

1 **BEFORE THE LAND USE HEARINGS OFFICER FOR**
2 **CITY OF TALENT, OREGON**

3
4 In the matter of an Appeal from the)
5 Decision of City of Talent Planning)
6 Commission denying an application for a)
7 proposed 49-lot subdivision on a 26.59)
8 acre parcel located at 201 Belmont Road,)
9 Talent, Oregon, and described as)
10 Township 38, Range 1 West, Section 36,)
11 Tax Lot 1001)
12 Applicant: Tony and Tory Nieto)
13 Appellant: Tony and Tory Nieto)
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File No. APL 2020-002 (SUB 2002-001)

DECISION AND FINAL ORDER

12 **THE APPEAL IS DENIED AND THE APPLICATION IS DENIED**

13 **I. INTRODUCTION AND PROCEDURAL POSTURE**

14 On March 23, 2018, Tony and Tory Nieto (“Applicant” or “Appellant” herein) filed an
15 application with the City of Talent Community Development Department seeking land division
16 approval to create 49 lots for single-family development on an existing 26.58 parcel (the
17 “Application”).¹ The original Application proposed an expedited land division pursuant to
18 Oregon Revised Statutes (“ORS”) 197.360 through 197.385. The property that is the subject of
19 the Application is owned by the Applicant, is commonly known as 201 Belmont Road in Talent,
20 Oregon, and is legally described as Township 36, Range 1 East, Section 36, Lot 1001 (the
21 “Property”). The Property is designated for Residential Low Density on the City of Talent’s
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23 ¹ Administrative Record (“AR”) 22 – 145.

1 Comprehensive Plan Map, and is zoned Single Family – Low Density (RS-5) on the City’s
2 Official Zoning Map. The Application was deemed complete on May 9, 2018. The expedited
3 land division (“ELD”) process provides for a quicker subdivision application review than a
4 normal subdivision application if the application meets the ELD criteria in ORS 197.360(1).

5 On July 6, 2018, the City issued a decision denying the ELD application. The City
6 determined that the Application was not eligible to be processed as an ELD. The Applicant
7 timely filed an appeal of that City decision, and the ELD statute required the City to appoint a
8 Referee to hear and decide that appeal. ORS 197.375(2). The Referee conducted the appeal
9 hearing on August 16, 2018, and issued a decision and final order on September 5, 2018 (the
10 “Referee Decision”).² The Referee Decision determined that the Application did not qualify for
11 review as an expedited land decision, and remanded the Application to the City of Talent
12 Community Development Department pursuant to ORS 197.375(4)(a).³ The Referee Decision
13 was appealed to the Oregon Court of Appeals, which affirmed the Referee Decision. *Nieto v.*
14 *City of Talent*, 25 Or. App. 625, 436 P.3d 82 (2019).

15 On remand, the City and Applicant evidently disagreed on certain procedural issues,
16 which were resolved by January 2020.⁴ Those disagreements are not part of the Administrative
17 Record in this proceeding and are not relevant to the Hearings Officer’s decision in this matter.
18 Due to the covid-19 epidemic, the City had difficulty scheduling hearings before the Planning
19 Commission. Public hearings before the Planning Commission were finally held on June 23 and
20 June 30, 2020. Planning Commission deliberation meetings were held on July 28 and 29, 2020.⁵

22 ² AR 754 – 792.

23 ³ *Id.*

24 ⁴ See AR 20 – 21 letter from Applicant’s counsel.

⁵ AR 1561.

