**BEFORE THE EXPEDITED LAND DIVISION REFEREE FOR CITY OF TALENT, OREGON**

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| In the matter of an Appeal from the Decision of City of Talent Community Development Department denying an application for an expedited land division for 49 lots on a 26.59 acre parcel located at 201 Belmont Road, and described as Tax Lot 1001, Township 38, Range 1 West, Section 36, in the City of Talent, Oregon.<br><br>Applicant: Tony and Tory Nieto<br><br>Appellant: Tony and Tory Nieto | File No. SUB 2018-001<br><br>**DECISION AND FINAL ORDER** |

**THE APPEAL IS DENIED AND THE APPLICATION IS REMANDED**

## I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

### A. Application

On March 23, 2018, Tony and Tory Nieto ("Applicant" or "Appellant" herein) filed an application with the City of Talent Community Development Department seeking land division approval to create 49 lots for single family development from an existing 26.58 parcel (the "Application"). The property that is the subject of the Application is owned by the Applicant, is commonly known as 201 Belmont Road in Talent, Oregon, and is legally described as Township 38, Range 1 West, Section 36, Lot 1001 (the "Property"). The Property is designated for Residential Low Density (RL) on the City of Talent's Comprehensive Plan Map, and is zoned Single Family – Low Density (RS-5) on the City's Official Zoning Map. The Application was deemed complete on May 7, 2018. The Application proposed an expedited land division

pursuant to Oregon Revised Statutes ("ORS") 197.360 through 197.385. The expedited land division process provides for a quicker subdivision application review than a normal subdivision application process if the application meets the definition for an expedited land division (abbreviated "ELD" herein) found in ORS 197.360(1).

**B. The Subject Property: Location and Public Facility Issues**

The Property is in an area that is referred to as the Railroad District in the City's planning documents – both the 2017 Comprehensive Plan and a City document called the 2005 Railroad District Master Plan. The Railroad District is the southern and eastern edge of the City from Rapp Road on the northwest, extending to one parcel beyond the subject Property on the southeast. All of the Railroad District is separated from the great majority of the City of Talent by the California Oregon and Pacific Railroad ("CORP") right-of-way. In addition, while all of the Railroad District is within the City's Urban Growth Boundary ("UGB"), only a handful of parcels are actually within the city limits of the City of Talent, and one of those parcels is the Property. As seen on the City's 2017 Comprehensive Plan Map and 2017 Zoning Map, the Property is a peninsula of the City extending to the south, surrounded on three sides by parcels within Jackson County's jurisdiction, and separated from the remainder of the City of Talent by the CORP right-of-way.

The only access to the Property is from Belmont Road, which the City recognizes has poor pavement condition[1]. The City classifies Belmont Road as a Collector, because it is proposed to provide a primary access to lands that could develop in the Railroad District.[2] Hearing testimony and City maps show that the Belmont Road right-of-way ends at the CORP

[1] 2017 Comprehensive Plan, Element D, at 14.
[2] *Id.*

railway right-of-way.[3] Access to the property is currently over a one-lane, graveled private crossing of that railroad right-of-way.[4] There is no public road or public right-of-way beyond where the Belmont Road right-of-way ends at the CORP right-of-way. While no survey or drawing of proposed improvements crossing the CORP right-of-way were provided by Applicant,[5] the CORP right-of-way appears to be approximately sixty (60) feet in width in the County's public tax lot records, which is the same width as the Belmont Road right-of-way, which meets it at a right angle.

The City has done some fairly significant planning work for the eventual development of the Railroad District, and the Railroad Master Plan was completed in 2005. More recently, the City has recognized how public facility development in the area is far from ideal for development. The 2017 Comprehensive Plan recognizes that lands planned for growth southwest of the railroad tracks (the Railroad District) "will not be viable without a new street network that meets emergency service needs, and new water, storm sewer and sanitary sewer facilities."[6] Objective 10.1.1 in the 2017 Comprehensive Plan puts it bluntly that no planning approvals should be allowed for any Railroad District parcels until a new master plan is completed showing how all infrastructure will be connected and phased.[7] Objective 10..1.2 in the Comprehensive Plan is even more blunt; stating that construction permits for new residential development in the Railroad District should not be issued until all necessary services are designed, engineered and funding is secured.[8] Implementation Strategy 10.2.1 of the

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[3] *See* Administrative Record ("AR") at 825 (1926 plat of Hyde Park).
[4] *See* AR at 862-863.
[5] Applicant provided proposed road sections for Belmont Road leading from Talent Ave to the CORP right-of-way and leading from the CORP right-of-way into Applicant's property, but no proposed design for a public road crossing itself. *See* AR at 111.
[6] 2017 Comprehensive Plan at F-2.
[7] 2017 Comprehensive Plan at F-17.
[8] *Id.*

Comprehensive Plan, while not specifically focused on the Railroad District, provides that all new development shall include street access with two outlets sufficiently separated for fire life safety access.[9]

**C. City Decision**

The City initially determined that the application met the ELD definition, but after receiving comments from the public and affected agencies, the City decided the application was not appropriate for treatment as an ELD. The great majority of public comments reflected the public facility concerns discussed above. In particular, the public comments were that fire and life safety would be compromised if there was only one entrance to the subdivision, that Implementation Strategy 10.2.1 of the Comprehensive Plan required a second access, and that stormwater facilities were already insufficient. The agency comments focused more on the technical aspects of the access issue. The Oregon Department of Transportation (Rail Division) ("ODOT Rail" herein) is the permitting agency for highway-railroad crossings and commented that a condition of their approval would require closure of the existing Public Road/CORP private railroad crossing just to the south of the Property. Jackson County commented that, if the Public Road/Corp crossing was eliminated, access for the properties currently using that crossing would have to be provided to the new Belmont Road crossing. Fire District No. 5 commented that a single access would likely not meet the Oregon Fire Code requirements for fire equipment access. Because Belmont Road crosses the Talent Main Canal, the Bureau of Reclamation and the Talent Irrigation District commented that any widening of Belmont Road would need to meet culverting requirements, would need approval from the Bureau of Reclamation, and would also

[9] Id.

likely need conduct consultation under Section 106 of the National Historic Preservation Act of 1966.[10]

On July 6, 2018, the City issued its decision denying the Application (the "City Decision").[11] The City Decision determined that the Application was not eligible to be processed as an ELD because it did not meet ORS 197.360(1)((a)(D):

> Satisfies minimum street or other right–of-way connectivity standards established by acknowledged land use regulations or, if such standards are not contained in the applicable regulations, as required by statewide planning goals and rules.

ORS 197.360(1)(a)(D). The primary reasons for the City Decision were (1) that the Application did not meet the secondary access requirement of Implementation Standard 10.2.1 in the City's 2017 Comprehensive Plan, as well as other provisions from Element F (Public Facilities) of the 2017 Comprehensive Plan, and (2) the Application had not resolved how the railroad crossing would work, in particular ODOT Rail's statements about how the Public Road/CORP crossing would have to be closed and access provided to the properties currently using that crossing.[12] Perhaps in an excess of caution, the City Decision went on to also review the Application under the City's Zoning Code[13] and the City's Subdivision Code.[14] For the same reasons, and for other reasons (e.g. stormwater requirements), the City determined that the Application did not meet the substantive requirements of the City's Zoning Code and Subdivision Code.

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[10] Those agencies commented that the Talent Main Canal is eligible for inclusion on the National Register of Historic Places. If correct, any federal undertaking (such as a Bureau of Reclamation consent) would require consultation under the National Historic Preservation Act of 1966. See 16 U.S.C. 470 *et seq.*

[11] AR at 687 - 749

[12] AR at 692 - 695.

[13] AR at 695 – 707.

[14] AR at 707 – 749.

