

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

JULIE HULME, ROB HANDY, H.M.)	
SUSTAITA,)	
)	
Petitioners,)	
)	LUBA No. 2018-118
vs.)	
)	
CITY OF EUGENE)	
)	
Respondent,)	
)	
and)	
)	
HOMEBUILDERS ASSOCIATION OF)	
LANE COUNTY and LOMBARD)	
APARTMENTS, LLC,)	
)	
Respondents-Intervenors)	

Sean T. Malone, OSB # 084060
Attorney at Law
259 E. 5th Ave, Ste 200-C
Eugene OR 97401
(303) 859-0403
seanmalone8@hotmail.com
*Counsel for Petitioners Julie Hulme,
Rob Handy, and H.M. Sustaita*

Bill Kloos, OSB # 811400
Law Office of Bill Kloos
375 W. 4th Ave, Ste 204
Eugene OR 97401
(541) 343-8596
billkloos@landuseoregon.com
*Counsel for Homebuilders Assoc. of
Lane County*

Lauren Sommers, OSB # 065989
City of Eugene Attorney's Office
125 E 8th Ave, 2nd Floor
Eugene OR 97401
(541) 682-8447
Lauren.a.sommers@ci.eugene.or.us
Counsel for Respondent City of Eugene

Mike Reeder
Law Office of Mike Reeder
375 W 4th Ave, Ste 205
Eugene OR 97401
(458) 210-2845
mreeder@oregonlanduse.com
Counsel for Lombard Apartments LLC

TABLE OF CONTENTS

I. <u>PETITIONERS' STANDING TO APPEAL</u>	1
II. <u>STATEMENT OF THE CASE</u>	1
A. <u>NATURE OF THE LAND USE DECISION AND RELIEF SOUGHT</u>	1
B. <u>SUMMARY OF ARGUMENTS</u>	2
C. <u>SUMMARY OF MATERIAL FACTS</u>	3
1. <u>The subject property and application</u>	3
2. <u>Opposition to the application</u>	4
III. <u>JURISDICTION</u>	5
IV. <u>ARGUMENT</u>	6
A. <u>FIRST ASSIGNMENT OF ERROR</u> – The Planning Commission misconstrued the EC 9.2751 requirements for calculating the subject property's “net density.”.....	6
1. <u>Preservation of assignment of error</u>	6
2. <u>Standard of review</u>	6
3. <u>Argument</u> –	7
a. <u>Legal Background</u>	7
b. <u>Petitioner's Argument</u>	8
c. <u>The Hearings Official's Decision</u>	9
d. <u>The Planning Commission's decision</u>	10
e. <u>Analysis</u>	11
B. <u>SECOND ASSIGNMENT OF ERROR</u> – The Planning Commission misconstrued and made findings not based on substantial evidence regarding the City's implementation of the Willamette Greenway criteria at EC 9.8815.	17
1. <u>Preservation of assignment of error</u>	17
2. <u>Standard of review</u>	17
3. <u>Argument</u>	18

1	a. <u>The Planning Commission misconstrued and made findings not based on</u>	
2	<u>substantial evidence regarding EC 9.8815(1)</u>	18
3	i. <u>Hearings Official’s Findings</u>	19
4	ii. <u>Planning Commission’s Findings</u>	20
5	iii. <u>Analysis</u>	21
6	b. <u>The Planning Commission misconstrued and made findings not based on</u>	
7	<u>substantial evidence regarding EC 9.8815(2)</u>	22
8	i. <u>Hearings Official’s Findings</u>	22
9	ii. <u>Planning Commission’s Findings</u>	23
10	iii. <u>Analysis</u>	24
11	c. <u>The Planning Commission misconstrued applicable law and made</u>	
12	<u>inadequate findings not based on substantial evidence regarding EC</u>	
13	<u>9.8815(3)</u>	26
14	i. <u>Hearings Official’s Findings</u>	26
15	ii. <u>Planning Commission’s Findings</u>	27
16	iii. <u>Analysis</u>	27
17	C. <u>THIRD ASSIGNMENT OF ERROR</u> – The Planning Commission	
18	misconstrued applicable law and made findings not based on substantial	
19	evidence regarding EC 9.8445(4)(f)(2), EC 7.420(3)(j), and EC 9.6780.....	29
20	1. <u>Preservation of assignment of error</u>	29
21	2. <u>Standard of review</u>	29
22	3. <u>Argument</u>	30
23	a. <u>The Hearings Official’s Decision</u>	30
24	b. <u>The Planning Commission’s Decision</u>	31
25	c. <u>Analysis</u>	35
26	E. <u>FIFTH ASSIGNMENT OF ERROR</u> – The Planning Commission	
27	misconstrued applicable law and made findings not based on substantial	
28	evidence regarding EC 9.6815(2)(f).	36
29	1. <u>Preservation of assignment of error</u>	36

2. <u>Standard of review</u>	37
3. <u>Argument</u>	38
a. <u>The Hearings Official’s Decision</u>	38
b. <u>The Planning Commission’s Decision</u>	39
c. <u>Analysis</u>	40
V. <u>CONCLUSION</u>	44

TABLE OF AUTHORITIES

CASES

<i>Angius v. Washington County</i> ,	
35 Or LUBA 462, 464-66 (1999)	44
<i>Heiller v. Josephine County</i> ,	
23 Or LUBA 551, 556 (1992).....	18, 38
<i>Heitsch v. City of Salem</i> ,	
65 Or LUBA 187 (2012).....	6, 17, 29, 33, 37
<i>Norwell v. Portland Metropolitan Area Local Government Boundary Com.</i> ,	
43 Or App 849, 853 (1979).....	18, 38
<i>PGE v. Bureau of Labor and Industries</i> ,	
317 Or 606, 859 P2d 1143, 1146 (1993), <i>modified by State v. Gaines</i> , 346 Or	
160, 171-172, 206 P3d 1042 (2009)	6, 17, 37
<i>Seitz v. City of Ashland</i> ,	
24 Or LUBA 311, 314 (1992).....	44
<i>Siporen v. City of Medford</i> ,	
349 Or 247, 266 (2010).....	6, 17, 29, 33, 37
<i>Waverly Landing Condo. Owners’ Assoc. v. City of Portland</i> ,	
61 Or LUBA 448 (2010).....	6, 17, 29, 33, 37
<i>Younger v. Portland</i> ,	
305 Or 346 (1988).....	18, 33, 37

STATUTES

ORS 174.010	12
ORS 197.015(10)(a)(A)	5
ORS 197.825(1)	5
ORS 197.829(2)	6, 17, 29, 33, 37
ORS 197.830(2)	1
ORS 197.835(8)	7, 18, 37
ORS 197.835(9)(a)(C)	7, 17, 18, 29, 33, 37, 38

OTHER AUTHORITIES

EC 9.5500(11)(b)(2).....	16
EC 7.420.....	30
EC 7.420(3)(j)	29, 32
EC 9.0500.....	7, 14, 32
EC 9.2750.....	9
EC 9.2751.....	6, 7, 10
EC 9.2751(1)(b)	11, 12, 13
EC 9.2751(1)(c)	10, 11, 12, 13
EC 9.4290.....	9
EC 9.4290(2)	35
EC 9.5500(11)(b)	8
EC 9.5500(6)	33
EC 9.5500(6)(a)	33, 34, 36
EC 9.6780.....	29, 30, 32
EC 9.6815(2)(f)	36
EC 9.8030(8)	35
EC 9.8030(8)(a)	33, 34, 36
EC 9.8030(8)(e)	10
EC 9.8445(4)(f)(2)	29, 30, 32
EC 9.8670.....	31
EC 9.8812(2)	23
EC 9.8815.....	17, 19, 25
EC 9.8815(1)	18, 19
EC 9.8815(2)	23

1 EC 9.8815(3)..... 26, 28

2 EC 9.8815(5).....20

3

1 I. PETITIONERS' STANDING TO APPEAL

2 Petitioners Julie Hulme, Rob Handy, and H.M. Sustaita (Petitioners)
3 submitted written comments of their own and appeared before the local
4 government at the Hearings Official public hearing and the Planning Commission
5 hearing. *See* Record (R) 71-72 (Hulme), 74-75 (Malone), 128 (Sustaita), 171
6 (Hulme), 278-283 (appeal to Planning Commission), 372-374(Malone), 386
7 (Hulme), 480-482 (Malone), 711 (Hulme), 737-740 (Malone), 877-879 (Sustaita).
8 Therefore, Petitioners have standing to appeal this land use decision under ORS
9 197.830(2).

10 II. STATEMENT OF THE CASE

11 A. NATURE OF THE LAND USE DECISION AND RELIEF SOUGHT

12 Petitioners seek review of the final order of the City of Eugene Planning
13 Commission on the appeal of the Hearings Official's tentative approval for
14 Lombard Apartments Willamette Greenway Permit, Site Review, and Adjustment
15 Review (WG18-3/SR 18-3/ARA 18-8) to construct 94 market-rate residential
16 apartment units. R 18 (Appx 1). The minimum density for the subject property
17 would be 10 units per acre or 33 units total. R 221. The maximum density for the
18 subject property would be 28 units per acre or 94 units total. *Id.* Here, the
19 applicant is seeking the maximum density possible on the subject site.

1 The application was deemed complete on May 22, 2018. R 1087. A public
2 hearing was held on June 27, 2018, before the Hearings Official. The Hearings
3 Official approved the application on August 7, 2018. R 56 (Appx 39). The
4 Planning Commission held a hearing on September 5, 2018, and modified the
5 Hearings Official's decision, and affirmed the approval of the application on
6 September 6, 2018. R 19 (Appx 2). Petitioners seek reversal or remand of the
7 challenged decision.

8 B. SUMMARY OF ARGUMENTS

9 1. FIRST ASSIGNMENT OF ERROR

10 The Planning Commission misconstrued the Eugene Code 9.2751
11 requirements for calculating the subject property's "net density." Based on the text
12 of the provisions, certain components of the development were (1) not in actual
13 residential use or (2) not reserved for the exclusive use of the residents. Next,
14 additional portions of the development's internal circulation must be excluded
15 because they fall within the definition of "street."

16 2. SECOND ASSIGNMENT OF ERROR

17 The Planning Commission misconstrued and made inadequate findings not
18 based on substantial evidence regarding EC 9.8815(1). The Planning Commission
19 misconstrued and made findings not based on substantial evidence regarding EC

1 9.8815(2). The Planning Commission misconstrued applicable law and made
2 inadequate findings not based on substantial evidence regarding EC 9.8815(3).

3 3. THIRD ASSIGNMENT OF ERROR

4 The Planning Commission misconstrued applicable law and made
5 inadequate findings not based on substantial evidence regarding EC
6 9.8445(4)(f)(2), 7.420(3)(j), and 9.6780.

7 4. FOURTH ASSIGNMENT OF ERROR

8 The Planning Commission misconstrued applicable law and made findings
9 not based on substantial evidence regarding the adjustment pursuant to EC
10 9.550(6)(a) and EC 9.8030(8)(a).

11 5. FIFTH ASSIGNMENT OF ERROR

12 The Planning Commission misconstrued applicable law and made
13 inadequate findings not based on substantial evidence regarding EC 9.6815(2)(f).

14 C. SUMMARY OF MATERIAL FACTS

15 1. The subject property and application

16 The subject property is an approximately 3.59-acre, undeveloped site in an
17 area of residential uses located between River Road and the Willamette River. R
18 18 (Appx 1); R 648 (vicinity map); R 649 (site plan). The Site is located at the
19 northern terminus of Lombard Street, with frontage along River Road to the west.
20 R 18 (Appx 1). The entire site is zoned R-2 Medium-Density Residential with /ND

1 Nodal Development overlay. The southern portion of the site has a /SR Site
2 Review overlay. *Id.* The entire property is within the bounds of the Willamette
3 Greenway. *Id.* The applicant seeks to construct 94 apartments in four buildings, as
4 well as a leasing office, maintenance building, and associated site improvements.
5 *Id.* The main entrance would be from River Road. At the main entrance and
6 fronting River Road, the development contains a leasing office and a maintenance
7 shed. *See* R 221 (architectural site plan with leasing office and maintenance shed
8 located to the west, fronting River Road). The proposal would also extend
9 Lombard Street to the northern boundary of the subject property.

10 The property is owned by Homes for Good, which was previously was
11 known as Housing and Community Services of Lane County. R 1199. Homes for
12 good acquired the property “for the purpose of building low income housing
13 there.” R 494. Despite the purpose of Homes for Good, the applicant is Lombard
14 Apartments, LLC, which proposes to construct 94 dwelling units at market rate.

15 2. Opposition to the application

16 The application was met with overwhelming opposition from the small,
17 affected neighborhood, as well as from throughout the City and beyond. *See* R
18 1010-1059; 766-867; 126-203. Much of the neighborhood testimony was not
19 opposed to development but believed that Homes for Good failed to actually
20 provide low-income or affordable housing, which was the intended purpose when

1 the Lane County sold the property to Homes for Good. *See* R 128 (“I can imagine
2 that there is a need for market rate housing in some markets, but surely you can see
3 that the 8000 empty market rate apartments here in Eugene (according to our local
4 Housing Authority in a report to the city council in December of 2017) does not
5 make Eugene a candidate for more of the same.”); *id.* (“What Eugene is in
6 desperate need of is 15,000 reasonably-priced low-cost housing units.... Building
7 94 market rate units will do nothing for the 15,000 people n need of the low-cost
8 housing, and will simply add to the glut of empty units in the Eugene area.”); R
9 194 (“Homes for Good could construct an affordable housing development on this
10 project that is in keeping with the goals of the Greenway.”); R 711 (Hulme: “our
11 community needs affordable housing not more expensive, ‘market-rate’ housing
12 based on current vacancy rate data.”); R 1061 (Doug Curry: “we have a real need
13 for affordable family housing, and a big apartment complex doesn’t seem to fill the
14 bill, I expect most neighbors would readily support a project with a nod to the
15 needy, and a design that is elegant and architecturally friendly.”).

16 III. JURISDICTION

17 LUBA has jurisdiction under ORS 197.015(10)(a)(A) and ORS 197.825(1).
18

1 IV. ARGUMENT

2 A. FIRST ASSIGNMENT OF ERROR – The Planning Commission
3 misconstrued the EC 9.2751 requirements for calculating the subject
4 property’s “net density.”

5
6 1. Preservation of assignment of error

7 Petitioners preserved this assignment of error at R 737-740, 480-482.

8 2. Standard of review

9 The local government’s interpretation of state law and local law that
10 implements state law is not entitled to the deferential standard of review under
11 *Siporen v. City of Medford*, 349 Or 247, 266 (2010). LUBA reviews such
12 interpretations under ORS 197.835(9)(a)(D) to determine whether the local
13 government “[i]mproperly construed applicable law.” *Waverly Landing Condo.*
14 *Owners’ Assoc. v. City of Portland*, 61 Or LUBA 448 (2010). If there is no
15 interpretation or the interpretation is inadequate for review, ORS 197.829(2)
16 provides that LUBA may interpret the local provision in the first instance. Where
17 there is no reviewable express or implied interpretation, LUBA has nothing to
18 defer to. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

19 Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143,
20 1146 (1993), *modified by State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042
21 (2009), “[i]n interpreting a statute, the court’s task is to discern the intent of the
22 legislature.” Courts examine both the text and context of a particular statute,

1 including ordinances, as well as legislative history. LUBA shall reverse or remand
2 a decision involving the application of a plan provision if the decision is not in
3 compliance with applicable provisions of the plan. ORS 197.835(8).

4 3. Argument –

5 a. Legal Background
6

7 The Eugene Code (EC) provides for a “net density” calculation. EC 9.2751
8 provides:

9 “(1) Density
10

11 (a) *****
12

13 (b) For purposes of this section, ‘net density’ is the number of
14 dwelling units per acre of land in actual residential use and
15 reserved for the exclusive use of the residents in the
16 development, such as common open space or recreation
17 facilities.
18

19 (c) For the purposes of calculating net density:
20

21 (1) The acreage of land considered part of the residential use
22 shall exclude public and private streets and alleys, public
23 parks, and other public facilities.”
24

25 Eugene Code also defines “street.” EC 9.0500 provides:

26 “An improved or unimproved public or private way, other than an alley, that
27 is created to provide ingress or egress for vehicular traffic to one or more
28 lots or parcels, excluding a private way that is created to provide ingress or
29 egress to land in conjunction with the use of land for forestry, mining, or
30 agricultural purposes. A ‘street’ includes the land between right-of-way lines
31 within the ingress/egress easement areas serving multiple residential lots but
32 excluding ‘flagpole’ portions of flag lots.”
33

1 R 24 (Appx 7).

2 EC 9.5500 defines “driveway” as “[t]he area located outside of the public
3 right-of-way that abuts the access connection and allows for vehicles to move or to
4 form a development site.” R 25 (Appx 8).

5 EC 9.5500(11)(b) defines “parking drive” to mean:

6 “Parking drives are driveways lined with head-in parking spaces, diagonal
7 parking spaces, garages, or any combination thereof along a significant
8 portion of their length. Parking drives for multiple-family developments
9 with more than 20 units shall be designed so as to emit no through motor
10 vehicle movements.”

11
12 R 25 (Appx 8).

13 b. Petitioner’s Argument
14

15 Petitioners argued below that the net density calculation under the Eugene
16 Code required additional areas of the property to be excluded from the property’s
17 net density. Based on the text of the provisions, Petitioners argued that certain
18 components of the development were (1) not in actual residential use or (2) not
19 reserved for the exclusive use of the residents. Next, Petitioners argued that
20 additional portions of circulation must be excluded because they fall within the
21 definition of “street.”¹

¹ The Planning Commission decision summarized Petitioner’s arguments as follows:

“Summary of Appellant’s Argument

Appellants argue that the Hearings Official erred in his inclusion of ‘paved circulation areas’, the leasing office, maintenance building, and open space

1 c. The Hearings Official's Decision

2 The Planning summarized the Hearings Official's decision regarding
3 Petitioners' net density calculations as follows:

4 **"Hearings Official's Decision**

5
6 ****

7
8 On pages 13-14 of the decision document, the Hearings Official agrees with
9 the Applicant's net density calculation. The staff findings on page 22 of the
10 report to the Hearings Official, adopted by the Hearings Official to address
11 EC 9.2750, were as follows:

12
13 "The minimum density for the subject site is 15 units per acre as
14 established by the /ND Nodal Development Overlay Zone at EC
15 9.4290 ***. The R-2 base zone of the subject site provides that a
16 maximum density of 28 units per acre is allowed ***.