1 On July 31, 2020, the Planning Commission issued an Order denying the Application (the
2 “Planning Commission Decision”).⁶ Notice of Decision was published on that same date.⁷

3 Applicant timely appealed the Planning Commission Decision on August 7, 2020.⁸ The
4 City issued both electronic, newspaper, and posting notices of the September 1, 2020, hearing
5 before the City of Talent Hearings Officer.⁹ The hearing was held via videoconference pursuant
6 to Oregon Governor’s Executive Order 20-16 and City of Talent resolutions requiring public
7 hearings by a public body to be held by electronic or virtual means. The City’s notice allowed
8 submittal of documentary evidence or written legal argument by 10:00 AM on Monday, August
9 31, 2020. Persons could register to provide oral testimony at the hearing by 4:00 PM on the day
10 of the hearing – September 1, 2020. Visual evidence accompanying oral testimony had to be
11 received by that same date/time.¹⁰

12 The videoconference hearing was held on September 1, 2020, at 6:30 PM (the
13 “Hearing”). The administrative record was supplemented by pre-hearing submittals from both
14 the Applicant and project opponents, who are primarily residents of the immediate area near the
15 Property. This brought the written administrative record to 1,702 pages. At the earlier request of
16 the Hearings Officer, the City had included in the administrative record the audio tapes from the
17 hearings and meetings of the Planning Commission. Several property owners provided
18 powerpoint presentations with their testimony at the hearing. These presentation materials were
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20 ⁶ AR 1561 – 1569.

21 ⁷ AR 1570 – 1573.

22 ⁸ AR 13 – 17.

23 ⁹ AR 6 – 12. Note that the printout in the record at AR 6 does not contain the email header, so
that printout did not show the date and time of the hearing. The original email did clearly show
the hearing date and time.

24 ¹⁰ *Id.*

1 either duplicative of the materials in the administrative record or summaries of those materials.
2 The Hearings Officer deemed the powerpoint presentations to be demonstrative evidence, and
3 they were not included in the administrative record. Prior to the conclusion of the hearing, two
4 parties requested that the record be left open for submission of additional evidence and legal
5 argument.¹¹ Because the 120-day period within which the City must make a final decision was
6 only eight days later (September 9, 2020), the Hearings Officer was not able to accommodate
7 those requests. The Applicant had already agreed to two lengthy extensions of the 120-day
8 period and was understandably reluctant to agree to more delays, as was Applicant's right.
9 Accordingly, the Hearings Officer closed the Hearing and closed the administrative record at the
10 conclusion of the September 1, 2020, hearing.

11 All the documents in the 1,702-page administrative record, the audio recordings of the
12 proceedings before the City Planning Commission, together with all oral testimony at the
13 hearing, comprise the administrative record. The matter is now properly before the City's
14 Hearings Officer for decision.

15 **II. APPLICABLE CRITERIA**

16 The City and Applicant agreed that the applicable criteria would include the City's
17 subdivision code (General Ordinances, Title 8, Chapter 2) and the City's zoning code (General
18 Ordinances, Title 8, Chapter 3) that were in effect when the Application was deemed complete in
19 May 2018.¹² The Hearings Officer concludes that the correct date, under the Oregon "fixed
20 goalpost" statute, would be the date of initial application on March 21, 2018.

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22 ¹¹ The requesting parties were project neighbor Mr. Ronald Laupheimer and Mr. Christian Hearn
23 of the firm Davis, Hearn, Anderson & Turner, P.C., who represented several of the neighbors
opposing the Application.

¹² AR 20.

1 ORS 227.178(3)(a). (This does not make a difference in this case because those two code
2 chapters did not change between March and May 2018.) Applicable and potentially applicable
3 sections of 2018 Talent General Ordinances, Title 8, Chapters 2 and 3 are:

4 **Talent Subdivision Code**

5 *Section 8-2.110 - Purpose*

6 *Section 8-2.210 – Open Space*

7 *Section 8-2.220 – Public Facilities Standards and Improvements*

8 *Section 8-2.230 – Pedestrian Access and Circulation*

9 *Section 8-2.240 – Street Trees*

10 *Section 8-2.250 – Transportation Facility Standards*

11 *Section 8-2.260 – Vehicular Access and Circulation*

12 *Section 8-2.280 – Storm Drainage and Surface Water Management*

13 *Section 8-2.290 – Utilities*

14 *Section 8-2-320 – Preliminary Plat Submission Requirements*

15 *Section 8-2.330 – Approval Criteria: Preliminary Plat*

16 *Section 8-2.340 – Variances Authorized*

17 *Section 8-2.420 – Public Improvements*

18 *Section 8-2-440 – Performance Guarantee*

19 **Talent Zoning Code**

20 ***Single-Family – Low Density (RS-5)***

21 *Section 8-3C.120 – Building and Uses Permitted Subject to Type 1 Permit Review*