**D. Appeal and Appeal Hearing**

On July 20, 2018, the Applicant timely filed an appeal of the City Decision. The ELD statutes require the City to appoint a Referee to hear and decide an appeal of an ELD application. ORS 197.375(2). The Referee is required to send notice to relevant parties and advise them on the manner on which they can participate in the appeal. ORS 197.375(3). With respect to process, the Referee "may use any procedure for decision-making consistent with the interests of the parties to ensure a fair opportunity to present information and argument." *Id.* The statute is clear that the Referee may consider "information not presented to the local government." *Id.*

After consulting with several of the parties regarding procedures and schedule,[15] the Referee and City issued a notice on August 2, 2018, which set the appeal hearing for August 16, 2018.[16] The notice provided that written testimony and demonstrative evidence would be allowed at the appeal hearing, and rebuttal evidence from the Applicant/Appellant would be allowed. All other written evidence or reports were required to be submitted to the City's Community Development Department by August 10, 2018.

The Referee conducted the appeal hearing on August 16, 2018 (the "Hearing"). The Applicant was represented by Mr. Tommy Brooks and Cable Huston LLP; a group of nearby property owners and project opponents (the "Opponent Group") was represented by Mr. Christian Hearn and Davis Hearn Anderson & Turner Attorneys at Law; the City of Talent was

[15] The Referee convened a conference call with the attorney for Applicant (Tommy Brooks of Cable Huston); the attorney for a group of project opponents (Christian Hearn of Davis Hearn Anderson & Turner); Mr. Ronald Laupheimer, an attorney that participated and provided comments in his individual capacity; and the City's Planning Director regarding the proposed hearing schedule and process for evidence submittal. The Referee also spoke to the City's attorney (Rebekah Dohrman of Local Government Law Group) regarding the notice content.

[16] A copy of the notice for the 8/16/18 hearing is available on the City's website, along with other appeal documents, at http://www.cityoftalent.org/Page.asp?NavID=169. A copy will be included in the Administrative Record.

represented by Ms. Rebekah Dohrman and Local Government Law Group, a member of Speer Hoyt LLC; and a number of members of the public with standing also participated in the Hearing. At the beginning of the Hearing, the Referee announced that the appeal was a *de novo* proceeding, both in the sense that evidence not presented to the City prior to the City's Decision would be considered and in the sense that the Referee would not defer to the City's legal interpretations in the City's Decision. That scope and standard of review for the appeal are addressed further below.

The Referee also announced that written legal arguments, but no additional evidence, would be accepted after the close of the Hearing. Any participant could submit a final legal argument by close of business on August 22, 2018; and the Applicant could submit a final legal argument by close of business on August 28, 2018. The Referee's decision would be published on or before September 7, 2018.[17]

## II. APPLICABLE CRITERIA

Applicable approval criteria were identified in the City Decision.[18] With the following changes, the Referee adopts that list of applicable criteria. In addition to that list, the Referee concludes that the standards in Element D (Transportation System Plan) of the 2017 Comprehensive Plan are incorporated into the City's Subdivision Code as applicable criteria – especially the street design standards and cross-sections.[19] As discussed in more detail below, the Referee concludes that the standards in Element F, Policy 10, are not incorporated into the City's Subdivision Code and are not applicable criteria for the Application.

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[17] The ELD statute requires the Referee decision to be published within 42 days of fling the appeal. ORS 197.375(4)(b); ORS 197.375(5). The Applicant and the City agreed in writing that, in order to accommodate a reasonable post-hearing period for submittal of legal arguments, the 42-day period would be extended by seven (7) days until end of business on September 7, 2018.

[18] AR at 691 – 692.

[19] See, e.g., 2017 Comprehensive Plan, Element D, at 51 – 53.

## III. DISCUSSION, FINDINGS OF FACT, AND LEGAL CONCLUSIONS

### A. The Expedited Land Division (ELD) Statutes

A land division or land partition application can only be processed as an ELD if it meets the requirements of ORS 197.360(1):

> (1) As used in this section:
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> (a) "Expedited land division" means a division of land under ORS 92.010 (Definitions for ORS 92.010 to 92.192) to 92.192 (Property line adjustment), 92.205 (Policy) to 92.245 (Fees for review proceedings resulting in modification or vacation) or 92.830 (Definitions for ORS 92.830 to 92.845) to 92.845 (Relationship of subdivision in manufactured dwelling park or mobile home park to planned community statutes and series partition statutes) by a local government that:
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> (A) Includes only land that is zoned for residential uses and is within an urban growth boundary.
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> (B) Is solely for the purposes of residential use, including recreational or open space uses accessory to residential use.
>
> (C) Does not provide for dwellings or accessory buildings to be located on land that is specifically mapped and designated in the comprehensive plan and land use regulations for full or partial protection of natural features under the statewide planning goals that protect:
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> (i) Open spaces, scenic and historic areas and natural resources;
> (ii) The Willamette River Greenway;
> (iii) Estuarine resources;
> (iv) Coastal shorelands; and
> (v) Beaches and dunes.
>
> (D) Satisfies minimum street or other right-of-way connectivity standards established by acknowledged land use regulations or, if such standards are not contained in the applicable regulations, as required by statewide planning goals or rules.
>
> (E) Will result in development that either:
>
> (i) Creates enough lots or parcels to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site; or
> (ii) Will be sold or rented to households with incomes below 120 percent of the median family income for the county in which the project is built.

> (b) "Expedited land division" includes land divisions that create three or fewer parcels under ORS 92.010 (Definitions for ORS 92.010 to 92.192) to 92.192 (Property line adjustment) and meet the criteria set forth in paragraph (a) of this subsection.

ORS 197.360(1).

In addition, an ELD is specifically not a land use decision or a limited land use decision and is also not a permit as defined by Oregon statutes. ORS 197.360(3). One result of those limitations is that an appeal of an ELD decision is not within the jurisdiction of the Oregon Land Use Board of Appeals. *See Richey Lane Neighborhood Association, Inc. v. Washington County*, LUBA No. 96-076 (Or. LUBA 1996).

The city or county has a limited time within which to deem the application complete. ORS 197.365(1). Once complete, the city or county provides notice to affected agencies and nearby property owners. ORS 197.365(2) & (3). There is a fourteen (14) day period for submission of written comments; and the local jurisdiction may not hold a public hearing on the application. ORS 197.375(4). The city or county must issue a written decision within 63 days of the receipt of a completed application. *Id.*

An appeal may be filed within fourteen (14) days of the mailing of the local decision. ORS 197.375(2). One basis for appeal is that the application does not qualify as an ELD under ORS 197.360. ORS 197.375(1)(c). Other bases include noncompliance with the substance of applicable land use regulations, unconstitutionality of the local government decision, and procedural error that substantially prejudiced a parties' substantive rights. *Id.* As mentioned above, the local government appoints a referee to decide the appeal. ORS 197.375(3).

The referee applies the substantive requirements of the local government's land use regulations and ORS 197.360. If the referee determines that the application does not qualify as an ELD per ORS 197.360, the referee must remand the application for consideration as a land use decision or (as here) a limited land use decision. ORS 197.375(4)(a). In all other cases, the

referee must seek to identify means by which the application can satisfy the applicable requirements. *Id.* This provision is noteworthy because the referee's duty to seek ways for the application to meet applicable criteria does not apply if the application is not an ELD – in that circumstance, the referee simply remands the application to the local government.

The ELD statutes were passed in 1995 and have been amended several times – most recently by House Bill 3223 in 2015. For whatever reason, the ELD process is little used; and there is no case law construing the ELD statutes. Several parties argued that the Legislature only intended the ELD statutes to apply to subdivisions that clearly meet approval criteria and do not involve complex issues, such as protecting natural features or street access and connectivity.[20] Rogue Advocates includes with its comments some of the legislative history of House Bill 3223. The committee reports indicate that the legislature considered ELD's to be "subject to standards that require very little judgment on the part of city or county staff."[21] The legislative history of the ELD statutes is interesting, but the definition of an ELD in ORS 197.360 is straightforward. Accordingly, the Referee does not find any need to utilize legislative history in order to interpret that statute.