17
18 The applicant also provides a calculation on sheet A1 of the May 11,
19 2018 application materials. The calculation identifies the entire site
20 area as being 3.59 acres, subtracts the .21 acres to be dedicated for
21 Lombard Street, and concludes that 94 units is the maximum density
22 considering 28 units per net acres is allowed."

23
24 Concerning whether the internal vehicular circulation areas meets the
25 definition of 'street' and, therefore, should be excluded from total acreage
26 for the purpose of calculating density; the Hearings Official concludes that

on the eastern portion of the property as part of the acreage of land
considered part of the residential use of the subject lot. According to the
Appellants, the 'circulation areas' meet the EC definition of 'streets'.
Additionally, the leasing office, maintenance building, and open space areas
should be excluded as they are not 'for the exclusive use of the residents of
the development.' Instead, the Appellants argue that these areas are open to
the public and not for the exclusive use of the residents. Lastly, the
Appellants argue that the 'Greenway area' designated as open space is also
open and not exclusive to the residents."

R 25-26 (Appx 8-9).

1 Eugene Code treats driveways and parking drives as separate and distinct
2 from streets. Thus, the parking drives do not have to be subtracted from the
3 net density calculation.
4

5 The Hearings Official also reasons that the leasing office and maintenance
6 buildings are not public facilities that must be excluded from the net density
7 calculation.
8

9 Lastly, the Hearings Official concludes that the open space area along the
10 east side of the subject property is not open to the public and therefore,
11 would qualify as common open space for the exclusive use of the residents.”
12

13 R 25 (Appx 8).

14 d. The Planning Commission’s decision
15

16 The Planning Commissions’ findings are as follows:

17 **“Planning Commission’s Determination**
18

19 The Planning Commission finds that the Hearings Official did not err in
20 determining that the application properly applies the net density calculation
21 and that EC 9.2751 is satisfied.
22

23 In regards to ‘parking drives,’ the Planning Commission agrees with the
24 Hearings Official’s findings. The Applicant’s proposal includes two
25 through-motor vehicle parking drives. The Applicant requests an adjustment
26 to the parking drives standard, which is allowed, subject to review under the
27 criteria listed at EC 9.8030(8)(e). Even though the Applicant requests an
28 adjustment to parking drive standards, the adjustment does not change the
29 features’ designation from ‘parking drives’ to ‘streets.’ Therefore, the
30 Planning Commission finds that none of the area identified as parking or
31 parking drives must be excluded from the net density calculation.
32

33 In regards to the leasing office, maintenance building, and required open
34 space, the Planning Commission notes that EC 9.2751(1)(c) provides the
35 applicable instrument for calculating density and excludes any reference to
36 resident-only exclusivity. The leasing office and maintenance building are
37 accessory to the residential use, specifically serving current and future
38 residents as well as employees carrying out functions directly related to

1 maintenance and operations of the residential use. In no way do either
2 structures [sic] constitute a public park or public facilities for the purpose of
3 calculating density.

4
5 The Planning Commission confirms the Applicant's residential density
6 calculations and agrees with the Hearings Official that the standards at EC
7 9.2751 are met."

8
9 R 25-26 (Appx 8-9).

10 e. Analysis

11
12 The Planning Commission misconstrued applicable law in determining the
13 net density. More specifically, the City (1) failed to exclude areas that are not in
14 actual residential use and not reserved for the exclusive use of the residents in the
15 development; and (2) failed to exclude all public and private streets and alleys.

16 Ignoring EC 9.2751(1)(b), the Planning Commission first found that "net
17 density" is calculated based solely on EC 9.2751(1)(c): "the Planning Commission
18 notes that EC 9.2751(1)(c) provides the applicable instrument for calculating
19 density and excludes any reference to resident-only exclusivity." While EC
20 9.2751(1)(c) is a component of the "net density" calculation, EC 9.2751(1)(b) also
21 must be factored into the "net density" calculation because it expressly states that
22 "net density" includes "the number of dwelling units per acre of land in actual
23 residential use and reserved for the exclusive use of the residents in the
24 development, such as common open space or recreation facilities." In other words,
25 only if two criteria are satisfied (i.e., [1] "land in actual residential use and [2]

reserved for the exclusive use of the residents in the development”), should the area be included in the net density calculation. By looking only at EC 9.2751(1)(c), the Planning Commission has only engaged in half of the calculation or analysis. *See* ORS 174.010 (“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.”). Here, the Planning Commission’s interpretation not only omits EC 9.2751(1)(b) but also renders it superfluous. The Planning Commission cannot simply ignore its own code.

Here, Petitioners pointed out that the leasing office, maintenance shed, and area adjacent to the bicycle trail must be excluded from the net density calculation because the areas are not in “actual residential use” and not “reserved for the exclusive use of the residents of the development.” The leasing office is not in “actual residential use” because it is not a residence. The leasing office is used as a commercial component of the development to allow applicants to apply for an apartment. Moreover, the leasing office is not “reserved for the exclusive use of the residents in the development” because anyone can walk into the leasing office and inquire and apply. The leasing office is very different from an apartment within the development, which is reserved exclusively for residential use. The

1 leasing office is not open to the public. The leasing office is not open space or a
2 recreation facility. Because the leasing office does not satisfy both of the criteria
3 contained in EC 9.2751(1)(b), it must be excluded from the “net density”
4 calculation, which should result in a reduction in the number of dwelling units for
5 the development.

6 The same is true of the maintenance shed. The maintenance shed is not in
7 “actual residential use” because it is not a residence. The maintenance shed is also
8 not “reserved for the exclusive use of the residents in the development” because
9 there is nothing to demonstrate that those performing maintenance on the property
10 are actual residents of the development. The maintenance shed is not open space
11 or a recreation facility. Because the maintenance shed does not satisfy both of the
12 criteria, it must be excluded from the “net density” calculation, which should result
13 in a reduction in the number of dwelling units for the development.

14 The paved, interior circulation area within the development constitute
15 “streets” under the code’s definition, which must be excluded under EC
16 9.2751(1)(c). EC 9.2751(1)(c) provides that “[t]he of land considered part of the
17 residential use shall exclude public and private streets and alleys, public parks, and
18 other public facilities.” Pursuant to this provision, the City required that the
19 applicant exclude the extension for Lombard Street. *See* R 221 (noting that the
20 “Total Site Area” at “3.59 acres” and subtracts “the Lombard Dedicated ROW” of

1 “0.21 acres” in order to calculate net density); R 399 (“The calculation identifies
2 the entire site area as being 3.59 acres, subtracts the .21 acres to be dedicated for
3 Lombard Street, and concludes that 94 units is the maximum density considering
4 28 units per net acre is allowed.”). Here, the City required the exclusion of the
5 Lombard right-of-way from the net density calculation. The problem is that the
6 City did not require the exclusion of all areas accurately defined as “streets” under
7 the City’s code from the net density calculation.

8 The definition of “streets” provides as follows:

9 “An improved or unimproved public or private way, other than an alley, that
10 is created to provide ingress or egress for vehicular traffic to one or more
11 lots or parcels, excluding a private way that is created to provide ingress or
12 egress to land in conjunction with the use of land for forestry, mining, or
13 agricultural purposes. A ‘street’ includes the land between right-of-way lines
14 within the ingress/egress easement areas serving multiple residential lots but
15 excluding ‘flagpole’ portions of flag lots.”
16

17 EC 9.0500. At the outset, there is no question that the area at issue is not a “private
18 way that is created to provide ingress or egress to land in conjunction with the use
19 of land for forestry, mining, or agricultural purposes.”

20 The paved, interior circulation constitutes an “improved ... private way”
21 under the definition of “streets.” The interior circulation provides ingress or egress
22 for vehicular traffic to one or more lots or parcels” because it provides
23 ingress/egress to other lots and parcels via River Road and Lombard Street. The
24 applicant’s legal counsel argued that the internal circulation areas are “driveways”

1 because “driveways do not provide ingress or egress to one or more lots or parcel.
2 They provide access internally to the Subject Property.” This is plainly wrong as
3 the internal circulation provides access to not only the lot or parcel at issue (i.e.,
4 the subject property) but they also provide access to other lots and parcels via the
5 Lombard Street.² The applicant’s legal counsel also relies on the definition of
6 “driveway” to support its argument:

7 “the EC definition of ‘Driveway’ clarifies the first point above – that
8 driveways (internal drive aisles) are different and distinct from streets.
9 Driveways are defined thusly in relevant part:

10
11 *‘The area located outside of the public right-of-way that abuts*
12 *the access connection and allows for vehicles to move **to and***
13 ***from a development site.**’ EC 9.0500, ‘Driveway’ (Emphasis*
14 *added).*

15
16 In other words, the driveways are not streets because they provide
17 internal access within the Subject Property and do not provide access to
18 other lots or parcels. Therefore, driveways were property [sic] included from
19 the net density calculation.”

20
21 R 406 (italics, underline, and bold in original). Again, the area at issue does not
22 simply provide for movement to and from a development site but also to other lots
23 and parcels Lombard Street.

24 The Planning Commission decision found that “none of the area identified as
25 parking or parking drives must be excluded from the net density calculation.” R 25

² Ironically, the applicant and City would not find themselves in such a situation if a temporary gate was placed to limit access to the unimproved portion of Lombard Street, which is addressed in greater detail below.

1 (Appx 8). “Parking Drives” are defined as “driveways lined with head-in parking
2 spaces, diagonal parking spaces, garages, or any combination thereof along a
3 significant portion of their length. Parking drives for multiple-family developments
4 with more than 20 units shall be designed so as to permit no through-motor vehicle
5 movements.” 9.5500(11)(b)(2). The subject application is for a “multiple-family
6 development” and contains more than 20 units. As such, a “parking drive” cannot
7 allow for “through-motor vehicle movements,” but the interior circulation at issue
8 here does just that: it provides for “through-motor vehicle movements” through
9 Lombard Street to the south and River Road to the west. *See* R 221; R 633 (staff
10 report: “The applicant’s proposal includes two through-motor vehicle parking
11 drives.”).

12 Therefore, because the interior, paved circulation area is not a driveway, the
13 interior circulation falls within the definition of “street,” which must be excluded
14 from the net density calculation³, just as it was done with the extension of Lombard
15 Street.

³ This standard is also clear and objective in the same manner that 20% standard in *SE Neighbors v. City of Eugene*, __ Or LUBA __ (LUBA No. 2013-004, July 12, 2013), wherein the City proposed a clear and objective way in which to measure the 20% slope. Here, the City need only propose a method to measure the internal circulation area that would be clear and objective.

1 B. SECOND ASSIGNMENT OF ERROR – The Planning Commission
2 misconstrued and made findings not based on substantial evidence
3 regarding the City’s implementation of the Willamette Greenway
4 criteria at EC 9.8815.

5
6 1. Preservation of assignment of error

7 Petitioners preserved this assignment of error at R 71-72, 74-75, 278-279,
8 386, 480-482, 737-740.

9 2. Standard of review

10 The local government’s interpretation of state law and local law that
11 implements state law is not entitled to the deferential standard of review under
12 *Siporen*, 349 Or at 266. LUBA reviews such interpretations under ORS
13 197.835(9)(a)(D) to determine whether the local government “[i]mproperly
14 construed applicable law.” *Waverly Landing Condo. Owners’ Assoc.*, 61 Or
15 LUBA 448. If there is no interpretation or the interpretation is inadequate for
16 review, ORS 197.829(2) provides that LUBA may interpret the local provision in
17 the first instance. Where there is no reviewable express or implied interpretation,
18 LUBA has nothing to defer to. *Heitsch*, 65 Or LUBA 187.

19 Under *PGE*, 317 Or at 859, *modified by Gaines*, 346 Or at 171-172, “[i]n
20 interpreting a statute, the court’s task is to discern the intent of the legislature.”
21 Courts examine both the text and context of a particular statute, including
22 ordinances, as well as legislative history. LUBA shall reverse or remand a decision

1 involving the application of a plan provision if the decision is not in compliance
2 with applicable provisions of the plan. ORS 197.835(8).

3 Findings must be based on substantial evidence. *Younger v. City of*
4 *Portland*, 305 Or 346 (1988). Substantial evidence is evidence that a reasonable
5 person would rely on, and findings must be based on substantial evidence. *Id.*
6 LUBA may reverse or remand if the local government's decision is based on facts
7 that are not supported by substantial evidence in the whole record. ORS
8 197.835(9)(a)(C).

9 A local government's findings are necessary to the degree they are essential
10 to the challenged decision. Findings must "(1) identify the relevant approval
11 standards, (2) set out the facts which are believed and relied upon, and (3) explain
12 how those facts lead to the decision on compliance with the approval standards."
13 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Additionally, findings
14 must address and respond to specific issues relevant to compliance with applicable
15 approval standards that were raised in the proceedings below. *Norwell v. Portland*
16 *Metropolitan Area Local Government Boundary Com.*, 43 Or App 849, 853
17 (1979).

18 3. Argument

- 19 a. The Planning Commission misconstrued and made
20 findings not based on substantial evidence regarding EC
21 9.8815(1)
22

1 EC 9.8815(1) requires that “[t]o the greatest possible degree, the ...
2 development will provide the maximum possible landscaped area, open space, or
3 vegetation between the activity and the river.” EC 9.8815 further provides that
4 “[a]s used in this section, the words ‘the greatest possible degree’ are drawn from
5 Oregon Statewide Planning goal 15 (F.3.b.) and are intended to require a balancing
6 of factors so that each of the identified Willamette Greenway criteria is met to the
7 greatest extent possible without precluding the requested use.”

8 i. Hearings Official’s Findings

9 The Hearings Official’s findings are as follows:

10 “Opponents argue that the proposal does not satisfy EC 9.8815(1),
11 which requires that ‘[t]o the greatest possible degree, the * * * development
12 will provide the maximum possible landscaped area, open space, or
13 vegetation between the activity and the river.’ The proposal includes a 100-
14 foot setback from the river, although only approximately 70 feet of that is on
15 the applicant’s property. The rest of the setback is provided by the City
16 owned property that includes the river trail and bike path. The open space
17 proposed by the development is approximately 15% of the property.
18 According to opponents, only preserving 15% of the property in open space
19 fails to satisfy the EC 9.8815(1). The staff report found:

20
21 ‘The applicant’s response under this criterion does not provide
22 much information, but clearly the applicant chose to locate the
23 development at least 100 feet from the river, and to retain that open
24 space area along the bike path and river. Staff believes the applicant’s
25 site plan and other available information showing ample distance and
26 existing riparian vegetation between the development and river is
27 sufficient to demonstrate compliance with this criterion.’ Staff Report
28 4.

29
30 Opponents argue that this does not provide the maximum possible
31 open space to the greatest degree possible. Theoretically, the applicant could

1 not develop the property at all and have the entire site be open space. If ‘to
2 the greatest possible degree’ meant the theoretical maximum then no
3 development could ever occur. EC 9.8815(5) explains that ‘to the greatest
4 possible degree’ means:

5
6 ‘As used in this section, the words ‘the greatest possible degree’ are
7 drawn from Oregon Statewide Planning Goal 15 (F.3.b.) and are intended to
8 require a balancing of factors so that each of the identified Willamette
9 Greenway criteria is met to the greatest extent possible without precluding
10 the requested use.’

11
12 As EC 9.8815(5) explains, ‘the greatest possible degree’ language
13 cannot be used to precludes the requested use. The requested use is a 94-unit
14 multi-family apartment complex – that is a permitted use in the R-2 zone.
15 The applicant has placed all of the development in the western portion of the
16 property – as far away from the river as possible. Opponents have not
17 argued, and I do not see, that the applicant could have configured the
18 propped development in a way that retains 94 units and the associated
19 requirements in a way that would provide more open space closer to the
20 river. I also do not see that the applicant is required to reduce the requested
21 density in order to preserve more open space. EC 9.8815(1) is satisfied.”

22
23 R 38-39 (Appx 21-22).

24 ii. Planning Commission’s Findings

25 The Planning Commission’s findings are as follows:

26 “The Planning Commission agrees with the conclusion of the Hearings
27 Official that EC 9.8815([1]) is satisfied. An alternative proposal which
28 retains the permitted density while balancing, to a greater extent, required
29 open space does not seem readily apparent. The configuration of the lot,
30 with the majority of its area on its eastern half, restricts substantial design
31 alternatives, particularly alternatives which retain 94 total dwelling units.

32
33 Based on the available information in the record, the Planning Commission
34 finds that the Hearings Official did not err with respect to this appeal issue.”

35
36 R 22 (Appx 5).

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17

Here, the proposal provides a 100-foot setback from the river, but only a 70-foot setback from the property line. The Planning Commission’s decision erred in failing to rely on any evidence to demonstrate that the proposed setback is satisfied to the “greatest possible degree,” which is “intended to require a balancing of factors so that each of the identified Willamette Greenway criteria is met to the greatest extent possible without precluding the requested use.” The Hearings Official’s and Planning Commission’s decision does not rely upon any “balancing.” The Hearings Official engaged in a “theoretical” reduction to absurdity by arguing that the applicant could have no development at all under the standard. However, that is not what Petitioners argued. Instead, there is simply no balancing as it relates to the particular standard as it relates to the standard. For example, there is nothing to demonstrate that a different configuration – with the same number of units⁴ – could better satisfy the standard by creating 3-story buildings closer to the River Road and maximizing the development away from the river. The City simply accepted that the proposed set back was sufficient to satisfy this standard. The failure is that the City misconstrued the standard and did not set

⁴ Petitioners are not arguing that the applicant must reduce the number of dwelling units; rather, Petitioners are arguing that the City did not issue any findings related to the necessary balancing and that the applicant could have placed the greatest degree of development away from the river, under this standard.

1 forth any findings as it relates to the necessary balancing, which implements the
2 “greatest possible degree” language in the standard.