22 *Section 8-3C.170 – Lot Area and Dimension*

23 ***Overlay Zone – Steep Slopes (OSS)***

24 *Section 8-3H.140 – Density Transfer*

Section 8-3H.150 – Standards of Development in the OSS Zone

Section 8-3H.180 – Maintenance of Improvements

Tree Preservation and Protection

Section 8-3J.350 – Permit Types

Landscaping, Fencing and Hedges

Section 8-3J.420 - Minimum Landscaped Area

Section 8-3J.430 – Minimum Vegetation and Ground Cover

Access, Circulation and Street Improvements

Section 8-3J.630 – Street Access and Circulation

Section 8-3J.640 – Pedestrian Access and Circulation

Section 8-3J.650 -

Public Trees

Section 8-3J.1020 – Permission to Plant or Remove

Traffic Impact Study

Section 8-3L.920 – Applicability

1 The City assembled and recodified its ordinances in 2019. The Planning Commission
2 Decision and this Decision and Final Order refer to the earlier ordinance numbers above. The
3 earlier codification is available on the City’s website at the Community Development Page
4 under the tab labelled “Planning Documents & Ordinances.”¹³

5 In addition to that list, the Hearings Officer concludes that certain standards in Element D
6 (Transportation System Plan) of the City’s 2017 Comprehensive Plan are incorporated into the
7 City’s Subdivision Code as applicable criteria – as discussed in more detail below. Also as
8 discussed in more detail below, other elements of the City’s 2017 Comprehensive Plan were not
9 incorporated into the Subdivision Code and are not applicable criteria – including the
10 implementation standards in 2017 Comprehensive Plan, Element F, Policy 10. Note that the
11 City’s Comprehensive Plan was revised in December 2019, effective January 2020. The
12 evidence at the hearing from the City Planning Director showed that Element D (Transportation
13 System Plan) and Element F (Public Facilities) were unchanged in that revision. Both the 2015
14 Transportation System Plan (which was the same as Element D in the 2017 Comprehensive Plan)
15 and the current Comprehensive Plan are available to review on the City’s website at the
16 Community Development Page under the tab labelled “Planning Documents & Ordinances.”¹⁴

22 ¹³ The specific webpage is <http://www.cityoftalent.org/Page.asp?NavID=38>.

23 ¹⁴ The specific webpage is <http://www.cityoftalent.org/Page.asp?NavID=38>.

1 **III. FINDINGS OF FACT AND LEGAL CONCLUSIONS**

2 **A. Generally Applicable Legal Standards.**

3 **1. Standard of Review and Burden of Proof**

4 The Application is a Type III application under the Talent Municipal Code.

5 TMC 18.190.020. Type III applications are decided by the City of Talent Planning Commission.

6 TMC 18.190.050.D & E. The Planning Commission decision may be appealed to the City’s

7 Land Use Hearings Officer, and that appeal is a *de novo* proceeding. Accordingly, the Hearings

8 Officer is allowed to take new evidence on any relevant issue and is not required to give any

9 deference to the decision of the Planning Commission. TMC 18.190.050.F. The applicant has

10 the burden of proof to show that its application meets the applicable land use criteria for

11 approval. TMC 18.190.050.B.2

12 Because this proceeding before the Hearings Officer is a *de novo* proceeding, the
13 standard of review applicable to this appeal proceeding is preponderance of the evidence.

14 *Morgan v. Jackson County*, LUBA No. 2017-053 (Or. LUBA 2018 – Final Opinion and Order

15 on Remand) at 15 – 17. Court decisions in land use matters often refer to the substantial

16 evidence standard of review. That standard is applicable in proceedings before the Land Use

17 Board of Appeals, but the preponderance of evidence standard is applicable in this *de novo*

18 proceeding before the Hearings Officer. *Morgan* at 15 – 17; *see* ORS 197.835(9)(a)(C) and (D)

19 (stating that LUBA shall reverse or remand a land use decision if the local government “made a

20 decision not supported by substantial evidence in the whole record” or that “improperly

21 construed the applicable law”).