**B. Generally Applicable Legal Standards.**

We are guided in the resolution of these issues by the following burden of proof. An applicant must provide substantial evidence supporting the approval criteria applicable to the application. See ORS 197.360(4) (applicant has burden to show how the proposed ELD complies with the provisions of ORS 197.360(1)). A finding of fact is supported by substantial

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[20] E.g., AR at 886 – 887; AR at 443 - 452

[21] AR at 450 – 451. Rogue Advocates also argues that the Referee should restrict ELDs to partitions of three or fewer lots, because that was the original intent of the 1995 Legislature. Whatever the original intent of the Legislature in 1995, however, the current ELD statutes clearly apply to any partition or subdivision, no matter the number of lots, so long as the application meets the ELD definition in ORS 197.360.

evidence in the record, viewed as a whole, would permit a reasonable person to make that finding. *Rogue Advocates v. Jackson County*, 282 Or. App. 381, 388–89 (2016) (citing *Younger v. City of Portland*, 305 Or. 346, 360 (1988)).

When interpreting the City's ordinances or state statutes, the Referee's primary task is to discern the intent of the legislative body, beginning with an examination of the text of the statute in its context. *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009) (text and context provide the best evidence of legislative intent). The Referee must also apply the rule of statutory construction set out by the Legislature in 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.

ORS 174.010; *Clackamas County v. Gay*, 146 Or. App. 706, 711, 934 P.2d 551 (1997) (citing ORS 174.010, court refused to add repealer language to statute affecting local land use regulations).

**C. Procedural Issues**

**1. *De Novo* Scope and Standard of Review**

The ELD statute states that the referee may use any procedure for decision-making consistent with the interests of the parties to ensure a fair opportunity to present information and argument. ORS 197.375(3). That statute also states that the Referee may consider information not presented to the local government. The Referee finds that this indicates the scope of review under ORS 197.375 should be *de novo*. In addition, the opportunity for written comments in the ELD statute is brief, there is no explicit opportunity for responding to other parties' comments, and there is no opportunity to present evidence or argument at a hearing. ORS 197.365(4).

Accordingly, a *de novo* scope of review is appropriate in order to give the parties an opportunity to provide evidence and address all issues.

The City argues that the Referee should give deference to the City's interpretation of its ordinances under ORS 197.829. In particular, the City suggests that it has consistently applied Policy 10 and Implementation Standard 10.2.1, Appendix F, of its Comprehensive Plan to subdivision applications. The Referee concludes that the City's position is incorrect for several, independent reasons. First, ORS 197.829 only requires LUBA – not the Referee under the ELD statute – to give deference to a local governing body's interpretation of its own land use regulations. *Delta Property Company LLC v. Lane County*, LUBA No. 2013-061 (Or. LUBA 2015) at p. 6; *see* ORS 197.829(1). Second, ORS 197.829 only applies to interpretations from the local governing (legislative) body, not to interpretations of staff or a local hearings officer. *Gould v. Deschutes County*, 272 Or. App. 666, 682, 362 P.3d 679 (Or. App. 2015) (a governing body's interpretation is entitled to deference from LUBA, but a hearing officer's decision is not entitled to any deference): *Green v. Douglas County*, 245 Or. App. 430, 437, 263 P.3d 355 (Or. App. 2011) (LUBA owes deference when "a governing body of a local government . . . makes an 'interpretation' of its own land use policies."). Third, the City produces no evidence that the governing body of the City of Talent has ever made any such legal interpretation in a subdivision case.[22] Fourth, where a reviewing decision maker takes new evidence (as is appropriate here pursuant to ORS 197.360(3)), deference to the decision maker below is not appropriate, because the decision maker below made his or her decision based on a different evidentiary record.

[22] The Applicant points to other fairly recent subdivision approvals in the City of Talent where a secondary access (as required by Implementation Strategy 10.2.1) was not required. While this does show that the City does not always require a secondary access, it is not persuasive, because this Application involves a railroad crossing and wildfire issues where fire and life safety issues are different than the examples proffered by Applicant.

The Referee concludes that the *de novo* scope and standard of review were correctly applied to the appeal in this matter.

**2. Late Evidentiary Materials Submitted by Project Opponents Are Stricken**

At the August 16, 2018, Hearing, the Project Opponents submitted an Updated Report of Fire Marshal Marguerite Hickman regarding the adequacy of Belmont Road as the sole fire apparatus access for the proposed 49-lot subdivision (the "Updated Report"). The Updated Report was evidently given to the City's Planning Director at the Hearing. No motion was made to the Referee requesting leave to admit the late Updated Report. All written evidence and reports were required to be submitted by August 10, 2018. A copy of the Updated Report (labeled Exhibit "I") was attached to the August 22, 2018, final legal argument of Project Opponents.

Project Opponents provide no justification for the late report, and no explanation why the evidence could not have been testimonial as <u>was</u> allowed at the Hearing. Accordingly, the Referee ORDERS that the Updated Report shall be stricken and not considered in this proceeding.

**3. Applicant's Claim of Substantial Procedural Prejudice Is Denied**

In its appeal of the City Decision, the Applicant argued that the City had committed a substantial procedural error that substantially prejudiced the Applicant. After the close of the 14-day comment period allowed by ORS 197.365(4)(a), the Applicant sought to respond to public comments about how secondary access should be required under 2017 Comprehensive Plan, Element F, Implementation Strategy 10.2.1. Based on ORS 197.365(4)(a), the City denied Applicant's request.

ORS 197.365(4) does not make any provision for responding to written comments. Accordingly, the Referee concludes the City did not commit any procedural error when it

rejected comments from Applicant after that deadline. Whatever the merits of Applicant's claim of procedural prejudice, however, the Applicant had a full and fair opportunity to respond to all public comments in the appeal before the Referee in a *de novo* proceeding. When asked at the Hearing, the Applicant agreed that any prior prejudice was cured. Accordingly, the Referee concludes that the Applicant's appeal issue regarding procedural prejudice is both without merit and has been waived.

**4. ORS 197.522 Is Not Applicable**

Appellant repeatedly argues that ORS 197.522 requires that the City (and the Referee) must try to make the Application consistent with the applicable land use criteria by imposing reasonable conditions of approval. *See* ORS 197.522(4). Appellant's legal argument is flatly contradicted by controlling case law from the Oregon Land Use Board of Appeals ("LUBA").

ORS 197.522 is part of a group of statutes in Chapter 197 ORS dealing with moratoria. *See* ORS 197.505 through ORS 197.540. Prior to 2009, LUBA decisions questioned whether ORS 197.522 had any application outside the context of a declared or *de facto* moratorium. *See, e.g., Oien v. City of Beaverton*, LUBA No. 2002-075 (Or. LUBA 2003) at 14 – 19. In 2009, that question was presented directly to LUBA, and the LUBA court held that "ORS 197.522 does not apply outside the context of a declared or *de facto* moratorium under ORS 197.520 or 197.524." *Reeder v. Multnomah County*, LUBA No. 2009-015 (Or. LUBA 2009) at 17. LUBA cases since 2009 have consistently followed the holding in the *Reeder* case.

> Petitioners cite ORS 197.522 for the proposition that the city itself was obligated to propose conditions of approval to ensure compliance with the tree preservation standards, rather than deny the application. However, we held in *Reeder v. Multnomah County*, 59 Or LUBA 240, 254-55 (2009), that ORS 197.522 applies only in the context of a declared or *de facto* moratorium

*Sage Equities, LLC v. City of Portland*, LUBA No. 2015-047 (Or. LUBA 2015) at f.n.8; *see also Wilson v. Washington County*, LUBA No. 2011-007 (Or. LUBA 2011) at f.n. 5 (Accord);

*Konrady v. City of Eugene*, LUBA No. 2009-028 (Or. LUBA 2009) at 21 ("ORS 197.522 does not apply outside the context of a declared or *de facto* moratorium").

The LUBA Court succinctly summarized the current state of the law in this area in its *Wilson* decision:

> An applicant bears the burden of proof to demonstrate that an application complies with applicable approval standards, and a local government is not required to approve a noncomplying development proposal, even if conditions of approval might be imposed that would render the proposal consistent with the applicable criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77, 91 (2003), *rev'd on other grounds*, 192 Or App 567, 86 P3d 1140 (2004).

*Wilson v. Washington County*, LUBA No. 2011-007 (Or. LUBA 2011) at 9. The Referee will follow that controlling case law and concludes that Appellant's reliance on ORS 197.522 has no merit.