3 b. The Planning Commission misconstrued and made
4 findings not based on substantial evidence regarding EC
5 9.8815(2)
6

7 EC 9.8815(2) provides that “[t]o the greatest possible degree, necessary and
8 adequate public access will be provided along the Willamette River by appropriate
9 legal means.”

10 i. Hearings Official’s Findings

11 The Hearings Official’s findings provide as follows:

12 “According to opponents, because the proposal does not provide public
13 access from the property to the river and a proposed fence would prevent
14 residents from accessing the river, the proposal does not provide adequate
15 public access. The staff report found:

16
17 ‘The applicant further states that there is a public bike path on
18 the west side of the greenbelt between the river and this site that
19 provides adequate public access to the river. The applicant also states
20 that the extension of Lombard Drive (street) will also allow future
21 development to the north of the site to gain access to Ma[u]rie Jacobs
22 Park by travel southbound through the site along public roadways to
23 the park.

24
25 Staff believes that the above criterion requires access to be provided
26 *along* the river, and in this case the applicant benefits from the
27 existence of the City’s Riverfront Path System. This existing system
28 provides a path that is paved, and runs along the river from the
29 Springfield to the Beltline Highway, providing access *along* the
30 Willamette River. The applicant has proposed a 42” fence along the
31 100 foot setback that will block access from the site to the Riverbank
32 Path System.
33

1 While it is unfortunate that the applicant has not proposed a direct
2 access to that path, the above criterion does not necessarily require
3 that access be provided directly from the development site in all cases.
4 Based on the available evidence, and the specific wording of the
5 criterion above, staff believes this criterion is met.’ Staff Report 4-5
6 (emphasis in original).
7

8 I agree with the staff report. EC 9.8815(2) addresses adequate public
9 access ‘along the river.’ There is more than adequate public access along the
10 river. The City’s renowned Riverfront Path System runs to the east of the
11 property along the river. If the property was adjacent to the river and
12 proposed to restrict access along the river then opponents would likely be
13 correct that the criterion is not satisfied. But that is not the scenario in the
14 present case. EC 9.8815(2) is satisfied.”
15

16 R 39-40 (Appx 23-24); R 23 (Appx 6) (Planning Commission’s summary of the
17 Hearings Official’s findings: “In addition to clarifying that the standard concerns
18 access *along* the river, not *to* the river, the Hearings Official found that the existing
19 riverfront path system provides ‘more than adequate public access along the river’
20 (page 7). Furthermore, the Hearings Official relies on the fact that the subject
21 property does not directly front the Willamette River to find that EC 9.8815(2) is
22 satisfied.”).

23 ii. Planning Commission’s Findings

24 The Planning Commission’s findings are as follows:

25 “The Planning Commission agrees with the conclusion of the Hearings
26 Official that EC 9.8812(2) does not require access to the Willamette River.
27 The proposal includes no changes or impacts to the existing riverfront path,
28 a public park which provides adequate public access along the river.
29

30 Based on the available information in the record, the Planning Commission
31 finds that the Hearings Official did not err with respect to this appeal issue.”

1
2 R 23 (Appx 6).

3 iii. Analysis

4 Here, the applicant provides no means to access the river or the bike path,
5 which is immediately adjacent to the river – either for the general public or the
6 residents of the development. Far from providing access, the proposed
7 development includes a fence that would actually restrict access to the greenway
8 from the subject development to the bike path and the river. First, too much is
9 made of the distinction drawn by staff, the Hearings Official, and the Planning
10 Commission between the terms “along” and “to.” If an individual wanted to walk
11 to the river or along the river from the subject property, that person would
12 effectively be doing the same thing – accessing the river. Goal 15⁵ uses the word
13 “to” and the local provision uses the word “along.” The City cannot make an
14 interpretation of a regulation implementing a Goal that is inconsistent with the
15 Goal itself. The City’s reliance on satisfying the criterion based on the use of the
16 word “along” instead of “to” is inconsistent with the Goal if the City would have
17 come to a different conclusion if it’s implementing regulation used the word “to.”
18 While Petitioners believe the use of either word requires the applicant to provide
19 access to the bike path and/or river (and therefore the City misconstrued applicable

⁵ Goal 15, OAR 660-015-0005 C.3.c provides that “adequate public access to the river shall be provided for, with emphasis on urban and urbanizable areas.”

1 law), Petitioners also believe that if the City’s outcome would have been different
2 if the term “to” was used, then the City has effectively rendered an interpretation
3 that is inconsistent with the Goal.

4 Moreover, the notion that access to the existing bike path through public
5 streets and then to Maurie Jacobs Park provides the necessary access is mistaken.
6 If that could satisfy the standard, then, taken to its logical conclusion, a property
7 situated in Eugene’s south hills could satisfy this standard (and it is understand that
8 such a property would not be subject to this standard because it would not be
9 within the Greenway) because the property would connect to streets that would
10 eventually access Maurie Jacobs park, the bike path, and the river. The City’s
11 solution to satisfying this standard is simply too attenuated because the proposal⁶
12 or development does not provide access “to” or “along” the path or river because
13 the bike path is not part of the application or development. The standard requires
14 that the proposed development provide access – to the greatest possible degree – to
15 the River. Here, no access is provided to any degree. The fact that there is access
16 along the river by means other than the subject property is irrelevant – the focus is
17 the subject property. The Hearings Official alleges that “[i]f the property was

⁶ Indeed, EC 9.8815 requires that a permit be granted “only if the *proposal* conforms to all the criteria in subsections (1) through (4).” Here, the proposal does not access the path or river, though it is located immediately adjacent to the path and river.

1 adjacent to the river and proposed to restrict access along the river[,] then
2 opponents would likely be correct that the criterion is not satisfied.” Here, that is
3 the case. The property is – for all intents and purposes – adjacent to the river, path,
4 and public park but restricts access to the river, path, and public park via the
5 subject property. The City has misconstrued the standard and there is no
6 substantial evidence in the record to show that the applicant has satisfied the
7 standard.

8 c. The Planning Commission misconstrued applicable law
9 and made inadequate findings not based on substantial
10 evidence regarding EC 9.8815(3)
11

12 EC 9.8815(3) provides that “[t]he intensification, change of use, or
13 development will conform with applicable Willamette Greenway policies as set
14 forth in the Metro Plan.” The Metro Plan includes policy D.5 from Section III-D,
15 which provides as follows: “New development that locates along the river
16 corridors and waterways shall be limited to uses that are compatible with the
17 natural, scenic, and environmental qualities of those water features.” *See* R 22
18 (Appx 5).

19 i. Hearings Official’s Findings

20 The Hearings Official’s findings, in relevant part, are as follows:

21 “The policy talks about ‘uses’ that are compatible with the applicable water
22 feature. The applicable R-2 zoning allows multi-family residential – that is
23 the use. By adopting R-2 zoning for the property the City obviously
24 envisioned multi-family residential use as a potential- use for the property.

1 The City clearly though such a use was compatible with the Willamette
2 River Greenway or it would not have zoned the property R-2. I do not see
3 that the plan policy allows micro-management of the building layout or
4 design of a permitted use. Even if it did, the proposal locates the
5 development as far away from the river as possible. I do not see that merely
6 because the proposed development uses the full 35-foot height maximum
7 allowed under R-2 zoning that it somehow renders the proposal
8 incompatible with the natural, scenic, and environmental qualities of the
9 greenway.”

10
11 R 40-41 (Appx 23-24) (Hearings Official decision).

12 ii. Planning Commission’s Findings

13 The Planning Commission’s findings are as follows:

14 “The Planning Commission finds that the Hearings Official did not err in
15 determining that existing R-2 zoning permits multi-family residential
16 development and that the 35-foot building height proposed by the applicant
17 is not incompatible with the natural, scenic, and environmental qualities of
18 the Willamette River.

19
20 Based on the available information in the record, the Planning Commission
21 finds that the Hearings Official did not err with respect to this appeal issue.”

22
23 R 22 (Appx 5).

24 iii. Analysis

25 Metro Plan Policy D.5 of Section III-D, Policy D.5 provides that “[n]ew
26 development that locates along the river corridors and waterways shall be limited to uses
27 that are compatible with the natural, scenic, and environmental qualities of those water
28 features.” The Hearings Official simply concludes that because the proposed use is
29 allowed in the R-2 zone, and because the City zoned the Property R-2, then the proposed
30 development is inherently consistent with Policy D.5. The use, however, is not simply

1 “multi-family residential” but more specifically a 94-unit multi-family residential use
2 comprising four buildings, with the tallest and largest building closest to the river (i.e.,
3 the “water feature.”). Other than alleging that the use is allowed, there has been no
4 showing that the 35-foot tall, 94-unit building 2 (the largest and tallest within the
5 development) is consistent with the “natural, scenic, and environmental qualities” of the
6 “river corridors and waterways” when it is the building that is most prominently within
7 the river corridor and waterway. It begs the question of whether one of the more modest
8 buildings (e.g., building 2, 3, or 4) would not be more compatible with the natural, scenic,
9 and environmental qualities of the river and corridor. There are simply no findings to
10 satisfy this particular policy, pursuant to the City’s implementing regulation for Goal 15,
11 which is necessary when Petitioners noted that “[t]he proposed three-story apartment
12 building is designed to the maximum 35’ height restriction of R-2 zoning, and not
13 consideration has been given to the effect on the natural, scenic, and environmental
14 qualities” of the river corridor and waterway. R 739; *id.* (“Nowhere is a rationalization of
15 the effects on the scenic nature of the Greenway of a towering three-story apartment
16 building just beyond the setback.”). Therefore, the Hearings Official and Planning
17 Commission (1) misconstrued applicable law in determining that the development
18 automatically complies with the Metro Plan policy and EC 9.8815(3); (2) made
19 inadequate findings by not responding to Petitioners’ argument that there are no
20 findings of compatibility as it relates to the largest and tallest building placed
21 closes to the river corridor and waterway; and (3) made findings not based on

substantial evidence because the findings do not rely on any evidence to demonstrate compatibility of building 4 with the natural, scenic, and environmental qualities of the river and its corridor.

C. THIRD ASSIGNMENT OF ERROR – The Planning Commission misconstrued applicable law and made findings not based on substantial evidence regarding EC 9.8445(4)(f)(2), EC 7.420(3)(j), and EC 9.6780.

1. Preservation of assignment of error

Petitioners preserved this assignment of error at R 49-50 (Appx 32-33), 281, 298-299.

2. Standard of review

The local government’s interpretation of state law and local law that implements state law is not entitled to the deferential standard of review under *Siporen*, 349 Or at 266. LUBA reviews such interpretations under ORS 197.835(9)(a)(D) to determine whether the local government “[i]mproperly construed applicable law.” *Waverly Landing Condo. Owners’ Assoc.*, 61 Or LUBA 448. If there is no interpretation or the interpretation is inadequate for review, ORS 197.829(2) provides that LUBA may interpret the local provision in the first instance. Where there is no reviewable express or implied interpretation, LUBA has nothing to defer to. *Heitsch*, 65 Or LUBA 187.

1 3. Argument

2 a. The Hearings Official's Decision

3
4 The Hearings Official's decision provided as follows:

5
6 “EC 9.8445(4)(f)(2) requires that access from a public street to a
7 development shall be located in accordance with EC 7.420 Access
8 Connections. EC 7.420(3)(i) provides that the proposal must comply with
9 EC 9.6780, which provides:

10
11 ‘Vision Clearance Area. *Development sites* shall have triangular
12 vision clearance areas on all street corners to provide for unobstructed
13 vision consistent with American Association of State Highway and
14 Transportation Officials (AASHTO) standards. (See Figure 9.0500
15 Vision Clearance Area). Vision clearance areas shall be kept free of
16 all visual obstructions from 2 ½ feet to 9 feet above the curb line.
17 Where curbs are absent, the crown of adjacent streets shall be used as
18 the reference point. These vision clearance requirements may be
19 adjusted if consistent with the criteria of EC 9.8030(11) of this land
20 use code.’

21
22 Opponents argue that the triangular vision clearance areas on the corners of
23 Lombard Street and Fir Lane are inadequate. The intersections opponents
24 complain about are not part of or adjacent to the subject property – they are a
25 block or more away from the property. EC 9.0500 defines ‘development
26 site’ as:

27
28 ‘A tract of land under common ownership or control, either undivided
29 or consisting of two or more contiguous lots of record. For the
30 purpose of land use applications, development site shall also include
31 property under common ownership or control that is bisected by a
32 street or alley.’

33
34 As the applicant's traffic engineer explains, ‘development site’ does not
35 include off-site intersections. As the July 12, 2018 memorandum form [sic]
36 Public Works further explains, EC 9.0500 defines ‘vision clearance’ as:

37
38 “A triangular area within a lot immediately adjacent to the intersection
39 of streets to provide a clear area for viewing approaching traffic for

1 public safety purposes. For the intersection of 2 improved public
2 rights-of-way, the vision clearance area is the triangular area of the lot
3 at the intersection of two lot lines. At the intersection of a public street
4 and a private street, the vision clearance area is the triangular area of
5 the lot at the intersection of the lot line and each edge of the street. For
6 all vision clearance areas, the apex is located at the intersection of the
7 two 35[-]foot legs, extended if necessary. The base of the triangle
8 extends diagonally across the lot intersecting the two legs an equal
9 distance from the apex.’

10
11 The development will be creating an access point on River Road and the
12 Lombard Street extension, but it will not be creating any new intersections.
13 Therefore, EC 9.8670 is not applicable to the application. The applicant will
14 provide adequate vision clearance area for the access points at River Road
15 and Lombard Street. Opponents’ arguments do not provide a basis to deny
16 the application.”

17
18 R 49-50 (Appx 32-33).

19 b. The Planning Commission’s Decision

20
21 The Planning Commission’s decision provides as follows:

22 “The Planning Commission finds that the Hearings Official did not err in
23 determining that proposed development site is neither adjacent to, nor
24 responsible for, any vision clearance areas at the intersection of Lombard
25 Street and Fir Lane. The Planning Commission also finds that the Hearings
26 Official did not err in determining that ‘development site’ does not include
27 off-site intersections, nor is the development creating new intersections.
28 Therefore, EC 9.8670 is not applicable to the application.

29
30 Based on the available information in the record, the Planning Commission
31 finds that the Hearings Official did not err with respect to this appeal issue.”

32
33 R 26-27 (Appx 9-10).

34 c. Analysis

1 The issue of triangular vision clearance is explained at 297-300, which
2 explains that the intersection of Lombard Street/Fir Lane and Lombard
3 Street/Briarcliff Lane. The issue, however, boils down to whether the intersections
4 are within the definition of “development site.” The definition notes that “[f]or the
5 purpose of land use applications, development site shall also include property
6 under common ownership or control that is bisected by a street or alley.” EC
7 9.0500. This implies that when a street bisects a property – which is the case here
8 with the dedication of a portion of Lombard Street – is subject to the requirements
9 of EC 9.8445(4)(f)(2), EC 7.420(3)(j), and EC 9.6780. Moreover, there is no
10 dispute that the applicant is significantly increasing the traffic that will now utilize
11 the intersection of Lombard Street and Fir Lane because the applicant is dedicating
12 a portion of the subject property that will become Lombard Street. Because the
13 definition of “development site” includes the street that bisects the subject
14 property, which is being dedicated, the intersection of Lombard Street and Fir Lane
15 is subject to EC 9.8445(4)(f)(2), 7.420(3)(j), and 9.6780.

16 D. FOURTH ASSIGNMENT OF ERROR – The Planning Commission
17 misconstrued applicable law and made findings not based on
18 substantial evidence regarding the adjustment pursuant to EC
19 9.550(6)(a) and EC 9.8030(8)(a).
20

21 1. Preservation of assignment of error

22 Petitioners preserved this assignment of error at R 51-52 (Appx 34-35), 29-
23 30 (Appx 11-13).

1 2. Standard of review

2 The City’s interpretation of state law and local law that implements state
3 law is not entitled to the deferential standard of review under *Siporen*, 349 Or at
4 266. LUBA reviews such interpretations under ORS 197.835(9)(a)(D) to
5 determine whether the local government “[i]mproperly construed applicable law.”
6 *Waverly Landing Condo. Owners’ Assoc.*, 61 Or LUBA 448. If there is no
7 interpretation or the interpretation is inadequate for review, ORS 197.829(2)
8 provides that LUBA may interpret the local provision in the first instance. Where
9 there is no reviewable express or implied interpretation, LUBA has nothing to
10 defer to. *Heitsch*, 65 Or LUBA 187.

11 Findings must be based on substantial evidence. *Younger*, 305 Or 346.
12 Substantial evidence is evidence that a reasonable person would rely on, and
13 findings must be based on substantial evidence. *Id.* LUBA may reverse or remand
14 if the local government’s decision is based on facts that are not supported by
15 substantial evidence in the whole record. ORS 197.835(9)(a)(C).

16 3. Argument

17 a. The Hearings Official’s Decision

18 The Hearings Official’s findings for compliance with EC 9.5500(6)(a) and
19 EC 9.8030(8)(a) provide as follows:

20 “Opponents argue that the applicant’s proposed adjustment for EC
21 9.5500(6) is not satisfied. EC 9.55006 provides:

1
2 'Building Mass and Façade.
3

- 4 (a) Maximum Building Dimension. Neither the maximum length
5 nor width of any building within 40 feet of a front lot line can
6 exceed 100 feet in the R-1 and R-2 zones and 150 feet in all
7 other zones.
8

9 ***
10

- 11 (c) Criteria for Adjustment. Adjustments to the standards in this
12 subsection may be made, based on criteria of EC 9.8030(8)(a).'
13

14 The applicant seeks an adjustment to allow a building more than 100
15 feet in length. Under EC 9.8030(8)(a), the requirements set forth in EC
16 9.5500(6)(a) may be adjusted if the proposal will 'create a vibrant street
17 façade with visual detail' and 'provide multiple entrances to buildings or
18 yards.' Opponents argue that the applicant has not demonstrated how the
19 proposed building 'creates a vibrant street façade.' The applicant responds
20 that the proposed building will create a vibrant street façade with visual
21 detail by incorporating visual details such as modulation, architectural
22 articulation, and finish material selection. The building will also include an
23 exaggerated offset at the midpoint to visually break the building massing
24 into two distinct segments. Each segment also has multiple offsets and
25 projections across the façade to break up the massing even further. Vertical
26 articulation is provided in addition to the horizontal massing variations in the
27 form of decks, patios, and large windows to enhance the 'eyes on the street'
28 and connection between the interior and exterior. The siding treatment is
29 broken up vertically in alternating locations with changes in materials and
30 color placement.
31

32 The standard of whether a proposed building creates a vibrant street
33 façade with visual detail is a particularly subjective standard. The applicant
34 has provided a long list of items designed to create a vibrant street façade
35 through visual detail. I agree with the applicant and staff that the proposed
36 building provides a sufficient vibrant street façade with visual detail to
37 warrant an adjustment."
38

39 R 51-52 (Appx 34-35).

1 b. The Planning Commission’s Decision

2 The Planning Commission found as follows:

3 “The Planning Commission finds that the Hearings Official did not err in
4 determining that an adjustment to EC 9.4290(2) is warranted for proposed
5 Building 2 and that the adjustment approval criteria at EC 9.8030(8) are
6 satisfied. The Applicant requests an adjustment to the standard at EC
7 9.5500(6) for Building 2, which exceeds the maximum allowable building
8 length by 31 feet. The Applicant’s proposal provides evidence of
9 articulation, multiple building entrances, private patios, and decks.

