

Bateman Seidel

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April 18, 2019

McMinnville Planning Commission  
c/o Jamie Fleckenstair  
City of McMinnville Planning Department  
231 NE 5<sup>th</sup> Street  
McMinnville, OR 97128

Re: PDA 3-18/PDA 4-18/S 3-18 (Planned Development Amendments and  
Subdivision)  
Applicant – Premier Development

Dear Chair Hall and Members of the Planning Commission:

This firm represents the Friends of Baker Creek (“FBC”), a group of local neighbors concerned about the development contemplated in the above applications and its impact on the Baker Creek wetlands and access in this neighborhood. FBC urges the Planning Commission to deny each of the proposed applications and send this development back to the drawing board. Please accept this letter in opposition to the above-referenced applications and provide me with notice of the Commission’s final decisions in these matters.

## I. INTRODUCTION

Friends of Baker Creek are a group of local residents and neighbors who have come together to protect the integrity of the Baker Creek wetlands and flood plains. FBC does not oppose the development of Oak Ridge Meadows, provided it is done correctly and in a manner that will not compromise the integrity of Baker Creek or the neighborhood transportation system. Unfortunately, as described further below, the proposal that is before the Planning Commission in the three applications does not do so. FBC is gravely concerned about the proposed development in the wetlands/floodplain and the failure to acknowledge the previous history of these developments.

## II. FLOODPLAIN/WETLANDS

The intent of these three applications are to do two separate things; first, to transfer an area from the Oak Ridge Planned Development to the Oak Ridge Meadows Planned Development, and, second, to subdivide the resulting area subject to the Oak Ridge Meadow

Planned Development. One of the difficulties that led to this proposal is that the area being transferred from the Oak Ridge PD to the Oak Ridge Meadows PD borders on Baker Creek and contains significant amount of wetlands that serves as part of the floodplain for Baker Creek. Although the area has not been designated as part of the City's Flood Area zone under MCL Chapter 17.48, the testimony before this body will explain why it should be treated as such.

The primary concern with the development of this area is not with the new homes being proposed for the neighborhood; most of homes will be built outside of the wetlands and floodplain. However, the application is not so prescient when it comes to the proposed new street and several of the homes. In particular, the applicant shows an extension of Pinehurst Avenue that will be located in the wetlands and the creation of a roadbed that will act as a dike for the rest of the wetlands. That dike will have impacts on neighboring properties, most particularly, the homes in the Crestbrook subdivision and the surrounding lands.

This is critical to the Planning Commission's consideration of this matter because it implicates several of the criteria that govern these applications. MCC 17.74.070 provides the review criteria that apply to amendments to planned developments and that the Planning Commission must use to review the applications to amend the already approved planned developments:

"An amendment to an existing planned development may be authorized, provided that . . . the applicant demonstrates the following:

"\* \* \* \* \*

"B. Resulting development will not be inconsistent with the Comprehensive Plan objectives of the area;

"C. The development shall be designed so as to provide for adequate access to and efficient provision of services to adjoining parcels;

"\* \* \* \* \*

"F. Proposed utility and drainage facilities are adequate for the population densities and type of development proposed;

"G. The noise, air, and water pollutants caused by the development do not have an adverse effect upon surrounding areas, public utilities, or the city as a whole."

MCL 17.740.70(B) requires planned developments to "not be inconsistent with" the Comprehensive Plan for the area – in other words, the resulting development must be consistent with the policies and requirements in the City's Comprehensive Plan. As explained in other

submittals by the FBC, allowing a planned development that will significantly impair a functioning wetland, increase flooding on other properties and cause a myriad of other problems is not consistent with the Comprehensive Plan.

MCL 17.74.070(C) focuses on “adequate access” and “efficient provision of services” to other parcels, and subsection (F) focuses on drainage in particular. Access will be discussed in the next section, but the unlikelihood of Pinehurst ever being completed means that access is not adequate and, moreover, the flooding and wetlands will imperil the neighbors of this new development.

Finally, MCL 17.74.070(F) looks to the “noise, air and water pollutants caused by the development” and whether they will have an “adverse effect” on surrounding areas of the City as a whole. The development of the roadway in the wetlands would almost certainly increase water pollution to the detriment of current surrounding homes, particularly in the Crestbrook subdivision and already built Oak Ridge subdivision.

Turning to the subdivision proposal, as noted by the Staff Report, the criteria for the proposal include the Goals and Policies of Volume II of the Comprehensive Plan.

Policy 2.00 requires the City to “enforce appropriate development controls on lands with identified building constraints.” As noted above and in other comments from the FBC and other members of the public, the area proposed for development, particularly, the area with the proposed extension of Pinehurst, will be built in a wetland and will have significant impacts for other properties, including the adjoining Crestbrook and Oak Ridge subdivisions.

The Planned Development Policies are also implicated by this proposal and Policy 74.00 requires planned developments to retain “distinctive natural, topographic and aesthetic features.” The wetland area is such a feature and should be retained. This retention of the entire wetland is also required by Residential Design Policy 80.00, which requires the preservation of “distinctive or unique natural features.”

### **III. PREVIOUS HISTORY**

The other significant concern with the proposed applications is the failure to acknowledge the history of these developments and to follow the measures taken by a previous City Council to prevent problems and, in particular, the limited access to the site. As noted in the application and staff report, these planned developments were approved over a decade ago and either partially developed or not developed at all

As is readily apparent from a review of the proposed subdivision, there is only one access to the site – Pinot Noir Drive. The map suggests a potential future access to the east along an extension of Pinehurst. However, the owner of the intervening property, Les Toth, has made it clear that he will not allow the development of a new road across his property, so that is not an

actual access point. See Letter from Mr. Toth, attached as Exhibit 1 to this letter. There is also a potential future street connection to NW Shadden Drive on the southwest side of the proposed subdivision; however, that is shown as a “gravel secondary emergency vehicle access” on the applicant’s submission. Although it may be developed at some point in the future, it is not available for use as a secondary access in this application.