22 If required to interpret the County’s ordinances or state statutes, the Hearings Officer’s

23 primary task is to discern the intent of the legislative body, beginning with an examination of the

24 (Nieto) Subdivision Application (APL 2020-002 SUB 2020-001): Decision and Final Order - 7

1 text of the ordinance or statute in its context. *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042
2 (2009) (text and context provide the best evidence of legislative intent). The Hearings Officer
3 must also apply the rule of statutory construction set out by the Legislature in ORS 174.010:

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

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

11 **2. The Law Of The Case Doctrine**

12 Both the Planning Commission, some project opponents, and Applicant cite to sections of
13 the earlier Referee Decision in support of their positions in this matter. The Hearings Officer
14 finds that, pursuant to the law of the case doctrine, the earlier Referee Decision did not establish
15 any factual findings, any legal interpretations, or any legal conclusions that are binding for this
16 proceeding.

17 The law of the case doctrine precludes relitigation of an appellate court holding after remand
18 and on subsequent appeal. *SAIF Corporation v. Maldonado*, 294 Or. App. 252, 430 P.3d 580 (Or. App.
19 2018). As explained by the *Maldonado* court, the doctrine does not apply to successive administrative
20 proceedings:

21 The doctrine does not apply in the context of two separate administrative proceedings,
22 "because it gives preclusive effect only to the prior ruling or decision of an *appellate court*
23 (as opposed to a trial court or administrative body) and does not bar such rulings from
24 being overruled in separate cases." *ILWU, Local 8*, 279 Or. App. at 164, 379 P.3d 1172
(emphasis in original).

Maldonado, 94 Or. App. at 254.

1 Here, the 2019 Court of Appeals decision¹⁵ would have preclusive effect if any of the
2 holdings from that decision were applicable. The Court of Appeals decision decided a narrow
3 issue (whether the Application qualified to be processed as an expedited land division), and no
4 party argued that the Court of Appeals decision has preclusive effect on any issues presented in
5 this proceeding. More to the point, the earlier Referee Decision has absolutely no preclusive
6 effect on any factual findings, legal interpretations, legal conclusions or anything else in this
7 proceeding.

8 **3. The Needed Housing Statute**

9 Applicant argues that the Application is for single-family housing, which is a type of
10 “needed housing” in the City of Talent. *See* ORS 197.303(1) (defining “needed housing”). The
11 analysis provided by Applicant is correct – the housing proposed in the Application meets the
12 definition of needed housing. Accordingly, the requirement for “clear and objective” standards
13 applies to the proposed housing. In fact, the requirement that only clear and objective criteria
14 may be used to regulate needed housing has been extended by the Legislature to all proposals to
15 develop housing:

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

19 (a) May include, but are not limited to, one or more provisions regulating the
density or height of a development.

20 (b) May not have the effect, either in themselves or cumulatively, of discouraging
21 needed housing through unreasonable cost or delay.

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¹⁵ *Nieto v. City of Talent*, 25 Or. App. 625, 436 P.3d 82 (2019).

1 ORS 197.307(4) (underlining supplied). Accordingly, the City may regulate Applicant’s
2 proposal for housing only with clear and objective “standards, conditions and
3 procedures.” There are a number of recent cases explaining what is means to regulate
4 housing using only clear and objective standards, conditions and procedures.

5 In a facial challenge, the Court of Appeals explained that needed housing may not
6 be regulated with standards, conditions or procedures that involve subjective, value-laden
7 analyses that are designed to balance or mitigate impacts on adjoining properties or the
8 community. *Rogue Valley Association of Realtors v. City of Ashland*, 158 Or. App. 1, 4,
9 970 P.2d 685 (1999).