10
11 Based on the available information in the record, the Planning Commission
12 finds that the Hearings Official did not err with respect to this appeal issue.”

13
14 R 30 (Appx 13).

15 c. Analysis

16
17 Other than a site plan, building elevations, and allegations, there is nothing
18 to support the applicant’s allegation that building 2 would satisfy the criteria for an
19 adjustment. For example, the “site layout plan” located at R 1180-1182, 1184⁷,
20 and 1193 simply provides a bird’s-eye view, which provides nothing more in terms
21 of “vibrancy” or “detail.” Aside from mere allegations of the applicant, the only
22 other putative evidence in the record to support the notion of “vibrancy” are the
23 building elevations located at R 1185-1191. However, when reviewing the
24 building elevations, there is simply nothing architecturally significant (including
25 modulation, architectural articulation, finish material selection, exaggerated offset,

⁷ Mislabeled as the Shevlin Multi-Family located in Bend, Oregon. R 1184.

vertical articulation, decks, patios, windows, and so forth) about building 2 that sets it apart from any of the other buildings. *See* R 1185 (showing elevation of building 1); R 1186 (showing elevation of building 2); R 1187 (showing elevation of building 3); R 1188 (showing elevation of building 4). Absent some distinguishable characteristics of building 2 from buildings 1, 3 and 4, the applicant has not provided a “vibrant street façade with visual detail” over and above the other buildings that would not contain such vibrancy and detail. The applicant has simply wrapped up a normal building in allegations of architectural platitudes but doing so does not set it apart from the other buildings in the development that allegedly do not contain the same vibrancy and detail. As such, the findings of compliance with EC 9.5500(6)(a) and EC 9.8030(8)(a) are not supported by substantial evidence and the City misconstrued applicable law by agreeing with allegations vibrancy and detail that are indistinguishable from the remaining development.

E. FIFTH ASSIGNMENT OF ERROR – The Planning Commission misconstrued applicable law and made findings not based on substantial evidence regarding EC 9.6815(2)(f).

1. Preservation of assignment of error

Petitioners preserved this assignment of error at R 301, 50 (Appx 33), 281.

1 2. Standard of review

2 The City’s interpretation of state law and local law that implements state
3 law is not entitled to the deferential standard of review under *Siporen*, 349 Or at
4 266. LUBA reviews such interpretations under ORS 197.835(9)(a)(D) to
5 determine whether the local government “[i]mproperly construed applicable law.”
6 *Waverly Landing Condo. Owners’ Assoc.*, 61 Or LUBA 448. If there is no
7 interpretation or the interpretation is inadequate for review, ORS 197.829(2)
8 provides that LUBA may interpret the local provision in the first instance. Where
9 there is no reviewable express or implied interpretation, LUBA has nothing to
10 defer to. *Heitsch*, 65 Or LUBA 187.

11 Under *PGE*, 317 Or 606, 859 P2d at 1146, *modified by Gaines*, 346 Or at
12 171-172 (2009), “[i]n interpreting a statute, the court’s task is to discern the intent
13 of the legislature.” Courts examine both the text and context of a particular statute,
14 including ordinances, as well as legislative history. LUBA shall reverse or remand
15 a decision involving the application of a plan provision if the decision is not in
16 compliance with applicable provisions of the plan. ORS 197.835(8).

17 Findings must be based on substantial evidence. *Younger*, 305 Or 346.
18 Substantial evidence is evidence that a reasonable person would rely on, and
19 findings must be based on substantial evidence. *Id.* LUBA may reverse or remand

1 if the local government's decision is based on facts that are not supported by
2 substantial evidence in the whole record. ORS 197.835(9)(a)(C).

3 A local government's findings are necessary to the degree they are essential
4 to the challenged decision. Findings must "(1) identify the relevant approval
5 standards, (2) set out the facts which are believed and relied upon, and (3) explain
6 how those facts lead to the decision on compliance with the approval standards."
7 *Heiller*, 23 Or LUBA at 556. Additionally, findings must address and respond to
8 specific issues relevant to compliance with applicable approval standards that were
9 raised in the proceedings below. *Norwell*, 43 Or App at 853.

10 3. Argument

11 a. The Hearings Official's Decision

12 The Hearings Official's findings for compliance with EC 9.5500(6)(a) and
13 EC 9.8030(8)(a) provide as follows:

14 "EC 9.8445(2) requires that the proposal comply with the multi-
15 family standards of EC 9.5500. EC 9.550(11)(a) requires that street
16 standards and connectivity requirements for local residential streets shall be
17 applied to public and private streets within multi-family developments and
18 states 'refer to EC 9.8615 Connectivity for Streets.' Opponents argue the
19 proposal does not satisfy EC 9.6815(2)(f), which provides:

20
21 'In cases where a required street connection would result in the
22 extension of an existing street that is not improved to city standards
23 and the street has an inadequate driving surface, the developer shall
24 construct a temporary barrier at the entrance to the unimproved street
25 section with provision for bicycle, pedestrian, and emergency vehicle
26 access. The barrier shall be removed by the city at the time the
27 existing street is improved to city standards or to an acceptable

1 standard adopted by the public works director. In making a
2 determination of an inadequate driving surface, the public works
3 director shall consider the rating according to Eugene's Paving
4 Management System and the anticipated traffic volume.'

5
6 Opponents argue that Lombard Street is not improved to City
7 standards and that it has an inadequate driving surface. According to
8 opponents, the applicant should be required to install a temporary barrier at
9 the entrance to Lombard Street from the development. While Lombard
10 Street is not developed to City standards, the applicant and the City contend
11 that it does not have an inadequate driving surface. According to the
12 applicant's traffic expert, while the street is narrow, the roadway pavement
13 is in generally good condition with no potholes or other significant
14 deterioration on the driving surface. While Lombard Street is not in perfect
15 condition, it does not appear to be 'inadequate.' The July 12, 2018
16 memorandum from the public work states:

17
18 'EC 9.8615(2)(f) provides for the construction of temporary barriers
19 where there is an inadequate driving surface. It is noted that road
20 surfaces that are less than full improvement to city standards are not
21 necessarily considered to be 'inadequate' in this context. The
22 applicant has proposed a suitable transition surface between the new
23 and existing segments of Lombard Street.'

24
25 I agree with the applicant's traffic engineer and public works that
26 Lombard Street is not inadequate and therefore temporary barriers are not
27 required."

28
29 R 50 (Appx 33)

30 b. The Planning Commission's Decision

31 The Planning Commission found as follows:

32 "The Planning Commission finds that the Hearings Official did not err in
33 determining that the existing driving surface of Lombard Street does not
34 appear 'inadequate.' In this context, inadequate driving surface means nearly
35 impassable, such as would exist at the proposed northern terminus of the
36 Lombard Street extension. Furthermore, in regards to EC 9.6815(2)(f),
37 'where a required street connection would result in the extension of an

1 existing street that is not improved to city standards and the street has an
2 inadequate driving surface, the developer shall construct a temporary
3 barrier.’ In the ‘Staff Response to Public Comments,’ an attachment to the
4 June 20, 2018 Staff Report to the Hearings Official and included in the
5 application file for reference, City of Eugene Public Works Engineering staff
6 explain that ‘inadequate’ would equate to nearly impassable or dangerous
7 conditions.

8
9 The Planning Commission also notes that temporary bollards on Lombard
10 would prohibit access, and are not consistent with EC 9.6815 Connectivity
11 for Streets. The street connectivity standards are established to ensure that
12 streets can accommodate emergency vehicles and create interconnections to
13 reduce travel distance, promote the use of alternative modes, provide for
14 efficient utility and emergency services, and provide for more even dispersal
15 of traffic.

16
17 Based on the available information in the record, the Planning Commission
18 finds that the Hearings Official did not err with respect to this appeal issue.”
19

20 R 28 (Appx 11).

21 c. Analysis

22 Under EC 9.6815(2)(f), there is no dispute that Lombard Street⁸ is not
23 improved to city standards. Lombard Street “is constructed with a paved width of
24 approximately 16 feet.” R 294; R 295 (Figure 1 at R 295, showing width of
25 Lombard Street); R 294 (“There are numerous locations along Lombard Lane that
26 are experiencing pavement distress as illustrated in Figures 2 and 3); R 296-297
27 (Figures 2 and 3 showing pavement distress, pavement crumbling at edge and no

⁸ The neighborhood generally refers to it as Lombard Lane and it is also referred to as Lombard Drive. However, it is mostly referred to as Lombard Street throughout the record and Petitioners refer to it as Lombard Street.

1 drainage facilities); R 302 (“Table 2 of the *Design Standards and Guidelines for*
2 *Eugene Streets, Sidewalks, Bikeways and Accessways* requires a 45 foot right of
3 way, a 20 foot wide paved width (when no parking is allowed), a curb (and likely
4 drainage facilities), two six foot wide sidewalks, and two six foot, six inch wide
5 planning strips. Neither Lombard Lane nor Fir Lane remotely meet this
6 standard.”); R 375 (“Approximately 235 feet of Lombard Lane would be
7 considered to be a narrow residential roadway between Briarcliff Lane and Fir
8 Lane.”). Moreover, Petitioners’ traffic engineer noted that:

9 “In their narrative, the applicant states that ‘[t]he existing Lombard Street
10 will be extended and improved to City public street standards.’ The
11 applicant states that the existing Lombard Lane will meet City standards,
12 however, it is unclear that this can even be accomplished. Additionally, the
13 applicant’s narrative states that the ‘City has requested paving for Lombard
14 be extended offsite to the south the location (sic) of an existing fire hydrant
15 on the west side of Lombard Street; a distance of approximately 109-feet.’
16 These statements are in conflict as the proposed paving does not suggest that
17 the required city standard will be met. The proposed improvements fall well
18 short of meeting city standards.”

19
20 R 302; *id.* (“In the case of Lombard Lane and Fir Lane, both roadways meet the
21 definition of ‘extension of an existing street that is not improved to city standards
22 and the street has an inadequate driving surface.’ In addition, these roadways
23 fail to meet the standards of the City of Eugene with regard to curbing (and
24 drainage facilities), sidewalks, landscape strips and adequate intersection
25 visibility.”).

1 While the standard contains an additional component that requires that the
2 “the street has an inadequately driving surface,” EC 9.6815(2)(f), the standard also
3 notes that “[t]he barrier shall be removed by the city at the time the existing street
4 is improved to city standards or to an acceptable standard adopted by the public
5 works or to an acceptable standard adopted by the public works director.” If the
6 barrier can be removed once the street is improved to city standards, and Lombard
7 Street is not up to city standards, then a temporary barrier must be put in place until
8 it meets city standards.

9 The standard also requires that “[i]n making a determination of an
10 inadequate driving surface, the public works director shall consider the street rating
11 according to Eugene’s Paving Management System and the anticipated traffic
12 volume.” EC 9.6815(2)(f). As noted by the applicant’s traffic engineer, the public
13 works director did not provide the requisite analysis under the code: “There is no
14 professional pavement evaluation in the record that established the adequacy or
15 inadequacy of the pavement condition. It seems to be agreed that the pavement is
16 narrow and does not meet city standards for width.” Comments from public works
17 are contained at R 998-1006 and R 390, neither of which contains the
18 considerations required by the code. The Public Works comments at R 390
19 addresses EC 9.6815(2)(f) but fails to address the requisite considerations, stating:

20 “EC 9.6815(2)(f) provides for the construction of temporary barriers where
21 there is an adequate driving surface. It is noted that road surfaces that are

1 less than full improvement to city standards are not necessarily considered to
2 be ‘inadequate’ in this context. The applicant has proposed a suitable
3 transition surface between the new and existing segments of Lombard
4 Street.”

5
6 R 390. The City also relies on the notion that connectivity requirements would not
7 be satisfied because access would be restricted. However, that is not necessarily
8 the case because access would still be provided via River Road. While increased
9 connectivity and access may be desirable, there is nothing to demonstrate that
10 additional access should be prioritized over inadequate streets that do not provide
11 meet city standards. Furthermore, there is nothing that *requires* additional access
12 and dispersal when only a single access is provided for, which would be the case
13 here if a temporary gate would be put in place.⁹ The connectivity justification by
14 the City is nothing more than a red herring.

15 Thus, the City misconstrued applicable law by failing to actually address the
16 requisite considerations in determining whether Lombard Street was inadequate or
17 does not meet City standards; the City’s findings are not based on substantial
18 evidence because the conclusion of compliance with EC 9.6815(2)(f) does not rely
19 upon the necessary evidence in the record mandated by the code. Finally, the
20 City’s findings are inadequate in that they do not respond to Petitioners’ concerns

⁹ In addition, there is nothing that prohibits emergency access that is otherwise prohibited for general traffic. For example, a locked gate could be put in place and emergency services could access Lombard Street with a key to the locked gate.

1 about the lack of a professional evaluation of the pavement, which is required by
2 the Eugene code.

3 V. CONCLUSION

4 Petitioners respectfully request that LUBA reverse or remand the challenged
5 decision. *See Angius v. Washington County*, 35 Or LUBA 462, 464-66 (1999);
6 *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992).

7 Respectfully submitted this 23rd day of November, 2018.

8 By: _____
9 Sean T. Malone, # 084060
10 Counsel for Petitioners
11
12

13 **CERTIFICATE OF COMPLIANCE, FILING, AND SERVICE**
14

15 I certify that (1) this brief complies with the word-count limitation in OAR
16 661-010-0030(2) and (2) the word count of this brief as described in OAR 661-
17 010-0030(2) is 11,653 words.

18 I certify that on November 23, 2018, I filed the original of Petitioner's
19 Petition for Review along with four copies with the Land Use Board of Appeals,
20 DSL Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283, by
21 Certified First Class Mail, Return Receipt Requested.

22 I also certify that on November 23, 2018, I served a true and correct copy of
23 this Petition for Review by First Class Mail to the following person(s):

24 Lauren Sommers

1 Eugene City Attorney's Office
2 125 E 8th Ave 2nd Fl
3 Eugene OR 97401
4 *Attorney for Respondent*

5
6 Bill Kloos
7 Law Office of Bill Kloos PC
8 375 W 4th St. Ste 204
9 Eugene OR 97401
10 *Attorney for Respondent-Intervenor*

11
12 Mike Reeder
13 Law Office of Mike Reeder
14 375 W 4th Ave Ste 205
15 Eugene OR 97401
16 *Attorney for Respondent-Intervenor*

17
18 _____ Dated: 11/23/18
19 _____

20 Sean Malone OSB No. 084060
21 Attorney at Law
22 259 E. 5th Ave., Suite 200-C
23 Eugene, OR 97401
24 (303) 859-0403
25 seanmalone8@hotmail.com

Table of Contents - Appendix

Final Order of the Eugene Planning Commission, Final Order (WG 18-3/SR 18-3/ARA 18-8)	1-16
Decision of the Eugene Hearings Official (WG 18-3/SR 18-3/ARA 18-8).....	17-39



Eugene Planning Commission

FINAL ORDER OF THE EUGENE PLANNING COMMISSION ON APPEAL OF THE HEARINGS OFFICIAL'S TENTATIVE APPROVAL FOR LOMBARD APARTMENTS WILLAMETTE GREENWAY PERMIT, SITE REVIEW, AND ADJUSTMENT REVIEW (WG 18-3/SR 18-3/ARA 18-8)

I. INTRODUCTION

This final order concerns an appeal of a decision by the Eugene Hearings Official approving a Willamette Greenway Permit, Site Review and Adjustment Review to construct 94 market-rate residential apartment units. The subject property is an approximately 3.59-acre, undeveloped site in an area of residential uses located between River Road and the Willamette River. The site is located at the northern terminus of Lombard Street, with frontage along River Road to the west. The entire site is zoned R-2 Medium-Density Residential with /ND Nodal Development overlay. The southern portion of the site has a /SR Site Review overlay. The entire property is located within the bounds of the Willamette Greenway.

Lombard Apartments, LCC (Applicant) filed applications for a Willamette Greenway Permit, a Needed Housing Site Review and an Adjustment Review to construct 94 apartments in four buildings, as well as a leasing office, maintenance building, and associated site improvements such as parking areas. The main entrance would be from River Road. The proposal would also extend Lombard Street to the northern boundary of the subject property.

The Eugene Hearings Official held the initial public hearing on this request on June 27, 2018. Following the hearing and extended open record period, on August 7, 2018 the Hearings Official approved the Needed Housing Site Review and Adjustment Review, and Willamette Greenway Permit applications. However, the Hearings Official also determined that that the Willamette River Greenway Permit criteria are not clear and objective and therefore cannot be applied to the Applicant's proposed housing). Following the decision, Rob Handy, Julie Hulme, H. M. Sustaita, and Loren Schein (Appellants) filed a timely appeal of the applications, with the River Road Community Organization joining the appeal for the purpose of assisting neighbors in exercising their Oregon Land Use Goal One citizen involvement right. The appeal includes eleven (11) appeal issues.