**5. ORS 197.200 Is Not Applicable**

ORS 197.200 provides a process for local governments to adopt a "refinement plan" for a neighborhood or community "within its jurisdiction and inside the urban growth boundary." ORS 197.200(1) (emphasis added). A refinement plan must also meet all the following requirements:

> (a) Establish efficient density ranges, including a minimum and a maximum density for residential land uses;
>
> (b) Establish minimum and maximum floor area ratios or site coverage requirements for nonresidential uses;
>
> (c) Be based on a planning process meeting statewide planning goals; and
>
> (d) Include land use regulations to implement the plan.

ORS 197.200(2).

Once established, the local government must apply the EDL process from ORS 197.360 through ORS 380 to applications for land division within the area subject to an "acknowledged refinement plan." ORS 197.200(4).

Applicant argues that the City's 2005 Railroad District Master Plan (the "RDMP")[23] is a "refinement plan" and that the City is therefore required to process its land division application as an ELD application. Applicant's argument has no merit for multiple reasons.

- First, in order to be a refinement plan, the RDMP must be for land "within its jurisdiction and inside the urban growth boundary" of the City. ORS 197.200(1) (emphasis added)." The RDMP primarily addresses lands outside of the City's jurisdiction. For that reason alone, it cannot be a refinement plan.
- Second, the RDMP does not establish efficient density ranges for residential uses or establish minimum/maximum floor area ratios or site coverage requirements for nonresidential uses as required by ORS 197.200(2)(a) and (b).
- Third, the RDMP does not appear to be a planning process meeting statewide goals as required by ORS 197.200(2)(c), nor was it intended as such. In fact, the RDMP contains a prominent disclaimer on its opening pages that "*The contents of this document do not necessarily reflect views or policies of the State of Oregon.*"
- Fourth, while the RDMP does contain some suggested zoning language for mid-density residential zoning, that zoning has not been implemented in the Railroad District as

[23] No party placed a copy of the RDMP in the Administrative Record of this proceeding. The RDMP is a public document of which the Referee can take judicial notice. *Downtown Community Assoc. v. City of Portland*, 31 Or. LUBA 574 (1996) (pursuant to OEC 202(7), LUBA may take judicial notice of planning documents enacted by the local government). The RDMP is available on the City's website at http://cityoftalent.org/Page.asp?NavID=38.

required by ORS 197.200(2)(d). Most of the Railroad District is still outside the City's jurisdiction; and the subject Property is still zoned low-density residential.

The Referee concludes that the RDMP is not a refinement plan as defined in ORS 197.200 and further concludes that Appellant's arguments regarding ORS 197.200 are without merit.

**D. Substantive Issues – Whether the Application Qualifies as an Expedited Land Division**

**1. Are Element F and Implementation Standard 10.2.1 of the 2017 Comprehensive Plan Mandatory Approval Criteria for the ELD Application**

The City Decision determined that the Application did not qualify as an ELD because it did not meet the City's minimum street or other right-of-way connectivity standards. The relevant portion of the ELD definition is:

> (a) "Expedited land division"
> . . .
> (D) Satisfies minimum street or other right-of-way standards established by acknowledged land use regulations or, if such standards are not contained in the applicable regulations, as required by statewide planning goals or rules.

ORS 197.360(1)(a)(D).

This legislative definition begs the question as to what is an "applicable regulation." The City Decision reasoned that Implementation Strategy 10.2.1 of its 2017 Comprehensive Plan was an applicable regulation. That provision reads as follows:

> 10.2.1 All new development shall include street access that provides, at a minimum, two outlets sufficiently separated for fire-life-safety factors, including but not limited to railroad crossings, wildfire risk areas, and floodplains and floodways unless 1) access can be achieved by a cul-de-sac or dead end street, which while discouraged, are defined and limited in the Talent Land Division Ordinance and 2) the Fire District is satisfied that emergency access is adequate.

2017 Comprehensive Plan, Element F (Public Facilities & Services) at F-17. The City and Project Opponents both cite ORS 197.175, the statute which outlines local government planning

responsibilities. For acknowledged plans, that statute requires local governments to "make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations." ORS 197.175(2)(d). That statute is not strictly applicable here, because an ELD is neither a land use decision nor a limited land use decision. ORS 197.360(2). But the City's point is well taken, because ELD applications must comply with "applicable regulations" and Oregon decisionmakers have long had difficulty determining when a provision in a comprehensive plan is intended to be a mandatory applicable regulation. The Land Use Board of Appeals has explained the difficulty in the following, oft-quoted jeremiad:

> The comprehensive plan is a potential source of standards for review of a quasi-judicial land use permit application, because ORS 197.175(2)(d) expressly provides that where a local government's comprehensive plan and land use regulations have been acknowledged by LCDC, the local government is required to `make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations[.]' *Donivan v. City of La Grande*, 43 Or LUBA 477, 479-80 (2003); *Durig v. Washington County*, 35 Or LUBA 196, 202-03 (1998), *aff'd* 158 Or App 36, 969 P2d 401 (1999). Many local governments also impose a local requirement that the comprehensive plan be considered in approving a land use permit application. As far as we can tell, the fourth general conditional use criterion at [Bend Code] 10-10-29(3)(d) is such a local requirement.
>
> As intervenor correctly points out, local and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993); *Neuenschwander v. City of Ashland*, 20 Or LUBA 144, 154 (1990); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff'd* 96 Or App 645, 773 P2d 1340 (1989). Local governments and this Board have frequently considered the text and context of cited parts of comprehensive plans and concluded that the alleged comprehensive plan standard was not an applicable approval standard. *Stewart v. City of Brookings*, 31 Or LUBA 325, 328 (1996); *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 258 (1996); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 254-55 (1990). Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. *Bennett v. City of Dallas*, 17 Or LUBA at 456. Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required *consideration* that must be balanced with other relevant *considerations*. *See Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194,

> 826 P2d 20 (1992) (`a balancing process that takes account of relative impacts of particular uses on particular [comprehensive plan] goals and of the logical relevancy of particular goals to particular uses is a decisional necessity')." *Id.* at 209-210 (emphasis in original).

*Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 209 (2004); *see also Bothman v. City of Eugene*, LUBA No. 2005-171 (Or. LUBA 2006) at 11 – 12.

The LUBA Court noted further in *Save Our Skyline* that it is appropriate to "consider first whether the comprehensive plan itself expressly assigns a particular role to some or all of the plan's goals and policies." *Save Our Skyline* at 210; *Bothman* at 12. The idea that the decision maker should first look to the language of the plan itself has been reinforced by the Oregon Court of Appeals:

> [W]hether a particular plan provision is an approval criterion . . . must be determined from the function that the plan itself assigns to the provision.

*Von Lubken v. Hood River County*, 104 Or. App. 683, 689, 803 P.2d 750 (Or. App. 1990).

Turning to the arguments of the parties, the City argues that Implementation Standard 10.2.1 is incorporated by two sections of its Subdivision Code: TMC 8-2.330(A)(1) and TMC 8-2.330(D). However, those sections merely say that "all applicable code sections and other ordinances and regulations" shall apply to applications, and that the City may impose conditions necessary to carry out the provisions of the Subdivision Code "and other applicable ordinances and regulations." The City is correct that TMC 8-2.330(A)(1) puts applicants on notice that other provisions may apply – but that ordinance does not itself apply any other provision. Neither Subdivision Code section indicates an intent to incorporate Element F of the City's Comprehensive Plan or Implementation Standard 10.2.1. The City also cites two sections of the Zoning Code: TMC 8-3A.120(A) and TMC 8-3B.110. But Section TMC 8-3A.120(A) merely says that the Zoning Code intent is to implement the Comprehensive Plan, not that any particular Comprehensive Plan regulation is a mandatory criteria in the Subdivision Code. And TMC

8-3B.110 merely incorporates definitions from the Comprehensive Plan into the Zoning Code, and does not incorporate any provisions from Element F of the Comprehensive Plan into the Subdivision Code or Zoning Code.