The reality of the single point of entry was noted when Oak Ridge Meadows was initially approved in 2005. The City Council responded by limiting the number of lots that could be developed in the Oak Ridge Meadows Planned Development to 76, unless and until a new public street is constructed connecting to Baker Creek Road. See condition #5 of Ordinance 4822, attached to this letter as Exhibit 2. That condition provides as follows:

“5. That the number of lots allowed within the Oak Ridge Meadow subdivision **shall be limited to a maximum of 76 lots**. Additional lots may be permitted consistent with the submitted tentative plan upon the completion and acceptance of public street improvements to City standards that extend south from Pinehurst Drive (as labeled on the applicant's submitted tentative subdivision plan) and connect to Baker Creek Road.” (Bold emphasis added.)

This very applicant challenged this condition of approval at LUBA back in 2005. See *Premier Homes v. City of McMinnville*, 50 Or LUBA 666 (2005), attached as Exhibit 3 to this letter. As a result of that LUBA case, the City adopted Ordinance No. 4845, attached to this letter as Exhibit 4. Ordinance 4845 was adopted to reinforce the 76-lot limitation and explained further why that limitation was justified. That ordinance was not appealed, but the Staff Report nowhere mentions Ordinance No. 4845, nor does it propose any change or limitation on the 76 lot limitation from that ordinance.

Ordinance 4845 was adopted by the McMinnville City Council for the purpose of limiting the development of Oak Ridge Meadows to 76 lots, unless and until a secondary access was provided to the site. There is no secondary access provided, nor is the repeal or amendment of Ordinance No. 4845 proposed with this application. Accordingly, the application remains subject to that limitation and the applicant’s proposal must be rejected.

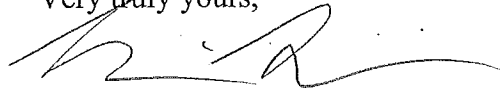
Moreover, even though the applicant has intended to develop this property for over a decade, there still is not a n approved delineation of the Baker Creek wetlands, nor is there a mitigation plan for the impacts to the wetlands. Although the applicant plans to significantly impact those wetlands in ways that will have a myriad of downstream, and upstream, impacts, the applicant does not have an acceptable plan to mitigate for these impacts. The City should not approve this approval without that plan.

April 18, 2019  
Page 5

#### IV. CONCLUSION

The proposal encompassed by the three applications before the Planning Commission should be rejected. It does not adequately accommodate or address the existing wetland area and floodplain. Building a roadway to nowhere through the heart of that area makes no sense and will significantly impair its function and fails to retain or preserve that natural feature. Moreover, the proposal as a whole never reckons with the previous history of the site and the 76 lot limitation confirmed by Ordinance No. 4845. Given these shortcomings, the Planning Commission has no choice but to reject this application.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Bill Kabeiseman', with a long horizontal flourish extending to the right.

Bill Kabeiseman

BK:dc  
Enclosure  
cc: Clients

2700 NW Pinehurst Dr.  
McMinnville, OR 97128  
(503) 472-2302



March 20, 2019

To Whom it May Concern:

I have owned the property adjacent to the development where Premier Homes is planning to build a sub-division. My 15 acres is made up of flood plain and wetland areas. My property floods numerous times during the year when Baker Creek rises over the banks.

I have had multiple questions from concerned residents concerning rumors that Pinehurst Dr is going to extend through my property. I have not given an easement for a road to go across my property, nor do I intend to do so. I also have no interest in selling my property or any part of it.

If you have any questions please see my contact information above.

Sincerely,

A handwritten signature in cursive script that reads "Les Toth".

Les Toth

ORDINANCE NO. 4800

An Ordinance rezoning certain property from a County EF-80 (Exclusive Farm Use – 80-acre minimum) zone to a City R-2 PD (Single-Family Residential Planned Development) zone on approximately 22.3 acres of land located northwest of the Oak Ridge residential development.

RECITALS

The Planning Commission received an application (ZC 12-04 / S 14-04) from Premier Development LLC, dated November 15, 2004, requesting a zone change from a County EF-80 (Exclusive Farm Use – 80-acre minimum) zone to a City R-2 PD (Single-Family Residential Planned Development) zone on approximately 22.3 acres of land located northwest of the Oak Ridge residential development. The property is further described as a portion of Tax Lot 600, Section 7, and Tax Lot 200, Section 8, T. 4 S., R. 4 W., W.M.

A public hearing was held on December 16, 2004 and continued on January 20, 2005, at 6:30 p.m. before the McMinnville Planning Commission after due notice had been given in the local newspaper on December 9, 2004, and written notice had been mailed to property owners within 300 feet of the affected property; and

At said public hearing, testimony was received, the application materials and a staff report were presented; and

The Planning Commission, being fully informed about said request, and after considerable deliberation as to whether the request conformed to the zone change review criteria listed in Chapter 17.72.035 of Ordinance No. 3380, could not reach consensus as to approval or denial of the submitted request, and, therefore, forwarded without recommendation the subject matter to the City Council; and

The City Council held a public hearing on February 22, 2005, at 6:30 p.m. after due notice had been given in the local newspaper on February 15, 2005, and written notice had been mailed to property owners within 300 feet of the affected property; and

At said public hearing, testimony was received, the application materials and a staff report were presented, and the proceedings and record of the prior Planning Commission hearings were entered into the Council hearing record; and

At the conclusion of the public hearing, the Council left open the record until 5:00 pm, March 1, 2005, for the purpose of receiving additional written testimony from opponents to the applicant's request. An additional seven days, to 5:00 p.m., March 8, 2005, was provided to the applicant for written rebuttal to the testimony received; and

On March 8, 2005, the City Council, being fully informed about said request, found that said change conformed to the zone change review criteria listed in Chapter 17.72.035 of Ordinance No. 3380 based on the material submitted by the applicant and findings of fact and the conclusionary findings for approval (Exhibit "A"), all of which are on file in the Planning Department, and that the zone change is consistent with the Comprehensive Plan. The Council directed Planning Department staff to prepare the appropriate ordinance

memorializing their decision and to present it to them at their April 12, 2005 meeting for review and adoption; and now, therefore,

THE CITY OF McMinnville Ordains as follows:

Section 1. That the Council adopts the findings and conclusions as contained in the Findings of Fact and Conclusionary Findings for Approval (Exhibit "A," attached), the staff report on file in the Planning Department, and the application filed by Premier Development LLC.

Section 2. That the property described in Exhibit "B", is hereby rezoned from an EF-80 (Exclusive Farm Use – 80-acre minimum) zone to an R-2 PD (Single-Family Residential Planned Development) zone subject to the following conditions:

1. That the Oak Ridge Meadow subdivision tentative plan (or such plan as it may be revised by conditions for approval of this development), be placed on file with the Planning Department and that it become a part of the zone and binding on the property owner and developer.