City staff issued written notice of the appeal hearing on August 24, 2018, consistent with land use code requirements. The Planning Commission held the public hearing on the appeal on September 5, 2018. At the public hearing, Andrew Brand, Hans Christiansen, and attorneys Michael Reeder and Bill Kloos provided testimony in support of the application and the Hearings Official's approval. Appellants Julie Hulme, Rob Handy, H. M. Sustaita, Loren Schein, Glen Mandzak and attorney Charles Woodward IV provided testimony in opposition as Appellants. One individual provided neutral testimony on behalf of the River Road Community

Organization, and a number of other individuals testified in opposition. The applicant's legal counsel, Michael Reeder, and Andrew Brand, followed with final rebuttal testimony. Written testimony was also submitted by several individuals.

The Planning Commission closed the public hearing on September 5, 2018. The Planning Commission deliberated on the appeal issues at its meetings on September 6, 2018, and reached its final decision on September 6, 2018. The Planning Commission affirmed with modifications the Hearings Official's approval of the Willamette Greenway Permit, Site Review, and Adjustment Review as set forth in Section IV, below.

As described below, with this September 6, 2018 Final Order, the Planning Commission affirms the Hearings Official's August 7, 2018 decision with modifications. The Planning Commission's decision is detailed below with respect to each assignment of error.

II. RECORD BEFORE THE PLANNING COMMISSION

The record before the Planning Commission consists of all the items that were placed before, and not rejected by, the Planning Commission prior to its final decision on this appeal. The record in this appeal was physically placed before the Planning Commission at the hearing and also provided electronically to each of the commissioners. Under EC 9.7655, appeals to the Planning Commission are "on the record," that is, the Planning Commission is limited to consideration of the evidence before the Hearings Official. In addition, appeals to the Planning Commission are "limited to issues raised in the record that are set out in the filed statement of issues." The Planning Commission's decision on the appeal is based upon consideration of all relevant evidence and argument within the record.

III. PROCEDURAL ISSUES

Bias/Ex Parte Contacts

At the Planning Commission hearing on September 5, 2018, Commissioner Fragala declared an ex parte contact and confirmed that she can make an unbiased decision based solely on the evidence and argument in the record. No other Commissioners announced any ex parte contacts related to the application on appeal.

A written challenge to the impartiality of Commissioner Randall was also made and introduced to the record before the Planning Commission. Staff advised that, irrespective of the challenge, Commissioner Randall was not in attendance at the hearing and would not be participating in any aspect of the decision-making process due to his unavailability resulting from prior personal commitments. As such, the Planning Commission need not address the challenge any further.

The Planning Commission Chair stated that any person in the audience had the right to rebut the substance of any ex parte communications, and asked whether anyone in the audience wished to challenge the qualifications of any of the Planning Commissioners. There were no other challenges to qualifications or impartiality.

Rejection of Testimony

At the Planning Commission meeting held on September 6, 2018, the Planning Commission rejected the following portions of written testimony submitted prior to the close of the September 5, 2018 public hearing.

1. Four maps included with written testimony submitted by Micheal Reeder on behalf of the Applicant.
2. A portion of written testimony submitted at the September 5, 2018 public hearing by Christopher Gadsby.
3. Three photographs and one graph submitted at the September 5, 2018 public hearing by Dennis Sandow.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the applicable law and all argument and evidence in the record, the Planning Commission finds that the subject application meets all applicable Willamette Greenway, Site Review, and Adjustment Review criteria from Eugene Code as specified by the Hearings Official, with the additional findings described below. In the event of any conflict between the Hearings Official's decision and this Final Order, this Final Order shall prevail. The Hearings Official's decision is adopted by reference except as modified by this Final Order and is included as Attachment A.

As noted above, the Planning Commission was presented with an appeal filed by Rob Handy, Julie Hulme, H. M. Sustaita, and Loren Schein (Appellants), with concurrent participation by the River Road Community Organization. Each assignment of error in the appeal is set forth below, followed by the Planning Commission's findings of fact and conclusions of law. The Planning Commission's deliberations supporting this decision took place on September 6, 2018.

Appeal

The appeal submitted includes eleven (11) issues identifying alleged errors in the Hearings Official's decision approving the Lombard Apartments applications. The appeal makes the case that the Hearings Official's decision should be reversed (and the application should be denied). The Planning Commission's findings and conclusions related to each appeal issue are provided below.

With the exception of the first appeal issue below, all of the issues are addressed in the order presented in the Appeal Statement.

Appeal Issue #1: The Hearings Official erred in finding that the Willamette River Greenway approval criteria do not apply to the subject application.

Hearings Official's Decision

On page 13 of the decision document, the Hearings Official opines that the Willamette Greenway approval criteria located in EC 9.8815 are not clear and objective and therefore the City may not apply them to the Applicant's needed housing application.

Summary of Appellants' Argument

On pages 2 and 3 of the appeal statement, Appellants argue that the Hearings Official erred in his interpretation of applicable Oregon Revised Statutes (ORS) and Oregon Statewide Planning Goal provisions. First, the Appellants argue that the newly amended version of ORS 197.307(4) does not include the reference to "buildable land" because, according to the Appellants, such reference would be redundant "because all residentially designated land *is buildable land*." [emphasis in original]. Appellants believe the reference to buildable land is important because the original ORS definition included an exception for those lands within the Willamette Greenway. Secondly, the Appellants state that Statewide Planning Goal 15, through the Willamette Greenway Permit, should control because it only applies to development in the greenway while ORS 197.307 applies to all lands and housing in the state.

Planning Commission's Determination

The Planning Commission disagrees with the conclusion of the Hearings Official concerning the applicability of Willamette Greenway Permit approval criteria. The Planning Commission finds that Willamette Greenway Permit approval criteria located in the Eugene Code (EC 9.8815) can and should be applied to the subject application. ORS 390.314 and Goal 15 require the City to adopt and apply specific subjective regulations within the Greenway (including regulations to ensure the "best possible appearance, landscaping and public access" and requiring findings that "to the greatest possible degree...the intensification, change of use or development will provide the maximum possible landscaped area, open space or vegetation between the activity and the river."). The City has complied with these state laws regulating the Greenway by adopting and applying EC 9.8815.

Separately, ORS 197.307(4) requires that the City offer all housing applicants the option to proceed under clear and objective approval standards. The competing requirements of ORS 390.314 and Goal 15 on one hand, and ORS 197.307(4) on the other, have created a legal conundrum for cities with land located within the Greenway.

The Planning Commission finds that for housing developments within the Greenway, ORS 390.314 and Goal 15 must take precedence over ORS 197.307. ORS 174.020(2) provides that when a general statutory provision and a particular statutory provision are inconsistent, the particular intent controls. Goal 15 and ORS 390.314 speak to a specific concern – preservation of the Willamette River Greenway, while ORS 197.307(4) appears to apply to all lands and all housing in the state. The Planning Commission finds that within the Greenway, as the more particular statutory provision, the requirements of ORS 390.314 (and by extension Goal 15) must take precedence over the requirement for clear and objective standards for housing.

Based on the available information in the record, the Planning Commission finds that the Hearings Official erred with respect to this appeal issue. Therefore, the Planning Commission modifies the Hearing Official's decision and finds that the criteria in EC 9.8815 are applicable to this application.

Appeal Issue #2: The Hearings Official misconstrued applicable law and made findings not based on substantial evidence with regard to EC 9.8815(1).

Hearings Official's Decision

EC 9.8815(1) states:

Willamette Greenway Permit Approval Criteria and Standards. Willamette Greenway permit approval may be granted only if the proposal conforms to all the criteria in subsections (1) through (4), and the applicable standards of subsection (5) as follows:

- (1) *To the greatest possible degree, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river.*

On page 6 of the decision, the Hearings Official opines that if "to the greatest possible degree" meant the theoretical maximum then no development could ever occur. The Hearings Official cites EC 9.8815(5) which explains, "greatest possible degree" language cannot be used to preclude the requested use. The Hearings Official determined that the requested use, a 94-unit multi-family apartment complex, is a permitted use in the R-2 zone and that no requirement to reduce the density in order to preserve open space exists. Furthermore, the Hearings Official determined that the Applicant has placed all of the development in the western portion of the property – away from the river. The Hearings Official could not determine how the Applicant could have configured the proposed development in an alternative layout that retains 94 units and the associated requirements in a way that would provide more open space closer to the river. Thus, the Hearings Official determined that EC 9.8815(1) is satisfied.

Summary of Appellants' Argument

The Appellants' argument concerns absence of evidence demonstrating that the proposal provides the maximum possible landscaped area, open space, or vegetation between the activity and the river. Appellants claim that the Hearings Official failed to provide the required specific explanation for how his findings demonstrate the required "balancing of factors;" therefore, they believe the Hearings Official's findings misconstrue applicable approval criteria.

Planning Commission's Determination

The Planning Commission agrees with the conclusion of the Hearings Official that EC 9.8815(2) is satisfied. An alternative proposal which retains the permitted density while balancing, to a greater extent, required open space does not seem readily apparent. The configuration of the lot, with the majority of its area on its eastern half, restricts substantial design alternatives, particularly alternatives which retain 94 total dwelling units.

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #3: The Hearings Official misconstrued applicable law and made findings not based on substantial evidence with regard to EC 9.8815(2).

Hearings Official's Decision

EC 9.8815(2) states:

- (2) *To the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means.*

In addition to clarifying that the standard concerns access *along* the river, not *to* the river, the Hearings Official found that the existing riverfront path system provides “more than adequate public access along the river” (page 7). Furthermore, the Hearings Official relies on the fact that the subject property does not directly front the Willamette River to find that EC 9.8815(2) is satisfied.

Summary of Appellants’ Argument

The Appellants state on page 1 and 2 of the appeal statement that the subject proposal provides no direct access to the Willamette River—neither private access for future residents nor open access for the general public. According to the Appellants, the property is adjacent to the river and the proposal restricts access.

Planning Commission’s Determination

The Planning Commission agrees with the conclusion of the Hearings Official that EC 9.8812(2) does not require access to the Willamette River. The proposal includes no changes or impacts to the existing riverfront path, a public park which provides adequate public access along the river.

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #4: The Hearings Official misconstrued applicable law and made findings not based on substantial evidence with regard to 9.8815(3).

Hearings Official’s Decision

EC 9.8815(3) states:

- (3) *The intensification, change of use, or development will conform with applicable Willamette Greenway policies as set forth in the Metro Plan.*

On page 7 of his decision, the Hearings Official found that the only applicable Metro Plan policy is Section III-D, Policy D.5, which provides:

New development that locates along the river corridors and waterways shall be limited to uses that are compatible with the natural, scenic, and environmental qualities of those water features.

In this case, the applicable R-2 zoning allows multiple-family residential development. The Hearings Official found that the City believed R-2 uses to be compatible with the Willamette River Greenway by designating the lot R-2. Furthermore, the Hearings Official finds that the portions of the proposal which meet the 35-foot building height maximum are not incompatible with the natural, scenic, and environmental qualities of the Willamette River. Lastly, in response to LandWatch Lane

County's argument involving Metro Plan Section III-C Environmental Resources Element, the Hearings Official found that the policies are neither relevant nor applicable approval criteria (page 8). Therefore, the proposal satisfies all of the Willamette Greenway approval criteria.

Summary of Appellants' Argument

The Appellants argue that explicit evidence demonstrating compliance with Metro Plan Section III-D, Policy D.5 is not provided. Therefore, without evidence demonstrating the opposite, they believe the proposed 35-foot height of portions of the proposal are incompatible with the natural, scenic, and environmental qualities of the Willamette River.

Planning Commission's Determination

The Planning Commission finds that the Hearings Official did not err in determining that existing R-2 zoning permits multi-family residential development and that the 35-foot building height proposed by the applicant is not incompatible with the natural, scenic, and environmental qualities of the Willamette River.

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #5: The Hearings Official misconstrued applicable law and made inadequate findings not based on substantial evidence with regard to the density calculations for the subject development.

Hearings Official's Decision

EC 9.2751 states:

(1) Density

(a) *****

(b) *For purposes of this section, 'net density' is the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common open space or recreation facilities.*

(c) *For the purposes of calculating net density:*

(1) *The acreage of land considered part of the residential use shall exclude public and private streets and alleys, public parks, and other public facilities.*

EC 9.0500 defines "street":

An improved or unimproved public or private way, other than an alley, that is created to provide ingress or egress for vehicular traffic to one or more lots or parcels, excluding a private way that is created to provide ingress or egress to land in conjunction with the use of land for forestry, mining, or agricultural purposes. A 'street' includes the land between right-of-way lines within the ingress/egress easement areas serving multiple residential lots but excluding 'flagpole' portions of flag lots.

EC 9.5500 defines "driveway":

The area located outside of the public right-of-way that abuts the access connection and allows for vehicles to move to or from a development site.

EC 9.5500(11)(b) defines "parking drive":

Parking drives are driveways lined with head-in parking spaces, diagonal parking spaces, garages, or any combination thereof along a significant portion of their length. Parking drives for multiple-family developments with more than 20 units shall be designed so as to emit no through motor vehicle movements.

On pages 13-14 of the decision document, the Hearings Official agrees with the Applicant's net density calculation. The staff findings on page 22 of the report to the Hearings Official, adopted by the Hearings Official to address EC 9.2750, were as follows:

The minimum density for the subject site is 15 units per acre as established by the /ND Nodal Development Overlay Zone at EC 9.4290 * * *. The R-2 base zone of the subject site provides that a maximum density of 28 units per acre is allowed * * *.

The applicant also provides a calculation on sheet A1 of the May 11, 2018 application materials. The calculation identifies the entire site area as being 3.59 acres, subtracts the .21 acres to be dedicated for Lombard Street, and concludes that 94 units is the maximum density considering 28 units per net acre is allowed.

Concerning whether the internal vehicular circulation areas meet the definition of "street" and, therefore, should be excluded from total acreage for the purpose of calculating density; the Hearings Official concludes that Eugene Code treats driveways and parking drives as separate and distinct from streets. Thus, the parking drives do not have to be subtracted from the net density calculation.

The Hearings Official also reasons that the leasing office and maintenance buildings are not public facilities that must be excluded from the net density calculation.

Lastly, the Hearings Official concludes that the open space area along the east side of the subject property is not open to the public and therefore, would qualify as common open space for the exclusive use of the residents.

Summary of Appellants' Argument

Appellants argue that the Hearings Official erred in his inclusion of "paved circulation areas", the leasing office, maintenance building, and open space on the eastern portion of the property as part of the acreage of land considered part of the residential use of the subject lot. According to the Appellants, the "circulation areas" meet the EC definition of "streets". Additionally, the leasing office, maintenance building, and open space areas should be excluded as they are not "for the exclusive use of the residents of the development." Instead, the Appellants argue that

these areas are open to the public and not for the exclusive use of the residents. Lastly, the Appellants argue that the "Greenway area" designated as open space is also open and not exclusive to the residents.

Planning Commission's Determination

The Planning Commission finds that the Hearings Official did not err in determining that the application properly applies the net density calculation and that EC 9.2751 is satisfied.

In regards to "parking drives," the Planning Commission agrees with the Hearings Official's findings. The Applicant's proposal includes two through-motor vehicle parking drives. The Applicant requests an adjustment to the parking drives standard, which is allowed, subject to review under the criteria listed at EC 9.8030(8)(e). Even though the Applicant requests an adjustment to parking drive standards, the adjustment does not change the features' designation from "parking drives" to "streets." Therefore, the Planning Commission finds that none of the area identified as parking or parking drives must be excluded from the net density calculation.

In regards to the leasing office, maintenance building, and required open space, the Planning Commission notes that EC 9.2751(1)(c) provides the applicable instrument for calculating density and excludes any reference to resident-only exclusivity. The leasing office and maintenance building are accessory to the residential use, specifically serving current and future residents as well as employees carrying out functions directly related to maintenance and operations of the residential use. In no way do either structures constitute a public park or public facilities for the purpose of calculating density.

The Planning Commission confirms the Applicant's residential density calculations and agrees with the Hearings Official that the standards at EC 9.2751 are met.

Appeal Issue #6: The Hearings Official misconstrued applicable law and made findings not based on substantial evidence with regard to EC 9.8445(4)(f)(2), EC 7.420(3)(i), and EC 9.6780.

Hearings Official's Decision

The Hearings Official comes to the conclusion that the intersections in question are not part of, nor adjacent to, the subject property. On page 16 of the decision document, he finds that the Applicant will provide adequate vision clearance for the access points at River Road and Lombard Street, and also concludes that the development does not propose any new intersections. Thus, the Hearings Official finds no basis by which to deny the application based on opponents' vision clearance arguments.

Summary of Appellants' Argument

Appellants argue, on page 4 of the appeal statement, that the proposal does not provide "triangular visual clearance on the corners of Lombard and Fir Lane."

Planning Commission's Determination

The Planning Commission finds that the Hearings Official did not err in determining that

proposed development site is neither adjacent to, nor responsible for, any vision clearance areas at the intersection of Lombard Street and Fir Lane. The Planning Commission also finds that the Hearings Official did not err in determining that “development site” does not include off-site intersections, nor is the development creating any new intersections. Therefore, EC 9.8670 is not applicable to the application.

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #7: The Hearings Official misconstrued applicable law and made inadequate findings not based on substantial evidence with regard to EC 9.6815(2)(f).

Hearings Official’s Decision

EC 9.6815(2)(f) states:

- EC 9.6815 Connectivity for Streets.
 (2) Street Connectivity Standards
 (f) *In cases where a required street connection would result in the extension of an existing street that is not improved to city standards and the street has an inadequate driving surface, the developer shall construct a temporary barrier at the entrance to the unimproved street section with provision for bicycle, pedestrian, and emergency vehicle access. The barrier shall be removed by the city at the time the existing street is improved to city standards or to an acceptable standard adopted by the public works director. In making a determination of an inadequate driving surface, the public works director shall consider the street rating according to Eugene’s Paving Management System and the anticipated traffic volume.*

On page 17, the Hearings Official agrees with the Applicant’s traffic engineer and City Public Works staff that, while Lombard Street is not in perfect condition or improved to City standards, it does not appear to be “inadequate.” As such, EC 9.6815(2)(f) does not apply and a temporary barrier is not required.