10 Cases from the Land Use Board of Appeals provide examples of the clear and
11 objective standard in “as applied” challenges. For example, a requirement that traffic
12 conflicts and hazards be “minimized” on-site and off-site was held not clear and objective
13 in *Parkview Terrace Dev. LLC v. City of Grants Pass*, LUBA No. 2014-024 (Or. LUBA
14 2014) at 19. An ordinance requiring the street layout of a proposed PUD to “disperse”
15 traffic onto more than one public street was not clear and objective for failure to define
16 the key term “disperse.” *Walter v. City of Eugene*, LUBA No. 2016-024 (Or. LUBA
17 2016) at 2 – 6. A code requirement to provide “adequate” drainage was held not clear
18 and objective, and another code requirement that required public facilities and services to
19 be “available” to the site was not clear and objective for failure to define key terms
20 “public facilities” and “available.” *Home Builders of Lane County v. City of Eugene*, 41
21 Or. LUBA 370, 410, 414 (Or. LUBA 2002).

22 Appellant argues that if a City ordinance requires any interpretation, it is not clear
23 and objective. Appellant’s argument sweeps too broadly. Not all ordinances requiring

1 interpretation fail the clear and objective test. An ordinance prohibiting grading on
2 certain areas but not specifying the measurement method was clear and objective where
3 the city’s application form notified applicants of the City’s interpretation that slopes
4 would be measured using five-foot contours. *SE Neighbors v. City of Eugene*, 68 Or.
5 LUBA 51, *aff’d* 259 Or. App. 139 (2013). An ordinance prohibiting structures on any
6 “identified foredune” was clear and objective where the city’s code defined the term
7 foredune with respect to slopes that could be determined. *Rudell v. City of Bandon*, 64
8 Or. LUBA 201, 208 (2011), *aff’d* 240 Or. App. 309. And an ordinance requiring a 30-
9 foot landscape buffer along the perimeter of any planned unit development was clear and
10 objective even though the city interpreted that ordinance not to apply to areas of a
11 planned unit development that provided access or that abutted streets. *Walter v. City of*
12 *Eugene*, LUBA No. 2016-024 (Or. LUBA 2016) at 6. The *Walter* court explained that
13 the city had applied the landscape buffer requirement in the only reasonable way
14 available, and the appellant could not manufacture a strained interpretation under which
15 development would be precluded and then argue that the standard was not clear and
16 objective. *Id.*

17 **B. Factual Background**

18 **1. The Property, Surrounding Area and Access**

19 The 26.58-acre Property is located in the far SW corner of the City of Talent and is
20 isolated from other properties within the City limits. The Property is improved with a single-
21 family residence, which is currently vacant. The northerly 600 feet of the Property is sloped
22 10% of less; the remainder of the Property slopes more steeply, reaching slopes of over 35% in
23 the southern portion.

- To the north, the Property is bounded by a 60-foot wide railroad right-of-way property owned by Central Oregon & Pacific Railroad (known as “CORP”). The sixty-foot right-of-way is not an easement but is owned in fee simple by CORP. Just beyond the CORP right-of-way to the north is the Talent Canal owned by the Talent Irrigation District. All other properties adjacent to the Property are in Jackson County.
- To the west, there is one parcel (Tax Lot 900 – also owned by Applicant) that is in the County but within the City’s Urban Growth Boundary –properties further to the west are in the County and zoned as resource lands.
- To the south, there is another Talent Irrigation District irrigation canal just outside the Property boundary. From there, the land slopes uphill and is zoned as resource land by Jackson County
- To the east, there are a number of parcels (15 or 16), ranging in size from approximately 5 to 20 acres as shown on the Jackson County Assessor website, stacked along the south/southeast side of the CORP right-of-way for a distance of over three-quarters of a mile before reaching where the City limits again crosses the CORP right-of-way to the south. All of those parcels are in the County. The parcels adjacent to the CORP right-of-way parcel are zoned Rural Residential by the County and are within the City’s Urban Growth Boundary. The parcels further from the CORP right-of-way are generally outside the Urban Growth Boundary and zoned as resource lands by the County.