That the developer is responsible for requesting approval of the Planning Commission for any major change of the details of the adopted plan. Minor changes to the details of the adopted plan may be approved by the Planning Director. It shall be the Planning Director's decision as to what constitutes a major or minor change. An appeal from a ruling by him may be made only to the Commission. Review of the Planning Director's decision by the Planning Commission may be initiated at the request of any one of the Commissioners.

2. That the average lot size within the Oak Ridge Meadow subdivision shall be 7,500 square feet.
3. That setbacks for the Oak Ridge Meadows subdivision are as follows:
  - Front Yard: 20 feet
  - Side Yard: (Lots less than 6,000 square feet in area): 6 feet
  - Side Yard (all other lots): 7.5 feet
  - Exterior Side Yard (Lots 40, 45, 46, 52, 54, and 55): 15 feet
  - Exterior Side Yard (all other lots): 20 feet
  - Rear Yard: 20 feet
  - Open side of garage: 20 feet

The Planning Director is authorized to permit reductions or increases to these setback standards as may be necessary to provide for the retention of trees greater than nine (9) inches in diameter measured at 4.5 feet above grade. In no case, however, may the rear yard setback or the side yard setback be reduced to less than five feet, or the exterior side yard setback to 15 feet, or the distance from the property line to the front opening of a garage to less than 18 feet without approval of the Planning Commission pursuant to the requirements of Chapter 17.69 (Variance). A request to adjust the setbacks for these lots shall be accompanied by a building



plan for the subject site that clearly indicates the location of existing trees. Trees to be retained shall be protected during all phases of home construction.

4. That existing trees greater than nine inches DBH (diameter at breast height) shall not be removed without prior review and written approval of the Planning Director. In addition, all trees shall be protected during home construction. A plan for such protection must be submitted with the building permit application and must meet with the approval of the Planning Director prior to release of construction or building permits within the subject site.
5. That the number of lots allowed within the Oak Ridge Meadow subdivision shall be limited to a maximum of 76 lots. Additional lots may be permitted consistent with the submitted tentative plan upon the completion and acceptance of public street improvements to City standards that extend south from Pinehurst Drive (as labeled on the applicant's submitted tentative subdivision plan) and connect to Baker Creek Road.

Passed by the Council this 12th day of April 2005 by the following votes:

Ayes: Hansen, Hill, Olson, Menke, Springer, Yoder

Nays: \_\_\_\_\_

Approved this 12th day of April 2005.

  
MAYOR

Attest:

\_\_\_\_\_  
CITY RECORDER

Approved as to form:

  
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CITY ATTORNEY



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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PREMIER DEVELOPMENT, LLC,  
*Petitioner,*

vs.

CITY OF McMinnville,  
*Respondent.*

LUBA No. 2005-065

FINAL OPINION  
AND ORDER

Appeal from City of McMinnville.

Norman R. Hill, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Webb, Martinis and Hill.

Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Miller Nash, LLP.

DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED

12/20/2005

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

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**NATURE OF THE DECISION**

Petitioner appeals a city decision approving a zone change from a county zoning designation, EF-80, to a city zoning designation, R-2 PD, and granting preliminary approval of a 99-lot planned unit development.

**FACTS**

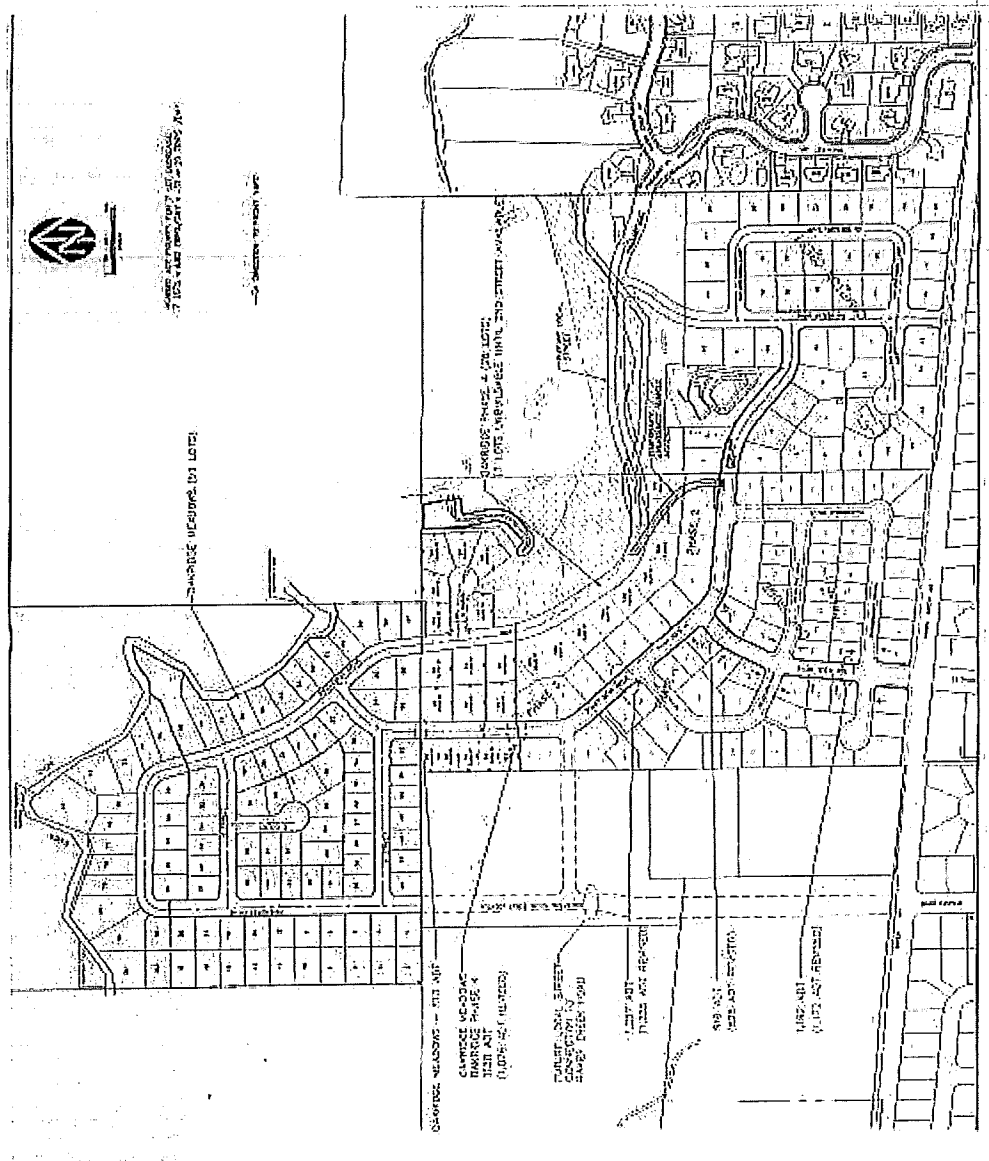
The subject property, a 22.3-acre site, was recently annexed into the city. On November 15, 2004, petitioner filed an application for approval of a zone change redesignating the subject property from a county zoning designation, EF-80 (Exclusive Farm Use – 80-acre minimum) to a city zoning designation, R-2 PD (Single-Family Residential Planned Development).