Summary of Appellants’ Argument

Appellants state that the Hearings Official erred in applying EC 9.6815(2)(f)—the Applicant should be required to install a temporary barrier at the entrance to Lombard Street from the development’s southern edge. On page 4 and 5 of the appeal statement, Appellants argue that Lombard Street shows “significant deteriorations of the surface and pavement distress, crumbling, and lack of drainage facilities.” Accordingly, the surface must be declared “inadequate” for the purposes of EC 9.6815(2)(f), and furthermore, no evidence in the record establishes the “adequacy” of the street.

Planning Commission’s Determination

The Planning Commission finds that the Hearings Official did not err in determining that the

existing driving surface of Lombard Street does not appear “inadequate.” In this context, inadequate driving surface means nearly impassable, such as would exist at the proposed northern terminus of the Lombard Street extension. Furthermore, in regards to EC 9.6815(2)(f), “where a required street connection would result in the extension of an existing street that is not improved to city standards and the street has an inadequate driving surface, the developer shall construct a temporary barrier.” In the “Staff Response to Public Comments,” an attachment to the June 20, 2018 Staff Report to the Hearings Official and included in the application file for reference, City of Eugene Public Works Engineering staff explain that “inadequate” would equate to nearly impassable or dangerous conditions.

The Planning Commission also notes that temporary bollards on Lombard Street would prohibit access, and are not consistent with EC 9.6815 Connectivity for Streets. The street connectivity standards are established to ensure that streets can accommodate emergency vehicles and create interconnections to reduce travel distance, promote the use of alternative modes, provide for efficient utility and emergency services, and provide for more even dispersal of traffic.

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #8: The Hearings Official misconstrued applicable law and made inadequate findings not based on substantial evidence with regard to EC 9.5500(7), (13), and (14).

Hearings Official’s Decision

The Needed Housing Site Review criterion at EC 9.8445(2) states:

For a proposal for multiple family developments, the proposal complies with the standards contained in EC 9.5500 Multiple Family Standards.

On pages 17-18, the Hearings Official found that the subject standards concerning building articulation (EC 9.5500(7)), on-site pedestrian circulation (EC 9.5500(13)), and recycling and garbage areas (EC 9.5500(14)) are satisfied or can be satisfied through the proposed conditions of approval (Decision of the Hearings Official, Conditions 1 and 2).

Summary of Appellants’ Argument

Appellants state that the Hearings Official’s allegations of adequacy concerning the multiple-family development standards at EC 9.5500(7), (13), and (14) are generalized and fail to explain how compliance with the subject criteria is feasible.

Planning Commission’s Determination

The Planning Commission finds that the Hearings Official did not err in determining that EC 9.5500(7), (13), and (14) standards are satisfied or can be satisfied through the proposed conditions of approval. Concerning EC 9.5500(7) Building Articulation, the Planning Commission believes that the Applicant’s site plans demonstrate conceptual compliance with the standard above, but understands that future design changes may occur due to conditions assuming the application is approved. To allow some flexibility in design, and to ensure that the Applicant complies with the standard above, the Hearings Official correctly included the following

condition of approval in his decision:

- Prior to issuance of a development permit, the applicant shall provide details that identify which features are being used to comply with EC 9.5500(7); and the following note will be added to the Final Site Plan: "Buildings shall comply with the building articulation requirements at EC 9.5500(7)."

In regards to EC 9.5500(13) On-Site Pedestrian Circulation, the Planning Commission notes that the Applicant does not create a connection to the public accessway directly to the east: the Ruth Bascom path. However, the Planning Commission also notes that the standards are intended to provide connections on-site, and to adjacent public or private street right of way lines only. As the standard does not require that connections to adjacent paths be provided, the Applicant's proposal complies with this standard.

Lastly, with reference to EC 9.5500(14) Recycling and Garbage Areas, while conceptually acceptable, no graphics of the structures are provided and further review to ensure the structures comply with the criterion above will be necessary at the time of building permit. To ensure this occurs, the Hearings Official correctly included the following condition of approval in his decision:

- Prior to issuance of a development permit, the applicant shall revise the site plan to demonstrate compliance with EC 9.5650 Recycling - Small Collection Facility Standards and EC 9.6740 Recycling and Garbage Screening. The following note shall also be added to the applicant's site plan: "Recycling and Garbage areas shall comply with EC 9.5650 and EC 9.6740."

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #9: The Hearings Official misconstrued applicable law and made inadequate findings not based on substantial evidence with regard to EC 9.5500(6).

Hearings Official's Decision

The Multiple Family Development Standards at EC 9.5500(6) state:

- (6) *Building Mass and Facade.*
 - (a) *Maximum Building Dimension. Neither the maximum length nor width of any building within 40 feet of a front lot line can exceed 100 feet in the R-1 and R-2 zones and 150 feet in all other zones.*

The criteria for adjustment to this standard states the following:

EC 9.8030(8):

- (a) *Maximum Building Dimension. The requirements set forth in EC 9.5500(6)(a) may be adjusted if the proposal creates building massing and/or facades that:*

1. *Create a vibrant street facade with visual detail.*
2. *Provide multiple entrances to building or yards.*

The Hearings Official found that the proposed adjustment, which includes vertical articulation, horizontal massing variations in the form of decks, patios, and large window, and siding treatment creates a vibrant street façade (page 19). The Hearings Official agreed with staff that the proposed building provides sufficient means by which an adjustment is warranted.

Summary of Appellants' Argument

Appellants argue that the Hearings Official relies on generalities in his findings. The proposed architectural design and finishings, the Appellants argue, are not yet established and therefore do not warrant adjustment under EC 9.5500(6).

Planning Commission's Determination

The Planning Commission finds that the Hearings Official did not err in determining that an adjustment to EC 9.4290(2) is warranted for proposed Building 2 and that the adjustment approval criteria at EC 9.8030(8) are satisfied. The Applicant requests an adjustment to the standard at EC 9.5500(6) for Building 2, which exceeds the maximum allowable building length by approximately 31 feet. The Applicant's proposal provides evidence of articulation, multiple building entrances, private patios, and decks.

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #10: The Hearings Official misconstrued applicable law and made inadequate findings not based on substantial evidence with regard to EC 9.6735(2).

Hearings Official's Decision

EC 9.6735 states:

9.6735 Public Access Required.

- (1) *Except as otherwise provided in this land use code, no building or structure shall be erected or altered except on a lot fronting or abutting on a public street or having access to a public street over a private street or easement of record approved in accordance with provisions contained in this land use code.*
- (2) *Access from a public street to a development site shall be located in accordance with EC 7.420 Access Connections – Location. If a development will increase the development site's peak hour trip generation by less than 50% and will generate less than 20 additional peak hour trips, the development site's existing access connections are exempt from this standard.*

The related adjustment review criteria at EC 9.8030(28) states:

- (28) *Public Access Required. The public access requirement of 9.6735(2) may be adjusted if the site developer demonstrates any of the following:*
- (a) *Physical conditions preclude compliance with EC 7.420. Such conditions may include, but are not limited to, topography, trees, existing buildings or other existing development on the subject property or adjacent property.*
 - (b) *The proposed adjustments to the standards will provide safe ingress and egress to the development site, will not negatively impact the efficiency of the public right-of-way, and will not result in a hazard to the bicycle, pedestrian or vehicular traffic using the right-of-way.*
 - (c) *The proposed development will not impact one or more of the existing access connections to the development site. Impact to an existing access connection includes, but is not limited to, increasing the number of vehicles, either directly or indirectly, that will utilize an existing access connection for ingress or egress to the development site.*
 - (d) *Compliance with EC 7.420(1)(c) will result in traffic patterns inconsistent with the character of the property located within a quarter mile radius of the development site or will increase the number of vehicular trips using the street with the lower classification above the typical daily trip range for that street's classification.*

The Hearings Official relied on the June 20, 2018 staff report and report of the Applicant's traffic engineer (Kelly Sandow P.E., Sandow Engineering, "Tech Memo" dated May 9, 2018 as part of application materials and included in the application file for reference) to find that an adjustment to EC. 9.6735(2) is warranted.

Summary of Appellants' Argument

The Appellants state that the Hearings Official's findings are conclusory and, therefore, not based on substantial evidence.

Planning Commission's Determination

The Planning Commission finds that the Hearings Official did not err in determining that the Applicant satisfies the approval criteria at EC 9.8030(28) and that the adjustment to EC 9.6735 Public Access Required is satisfied. Public Works Engineering referral comments (June 13, 2018) state that the analysis provided by the Applicant's traffic engineer, Kelly Sandow, P.E. of Sandow Engineering, conclude that the proposed access to River Road will provide safe ingress and egress, will not negatively impact the efficiency of the public right-of-way, and will not result in a hazard to bicycle, pedestrian, or vehicular traffic using River Road. Based on this evidence from a qualified traffic engineer, and agreement from the City's Public Works staff, the Planning Commission finds that the adjustment standard at EC 9.8030(28) is met and the adjustment is warranted.

Based on the available information in the record, the Planning Commission finds that the Hearings Official did not err with respect to this appeal issue.

Appeal Issue #11: Appellants incorporate by reference all arguments made by Sean T.

Malone, Greenlight Engineering, Rob Handy, Julie Hulme, H.M. Sustaita, Loren Schein, the City Attorney, and LandWatch Lane County.

Hearings Official's Decision

The Hearings Official's decision addresses the arguments previously raised by opponents as part of the initial hearing process and, as such, his findings are included herein by reference.

Summary of Appellants' Argument

Appellants conclude their appeal statement incorporating by reference all arguments by the identified parties.

Planning Commission's Determination

This appeal issue does not provide a clear argument or specific assignment of error, and therefore lacks sufficient specificity for the Planning Commission to respond any further.

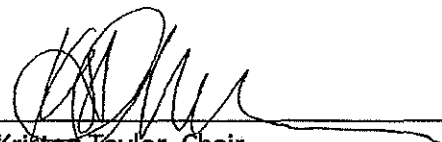
V. CONCLUSION

The Eugene Planning Commission reviewed the record and the assignments of error in the appeals, and hereby affirms with modification the Decision of the Hearings Official to conditionally approve the Willamette Greenway Permit, Site Review, and Adjustment Review for Lombard Apartments (WG 18-3/SR 18-3/ARA 18-8). The conditions of approval imposed by the Hearings Official and adopted by the Planning Commission are included below for ease of reference.

1. Prior to the issuance of a development permit the applicant shall provide details that identify which features are being used to comply with EC 9.5500(7); and the following note will be added to the Final Site Plan: "Buildings shall comply with the building articulation requirements at EC 9.5500(7)."
2. Prior to issuance of a development permit, the applicant shall revise the site plan to demonstrate compliance with EC 9.5650 Recycling – Small Collection Facility Standards and EC 9.6740 Recycling and Garbage Screening. The following note shall also be added to the applicant's site plan: "Recycling and Garbage areas shall comply with EC 9.5650 and EC 9.6740."
3. The following restriction shall be required to be shown on the Final Site Plan in accordance with EC 9.6500(3): "No building, structure, tree or other obstruction shall be placed or located on or in a Public Utility Easement."
4. The proposed Public Utility Easement shall be conveyed by a separate document meeting City standards in conjunction with the Privately Engineered Public Improvements (PEPI) permitting process.
5. Prior to issuance of a building permit, the applicant shall obtain approval of a PEPI permit for the construction of Lombard Street and any associated infrastructure that will be public including the proposed public wastewater line.

6. During the PEPI process, the applicant shall provide a street deed to convey the right-of-way for Lombard Street to the City.
7. In conjunction with the PEPI process, the applicant shall submit a street tree agreement application with a street tree plan to the City Urban Forester for review. Approval of the agreement will be required prior to PEPI approval.
8. Prior to the issuance of a development permit, the applicant shall demonstrate compliance with EC 9.6791 through EC 9.6797.
9. The applicant shall add the following note onto its Final Site Plans: "Parking areas shall comply with the standards at EC 9.6420."
10. The entire stall depth of the northern-most and western-most parking stall, adjacent to the north property line and near River Road access, shall be a minimum of 15 feet in depth from each corner and marked "compact", eliminated, or otherwise revised to meet EC 9.6420.
11. Final site plans shall be revised to require L-3 High Screen Landscaping along the south property line of the western-most parking area.

The Planning Commission modifies the Hearing Official's decision and finds that the criteria in EC 9.8815 are applicable to this application. The Willamette Greenway Permit, Site Review, and Adjustment Review applications are hereby approved with conditions. The foregoing findings and conclusions are adopted as the Final Order of the Eugene Planning Commission on Appeal of the Hearings Official's Conditional Approval for Lombard Apartments Willamette Greenway Permit, Site Review, and Adjustment Review (WG 18-3/SR 18-3/ARA 18-8), on this 6th day of September, 2018.



Kristen Taylor, Chair
Eugene Planning Commission

Attachment A: Hearings Official's Decision, dated August 7, 2018.

ATTACHMENT A

DECISION OF THE HEARINGS OFFICIAL FOR THE CITY OF EUGENE, OREGON

WILLAMETTE GREENWAY, SITE REVIEW, AND ADJUSTMENT REVIEW

INTRODUCTION

Application File Name (Number):

Lombard Apartment LLC (WG 18-3/ SR 18-3/ ARA 18-8)

Applicant's Request:

Approval of a Willamette Greenway Permit, Site Review, and Adjustment Review to construct 94 residential apartment units.

Subject Property/Location:

Located on the east side of River Road north of Lombard Street. Assessor's Map: 17-04-25-12 Tax Lot 1000.

Relevant Dates:

Applications submitted on April 6, 2018; supplemental materials submitted and application deemed complete at applicant's request on May 11, 2018; public hearing held on June 27, 2018.

Applicant's Representative:

Micheal Reeder.

Lead City Staff:

Rodney Bohner, Assistant Planner, Eugene Planning Division.

Summary of the Public Hearing

The Hearings Official held a public hearing on this application on June 27, 2018. The Hearings Official stated he had no conflicts of interests, was not biased, and had no *ex parte* communications to disclose. No person objected to the Hearings Official conducting the hearing. Rodney Bohner (Bohner), Assistant Planner, and Alissa Hansen, Principal Planner, were present for the hearing. Bohner presented the staff report, recommending approval of the application. Micheal Reeder, the applicant's representative, testified in favor of the application. Bill Kloos argued that the Willamette Greenway provisions could not be applied under the relevant needed housing statutes. A number of opponents testified in opposition to

the applications, primarily based on concerns about traffic, effects on the Willamette Greenway, and the sale of the property by a public entity. At the conclusion of the public hearing, the Hearings Official left the record open twelve days for the submission of new evidence and argument, seven additional days for responses to the new evidence and argument, and an additional seven days for the applicant's final legal argument.

FACTS

The property is a 3.59-acre undeveloped property located at the northern terminus of Lombard Street, with frontage along River Road to the west. To the east sits the City's Riverfront bike path, and then the Willamette River. To the southeast is Maurie Jacobs Park which is a City park that includes parking, a sports field, and other park amenities. The entire site is zoned Medium-Density Residential (R-2) with Nodal Development (ND) overlay. The southern portion of the site has a Site Review (SR) overlay. The entire property is located within the bounds of the Willamette Greenway. The property is an area of residential uses sandwiched between River Road and the Willamette River. Lombard Street currently ends at the southern boundary of the property. The proposal would extend Lombard Street to the northern boundary. The proposal is to construct 94 apartments in four buildings, as well as a leasing office and maintenance building. The main entrance would be from River Road.

ANALYSIS

A. Preliminary Issues

Initially, Dennis Sandow (Sandow) requests that the open record period be extended. Sandow argues that more time is needed to respond to the numerous issues, in particular because of the July 4th holiday. The open record period was actually five days longer than the standard 21-day period for precisely the July 4th reason Sandow raises. The 120-day deadline for making the decision would be in jeopardy if the open record period were extended for any additional time. In any event, the open record period complies with the requirements of ORS 197.763. Sandow's request to extend the open record is denied.

During the second open record period (to respond to evidence submitted during the first open record period), Julie Hulme (Hulme) submitted an email in opposition to the application stating that the opposition was being provided "[o]n behalf of the River Road Community Organization." July 16, 2018 E-mail. On July 22, 2018 (during the open record period for the applicant's final legal argument), Jon Belcher (Belcher) – who is apparently a co-chair of the River Road

Community Organization (RRCO) – submitted an e-mail stating that Hulme was not authorized to speak for the RRCO and that the RRCO did not have any position on the merits of the application. Belcher asks that Hulme’s e-mail be stricken from the record or that his email be included in the record. Hulme’s e-mail raises the issue of the applicability of the Willamette Greenway provisions and the proposal’s density calculations. Those issues are raised (and in greater detail) by numerous other parties, so I have to address those issues. I do not see that whether Hulme is speaking for the RRCO or not would affect my decision, but I appreciate the clarification from the RRCO and it is duly noted that Hulme does not speak for the RRCO. The e-mail from Belcher should be included in the record to clarify this point.

B. Willamette Greenway

1. Willamette Greenway Approval Criteria

The property is located within the Willamette River Greenway. Therefore, under the Eugene Code (EC), the application is required to comply with the Willamette Greenway provisions of EC 9.8815.¹ The staff report explains how the application meets all of the approval criteria. There are numerous approval criteria, and opponents do not challenge most of the findings in the staff report. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further.²

EC 9.8815 provides:

“Willamette Greenway Permit Approval Criteria and Standards. Willamette Greenway permit approval may be granted only if the proposal conforms to all the criteria in subsections (1) through (4), and the applicable standards of subsection (5) as follows:

- “(1) To the greatest possible degree, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river.
- “(2) To the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means.

¹ As discussed later, the applicant argues that the provisions of EC 9.8815 are not applicable to the application due to recently enacted housing statutes.

² This includes the clarifications to the staff report as explained in staff’s July 8, 2018 Memorandum.