The City also argues that it would not have adopted the Comprehensive Plan as a part of Title 8 if it were not intended to be regulatory. (The Comprehensive Plan is Chapter 8-1 of Title 8, the Subdivision Code is Chapter 8-2, the Zoning Code is Chapter 8-3A, etc.) But that begs the question of which parts of the Comprehensive Plan are intended to regulate subdivisions as mandatory approval criteria.

The Project Opponents argue that ORS 197.370(3) requires compliance with all elements of the comprehensive plan. The Referee concludes that Project Opponents are incorrectly reading of that statute. ORS 197.360(3) requires an ELD to comply with "all elements of a local government comprehensive plan and land use regulations applicable to a land division . . . ." As written, the "applicable to" modifier applies to both "comprehensive plan" and "land use regulations." The cited statute does not say what elements of a comprehensive plan are "applicable" – that is left to the individual jurisdiction when drafting its plan and regulations. Project Opponents also point out that there are multiple references to the 2017 Comprehensive Plan in the Subdivision Code. That is certainly a correct statement, and some parts of the 2017 Comprehensive Plan are specifically mentioned in the Subdivision Code as being applicable to land divisions – in particular, Element D (Transportation System Plan) is incorporated in several places. But there is no specific mention in the Subdivision Code of Element F (Public Facilities and Services).

Both the City and Project Opponents emphasize the mandatory language in Implementation Strategy 10.2.1 ("All new development shall include access that provides, at a minimum, two outlets … ."). They argue that this means Implementation Strategy 10.2.1 is

intended to be a mandatory applicable criterion. That language is important, but not necessarily dispositive. Some cases have found "shall" language in comprehensive plans not directly regulatory. *E.g., Friends of Indian Ford v. Deschutes County*, LUBA No. 95-247 (Or. LUBA 1996). Other cases have found it regulatory. *E.g., Von Lubken v. Hood River County*, 104 Or. App. 683, 803 P.2d 750 (1990). The critical difference in the cases seems to be whether the comprehensive plan prescribes a specific role to its policies and standards and/or whether the comprehensive plan standards have been actually incorporated into the land use regulations.

Case law provides some useful examples.

- In *Friends of Indian Ford*, LUBA considered partition criteria that required compliance with "applicable comprehensive plan policies." Several goals stated that the county "shall" discourage certain development and "shall" consider certain impacts. The court held that the policies were not mandatory review criteria, but were meant to guide the adoption of regulations. *Friends of Indian Ford v. Deschutes County*, LUBA No. 95-247 (Or. LUBA 1996).
- In *Stewart* , LUBA considered conditional use permit criteria that required "compliance with the Comprehensive Plan" The court held that policies calling for safe housing were aspirational, not directly regulatory. *Stewart v. City of Brookings*, LUBA No. 96-001 (Or. LUBA 1996).
- In *Bothman*, LUBA considered site-specific rezone criteria requiring a rezone to be consistent with "applicable provisions of the Metro Plan and applicable refinement plans." The plan itself stated that specific decisions "will be evaluated on the basis of their ability to implement adopted policies." Given that language, the court held that the city was required to "consider" the policies, but they were not mandatory approval criteria. *Bothman v. City of Eugene* LUBA No. 2005-171 (Or. LUBA 2006).

- In *Von Lubken*, the Court of Appeals considered conditional use permit criteria that required the application to "comply … with the comprehensive plan." The comprehensive plan itself stated that when goals or strategies used mandatory language (such as shall or will), they would be legally binding on land use decisions. Given that language, the comprehensive plan standard (development "will not" occur on certain lands) was a mandatory approval criterion. *Von Lubken v. Hood River County*, 104 Or. App. 683, 803 P.2d 750 (1990).
- In *Friends of the Hood River Waterfront*, LUBA considered conditional use permit criteria that the application must "be consistent with the Comprehensive Plan." The city took the position that its land use regulations fully implemented its comprehensive plan, so that no comprehensive plan standards (even those with mandatory language) were approval criteria. The court held that the City should not have adopted a conditional use permit criterion requiring consistency with the comprehensive plan if it intended no comprehensive plan provisions, even those couched in mandatory language, to be applicable. The court remanded to the city to determine whether certain comprehensive plan standards were approval criteria. *Friends of the Hood River Waterfront v. City of Hood River*, LUBA No. 2012-050 (Or. LUBA 2013).
- In *Eric Artner Construction*, LUBA considered a planned unit development ("PUD") application for a development that included the same Property as the present Application. The City's PUD criteria required the plan to meet "all relevant provisions of the City of Talent Comprehensive Plan (TCP), as defined by the city."[24] The City's plan has changed significantly since that 2005 case, but the 2005 plan did include Implementation

[24] The PUD approval criteria are no longer contained in the Talent Municipal Code.

Strategy 10.2.1 in the same form as in the present 2017 Comprehensive Plan. The 2005 application also included an annexation parcel that is not part of the current Application, and the annexation ordinance required any development must include "two legal access points accessible to the public."[25] The City denied the PUD application, and LUBA affirmed because there were not two access points. There was no question about whether Implementation Strategy 10.2.1 applied, and LUBA did not address that issue. The annexation ordinance also clearly required two public access points in any case. The primary issue in the case was the nature of the required access.

In all of the cases above, the permit criteria specifically required consistency with the comprehensive plan. In cases where the court addressed the issue of what comprehensive plan criteria should apply, the court placed significant weight on any language in the comprehensive plan directing how comprehensive plan standards would be used as criteria for specific projects.

Turning to the language of the City's Subdivision Code, there is specific language in the Subdivision Code incorporating some provisions of the 2017 Comprehensive Plan, especially the standards from Element D (Transportation System Plan). There is no generalized statement that land divisions must be consistent with "applicable" comprehensive plan policies.[26]

With respect to the 2017 Comprehensive Plan, there is no general statement about how plan goals, policies, and implementation strategies are to be used in permitting. Applicant correctly points out that the introduction to Element F (Public Facilities and Services) states it is

[25] The annexation parcel is not part of this Application and (the annexation ordinance having apparently lapsed) is not in the city limits of the City of Talent. That parcel is within the UGB.

[26] This may reflect the requirements of ORS 197.195(1) for limited land use decision. Discussed below.

a "long-range plan" for compliance with the statewide goals.[27] However, Element F goes on to directly discuss the viability of development in the Railroad District.

> There are two types of "available lands" in Talent. There are those lands that already have direct access to necessary services, and there are additional lands that will require new connections to most or all necessary services. The buildable lands planned for future residential growth southwest of the railroad tracks fall entirely within the latter category. Development of that area will not be viable without a new street network that meets emergency service needs, and new water, storm sewer and sanitary sewer facilities. The public facilities strategy for this and other underserved areas is included in the Goals and Implementation Strategies in this element.

2017 Comprehensive Plan, Element F, at F-2 (underlining added).

One objective in Element F, with associated implementation strategies, is specific to the Railroad District.

> *Objective 10.1: New Residential Development West of the Railroad and South of Rapp Road: A Master Planned residential development that will allow an integrated system of streets and utilities that also provides safe access, as well as an efficient provision of services at minimal public costs.*
>
> 10.1.1 Do not allow planning approval for any new residential development west of the Railroad Tracks and south of Rapp Road until an Area Master Plan is completed that illustrates how parks, street connections, transportation facilities, storm drainage system, and other utility mains will be routed, connected to existing facilities, and phased.
>
> 10.1.2 Do not allow construction permits for new residential development in the subject area until all necessary services are designed and engineered, and funding is secured.

2017 Comprehensive Plan, Element F, at F-17.

Strategy 10.2.1 is not specific to the Railroad District, but does address situations where railroad crossings or wildfire hazards might require a secondary access:

> ***Objective 10.2: Timely, safe and economical provision of all public facilities at service levels that anticipate future facility needs and long-term public costs.***
>
> **Implementation Strategies:**
>
> All new development shall include street access that provides, at a minimum, two outlets sufficiently separated for fire-life-safety factors, including but not limited to railroad

[27] 2017 Comprehensive Plan, Element F, at F-1.