A creek borders the subject property on the north and east sides, substantially limiting options for access to and from the proposed development. The eastern portion of the southern boundary of the subject property abuts a developed residential subdivision known as the Oak Ridge subdivision.<sup>1</sup> See map on following page. To the east of Oak Ridge subdivision is the Compton Crest subdivision. The application proposed only one means of accessing the public street system—through the Oak Ridge subdivision via a northern extension of Pinot Noir Drive. Connections between Pinot Noir Drive and Baker Creek Road would be via Oak Ridge Drive or Merlot Drive. Petitioner proposed to construct street stubs where Pinehurst Drive exits the proposed development at two points along the southern boundary of the development to connect to future streets when neighboring properties develop.

On February 22, 2005, the city council conducted a public hearing, at which there was extensive discussion of possible increased congestion on the local streets to the south of the

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<sup>1</sup> The proposed subdivision is Oak Ridge Meadows, and the subdivision to the southeast is the Oak Ridge subdivision.



1 proposed development, specifically, congestion anticipated at the intersection of Oak Ridge Drive  
 2 and Pinot Noir Drive. Petitioner and the opponents to the proposal submitted traffic impact studies  
 3 addressing the possible traffic congestion. At the public hearing, petitioner suggested three

1 alternatives to the access initially proposed in its application.<sup>2</sup> Petitioner proposed the following  
2 condition of approval to address the anticipated congestion:

3 “The Applicant shall not be entitled to plat or construct more than 76 lots unless it  
4 demonstrates that an additional public street is available to provide access to the  
5 subdivision, in addition to the streets currently proposed.” Record 22-23.

6 Planning staff drafted findings consistent with petitioner’s proposed condition. However, on March  
7 22, 2005, when the city council reconvened to review the findings, it directed staff to redraft the  
8 findings. The ordinance adopting the zone change included the following condition of approval:

9 “That the number of lots allowed within the Oak Ridge Meadow subdivision shall  
10 be limited to a maximum of 76 lots. Additional lots may be permitted consistent  
11 with the submitted tentative plan upon the completion and acceptance of public  
12 street improvements to City standards that extend south from Pinehurst Drive (as  
13 labeled on the applicant’s submitted tentative subdivision plan) and connect to  
14 Baker Creek Road.” Record 9.<sup>3</sup>

15 This appeal challenging that condition of approval followed.

16 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

17 **A. Comprehensive Plan Policies**

18 The McMinnville Comprehensive Plan (MCP) provides a suggested traffic volume range of  
19 1,000 to 1,200 vehicles per day for local streets. MCP Goal VI (Transportation System), Policy

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<sup>2</sup> Petitioner’s attorney submitted a letter at the March 8, 2005 hearing that provided as follows:

“As discussed in the Staff Report and at the prior hearing, it is anticipated that in the future that there may be access to the west via the Shadden Claim property, to the east via Compton Crest or by conversion of the temporary vehicle access shown on the street plan to a public street.” Record 23.

<sup>3</sup> In addressing a different code provision requiring adequate access to and efficient provision of services to adjoining parcels, McMinnville City Zoning Ordinance (MCZO) 17.51.030.C(3), the challenged findings also provide:

“Adequate access and services will be provided within the proposed development through the construction of streets and sidewalks, and by limiting future development beyond 76 lots to the provision of additional direct access to Baker Creek Road through the southerly extension of Pinehurst Drive to Baker Creek Road, as conditioned by this approval.” Supplemental Record 10.

1 122.00(3).<sup>4</sup> The challenged decision cites that policy, as well as residential design policies 79.00  
2 and 99.00 of the MCP's housing goal, in support of the condition challenged in this appeal.<sup>5</sup> In its  
3 first assignment of error, petitioner argues that the city's findings are not supported by substantial  
4 evidence. In its second assignment of error, it argues that the findings are inadequate in various  
5 respects.

6 **1. Adequacy of Findings**

7 The parties agree that the findings must (1) identify the relevant approval standards; (2) set  
8 out the facts which are believed and relied upon; and (3) explain how those facts lead to the

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<sup>4</sup> Policy 122.00 of the MCP's transportation goal provides, in pertinent part:

"The City of McMinnville shall encourage the following provisions for each of the three functional road classifications:

"\* \* \* \* \*

"3. Local Streets

"\* \* \* \* \*

"Traffic volumes should be less than 1,000 to 1,200 vehicles per day."

<sup>5</sup> Policy 79.00 provides:

"The density allowed for residential developments shall be contingent on the zoning classification, the topographical features of the property, and the capacities and availability of public services including but not limited to sewer and water. Where densities are determined to be less than that allowed under the zoning classification, the allowed density shall be set through adopted policies enumerating the reasons for the limitations, or shall be applied to the specific area through a planned development overlay. In no case shall densities greater than those allowed by the zoning classification be allowed, except where specifically provided in the zoning ordinance."

Policy 99.00(3) provides:

"An adequate level of urban services shall be provided prior to or concurrent with all proposed residential development. Services shall include, but not be limited to:

"3. Streets within the development and providing access to the development, improved to city standards (as required)."