- “(3) The intensification, change of use, or development will conform with applicable Willamette Greenway policies as set forth in the Metro Plan.
- “(4) In areas subject to the Willakenzie Area Plan, the intensification, change of use, or development will conform with that plan’s use management considerations.
- “(5) In areas not covered by subsection (4) of this section, the intensification, change of use, or development shall conform with the following applicable standards:
 - “(a) Establishment of adequate setback lines to keep structures separated from the Willamette River to protect, maintain, preserve, and enhance the natural, scenic, historic, and recreational qualities of the Willamette Greenway. Setback lines need not apply to water related or water dependent activities as defined in the Oregon Statewide Planning Goals and Guidelines (OAR 660-15-000 et seq.).
 - “(b) Protection of significant fish and wildlife habitats as identified in the Metropolitan Plan Natural Assets and Constraints Working Paper. Sites subsequently determined to be significant by the Oregon Department of Fish and Wildlife shall also be protected.
 - “(c) Protection and enhancement of the natural vegetative fringe along the Willamette River to the maximum extent practicable.
 - “(d) Preservation of scenic qualities and viewpoints as identified in the Metropolitan Plan Natural Assets and Constraints Working Paper.
 - “(e) Maintenance of public safety and protection of public and private property, especially from vandalism and trespass in both rural and urban areas to the maximum extent practicable.
 - “(f) Compatibility of aggregate extraction with the purposes of the Willamette River Greenway and when economically feasible, applicable sections of state law pertaining to Reclamation of Mining Lands (ORS Chapter 517) and Removal of Material; Filling (ORS Chapter 541) designed to minimize adverse effects to water quality, fish and wildlife, vegetation, bank stabilization, stream flow, visual quality, noise, safety, and to guarantee necessary reclamation.

- “(g) Compatibility with recreational lands currently devoted to metropolitan recreational needs, used for parks or open space and owned and controlled by a general purpose government and regulation of such lands so that their use will not interfere with adjacent uses.

“As used in this section, the words ‘the greatest possible degree’ are drawn from Oregon Statewide Planning Goal 15 (F.3.b.) and are intended to require a balancing of factors so that each of the identified Willamette Greenway criteria is met to the greatest extent possible without precluding the requested use.

- “(6) When site review approval is required, the proposed development will be consistent with the applicable site review criteria.
- “(7) The proposal complies with all applicable standards explicitly addressed in the application. An approved adjustment to a standard pursuant to provisions beginning at EC 9.8015 of this land use code constitutes compliance with the standard.”

Opponents argue that the proposal does not satisfy EC 9.8815(1), which requires that “[t]o the greatest possible degree, the * * * development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river.” The proposal includes a 100-foot setback from the river, although only approximately 70 feet of that is on the applicant’s property. The rest of the setback is provided by City owned property that includes the river trail and bike path. The open space proposed by the development is approximately 15% of the property. According to opponents, only preserving 15% of the property in open space fails to satisfy EC 9.8815(1). The staff report found:

“The applicant’s response under this criterion does not provide much information, but clearly the applicant chose to locate the development at least 100 feet from the river, and to retain that open space area along the bike path and river. Staff believes the applicant’s site plan and other available information showing ample distance and existing riparian vegetation between the development and the river is sufficient to demonstrate compliance with this criterion.” Staff Report 4.

Opponents argue that this does not provide the maximum possible open space to the greatest degree possible. Theoretically, the applicant could not develop the property at all and have the entire site be open space. If “to the greatest possible degree” meant the theoretical maximum

then no development could ever occur. EC 9.8815(5) explains that “to the greatest possible degree” means:

“As used in this section, the words ‘the greatest possible degree’ are drawn from Oregon Statewide Planning Goal 15 (F.3.b.) and are intended to require a balancing of factors so that each of the identified Willamette Greenway criteria is met to the greatest extent possible without precluding the requested use.

As EC 9.8815(5) explains, “the greatest possible degree” language cannot be used to preclude the requested use. The requested use is a 94-unit multi-family apartment complex – that is a permitted use in the R-2 zone. The applicant has placed all of the development in the western portion of the property – as far away from the river as possible. Opponents have not argued, and I do not see, that the applicant could have configured the proposed development in a way that retains 94 units and the associated requirements in a way that would provide more open space closer to the river. I also do not see that the applicant is required to reduce the requested density in order to preserve more open space. EC 9.8815(1) is satisfied.

Opponents argue that the proposal does not satisfy EC 9.8815(2), which requires that “[t]o the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means.” According to opponents, because the proposal does not provide public access from the property to the river and a proposed fence would prevent residents from accessing the river, the proposal does not provide adequate public access. The staff report found:

“The applicant further states that there is a public bike path on the west side of the greenbelt between the river and this site that provides adequate public access to the river. The applicant also states that the extension of Lombard Drive (Street) will also allow future development to the north of the site to gain access to Marie Jacobs Park by travel southbound through the site along public roadways to the park.

“Staff believes that the above criterion requires access to be provided *along* the river, and in this case the applicant benefits from the existence of the City’s Riverfront Path System. This existing system provides a path that is paved, and runs along the river from Springfield to the Beltline Highway, providing access *along* the Willamette River. The applicant has proposed a 42” fence along the 100 foot setback that will block access from the site to the Riverbank Path System.

“While it is unfortunate that the applicant has not proposed a direct access to that path, the above criterion does not necessarily require that access be provided

directly from the development site in all cases. Based on the available evidence, and the specific wording of the criterion above, staff believes this criterion is met.” Staff Report 4-5 (emphasis in original).

I agree with the staff report. EC 9.8815(2) addresses adequate public access “along the river.” There is more than adequate public access along the river. The City’s renowned Riverfront Path System runs to the east of the property along the river. If the property was adjacent to the river and proposed to restrict access along the river then opponents would likely be correct that the criterion is not satisfied. But that is not the scenario in the present case. EC 9.8815(2) is satisfied.

Opponents argue that the proposal does not satisfy EC 9.8815(3), which requires that the proposed development “conform with applicable Willamette Greenway policies as set forth in the Metro Plan.” According to opponents, the proposal does not conform with a number of applicable plan policies. The only applicable plan policy identified in the staff report is Metro Plan Section III-D, Policy D.5, which provides:

“New development that locates along the river corridors and waterways shall be limited to uses that are compatible with the natural, scenic, and environmental qualities of those water features.”

According to opponents, a “towering” 35-foot apartment complex is not compatible with the natural, scenic, and environmental qualities of the Willamette Greenway. The staff report found:

“* * * staff believes this policy is met to the extent that the proposed development of multi-family residential uses is allowed in the applicable R-2 zone, and otherwise found to be consistent with the natural resource protections afforded through the Willamette Greenway Permit criteria. Those requirements in EC 9.8815 are locally adopted regulations that implement Statewide Planning Goal 15 in the context of this policy.

“Based on the available information, staff believes this criterion is met.” Staff Report 5.

I agree with the staff report. The policy talks about “uses” that are compatible with the applicable water feature. The applicable R-2 zoning allows multi-family residential – that is the use. By adopting R-2 zoning for the property the City obviously envisioned multi-family residential use as a potential use for the property. The City clearly thought such a use was compatible with the Willamette River Greenway or it would not have zoned the property R-2. I do not see that the plan policy allows micro-management of the building layout or design of a

permitted use. Even if it did, the proposal locates the development as far away from the river as possible. I do not see that merely because the proposed development uses the full 35-foot height maximum allowed under R-2 zoning that it somehow renders the proposal incompatible with the natural, scenic, and environmental qualities of the greenway.

LandWatch Lane County also argues that there are numerous other Metro Plan policies that the proposal does not comply with. Those alleged applicable policies involve Goal 3 Agricultural policies and Goal 5 Open Space policies. I do not see that those policies have any particular relevance to the proposed development. Even if they did, however, they would still not be applicable approval criteria because EC 9.8815(3) specifically requires conformance with “applicable *Willamette Greenway* policies as set forth in the Metro Plan.” (Emphasis added.) The Willamette Greenway policies are specifically provided in section III D of the Metro Plan. There are eleven specific policies listed in this section – of which Policy D 5 is one. The Metro Plan policies cited by LandWatch Lane County are not found under section III D and are not Willamette Greenway policies. Therefore, they are irrelevant for purposes of this decision. EC 9.8815(3) is satisfied.

All of the Willamette Greenway approval criteria are satisfied.

2. Whether the Willamette Greenway Approval Criteria Apply

Although the applicant submitted an application for a Willamette Greenway permit, the applicant also argues that under the recently enacted state needed housing statutes that the City may not apply the Willamette Greenway approval criteria because they are not clear and objective approval standards.³

The proposed development is needed housing, and the applicant proceeded under the clear and objective site review approval criteria of EC 9.8445 rather than the general site review approval criteria (which are not clear and objective) of EC 9.8440. State statutes regarding housing and needed housing require a local government to provide clear and objective standards for such housing. ORS 197.307 provides, in pertinent part:

- “(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

³ The Home Builders Association of Lane County also makes this argument.

- “(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
- “(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

“* * * * *

- “(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:
 - “(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;
 - “(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and
 - “(c) The approval criteria for the alternative process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.”

The applicant and the Homebuilders Association of Lane County argue that the Willamette Greenway approval criteria are not clear and objective standards and therefore the City may not apply them to the needed housing application.⁴ There does not seem to be much doubt that the Willamette Greenway standards of EC 9.8815 are not clear and objective. For instance, EC 9.8815(1) and (2) both require a proposal to provide attributes to “the greatest possible degree.” This is an inherently unclear and subjective standard. I agree with the applicant’s analysis in its July 23, 2018 memorandum explaining why the EC 9.8815 approval criteria are not clear and objective. The real issue is not so much whether the Willamette Greenway approval criteria are clear and objective but whether they must be applied despite not being clear and objective.

Initially, the Assistant City Attorney (ACA) argues that a Hearings Officer does not have the authority to determine that the City may not apply approval criteria to a proposed needed housing application. According to the ACA:

⁴ The applicant and the Homebuilders Association of Lane County make complementary arguments regarding whether the Willamette Greenway approval criteria may be applied to the application. For convenience and brevity I will just refer to these arguments as the being made by the applicant.

“The City has consistently maintained the position that once the City Council adopts a code provision only the Council (through a code amendment) or an authority hierarchically above it (LUBA or a court), can void or choose not to apply that code provision. Neither city staff, the planning commission, nor the hearings officer have the legal authority to choose to ignore or override land use approval criteria adopted by the City Council.” ACA July 16, 2018 Memorandum 3-4 fn 1.

The ACA memorandum does not explain the basis for this assertion, but it appears to be based on the reasoning in a memorandum from another ACA in the Chamotee Trails PUD (PDT 15-1) case (Chamotee Trails Memorandum).⁵ The Chamotee Trails Memorandum states that the Planning Commission (and now extended to the Hearings Official) “does not have the authority to determine a provision is not clear and objective.” *Id.* at 1. The Chamotee Trails Memorandum explains the basis for this conclusion:

“The City Council adopted the 19-lot rule and the remainder of the needed housing PUD criteria by ordinance. Section 48 of the Eugene Charter provides that ‘all acts by the city or any of its officers, employees or agencies shall be presumed valid * * * Any action by this charter committed to the discretion of the council, when taken, shall be final and shall not be reviewed or called into question elsewhere.’ At the time the 19-lot rule was adopted into the new land use code, the statutory ‘clear and objective’ requirement was in effect. The council is presumed to have known of this requirement and adopted a provision that was in compliance with it.”

I tend to agree with this analysis. If the City Council (or the Planning Commission in my case) has determined that a particular provision is clear and objective, absent some extraordinary circumstances that I cannot think of, I should be bound by that determination unless and until a higher body determines differently. The situation described in the Chamotee Trails Memorandum, however, is not the situation in the present case. The City Council has adopted clear and objective standards for different housing applications – the Needed Housing Track. The City Council has also adopted standards involving discretion for those housing applications – the General Track. The 19-lot rule was adopted under the clear and objective standards of the Needed Housing Track. I agree with the other ACA that the City Council had determined that the 19-lot rule was clear and objective so the Planning Commission and Hearings Official should defer to the City Council. If for instance, the applicant were arguing that any of the Needed Housing Track site review approval

⁵ The memorandum was submitted into the record by the Homebuilders Association of Lane County.

criteria were not clear and objective, I would almost certainly agree with the ACA that I should not find otherwise.

In the present case, however, the Willamette Greenway approval criteria were adopted long before the 2017 statutes requiring clear and objective approval standards for all housing (and even before the statutes requiring clear and objective standards for needed housing). Unlike the Chamotee Trails case, the City Council (as far as I am aware) has never determined that the approval standards of EC 9.8815 are clear and objective. In fact it seems odd that the ACA would argue that I could not determine that the EC 9.8815 approval criteria are not clear and objective when she admits as much in her memorandum:

“It is not possible to draft clear and objective approval criteria that also require an applicant to comply with phrases like ‘the best possible,’ ‘the greatest possible degree,’ and ‘the maximum possible,’ as required by Goal 15. The City cannot comply with the requirements of ORS 390.314 and Goal 15 and also be limited to the application of clear and objective standards for proposed housing developments within the Greenway.” ACA Memorandum 4.

Again, the question is not so much whether the EC 9.8815 approval criteria are clear and objective (they are not), but whether they trump the needed housing statutes because the proposed development is in the Willamette Greenway. If the City Council or Planning Commission has expressed an opinion on that issue no one has brought it to my attention and I am not aware of any such opinion. The question of what approval criteria apply to a land use application is squarely within the universe of questions a hearings official is required to answer. I do not see that I am precluded from considering the issue.

The applicant has persuasively explained why the EC 9.8815 approval criteria are not clear and objective. Under ORS 197.307(4), this at least establishes a *prima facie* case that the approval criteria may not be applied to the proposal. Absent some argument that explains why the EC 9.8815 approval criteria nonetheless apply, I have no choice but to agree with the applicant that the approval criteria do not apply. Initially, many of the opponents argue that the Goals have to trump state statutes. These opponents essentially argue that the Goals are akin to a land use constitution or super-precedent that the legislature cannot undue. While the Statewide Planning Goals certainly have a ring of authority to them, they are still just statutorily created goals which can be undone just as easily through other statutory enactments. Furthermore, not applying the EC 9.8815 approval criteria to needed housing applications would hardly overturn or invalidate the goal, the

goal would still apply to all other proposed development in the greenway. This argument does not provide a basis to trump the needed housing statutes.

The ACA first argues that prior to the 2017 amendments to the needed housing statutes, the clear and objective standards requirement only applied to the development of needed housing on buildable lands. The ACA further argues that the subject property was not considered buildable lands because it is in the greenway. The 2017 amendments to the needed housing statute eliminated the restriction of the clear and objective standards to buildable lands and applied them to not only all needed housing but all housing period. According to the ACA, “[t]here is no indication that the legislature intended to change this [that the application was not entitled to clear and objective standards] when it passed * * * a revised version of ORS 197.307(4) that does not include the reference to ‘buildable land.’” ACA Memorandum 3. On the contrary, I agree with the applicant that if anything the opposite conclusion should be drawn:

“It is difficult to conceive of any other intent of the legislature than to rub out the issue of whether the clear and objective standards of ORS 197.307(4) applies to land outside of the buildable lands inventory than the text of the new statute. Whatever it meant before, it is now crystal clear that ORS 197.307(4) applies to all housing – not just housing in the [buildable lands inventory].” Applicant’s July 23, 2018 Memorandum 10-11.⁶

Next, the ACA argues ORS 309.314 and Goal 15 must take precedence over ORS 197.307.⁷ According to the ACA, when a general statutory provision and a particular statutory provision are inconsistent, the particular intent controls.⁸ The ACA argues that Goal 15 and ORS 309.314 speak to a particular concern – preservation of the Willamette River Greenway – while ORS 197.307(4) applies to all lands and housing in the state. I agree with the applicant that the opposite argument is more persuasive – that ORS 197.307(4) has the more narrow particular intent – housing development – while Goal 15 applies to all development in the greenway. Furthermore, as the applicant explains, ORS 197.307(4) was the later enacted statute. ORS 174.010 requires

⁶ Although I do not see that it affects my analysis, the applicant persuasively explains that although there is a presumption that lands such as those in the greenway would not be on the buildable lands inventory that local governments could include them if they wished and that the City did include the subject property on the buildable lands inventory.

⁷ ORS 390.314 provides the legislative findings and policy to establish the Willamette Greenway. Goal 15 expounds on those policies, and the City implemented Goal 15 through EC 9.8815.

⁸ ORS 174.020(2) provides: “When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.”

seemingly inconsistent statutes to be reconciled to give effect to both, if possible.⁹ It is possible to give effect to all provisions by not applying the non-clear and objective standards of EC 9.8815 to needed housing developments but still imposing such requirements on future non-residential development.

In conclusion, the needed housing statutes provide that only clear and objective standards may be applied to needed housing applications such as the present case (and now all housing applications). The Willamette Greenway approval criteria of EC 9.8115 are not clear and objective. Absent some argument that the needed housing statutes do not apply to housing in the Willamette Greenway, the approval criteria of EC 9.8815 cannot be applied. While there may be a winning argument as to why the Willamette Greenway approval criteria trump the needed housing statutes, I do not see that that argument has been made in this case. As this case will likely end up before the Planning Commission, perhaps the legal arguments may be more fully developed. Given the legal arguments before me, I agree with the applicant that the approval criteria of EC 9.8815 cannot be applied to the application because they are not clear and objective.

C. Site Review

As discussed earlier, the applicant is proceeding under the clear and objective Needed Housing Track site review approval criteria of EC 9.8445. The applicant is also seeking adjustments to a number of the site review approval criteria. The staff report explains how the site review approval criteria are satisfied. There are numerous approval criteria, and opponents do not challenge most of the findings in the staff report. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further.¹⁰

EC 9.8445(4)(a) requires that the proposal comply with the EC 9.2000 through 9.3980 lot dimension and density requirements. The staff report explains the density calculations:

“The minimum density for the subject site is 15 units per acre as established by the /ND Nodal Development Overlay Zone at EC 9.4290 * * *. The R-2 base zone of the subject site provides that a maximum density of 28 units per acre is allowed * * *.

⁹ ORS 174.010 provides: “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.”

¹⁰ This includes the clarifications to the staff report as explained in staff’s July 9, 2018 Memorandum.

"The applicant also provides a calculation on sheet A1 of the May 11, 2018 application materials. The calculation identifies the entire site area as being 3.59 acres, subtracts the .21 acres to be dedicated for Lombard Street, and concludes that 94 units is the maximum density considering 28 units per net acre is allowed." Staff Report 22.

