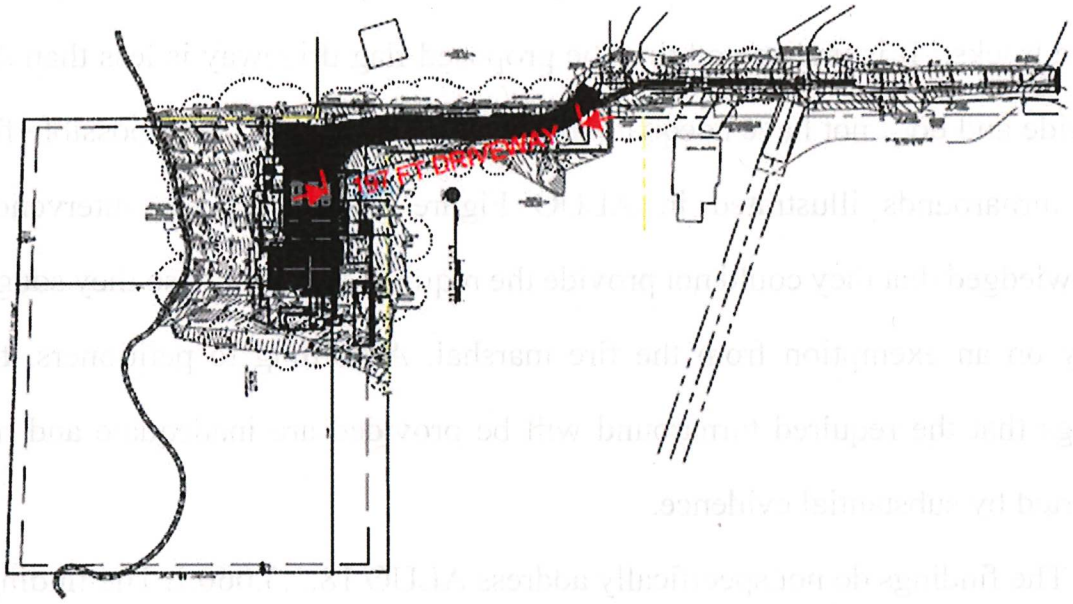
[8] As discussed under the first assignment of error, the interpretations of the planning commission are not entitled to *Siporen* deference. Even under *Siporen* deference, however, the city's interpretation that a variance can be granted for grades of over 18 percent is inconsistent with the express language of the ordinance and would result in the same result.

Further, as we find that the city misconstrued the applicable law, we need not consider whether the findings in support of that interpretation are supported by substantial evidence.

The 197-foot figure is apparently based on a straight-line measurement from the beginning of the driveway to the end of the driveway in an engineering site plan for the driveway.



Record 966.

The 223-foot measurement is based on intervenors' own testimony. Record 415, 449. The planning commission findings do not explain how it arrived at the 197-foot driveway length determination. The planning commission incorporates by reference materials that provide conflicting findings and evidence – some of which support the 197-foot measurement and some that support the 223-foot measurement. While measuring the distance as a straight line rather than following the path of the driveway might be consistent with ALUO 18.5.3.060.F, we agree with petitioners that the city's findings are inadequate to explain how it reached that conclusion.

Finally, petitioners argue that the proposed flag driveway does not provide the required fire truck turnaround. ALUO 18.5.3.060.J provides that when required by the fire code, flag drives longer than 150 feet must have a turnaround for fire trucks.[9] It is undisputed that the proposed flag driveway is less than 40-feet wide and does not have adequate area to implement any of the possible fire truck turnarounds illustrated in ALUO Figure 18.4.6.040.G.5. Intervenors acknowledged that they could not provide the required turnaround so they sought to rely on an exemption from the fire marshal. According to petitioners, the findings that the required turnaround will be provided are inadequate and not supported by substantial evidence.

The findings do not specifically address ALUO 18.5.3.060.J. The findings state:

> "The Commission further notes that the proposal has been reviewed by the Fire Marshal, and * * * the driveway grade and the final driveway design will be reviewed by the Fire Marshal for compliance with applicable fire codes. To ensure compliance with the requirements for * * * driveway grade and turnout dimensions and location * * * the Commission has included conditions of

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[9] ALUO 18.5.3.060.J provides:

> "When required by the Oregon Fire Code, flag drives greater than 150 feet in length shall provide turnaround (see Figure 18.4.6.040.G.5). The Staff Advisor, in coordination with the Fire Code Official, may extend the distance of the turnaround requirement up to a maximum of 250 feet in length as allowed by Oregon Fire Code access exemptions."

approval * * * addressing these criteria.

"* * * * *

"The Commission finds that the City of Ashland Fire Marshall has reviewed the proposed driveway grades, turnout locations, and hydrant access and has indicated that the proposal with the fire suppression system provides adequate fire apparatus access and does not substantially increase fire-fighting response times or emergency vehicle access to adjacent properties." Record 10-12.