> crossings, wildfire risk areas, and floodplains and floodways unless 1) access can be achieved by a cul-de-sac or dead end street, which while discouraged, are defined and limited in the Talent Land Division Ordinance and 2) the Fire District is satisfied that emergency access is adequate.

2017 Comprehensive Plan, Element F, at F-17.

The fact that Strategies 10.1.1, 10.1.2 and 10.2.1 are so directive tends to suggest they could be intended as approval criteria. The fact that the Subdivision Ordinance does not incorporate any provisions of Element F, and the fact that Element F has no specific direction on how its Objectives and Strategies are to be used, tends to suggest that these Strategies are not mandatory approval criteria.

In resolving this question, the Referee finds an issue not raised by the parties to be highly significant. The City's Subdivision Ordinance is intended to govern subdivision applications, which are limited land use decision. See 197.015(12) (definition of limited land use decision). For limited land use decisions, ORS 197.195(1) requires that all comprehensive plan provisions intended as approval criteria must be incorporated into the local government's land development ordinances. ORS 197.195(1)("Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations."); *see Paterson v. City of Bend*, 201 OR. App. 344, 118 P.3d 842 (Or. App. 2005) (comprehensive plan provisions were not applicable to subdivision application unless incorporated into city's regulations). The Referee assumes that the City and LCDC, which acknowledged the City's Subdivision Code and Zoning Code, complied with ORS 197.195 when those City regulations were passed and acknowledged. It follows that any comprehensive plan provisions intended to apply to subdivisions would have been incorporated into the Subdivision Code. ELDs are not defined as a "land use decision" per ORS 197.360(2), but the provisions of ORS 197.360 apply to plan elements and regulations "applicable to a land division."

ORS 197.370(3). The fact that the Element F Goals, Objectives and Strategies are not incorporated into the Subdivision Code strongly suggests that they are not intended as approval criteria for individual permit applications. And they would not be applicable criteria for a limited land use decision should this Application be remanded because they are not incorporated into the Subdivision Code.

With respect to Strategies 10.1.1 and 10.1.2, the Referee concludes they are directive to the City. Strategy 10.1.1 calls for a new Area Master Plan be completed prior to any planning approvals in the Railroad District. (The RDMP contains some, but not all, of the elements required by Strategy 10.1.1.) Strategy 10.1.2 suggests that the City should enact some sort of restriction on residential building permit issuance in the Railroad District unless adequate public services are designed, implemented and funded.[28] The Referee concludes that neither strategy is intended to be an approval criterion for the Application. With respect to Strategy 10.2.1, its language is more suggestive of a mandatory permit approval criterion. Because it is not mentioned or incorporated into either the Subdivision Code or Zoning Code, the Referee concludes it is not an approval criterion for the Application. That strategy does guide the City in the adoption of codes and other decisions.

The Referee's conclusions do not mean that the 2017 Comprehensive Plan provisions discussed above are irrelevant to other City decisions related to the project. The City will need to make a number of decisions, which are <u>not</u> permitting decisions, related to the project. For example, the City will need to decide whether to establish a new city street section from the end of the existing Belmont Road right-of-way over the CORP right-of-way that would provide

[28] The Referee notes that in the case of an actual or de facto moratorium, ORS 197.522 (discussed at III.C.4 above) *would* be applicable to future subdivision applications. Under ORS197.522(2), those applications must be consistent with "the comprehensive plan and applicable land use regulations."

sufficient public access for a 49-lot subdivision. The City will also need to decide whether to apply to ODOT Rail for a crossing permit, and decide whether to accept the terms of any ODOT Rail permit decision.[29] The Referee understands that the City can make those decisions based on its understanding of the public health, safety and welfare served by the City's action. The Referee expects that the 2017 Comprehensive Plan provisions discussed above would be relevant to the City's decisions in those matters.

**2. Does the ELD Application Meet Street and Right-of-Way Connectivity Standards as Required by ORS 197.360(1)(a)(D)**

Under ORS 197.360(1)(a)(D), an ELD must comply with minimum street and connectivity standards. The most significant issue for the Application is compliance with street standards applicable to the sole access road to the Property – Belmont Road. As described above, the current Belmont Road right-of-way runs from Talent Avenue for one block and ends at the NE side of the CORP railroad right-of-way. The CORP right-of-way is approximately 60-feet wide. Applicant's property begins on the other side of the CORP right-of-way (the SW edge of that right-of-way) and is currently accessed by a one-lane, graveled private crossing of that railroad right-of-way.[30] There is currently no public street or public right-of-way across the CORP right-of-way to the Property.

[29] ODOT Rail has stated, for example, that any crossing permit for a new public road at the Belmont Road location would be conditioned up closure of the existing Public/CORP private crossing just to the south. A condition of that nature would landlock several existing properties (some residential) located in Jackson County. The City and County may not be willing to accept such a condition at this time – until an alternate access for those properties using the Public/CORP crossing. This does not necessarily mean the burden of providing that access would fall on Applicant. It might simply mean that more intensive development of Applicant's Property might have to await development of public funding sources.

[30] AR at 862 – 863.

There are several applicable provisions of the Subdivision Code that apply to the existing Belmont Road right-of-way and/or to the proposed public street that will cross the CORP right-of-way to access the Property.

First. When a new subdivision "uses existing streets" those streets "shall be improved to current standards." TMC 8-2.220(B). In determining "current standards." the Referee looks to the purpose of Chapter 8-2:

> The purpose of this chapter is to ensure that developments provide a safe and efficient public street system for pedestrians and vehicles, in conformance with the City's Transportation System Plan and applicable ordinances.

TMC 8-2.250(A). Accordingly, the Referee concludes that Section 220(B) requires existing streets used by the Property are to be improved to the standards of the City's Transportation System Plan (Element D, 2017 Comprehensive Plan). Here, that means the existing Belmont Road right-of-way from Talent Avenue to the NE face of the CORP right-of-way must be improved to the design standards in the City's Transportation System Plan.

Second. The Subdivision Code transportation facility standards require that "[s]treets within or adjacent to a development shall be improved in accordance with the Transportation System Plan standards. TMC 8-2.250(B)(1). There is no definition of "adjacent" in the Subdivision Code, so the Referee may look to definitions from the City Zoning Code or from *Webster's Third New International Dictionary*. The Zoning Code defines adjacent as "Near, close; for example, an industrial zone across the street or highway from a residential zone shall be considered 'adjacent'." TMC 8-3B.120. The dictionary definition is in accord and defines adjacent as "not distant or far off" or alternately as "relatively close and having nothing of the same kind intervening" and gives the example of "the city square and *adjacent* streets." *Webster's Third New International Dictionary Unabridged* (copyright 2017 Merriam-Webster Incorporated). Pursuant to those definitions, the Referee concludes that the existing Belmont

Road and the new portion of Belmont Road that the City would have to establish crossing the CORP right-of-way are streets "adjacent to" the proposed development that must be improved in accordance with the City's Transportation System Plan standards.

Third. The Subdivision Code transportation facility standards also require that a development must have "frontage or approved access to a public street." TMC 8-2.250(B). Per TMC 8-2.260(A), that access must maintain the "functional classification" of roadways in the City's Transportation System Plan. For this reason also, the approach access to the development along existing Belmont Road and along the to-be-established portion of Belmont Road across the CORP right-of-way must be improved in accordance with the City's Transportation System Plan standards.

Fourth. The approval criteria in the Subdivision Code require all "proposed" streets to be consistent with the City's Transportation System Plan. TMC 8-2.330(A)(3). Here, the Application has proposed improvements to the existing Belmont Road right-of-way. The new street that will need to be established across the CORP railroad right-of-way is also a proposed street in the Application. Pursuant to TMC 8-2.330(A)(3), both those road sections must meet the City's Transportation System Plan standards.