Opponents argue that the applicant and the City improperly calculated the amount of acreage to be subtracted from the 3.59 total acreage of the property. EC 9.2751 sets forth the rules for calculating net density:

"(1) Density

"* * * * *

"(b) For purposes of this section, 'net density' is the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common open space or recreation facilities.

"(c) For the purposes of calculating net density:

"* * * * *

"(1) The acreage of land considered part of the residential use shall exclude public and private streets and alleys, public parks and other public facilities."

The applicant only subtracted the area proposed for the extension of Lombard Street — which is .21 acres. Opponents argue the applicant should also have subtracted the areas proposed for access from River Road — in essence all of the paved area — as well as the leasing office and maintenance building, and the open space proposed for the eastern portion of the property.

Initially, opponents argue that the access from River Road and internal paved circulation are streets and therefore must be subtracted for purposes of calculating net density. EC 9.0500 defines "street" as:

"An improved or unimproved public or private way, other than an alley, that is created to provide ingress or egress for vehicular traffic to one or more lots or parcels, excluding a private way that is created to provide ingress or egress to land in conjunction with the use of land for forestry, mining, or agricultural purposes. A 'street' includes the land between right-of-way lines within the ingress/egress easement areas serving multiple residential lots but excluding 'flagpole' portions of flag lots."

According to opponents, the access from River Road and the internal circulation area is a way that allows for ingress and egress of vehicular traffic. The applicant responds that the areas are not streets but driveways. EC 9.0500 defines “driveway” as:

“The area located outside of the public right-of-way that abuts the access connection and allows for vehicles to move to or from a development site.* * *”

The staff memorandum of July 9, 2018 explains that the areas are “parking drives.” EC 9.550(11)(b) provides that “[d]riveways and parking drives are private roadways for projects or portions of projects not served by streets.” The EC clearly treats driveways and parking drives as separate and distinct things from streets. I agree with the applicant and staff that the parking drives do not have to be subtracted from the net density calculation.

Opponents also argue that the leasing office and maintenance building must be subtracted from the net density calculation because they are “other public facilities” that are not “reserved the exclusive use of the residents in the development.” The staff memorandum of July 9, 2018 explains that:

“Both the EC definition, and EC 9.2751(1)(c)(1), use the specific language ‘public facilities.’ The provision does not include ‘leasing offices.’ ‘Public facilities’ are not defined in EC 9.0500. However, ‘public facility projects’ are defined in the Metro Plan. Those definitions contemplate above-ground physical structures such as water reservoirs, pump stations, and drainage or detention ponds. The leasing office does not become a public facility simply because it might be used by public entities, and therefore need not be excluded from the calculation. Staff also believes it is reasonable to expect that the leasing office will be for the use of residents who wish to reside at the development, therefore meeting the requirements of EC 9.2751 to be included as part of the net density calculation.” *Id.* at 4-5.

I agree with staff that the leasing office is not a public facility that must be excluded from the net density calculation. The same reasoning is applicable to the maintenance building – it is hardly something that would be open to the public.

Finally, opponents argue that the open space area proposed for the eastern area of the property must be excluded from the net density calculation. This argument is difficult to follow. Apparently, opponents believe that areas within the Willamette Greenway must be excluded, but the entire site is within the Willamette Greenway. Furthermore, the open space area is not open to the public so it would seem to fall squarely within the category of common open space for the exclusive use of the residents in EC 9.2751(1)(b). The application complies with EC 9.8445(4)(a).

EC 9.8445(4)(f)(2) requires that access from a public street to a development shall be located in accordance with EC 7.420 Access Connections. EC 7.420(3)(i) provides that the proposal must comply with EC 9.6780, which provides:

“Vision Clearance Area. *Development sites* shall have triangular vision clearance areas on all street corners to provide for unobstructed vision consistent with American Association of State Highway and Transportation Officials (AASHTO) standards. (See Figure 9.0500 Vision Clearance Area). Vision clearance areas shall be kept free of all visual obstructions from 2 ½ feet to 9 feet above the curb line. Where curbs are absent, the crown of adjacent streets shall be used as the reference point. These vision clearance requirements may be adjusted if consistent with the criteria of EC 9.8030(11) of this land use code.” (Emphasis added).

Opponents argue that the triangular vision clearance areas on the corners of Lombard Street and Fir Lane are inadequate. The intersections opponents complain about are not part of or adjacent to the subject property – they are a block or more away from the property. EC 9.0500 defines “development site” as:

“A tract of land under common ownership or control, either undivided or consisting of two or more contiguous lots of record. For the purpose of land use applications, development site shall also include property under common ownership or control that is bisected by a street or alley.”

As the applicant’s traffic engineer explains, “development site” does not include off-site intersections. As the July 12, 2018 memorandum from Public Works further explains, EC 9.0500 defines “vision clearance area” as:

“A triangular area within a lot immediately adjacent to the intersection of streets to provide a clear area for viewing approaching traffic for public safety purposes. For the intersection of 2 improved public rights-of-way, the vision clearance area is the triangular area of the lot at the intersection of two lot lines. At the intersection of a public street and a private street, the vision clearance area is the triangular area of the lot at the intersection of the lot line and each edge of the street. For all vision clearance areas, the apex is located at the intersection of the two 35 foot legs, extended if necessary. The base of the triangle extends diagonally across the lot intersecting the two legs an equal distance from the apex.”

The development will be creating an access point on River Road and the Lombard Street extension, but it will not be creating any new intersections. Therefore, EC 9.8670 is not applicable to the application. The applicant will provide adequate vision clearance area for the access points

at River Road and Lombard Street. Opponents' arguments do not provide a basis to deny the application.

EC 9.8445(2) requires that the proposal comply with the multi-family standards of EC 9.5500. EC 9.5500(11)(a) requires that street standards and connectivity requirements for local residential streets shall be applied to public and private streets within multi-family developments and states "[r]efer to EC 9.8615 Connectivity for Streets." Opponents argue the proposal does not satisfy EC 9.6815(2)(f), which provides:

"In cases where a required street connection would result in the extension of an existing street that is not improved to city standards and the street has an inadequate driving surface, the developer shall construct a temporary barrier at the entrance to the unimproved street section with provision for bicycle, pedestrian, and emergency vehicle access. The barrier shall be removed by the city at the time the existing street is improved to city standards or to an acceptable standard adopted by the public works director. In making a determination of an inadequate driving surface, the public works director shall consider the street rating according to Eugene's Paving Management System and the anticipated traffic volume."

Opponents argue that Lombard Street is not improved to City standards and that it has an inadequate driving surface. According to opponents, the applicant should be required to install a temporary barrier at the entrance to Lombard Street from the development. While Lombard Street is not developed to City standards, the applicant and the City contend that it does not have an inadequate driving surface. According to the applicant's traffic expert, while the street is narrow, the roadway pavement is in generally good condition with no potholes or other significant deterioration on the driving surface. While Lombard Street is not in perfect condition, it does not appear to be "inadequate." The July 12, 2018 memorandum from public works states:

"EC 9.8615(2)(f) provides for the construction of temporary barriers where there is an inadequate driving surface. It is noted that road surfaces that are less than full improvement to city standards are not necessarily considered to be 'inadequate' in this context. The applicant has proposed a suitable transition surface between the new and existing segments of Lombard Street."

I agree with the applicant's traffic engineer and public works that Lombard Street is not inadequate and therefore temporary barriers are not required.

Opponents argue that the applicant has not demonstrated compliance with EC 9.5500(7), (13), or (14). These arguments are not particularly developed – opponents merely argue the

standards are not satisfied or there is no finding of feasibility. The staff report explains that these standards are satisfied or can be satisfied through the proposed conditions of approval. I agree with the staff report and I find that it is feasible to comply with the articulation requirements of EC 9.5500(7) with the proposed condition of approval. As discussed later, there is a long list of building articulation features involved in the proposal.

All of the site review approval criteria are satisfied.

D. Adjustment Review

The applicant applied for a number of adjustments to the site review approval criteria. The staff report explains that all of the requested adjustments satisfy the applicable approval criteria.¹¹ The staff report explains how the adjustment review approval criteria are satisfied. There are numerous approval criteria, and opponents do not challenge most of the findings in the staff report. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further.¹²

After the staff report had been issued, staff determined that the applicant needed to either amend the site plan or seek an adjustment to the Nodal Development Overlay setback requirements. In its July 16, 2018 memorandum, the applicant addressed this issue by requesting an adjustment to EC 9.4290(2). The applicant provided a thorough analysis explaining why an adjustment is warranted. Opponents have not challenged the applicant's request for this adjustment. I have reviewed the applicant's findings and conclusions regarding an adjustment to EC 9.4290(2), and I agree with those findings and conclusions. Therefore, I adopt and incorporate those findings and conclusion in this decision. Applicant's July 16, 2018 Memorandum 1-5.

Opponents argue that the applicant's proposed adjustment for EC 9.5500(6) is not satisfied. EC 9.5500(6) provides:

“Building Mass and Facade.

“(a) Maximum Building Dimension. Neither the maximum length nor width of any building within 40 feet of a front lot line can exceed 100 feet in the R-1 and R-2 zones and 150 feet in all other zones.

¹¹ As discussed later, staff indicated that one additional adjustment would be required for Nodal Development setback requirements. That adjustment is addressed later.

¹² This includes the clarifications to the staff report as explained in staff's July 9, 2018 Memorandum.

“(b) Windows. Street facades shall contain windows covering a minimum of 15% of the facade on each floor level.

“(c) Criteria for Adjustment. Adjustments to the standards in this subsection may be made, based on criteria of EC 9.8030(8)(a).”

The applicant seeks an adjustment to allow a building more than 100 feet in length. Under EC 9.8030(8)(a), the requirements set forth in EC 9.5500(6)(a) may be adjusted if the proposal will “create a vibrant street façade with visual detail” and “provide multiple entrances to buildings or yards.” Opponents argue that the applicant has not demonstrated how the proposed building “creates a vibrant street façade.” The applicant responds that the proposed building will create a vibrant street façade with visual detail by incorporating visual details such as modulation, architectural articulation, and finish material selection. The building will also include an exaggerated offset at the midpoint to visually break the building massing into two distinct segments. Each segment also has multiple offsets and projections across the façade to break up the massing even further. Vertical articulation is provided in addition to the horizontal massing variations in the form of decks, patios, and large windows to enhance the “eyes on the street” and connection between the interior and exterior. The siding treatment is broken up vertically in alternating locations with changes in materials and color placement.

The standard of whether a proposed building creates a vibrant street façade with visual detail is a particularly subjective standard. The applicant has provided a long list of items designed to create a vibrant street façade through visual detail. I agree with the applicant and staff that the proposed building provides a sufficient vibrant street façade with visual detail to warrant an adjustment.

Finally, opponents’ traffic engineer argues that an adjustment to EC 9.6735(2) is not warranted to allow access from River Road rather than Lombard Street. I agree with the applicant that this is an odd argument since much of the opposition to the proposal concerns opposition to additional traffic on Lombard Street. In any event I agree with the staff report and the applicant’s engineer that the adjustment is warranted.

E. Other Issues

Opponents raise a number of issues that do not specifically relate to any applicable approval criteria. Sandow argues that the application does not comply with Goal 1 (Citizen Involvement) or

Goal 12 (Transportation). Neither Goal 1 nor Goal 12, however, is an applicable approval criterion for the application. Therefore, Sandow's arguments provide no basis to deny the application.

Numerous opponents argue that the property should have never been sold to a private entity – the property was previously owned by a public entity. While I understand opponents' concerns about disposition of public property, that disposition has already occurred. The only issues involved in this case are the applicable approval criteria. There is nothing that I can consider that places any relevance on whether the property should be sold to a private entity – or this particular private entity. Opponents' arguments do not provide a basis to deny the decision.

Opponents argue that the application should be denied because the applicant has not established that the property is a legal lot. The basis for this argument is somewhat unclear. Opponents cite an approval criterion – EC 9.8325(7)(a) – which is an approval criterion for planned unit developments not for site review. Opponents then cite another Hearings Official decision regarding a lot verification request. While the EC certainly provides a process for verifying legal lots that hardly means that that is a requirement for every application. Opponents argue that the property was reduced in size in the past and therefore might not be a legal lot. The mere fact that a property has changed sizes hardly suggests that it is not a legal lot. As the July 9, 2018 staff memorandum states:

“Staff note that the subject proposal is not subject to PUD approval criteria nor PUD application requirements. Staff further add that the Willamette Greenway Permit, Site Review, and Adjustment Review applications do not require the applicant to provide evidence of legal lot status.” *Id.* at 6.

Finally, opponents argue that a Traffic Impact Analysis (TIA) should have been performed. Under EC 9.8670 there are triggers for when a TIA must be performed. EC 9.8670 provides:

“Traffic Impact Analysis Review is required when one of the conditions in subsections (1) – (4) of this section exist unless the development is within an area (a) shown on Map 9.8670 Downtown Traffic Impact Analysis Exempt Area, or (b) subject to a prior approved Traffic Impact Analysis and is consistent with the impacts analyzed.

- (1) The development will generate 100 or more vehicle trips during any peak hour as determined by using the most recent edition of the Institute of Transportation Engineer's Trip Generation. In developments involving a land division, the peak hour trips shall be calculated based on the likely development that will occur on all lots resulting from the land division.

- (2) The increased traffic resulting from the development will contribute to traffic problems in the area based on current accident rates, traffic volumes or speeds that warrant action under the city's traffic calming program, and identified locations where pedestrian and/or bicyclist safety is a concern by the city that is documented.
- (3) The city has performed or reviewed traffic engineering analyses that indicate approval of the development will result in levels of service of the roadway system in the vicinity of the development that do not meet adopted level of service standards.
- (4) For development sites that abut a street in the jurisdiction of Lane County, a Traffic Impact Analysis Review is required if the proposed development will generate or receive traffic by vehicles of heavy weight in their daily operations.

"For purposes of EC 9.8650 through EC 9.8680, 'daily operations' does not include routine services provided to the site by others, such as mail delivery, garbage pickup, or bus service. 'Daily operations' does include, but is not limited to, delivery (to or from the site) of materials or products processed or sold by the business occupying the site. For purposes of EC 9.8650 through EC 9.8680, 'heavy vehicles' are defined as a single vehicle or vehicle combination greater than 26,000 pounds gross vehicle weight or combined gross vehicle weight respectively."

The primary trigger for a TIA is a development that will generate 100 or more vehicle trips during any peak hour. The applicant's traffic engineer calculated that the proposed use would generate 50 trips during the AM peak hour, 69 trips during the PM peak hour, and 49 trips during the weekend peak hour. This is below the thresholds for requiring a TIA under EC 9.8670(1). Although opponents argue that a TIA is required under EC 9.8670(2) and (3), there is nothing that would require action based on current accident rates, traffic volumes or speeds that warrant action under the city's traffic calming program, and identified locations where pedestrian and/or bicyclist safety is a concern by the city that is documented or city performed or reviewed traffic engineering analyses that indicate approval of the development will result in levels of service of the roadway system in the vicinity of the development that do not meet adopted level of service standards.¹³ In any event, as explained by the applicant, in recent cases involving needed housing and the TIA provisions I concluded that the TIA standards were not clear and objective and could not be applied

¹³ Although opponents claim EC 9.8670(4) was not addressed, it is clearly not applicable.

to needed housing applications under ORS 197.307(4).¹⁴ Therefore, opponents' TIA arguments do not provide a basis to deny the application.

All of the approval criteria are satisfied.

CONCLUSION

For all the reasons set forth above, the Hearings Official **APPROVES** the applications for a Willamette Greenway Permit, Site Review Approval, and Adjustment Review Approval, with the following conditions of approval.

CONDITIONS OF APPROVAL

1. Prior to the issuance of a development permit the applicant shall provide details that identify which features are being used to comply with EC 9.5500(7); and the following note will be added to the Final Site Plan: "Buildings shall comply with the building articulation requirements at EC 9.5500(7)."
2. Prior to issuance of a development permit, the applicant shall revise the site plan to demonstrate compliance with EC 9.5650 Recycling – Small Collection Facility Standards and EC 9.6740 Recycling and Garbage Screening. The following note shall also be added to the applicant's site plan: "Recycling and Garbage areas shall comply with EC 9.5650 and EC 9.6740."
3. The following restriction shall be required to be shown on the Final Site Plan in accordance with EC 9.6500(3): "No building, structure, tree or other obstruction shall be placed or located on or in a Public Utility Easement."
4. The proposed Public Utility Easement shall be conveyed by a separate document meeting City standards in conjunction with the Privately Engineered Public Improvements (PEPI) permitting process.
5. Prior to issuance of a building permit, the applicant shall obtain approval of a PEPI permit for the construction of Lombard Street and any associated infrastructure that will be public including the proposed public wastewater line.
6. During the PEPI process, the applicant shall provide a street deed to convey the right-of-way for Lombard Street to the City.

¹⁴ Those decision are Amazon Corner – (TIA 16-7) and Delta Ridge PUD - (PDT 17-3/ ARB 17-2/ TIA 17-2). Both of those decisions were submitted into the record by the applicant.

7. In conjunction with the PEPI process, the applicant shall submit a street tree agreement application with a street tree plan to the City Urban Forester for review. Approval of the agreement will be required prior to PEPI approval.
8. Prior to the issuance of a development permit, the applicant shall demonstrate compliance with EC 9.6791 through EC 9.6797.
9. The applicant shall add the following note onto its Final Site Plans: "Parking areas shall comply with the standards at EC 9.6420."
10. The entire stall depth of the northern-most and western-most parking stall, adjacent to the north property line and near River Road access, shall be a minimum of 15 feet in depth from each corner and marked "compact", eliminated, or otherwise revised to meet EC 9.6420.
11. Final site plans shall be revised to require L-3 High Screen Landscaping along the south property line of the western-most parking area.



Fred Wilson

Hearings Official

Dated this 7th day of August 2018.

Mailed this 9th day of August 2018.

SEE NOTICE OF HEARINGS OFFICIAL DECISION FOR STATEMENT OF APPEAL RIGHTS