1 decision on compliance with the approval standards. *Wood v. Crook County*, 36 Or LUBA 143,  
2 157 (1999). The parties do not agree, however, that the city’s findings satisfy that standard.<sup>6</sup>

3 Petitioner first argues that the city’s findings are inadequate because they do not explain the  
4 city’s rationale for requiring a *direct* connection from the proposed development to Baker Creek  
5 Road. It alleges that the city failed to consider other alternatives proposed by petitioner. The city  
6 concedes that the findings do not explain why the alternatives offered by petitioner were rejected.  
7 However, it notes that petitioner does not cite anything in the record that indicates that its suggested  
8 alternatives are adequate to address the traffic congestion expected from the proposed  
9 development.

10 We need not decide in this case whether the city was required to adopt findings addressing  
11 and/or rejecting petitioner’s suggested alternatives, because even if it was, that omission does not

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<sup>6</sup> The city’s findings supporting imposition of the condition provide:

“Policies 79.00, 99.00(3), and 122.00 are satisfied by the request, as residential development will occur, as conditioned, commensurate with the ability of the existing and planned street system to accommodate traffic without unduly impacting the livability of the neighborhood. This will be accomplished by the requirement for additional public street access to Baker Creek Road as a prerequisite to platting of lots in excess of 76 (to a maximum of 99). This condition results from testimony received from opponents to this proposed development, and the findings of their traffic engineer (study dated December 13, 2004, authored by The Transpo Group). This traffic study concluded that if Oak Ridge Meadows is developed as proposed (99 lots), streets within portions of the adjacent Oak Ridge neighborhood would experience weekday traffic volumes that would exceed the ‘environmental capacity’ of these streets and have a resultant detrimental impact on the livability of the adjacent neighborhood. This is contrary to McMinnville comprehensive plan policy and zone change criteria. As recommended by The Transpo Group study, this impact could be mitigated by reducing the number of lots allowed within the subject Oak Ridge Meadows subdivision, by constructing an additional street connection to Baker Creek Road, or combination of these two measures. [Footnote omitted].

“The applicant offered into the record a study conducted by its own traffic engineer, DKS Engineering. The traffic studies submitted into this record were crafted based, in part, on different assumptions and data and provided conflicting results and recommendations. Having thoroughly reviewed and considered this information as well as additional testimony received relative to this issue, in addition to their knowledge of the subject site and surrounding area, the Council determined to afford greater weight to the study offered by The Transpo Group and, as such, agreed with its conclusions and recommendations. To satisfy these plan policies the City has, therefore, conditioned the Oak Ridge Meadows development such that phasing of the lots would occur as recommended by the opponents’ traffic engineer, and described in the conditions of approval for this subject zone change and subdivision.” Supplemental Record 8.



1 provide a basis for reversal or remand here. *See* ORS 197.835(11)(b).<sup>7</sup> In this case, the record  
2 clearly reflects that the challenged condition, rather than petitioner's proposed condition, was  
3 adopted because the city was not convinced that the other alternatives proposed by petitioner  
4 would solve the traffic congestion problem. Record 12.<sup>8</sup>

5 In response to petitioner's argument that the findings fail to explain how the challenged  
6 decision complies with the policies referenced in those findings, the city offers the following  
7 response:

8 "Policies 79.00, 99.00(3), and 122 are interrelated. Policy 79.00 provides that  
9 residential density is contingent on the capacities and availability of public services.  
10 Policy 99.00(3) requires provision of an adequate level of urban services prior to or  
11 concurrent with residential development, including streets providing access to the  
12 development improved to city standards. Policy 122.00 establishes the City's  
13 traffic volume standard for local streets. The condition limits full build-out of the

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<sup>7</sup> ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

<sup>8</sup> The minutes of the April 12, 2005 hearing reflect the following discussion:

"Councilor Springer reviewed the three proposed avenues of entering and exiting the subdivision and stated that it was his belief that the Council had asked that the access would be direct to Baker Creek Road, as suggested in Alternative One (extend south from Pinhurst Drive – as labeled on the applicant's submitted tentative subdivision plan) and connect with Baker Creek Road. He stated that it was his understanding that was the plan that he had voted on.

"Councilor Olson agreed with Councilor Springer and stated that he did not believe that an access way that traveled through Crestbrook would remove any traffic pressure from the subdivision. Following discussion, Councilor Olson suggested an amendment which provided that no more than 76 houses could be constructed without direct access to Baker Creek Road but not running through Crestbrook or in front of Mr. Toth's home. He asked that just the first alternative be left in the ordinance.

"Following discussion, Councilor Olson MOVED to table the discussion and direct staff to recraft Paragraph Five of the proposed ordinance to reflect no more than 76 lots without direct access to Baker Creek Road; Councilor Springer SECONDED the motion. Motion PASSED unanimously." Record 11-12.

1 subdivision until sufficient street capacity is available pursuant to City standards to  
2 serve additional houses. The condition thereby ensures compliance with all three  
3 policies. The City submits that the finding quoted above adequately explains how  
4 these standards apply and why the condition was imposed based on these  
5 standards.” Respondent’s Brief 7-8 (footnotes and citations omitted).

6 We agree with the city.

7 **2. Substantial Evidence**

8 In its first assignment of error, petitioner argues that the challenged condition is not  
9 supported by substantial evidence. It alleges that the evidence the city relied upon is insufficient  
10 because it does not take into account the alternate routes petitioner suggested, and that there is “not  
11 sufficient evidence on the record as a whole to demonstrate that the southwestern extension of  
12 Pinehurst is the only acceptable alternative.” Petition for Review 8, 9.

13 Respondent responds, we believe correctly, that the question is whether the challenged  
14 decision is supported by substantial evidence, not “whether [the city] could have made a different or  
15 ‘better’ decision.” Respondent’s Brief 3. We agree with respondent that petitioner’s argument,  
16 which focuses on the decision’s failure to demonstrate that the required access is the *only*  
17 acceptable alternative, misses the point. The city is not required to demonstrate that the required  
18 access is the only possible alternative, or even the best alternative, that will ensure compliance with  
19 the applicable criteria. Rather, the inquiry presented in petitioner’s first assignment of error is  
20 whether the condition that the city did impose is supported by substantial evidence in the record.  
21 For the following reasons, we conclude that it is.