All parties agree that the City's Transportation System Plan classifies Belmont Road as a Residential Collector (from Talent Avenue to the CORP right-of-way, across the CORP right-of-way to the Property, and through Applicant's Property to the future Rapp Road connector).[31] Pursuant to the City's adopted Street Design Standards in the Transportation System Plan, a Residential Collector requires a minimum 70-foot right-of-way (it can be 80 feet if the City

[31] *See* 2017 Comprehensive Plan, Element D, at 49.

determines parking on both sides is needed).[32] Required cross-sections for the minimum 70-foot right-of-way are included in the 2017 Comprehensive Plan.[33]

The Application plainly does not meet the required Street Design Standards as required by the Transportation System Plan, TMC 8-2.220(B), TMC 8-2.250(B)(1), TMC 8-2.250(B), and TMC 8-2.330(A)(3).

With respect to the existing section of Belmont Road, the Applicant has proposed a 60-foot cross-section to fit within the existing 60-foot right-of-way. The Applicant argues that the City can waive the Street Design Standards requirements if an existing right-of-way is insufficient.[34] The Referee notes that variances are also available to the standards of the Subdivision Code pursuant to TMC 8-2.340, and the Applicant could apply for a variance from the Street Design Standards for existing Belmont Road. Indeed, given the existing development lining Belmont Road, this situation might be a candidate where the City could approve a variance. But the ELD statute requires that the ELD application "Satisfies minimum street and other right-of-way connectivity standards … ." ORS 197.360(1)(a)(D)(underlining added). The statute does not say that the ELD can satisfy standards *if* the City waives those standards *or if* the City grants a variance from those standards. Rather, the statute requires the minimum street and other right-of-way standards must be satisfied in order for the application to be processed as an ELD.[35] Here, the Application does not satisfy the relevant standards.

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[32] The City's Street Design Standards are found in Table 2, 2017 Comprehensive Plan, Element D, at 51.

[33] 2017 Comprehensive Plan, Element D, at 52.

[34] *See* 2017 Comprehensive Plan, Element D, at 50 ("Where the City is upgrading existing streets and cannot obtain more right-of-way, it shall not be bound by a strict application of the standard cross-sections.").

[35] Note that, when not voluntarily accepted by an applicant, the applicant's share of the improvement costs must meet the rough proportionality standard. TMC 8-2.220(D). But the required public facilities must be in place or guaranteed prior to development. *Id.*

The Applicant proposes road cross-sections from Talent Avenue to the edge of the CORP right-of-way (which do not meet City Design Standards as discussed above) and from the opposing edge of the CORP right-of-way to the Rapp Road connector (on Applicant's Property and which do meet minimum Design Standards).[36] With respect to the new 60-foot long[37] public road section of Belmont Road that would cross the CORP right-of-way, however, the Applicant has not proposed any street or right-of-way improvements that would meet the City's Design Standards from the Transportation System Plan. Accordingly, the Application does not meet the requirements of TMC 8-2.250(B)(1), TMC 8-2.250(B), and TMC 8-2.330(A)(3) that the proposed road crossing the CORP right-of-way would meet Design Standards for adjacent and proposed streets.

Applicant's failure to even propose street cross-sections for the new public road connecting the Project to the existing Belmont right-of-way may stem from Applicant's misunderstanding of railroad-highway crossings. (At the Hearing, the Applicant had a surprising dearth of information about CORP right-of-way – no one could tell the Referee, for example, what entity owned the CORP right-of-way and whether the ownership interest was fee title or some other type of interest.) In testimony and in its written materials, the Applicant asserted that the City (or perhaps CORP or ODOT Rail) would initiate an application for the highway-rail grade crossing, that ODOT Rail would dictate the design, and that ODOT would then assert complete "jurisdiction" over the crossing – back to the line of safe stopping distance – with the City having no jurisdiction and not needing to establish a road. The only authority cited by Applicant is a reference to OAR 714-100 (the ODOT Rail chapter in the Oregon Administrative

[36] AR at 111.

[37] The Referee estimates the exact width of the CORP right-of-way from maps in the record and from the County tax lot website. A survey of the CORP right-of-way was not provided, and the 8-1/2 by 11 drawings in the record are not easily scalable.

Rules titled "Railroad-Highway Crossings – General"). The Referee informed Applicant at the Hearing of his belief that Applicant's understanding of the various agencies' jurisdiction was incorrect, but Applicant submitted no legal briefing on this issue. After further research, the Referee concludes and explains below that Applicant misunderstands the jurisdictions of the various agencies and that the City will have to decide to establish a public city street over the CORP right-of-way before Applicant can show "approved access to a public street" as required by TMC 8-2.250(B).

Highway-rail crossings are governed by state statute at ORS 824.200 through 824.275, and by the administrative rules adopted by ODOT Rail Division in Chapter 741 OAR (primarily sections 741-100, 741-120 and 741-200). To understand the rules, some definitions are important:

- A "highway" is any road or street actually open and in use, or to be opened and used for travel by the public. ORS 824.200(2).
- A "public authority in interest" is the "state, county, municipal or other governmental body with jurisdiction over the highway crossing the railroad track." ORS 824.200(6) (underlining added).
- A "crossing" is the area affected by where the "highway" intersects the railroad tracks. OAR 741-100-0020(5).

When a railroad wants to extend a railroad track across an existing highway, or when a public authority in interest (such as the City here, if the City so decides) wants to extend a highway across an existing railroad track, a crossing permit is required from ODOT Rail. ORS 824.204. Only a railway company or a public authority in interest can file an application to construct, relocate or close a crossing. OAR 741-200-0030. ODOT can also (after a hearing) decide to

eliminate, alter or change an existing crossing ORS 824.206. But only the public authority in interest can decide to extend a "highway" across an existing railway track.

Appellants are correct that ODOT Rail has certain jurisdiction, but that jurisdiction is regulatory only. OAR 741-100-005 (state has jurisdiction "for the regulation of highway-rail grade crossings"). Moreover, the ODOT Rail regulatory jurisdiction is limited geographically, and extends only from the stop clearance line back a safe stopping distance. *Id.* ODOT Rail also has jurisdiction over construction and maintenance to insure safety, in conformance with recognized national standards. ORS 824.218. But the state statutes are absolutely clear that the public authority in interest maintains jurisdiction over its highway. ORS 824.214 (ODOT Rail's authority over highway-rail crossing is "in addition to and not in lieu of the authority of any city, county or other political subdivision of the state").

It may be theoretically possible for ODOT Rail or CORP to apply to change the existing grade crossing. (ODOT Rail has flatly stated that the City of Talent would have to apply for any crossing, and both ODOT Rail and CORP have stated they will expend no funds on the project.)[38] But only the City of Talent, which is the public authority in interest, can apply to extend a "highway" (Belmont Road) across the existing railway tracks, because the City is the party with jurisdiction over Belmont Road.[39] Accordingly, the Referee concludes that unless and until the Applicant can show that the City will extend Belmont Road across the existing CORP railway tracks, the Applicant cannot show that its development has access to a "public street" as required by TMC 8-2.250(B).

[38] AR at 125 – 128.

[39] The City has broad powers under the City of Talent Charter, including powers to establish and open city streets. Charter §4. *See* ORS 221.924 (a city has authority to establish and open streets and alleys).

The City's decision in that regard would not be a permitting decision, and the Referee understands the City can make that decision based on its view of the general health, safety and welfare of the community. The Referee does not presume to tell the City how it should balance the competing policy interests in that decision.

In summary, the Application does not qualify as an expedited land division. As the Referee concludes above in this section, the Application fails because it does not satisfy four separate "minimum street or other right-of-way connectivity standards" from the City Subdivision Code as required under ORS 197.360(1)(a)(D). Accordingly, the Application will be remanded pursuant to ORS 197.375(4)(a).

**3. Other Agency Permits**

The City also found that the Application did not qualify as an ELD because the Applicant had not obtained approvals from the Bureau of Reclamation and Talent Irrigation District for a required crossing of the Talent Main Canal, and because the Applicant had not obtained a crossing permit from ODOT Rail for the highway-rail crossing of the CORP railway tracks. Unless those permits are obtained, the Applicant will not be able to provide the required public street access for its proposed subdivision.