The decision states that the fire marshal reviewed and approved the proposed driveway grades and turnout locations. Intervenors argue that the "fire-apparatus access was reviewed by the City's Fire Marsal and acceptable configuration was identified," and that "the Fire Marshal advised that a turnout designed to Jackson County standards could feasibly satisfy the access requirement in lieu of a traditional turnaround." Intervenors-Respondents' Brief 18-19. The brief cites Record 919 for this proposition. Record 919, however, is merely an email from the fire marshal to one of intervenors' representatives stating, in pertinent part:

"It was good to meet you today. As a recap of our discussion, for an alternate turnaround I'll consider a turnout designed to Jackson County standards."

As discussed earlier, adequate findings must: (1) identify the applicable standards; (2) set out the facts relied upon; and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller*, 23 Or LUBA at 556. The planning commission findings do not identify the applicable standard and neither does the email from the fire marshal. Although intervenors do not identify

anywhere where the standard is addressed, petitioners identify a March 18, 2025 memorandum from the planning manager responding to public comments that does address the standard. The planning commission incorporated that memorandum into its findings. The memorandum first states the following public comment:

> "The applicant does not provide an emergency vehicle turnaround, as required by ALUO 18.5.3.060.J, and there is no exception provided from the Staff Advisor and Fire Code Official. This, compounded with the very steep driveway, will likely interfere with emergency vehicle response, particularly during fire season." Record 699.

In response to this comment, the planning manager states:

> "[ALUO] 18.5.3.060.J requires a turnaround where required by Oregon Fire Code, with the requirement to be determined in coordination between the Staff Advisor and the Fire Code Official. In this instance, the applicant has provided an e-mail from Ashland Deputy Chief & Fire Marshal Mark Shay dated December 5, 2024 which indicates that he would consider a turnout designed to Jackson County standards to meet the Fire Code Requirement. Such a turnout is identified in the record." *Id.*

The incorporated memorandum identifies the applicable standard – ALUO 18.5.3.060.J and sets out the facts relied upon – the email from the fire marshal. However, neither the incorporated memorandum, the email from the fire marshal, nor the findings explain how that fact leads to the conclusion that the standard is met. ALUO 18.5.3.060.J requires that the proposed driveway have a turnaround or an exemption must be obtained from the staff advisor in coordination with the fire marshal. The proposed driveway does not provide a turnaround that complies

with city requirements and no exemption has been obtained from the staff advisor and fire marshal. The fire marshal's offer to "consider" an alternate turnaround is not the same thing as granting an exemption. Therefore, the findings do not explain how ALUO 18.5.3.060.J is satisfied and are inadequate. We also agree with petitioners that, even if the incorporated documents cumulatively are adequate to establish that the planning commission concluded that ALUO 18.5.3.060.J is satisfied, such a finding is not supported by substantial evidence because the fire marshal's email does not approve an alternative turnaround. Finally, although the city imposed a condition of approval to comply with fire standards, there are no findings that it is feasible to comply with the required turnaround standard.

The second subassignment of error is sustained.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city made inadequate findings, misconstrued the law, and made a decision not supported by substantial evidence in finding that the hillside grading and erosion control provisions, and the tree conservation, protection, and removal provisions are satisfied.

A. Terracing

ALUO 18.3.10.090.B.8.a provides:

> "No terracing shall be allowed except for the purposes of developing a level building pad and for providing vehicular access to the pad."

The decision approves terracing to the south of the proposed dwelling to establish a multi-layer patio, with an upper, middle, and lower terrace. The decision approves a terrace to the east of the dwelling for a pool, spa, pool house, and sunbathing area. The decision also approves a terrace to the west of the dwelling for planters and a waterfall. *See* Record 972-75.

Petitioners argue the city's findings regarding ALUO 18.3.10.090.B.8.a are inadequate. The city's findings state:

> "The Commission finds that the site grading has been proposed, considering the factors found in [ALUO] 18.3.10.090.B.8. The area of the proposed patio, pool, and pool deck is within an area of excavation for the construction of the residence that will provide a contractor staging area during the construction of the residence." Record 8.

As discussed earlier, adequate findings must: (1) identify the applicable standards; (2) set out the facts relied upon; and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller*, 23 Or LUBA at 556. The city's findings marginally set out the applicable standard – ALUO 18.3.10.090.B.8.[10] The city's findings marginally set out the facts relied upon – the area for the proposed patio, pool, and pool deck is within a proposed staging area.[11] The city's findings, however, do not explain how these facts lead to the

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[10] As petitioners point out, however, the findings do not specifically reference ALUO 18.3.10.090.B.8.a regarding terracing.

[11] The findings, however, do not discuss the proposed terraced areas for the waterfall and planters.

conclusion that the standard is satisfied. The findings do not discuss the prohibition on terracing or explain why a staging area is sufficient to allow additional terracing. Furthermore, the findings do not address petitioners' arguments raised below that much of the proposed staging area is not necessary to develop a level building pad – even if that were an acceptable basis to allow additional terracing. Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). Therefore, the city's findings regarding ALUO 18.3.10.090.B.8.a are inadequate.[12]

This first subassignment of error is sustained.