22 As the challenged findings explain, the city council reviewed the traffic impact analysis of the  
23 opponents to the proposal and the traffic impact analysis prepared by petitioner’s expert. *See* n 6.  
24 Petitioner’s expert assumed that once a certain level of congestion was reached on Oak Ridge  
25 Drive, approximately one third of the traffic from the proposed development would be diverted  
26 away from Oak Ridge Drive and continue east on Pinehurst Drive, to access Baker Creek Road via  
27 Merlot Drive. With that anticipated diversion of traffic, petitioner’s expert concluded that the traffic  
28 numbers would be consistent with the goal of 1,200 vehicle trips per day. The city, however,

1 decided “to afford greater weight” to the opponent’s expert, and relied on the conclusions and  
2 recommendations of that study as a basis for imposing the challenged condition.<sup>9</sup>

3 Substantial evidence is evidence upon which a reasonable person would rely in reaching a  
4 decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475  
5 (1984). Where LUBA concludes that a reasonable person could reach the decision made by the  
6 local government, in view of all of the evidence in the record, the choice between conflicting  
7 evidence belongs to the local government. *Younger v. City of Portland*, 305 Or 346, 360, 752  
8 P2d 262 (1988). Where a reasonable person could have chosen to rely on a particular expert’s  
9 conclusions, a local government may choose to believe that expert over another expert expressing a  
10 contradictory opinion. *Molalla River Reserve Inc. v. Clackamas County*, 42 Or LUBA 251,  
11 268 (2002).

12 In this case, the city relied on the opponents’ expert’s conclusions and adopted its  
13 recommendation regarding the required access. We agree with the city that petitioner’s proposed  
14 condition that allows a secondary access in a different location “does not undermine the  
15 substantiality of the evidence relied upon by the [city].” Respondent’s Brief 4. The city imposed  
16 the challenged condition, which was recommended in the opponents’ expert’s traffic impact  
17 analysis. Petitioner offers no reason to question the qualifications of that expert, and the city was  
18 entitled to rely on that expert’s recommendation, rather than on the conclusions of petitioner’s

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<sup>9</sup> The footnote omitted in the findings referenced in n 6 provides:

“The Transpo Group ‘Findings,’ found on page 7 of their December 13, 2004 study, states:

“Our analysis indicates that the Oak Ridge Meadows development, proposed as 120 new dwelling units, will generate new traffic along Oak Ridge Drive and Pinot Noir Drive in excess of the City’s standard. These impacts can be mitigated, either by:

- “(1) Limiting the number of new lots within the proposed Oak Ridge Meadows subdivision from 120 to approximately about 65 (until such time as additional, direct street connections to Baker Creek Road are constructed), or
- “(2) Ensuring a fully accessible, second public access and direct connector between Oak Ridge Meadows and Baker Creek Road via the lands immediately southwest of the proposed site.” Supplemental Record 8.

1 expert. We therefore conclude that the condition, which was based upon the opponent's  
2 recommendation, is supported by substantial evidence in the record.

3 **B. MCZO 17.72.035**

4 Finally, petitioner argues that the findings are inadequate because they fail to explain how the  
5 challenged condition complies with MCZO 17.72.035.<sup>10</sup> The city asserts that the challenged  
6 condition was not imposed to ensure compliance with MCZO 17.72.035 and that the findings were  
7 therefore not required to address how the condition complies with that provision.

8 While we agree that the condition of approval was likely not imposed in order to ensure  
9 compliance with MCZO 17.72.035, we disagree with the city that it was not required to adopt  
10 findings addressing consistency of the condition with that code provision. The requirement to  
11 address needed housing and to give "added weight" to the MCP's housing policies is found in  
12 MCZO 17.72.035. See n 10. Petitioner alleges that the challenged decision is void of any  
13 discussion of whether or how the challenged condition impacts needed housing, and in particular

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<sup>10</sup> MCZO 17.72.035 provides the applicable zone change criteria:

"An amendment to the official zoning map may be authorized, provided that the proposal satisfies all relevant requirements of this ordinance, and also provided that the applicant demonstrates the following:

- "A. The proposed amendment is consistent with the goals and policies of the Comprehensive Plan;
- "B. The proposed amendment is orderly and timely, considering the pattern of development in the area, surrounding land uses, and any changes which may have occurred in the neighborhood or community to warrant the proposed amendment;
- "C. Utilities and services can be efficiently provided to serve the proposed uses or other potential uses in the proposed zoning district.

"When the proposed amendment concerns needed housing (as defined in the McMinnville Comprehensive Plan and state statute), criterion 'B' shall not apply to the rezoning of land designated for residential use on the plan map.

"In addition, the housing policies of the McMinnville Comprehensive Plan shall be given added emphasis and the other policies contained in the plan shall not be used to: (1) exclude needed housing; (2) unnecessarily decrease densities; or (3) allow special conditions to be attached which would have the effect of discouraging needed housing through unreasonable cost or delay."

1 does not explain the interplay between the comprehensive plan's residential and transportation  
2 policies. Petition for Review 12. We read petitioner's needed housing argument as an argument  
3 that the findings fail to address the needed housing language in MCZO 17.72.035.

4 The city argues, first, that petitioner did not raise this issue in the local proceedings and that  
5 it is therefore waived. ORS 197.835(3).<sup>11</sup> It alleges that petitioner only discussed needed housing  
6 in the context of supporting its proposal to rezone the property to R-2 PD, but did not argue that  
7 the challenged condition would unreasonably delay needed housing.

8 The challenged condition of approval, however, first appeared in the final decision, and  
9 petitioner could not have been expected to raise issues regarding it at the local proceedings. *See*  
10 *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998) (ORS 197.835(3) does not require a  
11 petitioner to raise issues concerning a condition of approval where the condition of approval first  
12 appeared in the final decision.). We will therefore address petitioner's needed housing argument.