As explained at the Hearing, the City applied the incorrect legal standard when it required the Applicant to have issued permits from other agencies prior to ELD preliminary land division approval. When other agency permits or approvals are required for a project, the local government typically should not require them to be already obtained or even require the applicant to show that they are feasible. Rather, obtaining those permits can be a condition of approval to be satisfied prior to final approval. *Bouman v. Jackson County*, LUBA No. 92-082 (Or. LUBA 1992) Controlling case law from LUBA holds that the applicant need only provide "substantial evidence in the record that the applicant is not precluded from obtaining such state

agency permits as a matter of law" *Bouman*, LUBA No. 92-082 at 25.[40] Case law provides several examples:

- In *Bouman*, the applicant's project needed approvals from the Oregon Water Resources Department ("WRD"). The applicant could apply for that permit, and there was no argument that WRD was precluded as a matter of law from issuing the requested permits. *Bouman v. Jackson County*, LUBA No. 92-082 (Or. LUBA 1992) at 25 – 26.
- In *Wal-Mart Stores*, mitigation for the proposed project required widening an existing city road across a railway right-of-way. The city and ODOT Rail had agreed to a condition of approval that applicant would pay for and process the crossing approval process. The LUBA court held that the "city decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as a matter of law." *Wal-Mart Stores, Inc. v. City of Bend*, LUBA No. 2006.040 (Or. LUBA 2006) at 22 – 25.
- In *Butte Conservancy*, provisions of certain CC&Rs on the property allegedly prohibited a secondary access required for a subdivision approval. LUBA found that applicant could get that legal question resolved by the Circuit Court, and the Circuit Court was not precluded by law from ruling on the question. Accordingly, it was sufficient for the local government to find that a condition of approval requiring resolution of that legal issue was not precluded by law. *Butte Conservancy v. City of Gresham*, LUBA No. 2006-084 (Or. LUBA 2006).

[40] The Referee interprets the *Bouman* holding not to be limited strictly to "state agency permits." The holding of *Bouman* is equally applicable to federal permits or consents, or even for private consents, needed for a project.

There are a number of other cases following *Bouman*. The difficulty for the Referee is that, in every case, it was obvious that the applicant had the ability to actually apply for the permit or approval in question, whether it was a federal permit, a state permit, a judicial ruling, or an agreement with a neighboring landowner. Even in *Wal-Mart*, where only the public authority or railroad could apply for the permit to alter the existing road crossing, it was unclear whether the "public authority in interest" was the city or ODOT Highway Division, but it was obvious from the case that the relevant agencies had agreed to an application for the highway-rail crossing. The difficulty in the case before the Examiner is that there is absolutely no evidence in the administrative record that any party will agree to apply to establish a new public highway-rail crossing at Belmont Road. And the Applicant is precluded from making an application. It is clear, however, that ODOT Rail is not precluded from issuing such a permit. So the Referee is reluctant to hold that, even though there is no current applicant for the state permit, there may never be one after the Application is considered on remand. Accordingly, the Referee declines to hold that the Application does not qualify as an ELD on that basis alone.

**4. Applicant's Takings Claims**

In its briefing in this matter, the Applicant argues at some length that the City Decision was unconstitutional. Applicant relies on case law regarding unlawful exactions: *Nollan v. California Coastal Commission*, 483 U.W. 825 (1987) (exactions require an essential nexus between the condition imposed and a legitimate state interest); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (the condition imposed must be roughly proportional to the impacts of the project); *Koontz v. St. Johns River Management District*, 570 U.W. 595 (2013) (*Nollan*/*Dolan* analysis applies to permit denial if the denial is based on applicant refusal to comply with an unconstitutional condition to perform off-site mitigation, or payment for such mitigation, that would violate the *Nollan*/*Dolan* essential nexus and proportionality requirements).

The Applicant had a more difficult time identifying actual conditions imposed by the City (or that were refused by the Applicant) which would have violated any of the principles in those cases. For example, ODOT Rail stated that, for any public road highway-rail crossing at Belmont Road, it would require the closing of the existing Public/CORP private crossing just south of the project.[41] That would also require providing new access for the properties currently using the Public/CORP crossing – presumably a new roadway that would lead to the new Belmont Road crossing. Applicant argued that it would be an unconstitutional taking for the City to require Applicant to provide that new roadway for the off-site projects. But the City did not make any such demand on Applicant. The City Decision simply stated that the access issues must be resolved prior to subdivision approval; and it neither imposed exactions in the City Decision nor denied the Application based on Applicant's refusal to comply with an unconstitutional condition.

The Referee finds that the Applicant's briefing regarding unconstitutional exactions is primarily admonitory. Moreover, any constitutional issues are now moot, because the City Decision is no longer in place as a final decision of the City, and the Application is being reminded by this Final Decision and Order to the City for processing as a land use decision or limited land use decision pursuant to ORS 197.375((4)(a).

[41] AR at 125 – 128. The Referee understands the ODOT Rail "Diagnostic" letter as a preliminary assessment for a proposed highway-rail crossing of Belmont Road. It is not a final decision from ODOT Rail, and it did not identify the funding sources for the project – either for the construction of the new section of Belmont Road to be established at the Belmont crossing of for the needed access for properties using the Public/CORP crossing upon its closure. The City agreed that the properties currently using the Public/CORP crossing would need continued at-grade crossing access, whether that was to a Belmont Road crossing or by maintaining the existing Public/CORP crossing. AR at 127.

**E. Substantive Issues – Whether the Application Meets the City's Other Land Subdivision Code and Zoning Code Criteria**

The City Decision, in an excess of caution, reached other Subdivision Code and Zoning Code criteria. There were numerous other important issues raised by the parties in comments on those criteria at the Hearing, and in the written briefing and comments to the Referee. Some of those issues include compliance with the Fire Code, compliance with the City Stormwater Code, and the extent to which the Needed Housing statutes might preclude application of some City criteria.

Because the Referee has already determined that the Application does not qualify as an ELD, and is required to remand the Application back to the City for consideration as a land use decision or limited land use decision per ORS 197.375(4)(d), those issues are all moot. Any attempt to address those issues by the Referee would merely be advisory. The Referee declines to issue an advisory opinion on those issues.

**F. Costs**

The ELD statute requires the Referee to make as assessment of costs pursuant to ORS 197.375(6). If an appellant materially improves his or her position from the decision of the local government decision appealed to the Referee, the Referee is required to order the local government to refund the $300.00 deposit for costs made pursuant to ORS 197.375(1)(a). If the appellant does not improve his or her position, the Referee is required to assess the cost of the appeal in excess of the deposit up to a maximum of $500.00.

Here, the City denied the Application because it found the Application did not qualify as an expedited land decision. The Referee also holds that the Application does not qualify as an expedited land decision. The Appellant has not improved its position on this appeal. Accordingly, the Referee finds that the costs of the appeal in this matter (based on the Referee's

fees alone) will be in excess of $800.00. Therefore, the Referee will assess costs against Appellant in the amount of $500.00 pursuant to ORS 197.375(6).

## IV. ORDER

Having reviewed all of the evidence, arguments, and applicable criteria, the Expedited Land Division Referee for the City of Talent ORDERS as follows:

1. The appeal of Applicant Tony and Tory Nieto is hereby DENIED.
2. The Application for subdivision approval to the City of Talent under File No. SUB 2018-001 and APL 2018-001 is hereby REMANDED to the City of Talent Community Development Department for appropriate review as described in ORS 197.375(4)(a).
3. Applicant Tony and Tory Nieto are hereby assessed costs of $500.00 pursuant to ORS 197.375(6).

Dated this 5th day of September 2018.

Roger Pearce

Roger Pearce,
City of Talent Referee for Expedited Land Division Appeal

## APPEAL NOTICE

The Referee's Decision and Final Order may be appealed. Any party to the proceeding before the Referee may seek judicial review of the above Decision and Final Order in the manner provided for review of final orders of the Land Use Board of Appeals under ORS 197.850 (Judicial review of board order) and ORS 197.855 (Deadline for final court order). The Court of Appeals shall review the decision of the Referee in the same manner as provided for review of final orders of the Land Use Board of Appeals in those statutes. Please note the bases for appeal contained in ORS 197.375(8).

This decision is being mailed on September 6, 2018.