As seen on the City’s maps, the Property appears as a peninsula – a solitary parcel within the City limits that is surrounded by properties in the County (though many of them are within the City Urban Growth Boundary) and separated from other private properties in the City limits by

1 the railroad-owned CORP right-of-way. (Note that the section of CORP right-of-way abutting
2 the Property is also within the City limits.)

3 The Property has a single access – from the north over Belmont Road, which is a one-
4 block long City right-of-way leading to the north boundary of the CORP right-of-way from
5 Talent Avenue. The Belmont Road right-of-way is 60 feet wide, but only a narrow two-lane
6 section is improved, with no sidewalks and no curb-and-gutter improvements. Belmont Road
7 crosses the TID Talent Canal on a 16-foot wide section over a culvert. The City’s Belmont Road
8 right-of-way ends at the northern boundary of the CORP right-of-way and does not extend across
9 the CORP property or beyond to the Property. The Property uses a narrow gravel crossing over
10 the CORP right-of-way and railroad tracks pursuant to a private crossing permit or agreement
11 from CORP. Both the City and the Talent Irrigation District have easements across the Property
12 to access City water tanks and the District’s irrigation canal near the Property’s southern
13 boundary.

14 There are five crossings of the CORP right-of-way parcel in the general area of the
15 Property. Two are “public” crossings – regulated by the Oregon Department of Transportation
16 Rail and Public Transit Division (“ODOT Rail”). Three are “private” crossings – permitted by
17 CORP but not regulated by ODOT Rail.

- 18 • Less than one-quarter mile¹⁶ to the east from Belmont Road, there is a public crossing
19 called the “Public Road” crossing which is a County road crossing that accesses a number
20 of rural properties.

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23 ¹⁶ Distances are estimated from the maps in the City’s Transportation System Plan. Precise
distances are not important.

- 1 • Moving westerly, there is the private crossing at Belmont Road that accesses the
2 Property.
- 3 • Less than one quarter mile to the west from Belmont Road, there is second private
4 crossing at Hilltop Road which accesses a number of parcels.
- 5 • A little over a quarter mile further to the west from Hilltop Road, there is a third private
6 crossing at Pleasant View Road.
- 7 • Over a half mile further to the west, there is a signalized and gated public crossing at
8 Rapp Road within the City of Talent.

9 **2. The City’s 2005 Railroad District Master Plan**

10 In 2004-2005, the City initiated a planning exercise which culminated in a document
11 titled the Talent Railroad District Master Plan (the “RDMP”). No party submitted a copy of the
12 RDMP into the record. The RDMP is a public document, however, and is available on the City
13 of Talent website at the Community Development Page under the tab labelled “Planning
14 Documents & Ordinances.”¹⁷ A number of the planning maps from the RDMP are not
15 reproduced in that online document, but the key map (showing the “Preferred Alternative”) is in
16 the online document at Page 6 of the RDMP. The RDMP was adopted by the City in 2007 (City
17 of Talent Ordinance #07-821-O) as a supplement to its Comprehensive Plan.

18 A number of stakeholders were involved in creating the RDMP, including property
19 owners, the City, Jackson County, ODOT and CORP. The RDMP sets out an ambitious plan for
20 the 155-acre area called the Railroad District. The Railroad District runs along the south side of
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22 ¹⁷ The specific webpage is:
23 [http://www.cityoftalent.org/SIB/files/Planning/Development_Codes/Talent%20RR%20Dist_%20Master%20Plan%20\(Adopted%202-7-2007\).pdf](http://www.cityoftalent.org/SIB/files/Planning/Development_Codes/Talent%20RR%20Dist_%20Master%20Plan%20(Adopted%202-7-2007).pdf).

1 the CORP right-of-way from Rapp Road (to the east/northeast) for approximately two (2) miles
2 and ending at the furthest extent of the City’s Urban Growth Boundary just beyond the Property
3 (to the east/southeast of the Property). At the western end, the Railroad District includes a parcel
4 outside the City and its Urban Growth Boundary and a parcel within the City boundary zoned
5 light industrial. The rest of the properties (stretching to the east/southeast) in the Railroad
6 District are outside the City boundary but within the City’s Urban Growth Boundary – with the
7 notable exception of the Property, which is in the City limits.