13 We question the validity of the substance of petitioner's needed housing argument,  
14 presented in its third assignment of error, *i.e.*, whether the challenged condition has the effect of  
15 unreasonably burdening or delaying needed housing. However, the challenged decision completely  
16 misquotes the applicable approval criterion, and omits any reference to the needed housing language  
17 in MCZO 17.72.035.<sup>12</sup> The omitted language, for instance, clarifies that with regard to a zoning

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<sup>11</sup> ORS 197.835(3) provides:

"Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

<sup>12</sup> The challenged decision quotes MCZO 17.72.035 as follows:

"17.72.035 Review Criteria. An amendment to the official zoning map may be authorized, provided that the proposal satisfies all relevant requirements of this ordinance, and also provided that the applicant demonstrates the following:

"A. The proposed amendment is consistent with the goals and policies of the comprehensive plan;

"B. The proposed amendment is orderly and timely, considering the pattern of development in the area, surrounding land uses, and any changes which may have occurred in the neighborhood or community to warrant the proposed amendment;

1 map amendment concerning needed housing, subsection (B), which requires that the proposal be  
2 “orderly and timely,” does not apply. However, the challenged decision treats that subsection as  
3 applicable, adopts findings addressing it, but then fails to address the applicable needed housing  
4 language.<sup>13</sup> Consequently, its findings are inadequate in this regard. Remand is appropriate for the  
5 city to address, in the first instance, the needed housing language in MCZO 17.72.035 and to  
6 explain how the challenged decision, and specifically the challenged condition, complies with that  
7 language.

8 The first assignment of error is denied.

9 The second assignment of error is sustained in part and denied in part.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner argues that the city violated MCZO 17.72.035 by imposing the challenged  
12 condition because it has the effect of unreasonably burdening or delaying needed housing. Because  
13 we sustain petitioner’s findings challenge in this regard, we need not address petitioner’s third  
14 assignment of error. On remand, the city shall address how the challenged decision, and the  
15 condition of approval in particular, complies with the language of MCZO 17.72.035 that the city  
16 omitted from the challenged decision.

17 The city’s decision is remanded.

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“C. Utilities and services can be efficiently provided to serve the proposed use or other potential uses within the proposed zoning district.” Supplemental Record 7.

Compare full quotation of MCZO 17.72.035 at n 10.

<sup>13</sup> The challenged findings address only subsections (A), (B) and (C) of MCZO 17.72.035, stating, in relevant part:

“The applicable requirements of Section 17.72.035 (Review Criteria) of the McMinnville Zoning Ordinance are satisfied by the request in that the proposal is consistent with the goals and policies of the Comprehensive Plan as demonstrated in Conclusionary Findings for Approval No. 1 listed above. This request is orderly and timely considering the pattern of development in the surrounding area and the intent to develop this land in a manner and at a density consistent with the City’s Comprehensive Plan Map and Zoning Ordinance, and with the recently adopted ‘McMinnville Growth Management and Urbanization Plan.’ Utilities and services are available to the subject site commensurate with the proposed subdivision’s needs.” Supplemental Record 10.

ORDINANCE NO. 4845

An Ordinance amending Ordinance 4822, which rezoned certain property from a County EF-80 (Exclusive Farm Use – 80-acre minimum) zone to a City R-2 PD (Single-Family Residential Planned Development) zone on approximately 22.3 acres of land located northwest of the Oak Ridge residential development, to adopt additional findings.

RECITALS

On April 12, 2005, the City Council approved Ordinance 4822, which implemented an application (ZC 12-04 / S 14-04) from Premier Development LLC, dated November 15, 2004, requesting a zone change from a County EF-80 (Exclusive Farm Use – 80-acre minimum) zone to a City R-2 PD (Single-Family Residential Planned Development) zone on approximately 23 acres of land located northwest of the Oak Ridge residential development. The property is further described as a portion of Tax Lot 600, Section 7, and Tax Lot 200, Section 8, T. 4 S., R. 4 W., W.M.

The applicant appealed the City Council's decision to the State of Oregon Land Use Board of Appeals ("LUBA"). LUBA remanded the decision back to the City Council for further consideration on one issue. Premier Development LLC v. City of McMinnville, \_\_\_\_\_ Or LUBA \_\_\_\_\_ (LUBA 2005-065, Dec. 20, 2005).

The City Council held a public hearing on remand and concluded that its April 12, 2005, decision complies with all applicable criteria. The Council decided to amend its April 12 decision to adopt additional findings in support of the decision; now, therefore,

THE CITY OF McMINNVILLE ORDAINS AS FOLLOWS:

Section 1. That the Council amends Section 1 of Ordinance 4822 to adopt the findings and conclusions as contained in the Supplemental Findings of Fact and Conclusionary Findings for Approval on Remand (Exhibit "A," attached) as additional findings and conclusions in support of its decision as set forth in Ordinance 4822.

Section 2. Except as provided by Section 1, Ordinance 4822 is unchanged.

Passed by the Council this 14th day of March 2006, by the following votes:

Ayes: Hansen, Hill, Menke, Olson, Springer, Yoder

Nays: \_\_\_\_\_

Approved this 14<sup>th</sup> day of March 2006.

  
MAYOR

Attest:

  
RECORDER

Approved as to form:

  
CITY ATTORNEY



**EXHIBIT "A"**  
**SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONARY FINDINGS**  
**FOR APPROVAL ON REMAND**  
**DOCKET ZC 12-04/S 14-04**

**INTRODUCTION**

1. Premier Development LLC ("applicant") requested approval of a zone change from a County EF-80 (Exclusive Farm Use - 80-acre minimum) zone to a City R-2 PD (Single-Family Residential Planned Development) zone on approximately 23.0 acres of land. The applicant also requested approval of a tentative residential subdivision plan to accommodate 99 single-family residential lots. The subject site is located north of Pinot Noir Drive and the Oak Ridge residential development and is further described as a portion of Tax Lot 600, Section 7, and Tax Lot 200, Section 8, T. 4 S., R. 4 W., W.M. The subject property was annexed to the city on May 18, 2004, by the voters of McMinnville. The City Council approved the application with conditions in a decision dated April 12, 2005.
2. The applicant appealed the City Council's decision to the State of Oregon Land Use Board of Appeals ("LUBA"). LUBA remanded the decision back to the City Council for further consideration on one issue. Premier Development LLC v. City of McMinnville, \_\_\_\_\_ Or LUBA \_\_\_\_\_ (LUBA 2005-065, Dec. 20, 2005).
3. The sole issue before the City Council on remand is whether the City's April 12, 2005, decision complies with a portion of the McMinnville Community Zoning Ordinance ("MCZO") Section 17.72.035 that the Council failed to discuss in its prior decision. The applicant's particular argument was that the condition imposed by the City Council limiting development of the proposed subdivision to 76 lots until a second direct access is constructed from Pinehurst Drive to Baker Creek Road did not comply with this portion of Section 17.72.035 because it "discouraged needed housing through unreasonable cost or delay."
4. LUBA otherwise upheld the City's decision, concluding that the City's decision to impose the above-noted condition was justified pursuant to its findings and was supported by substantial evidence in the record.
5. The City Council held an on the record hearing on remand at its March 14, 2006, meeting.