B. Swimming Pool and Spa

ALUO 18.3.10.090.B.8.c provides:

> "Building pads should be of a minimum size necessary to accommodate the structure and a reasonable amount of yard space. Pads for tennis courts, swimming pools and large lawns are discouraged. As much of the remaining lot area as possible shall be kept in the natural state of the original slope."

The footprint for the proposed residence and garage is 3440 square feet, while the building pad includes a significantly larger area for the swimming pool,

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[12] As the city's findings are inadequate, we do not address petitioners' arguments regarding misconstruction of the law or lack of substantial evidence.

pool house, and spa. Petitioners argue that the city's findings regarding ALUO 18.3.10.090.B.8.c are inadequate. The city's findings state:

> "The Commission finds that the pool is a lap pool, proposed in an area where the majority of the existing grade is slopes of less than 25 percent. The Commission finds that pools are discouraged but not prohibited. The Commission finds that the proposed location of the proposed building pad, the patio area, and the pool are in an area of least slope, closest to the driveway access location, with as much of the remaining lot area as possible retained in the natural state of the original slope." Record 8.

There are essentially three prongs to ALUO 18.3.10.090.B.8.c: (1) minimum building pad size necessary for structure and yard; (2) swimming pools are discouraged; and (3) keep as much of remaining lot area in a natural state. The city's findings address the third prong adequately, but petitioners do not challenge the decision under that prong. The city's findings quote the second prong that swimming pools are discouraged but make no attempt to explain why a swimming pool is allowed in this case even though they are discouraged. Merely stating that swimming pools are not prohibited does not explain why allowing a swimming pool is permitted when they are discouraged. The city's findings also make no attempt to address the first prong and explain why the building pad size is the minimum necessary for the structure and yard. The city's findings may identify the applicable standard and set out some facts, but they do not explain how those facts lead to the conclusion that the standard is met.

Therefore, the city's findings regarding ALUO 18.3.10.090.B.8.c are inadequate.[13]

This second subassignment of error is sustained.

C. Tree Preservation

ALUO 18.3.10.090.D.3.b provides:

> "Building envelopes shall be located and sized to preserve the maximum number of trees on site while recognizing and following the general fuel modification standards if the development is located in Wildfire Lands."

The building envelope is defined as that area "within which a permitted building can be placed." ALUO 18.6.1.030. Petitioners argue that the city violated this standard by including oversized terraces, a swimming pool, a spa, and an outdoor kitchen that almost double the size of the building envelope resulting in the proposed removal of more than 40 of the 74 trees located within or adjacent to the footprint for the improvements. The city's decision does not address ALUO 18.3.10.090.D.3.b. The only thing that addresses this provision is the incorporated staff response to public comments, which states:

> "As noted elsewhere, the proposed building envelope is as near the driveway access as possible which minimizes disturbances to the site and avoids additional site disturbance and tree removal which would be required if the driveway were extended to construct a building elsewhere, further up the slope." Record 694.

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[13] As the city's findings are inadequate, we do not address petitioners' arguments regarding misconstruction of the law or lack of substantial evidence.

The city's incorporated findings identify the applicable standard – ALUO 18.3.10.090.D.3.b. The city's findings set out the facts relied upon – that the location of the building envelope minimizes disturbances to the rest of the site. The city's findings, however, do not explain how those facts lead to the conclusion that the standard is met. As petitioners point out, ALUO 18.3.10.090.D.3.b requires that the building envelope not only be "located" to preserve the maximum number of trees but also that it be "sized" to preserve the maximum number of trees. The findings do not address, let alone explain, how the proposed building envelope is sized to preserve the maximum number of trees. Therefore, the city's findings regarding ALUO 18.3.10.090.D.3.b are inadequate.

The third subassignment of error is sustained.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the city made inadequate findings, misconstrued the applicable law, and made a decision not supported by substantial evidence in finding that the application satisfies the approval criteria for a variance to the flag driveway grade and length standards. As we have sustained petitioners' second assignment error that a variance is not available for a proposed driveway grade of over 18 percent, it would serve no purpose to address petitioners' argument regarding the approval criteria for a variance that cannot be obtained.

We do not reach the fourth assignment of error.

DISPOSITION

Petitioners argue that because intervenors seek a variance for a grade of over 18 percent for the flag driveway and variances for more than 18 percent grade are not possible, intervenors cannot provide access to the proposed dwelling as a matter of law. According to petitioners, because access cannot be provided as a matter of law, the decision should be reversed. OAR 661-010-0071(1)(c). While intervenors may be precluded from obtaining a variance for the proposed driveway, we cannot say as a matter of law that there is no other way to provide to access to the proposed dwelling. Therefore, remand is the proper disposition. OAR 661-010-0071(2)(d).

The city's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2025-053 on April 29, 2026, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 29th day of April, 2026.

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