8 The RDMP Preferred Alternative includes a proposed system of streets throughout the
9 Railroad District, including a collector road (mostly along the CORP right-of-way) that would
10 run from Rapp Road and terminate at the eastern edge of the City’s Urban Growth Boundary.¹⁸
11 The RDMP recognizes that implementation would require legislative action by the City and
12 would require new funding sources to pay for all the proposed street, sewer, municipal water,
13 and stormwater utilities, as well as proposed park areas.¹⁹ With respect to the proposed collector
14 road, the RDMP proposes that it could either be constructed in one project (with cost recovery
15 mechanisms) or could be constructed in phases by developers (so long as adequate fire protection
16 was provided).²⁰ With respect to the rail crossings in the Railroad District area, the RDMP
17 Preferred Alternative map proposes that the Rapp Road crossing would be realigned; that the
18 Pleasant View Road crossing could be an emergency crossing (pending ODOT Rail and CORP
19 approval); that the Hilltop Road crossing would be closed; that the Belmont Road crossing would

22 ¹⁸ See RRDMP at p. 6. The properties further to the east are in the City’s Urban Reserve but
outside the UGB.

23 ¹⁹ RDMP at p. 1.

24 ²⁰ RDMP at p. 8.

1 be improved to a public crossing; and that the Public Road crossing would be closed.²¹ The
2 RDMP text explains the plan for the rail crossings in more detail, especially the link between
3 Belmont and Public crossings:

4 Two public railroad crossings exist, including one improved (signalized and
5 gated) crossing at Rapp Road and one unimproved crossing just south of the
6 project area (“Public Road”). Other private crossings exist at Pleasant View,
7 Hilltop, and Belmont.

8 The Rapp Road/Helms intersection should be realigned, as described above, and
9 **the Public Road/CORP crossing should be closed in exchange for a fully
10 improved crossing at Belmont Road.** The full rail crossing improvements at
11 Belmont Road would provide a standard city street section with utilities, and a rail
12 crossing with a signal and gates. The Rail Division of ODOT and CORP have
13 indicated that the Belmont Road crossing should be improved and the Public
14 Road crossing closed.

15 An at-grade rail crossing at Pleasant View (realigned) is also recommended as a
16 contingency plan, i.e., in the event secondary emergency access is needed and no
17 other outlet is available.

18 The master plan locates the planned collector street at least 100 feet from the
19 railroad in each potential crossing location, as recommended by CORP; however,
20 neither CORP nor ODOT Rail Division had consented to a rail crossing at
21 Pleasant View at the time the RDMP was prepared.

22 RDMP at p. 10 (emphasis added).

23 3. The City’s 2017 Comprehensive Plan

24 The City’s Comprehensive Plan picks up elements of the RDMP. The Transportation
System Plan (the “TSP”) is Element D of the City’s Comprehensive Plan. The TSP plans shows
a collector through the Railroad District that would link Rapp Road to Belmont Road, with
Belmont Road being upgraded to a collector (extending across the CORP right-of-way and into
the Property as a collector).²² Projects in the TSP were identified without any budget limitations

²¹ RDMP at p. 6.

²² TSP at 49 (Functional Classification System); TSP at 32 (Street System Plan).

1 in order to identify all potential projects that could be needed in the future.²³ All the potential
2 TSP projects are identified as low, medium, or high priority.²⁴ Three specific projects for the
3 Railroad District are in Section 4 of the TSP (“Project Prioritization And Funding”).

- 4 • TSP Project #45 is the “Railroad District Collector – Belmont Rd to Rapp Rd” and is
5 describe as a new collector street to serve the UGB area south and west of the CORP
6 railway and connect to the Urban Reserve Area. This is identified as a low priority
7 project.²⁵
- 8 • TSP Project #46 is the “Rapp Rd Railroad Crossing” which would realign that street and
9 upgrade the crossing at Rapp Road. This is also a low priority project.²⁶
- 10 • TSP Project #47 is identified as the “Belmont Rd – Talent Ave to Railroad District
11 Collector” project. This project would “Upgrade to collector standard and upgrade
12 railroad crossing & restrict other crossings (Pleasant View, Hilltop, public to south).”²⁷

13 TSP Project #47 continues the connection in the RDMP that upgrading the Belmont Road
14 crossing would be linked to restrictions of other crossings, including the Public Road crossing to
15 the east.