## FINDINGS OF FACT

MCZO 17.72.035 contains the provisions at issue on remand:

**"17.72.035 Review Criteria.** An amendment to the official zoning map may be authorized, provided that the proposal satisfies all relevant requirements of this ordinance, and also provided that the applicant demonstrates the following:

**"A.** The proposed amendment is consistent with the goals and policies of the Comprehensive Plan;

**"B.** The proposed amendment is orderly and timely, considering the pattern of development in the area, surrounding land uses, and any changes which may have occurred in the neighborhood or community to warrant the proposed amendment;

**"C.** Utilities and services can be efficiently provided to serve the proposed uses or other potential uses in the proposed zoning district.

**"When the proposed amendment concerns needed housing (as defined in the McMinnville Comprehensive Plan and state statute), criterion "B" shall not apply to the rezoning of land designated for residential use on the plan map.**

**"In addition, the housing policies of the McMinnville Comprehensive Plan shall be given added emphasis and the other policies contained in the plan shall not be used to: (1) exclude needed housing; (2) unnecessarily decrease densities; or (3) allow special conditions to be attached which would have the effect of discouraging needed housing through unreasonable cost or delay."**

The portion of the section shown in bold is the portion of the provision that LUBA concluded the Council failed to address in its April 12, 2005, decision.

## CONCLUSIONS

1. The City Council's April 12, 2005, decision found that the application was in compliance with MCZO 17.72.035 subsections A, B, and C. This finding was not challenged by the applicant at LUBA, but LUBA questioned whether subsection B should have been applied given that the application dealt with needed housing. Subsection B was not applied to deny or condition the decision, so the Council concludes that its prior finding with regard to Subsection B is surplusage.

2. Although not raised by the applicant in its LUBA appeal, the Council concludes that its decision does not exclude needed housing or unnecessarily decrease densities within the meaning of MCZO 17.72.035. The Council approved the applicant's request for an R-2 zoning designation with a planned development ("PD") overlay. The PD overlay permits an applicant to vary from the clear and objective requirements of the City's subdivision ordinance, such as setbacks, lot size, and lot design, thereby allowing an applicant to maximize developable density on a constrained property. The Council's prior decision authorizes development of 99 lots, a 30% higher density than was originally proposed when the subject property was submitted to the voters for annexation. The Council approved the development at this density in spite of objections from opponents who argued that the development should be limited to the 76 lots proposed in the annexation measure. The Council's decision to approve the subdivision is consistent with the City's comprehensive plan designation and the City's housing policies as explained in the Council's unchallenged findings in its April 12, 2005, decision.

3. The Council concludes that the decision does not attach special conditions that "would have the effect of discouraging needed housing through unreasonable cost or delay." The City argued before LUBA that this provision is essentially identical to ORS 197.307(6) and should be construed accordingly. The Council finds that this subsection of MCZO 17.72.035 is clearly intended to implement the statute and finds that it should be construed consistently with the statute. As the City noted in its brief before LUBA:

"the statute does not prohibit *reasonable* cost or delay. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 422 (2002). The statute also doesn't prohibit local regulations that delay build out until urban services are available to support the development.

"The needed housing statute at ORS 197.307 is not concerned with the timing of development, nor does it require that all areas of the city be immediately available for development of needed housing under clear and objective standards. The statute is not offended by a standard that effectively requires needed housing developers to apply under discretionary standards

designed to address public safety concerns until emergency services are extended to currently unserved portions of the city.' *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA at 418-419."

The Council concludes that MCZO 17.72.035 is not intended to relax or prohibit conditions that delay development of needed housing until adequate public facilities are constructed or available. The condition requiring direct connection to Baker Creek Road was imposed pursuant to Comprehensive Plan Policies 79.00 and 99.00, which require an adequate level of urban services, including streets improved to city standards, to be provided prior to or concurrent with all proposed residential development. These policies are housing policies under Chapter V ("Housing and Residential Development") of the Plan. These are therefore the policies that MCZO 17.72.035 directs the Council to emphasize, not "other policies" to which subsections (1), (2), and (3) apply. (The condition was also imposed pursuant to Policy 122.00, which is not a housing policy but sets forth the City standards with regard to streets, and so the Council finds that its application implements the housing policies noted above.)

The Council concludes that any additional cost or delay as a result of conditions designed to ensure adequate public facilities is reasonable in light of these policies and the other multiple policy and ordinance requirements that public facilities must be adequate to serve new residential development and to preserve livability in surrounding neighborhoods as discussed in the unchallenged portions of the Council's prior decision. Allowing residential development to occur on substandard public facilities could actually increase delay as a result of citizen opposition and appeals (as occurred with this application) and add cost as a result of the need to install after-the-fact upgrades to bring the public facilities up to City standards.

In its appeal to LUBA, the applicant challenged the imposition of the condition limiting development of the proposed subdivision to 76 lots until a second direct access is constructed from Pinehurst Drive to Baker Creek Road. The applicant argued that the condition caused unreasonable cost and delay because the applicant had proposed alternative, more reasonable, access routes that would alleviate the identified traffic problem. The Council, however, did not agree that the applicant's proposed alternatives would alleviate the traffic impact on the local street system caused by full build-out of the subdivision. LUBA upheld that portion of the City's decision imposing the direct connection and rejecting the applicant's alternative routes, and the applicant did not appeal. That issue is therefore resolved with regard to this application. If another access route is constructed prior to the direct connection to Baker Creek Road that the applicant believes would alleviate the impact of the traffic generated by full build-out of the subdivision, the applicant may file an application to amend the condition pursuant

to MCZO 17.72.030 ("Public Hearings and Notice Requirements: Zoning Map and Planned Development Overlay Amendments") and make its case at that time.

For these reasons, the Council concludes that imposing a condition limiting development of the proposed subdivision to 76 lots until a second direct access is constructed from Pinehurst Drive to Baker Creek Road does not violate MCZO 17.72.035.

4. Based upon the findings and conclusions above, the Council concludes that its Ordinance 4822 implementing the zone change and PD overlay does not require any additional substantive amendment to decision, but should be modified to incorporate these supplemental findings in support of the decision.