16 The Public Facilities Element (Element F) of the City’s 2017 Comprehensive Plan²⁸
17 recognized how public facility development in the area is far from ideal for development.
18 Element F recognizes that lands planned for growth southwest of the railroad tracks (the Railroad

20 ²³ TSP at 23 – 24.

21 ²⁴ *Id.*

22 ²⁵ TSP at 29.

23 ²⁶ *Id.*

24 ²⁷ *Id.*

²⁸ As mentioned above, both Element D (Transportation System Plan) and Element F (Public
Facilities) in the City’s current comprehensive plan are unchanged from the City’s 2017
comprehensive plan.

1 District) “will not be viable without a new street network that meets emergency service needs,
2 and new water, storm sewer and sanitary sewer facilities.”²⁹ Objective 10.1.1 in the 2017
3 Comprehensive Plan puts it bluntly that no planning approvals should be allowed for any
4 Railroad District parcels until a new master plan is completed showing how all infrastructure will
5 be connected and phased.³⁰ Objective 10.1.2 in the Comprehensive Plan is even more blunt;
6 stating that construction permits for new residential development in the Railroad District should
7 not be issued until all necessary services are designed, engineered and funding is secured.³¹
8 Implementation Strategy 10.2.1 of the Comprehensive Plan, while not specifically focused on the
9 Railroad District, provides that all new development shall include street access with two outlets
10 sufficiently separated for fire life safety access.³²

11 **4. The 2018 ODOT Rail Diagnostic**

12 A few months before the Application was submitted, representatives of the Developer,
13 the City, the County, CORP Railroad, and three experts from ODOT Rail and Public Transit
14 Division met on the site to discuss the potential highway-rail grade crossing safety
15 improvements. Note that the term “highway” in the context of a rail crossing includes a public
16 street or county road. ORS 824.200(2).

17 As explained in the ODOT Rail 2017 Traffic Signal Design Manual Section 16.2,³³ a
18 diagnostic review is part of the requirements found in 23 C.F.R Part 646 for addressing

20 ²⁹ 2017 Comprehensive Plan at F-2.

21 ³⁰ 2017 Comprehensive Plan at F-17.

22 ³¹ *Id.*

23 ³² *Id.*

24 ³³ Applicant referred to the ODOT Design Manual in its presentation at the Hearing. It is a public document of ODOT which can be reviewed online at: <https://www.oregon.gov/ODOT/Engineering/Pages/Signal-Design-Manual.aspx>. Chapter 16 of the manual addresses railroads.

1 requirements for public (highway-rail) crossing of railways. As defined in federal law, a
2 “diagnostic team” is “a group of knowledgeable representatives of the parties of interest in a
3 [railroad](#)-highway crossing or a group of crossings.” 23 C.F.R §646.204. The ODOT Manual
4 explains that the field diagnostic review team will “meet on-site to determine the required safety
5 upgrades for the railroad crossing.”³⁴ The diagnostic identifies the work to be done and the
6 application needed to establish the highway-rail crossing.³⁵ Here, the diagnostic meeting
7 occurred on January 18, 2018, and the diagnostic was prepared on January 24, 2018, by the Lead
8 Engineer for ODOT Rail.

9 The diagnostic appears several times in the administrative record and was attached to the
10 Application at AR 134 – 137.

11 Two crossings were reviewed: The Belmont Road private crossing (Private, USDOT
12 756228P) and the Public Road public crossing (USDOT 756227H / C-432.8). The purpose of
13 the diagnostic was to discuss constructing the Belmont Road as a public collector roadway across
14 CORP in order to make the land to the southwest (the Property) developable. ODOT Rail
15 explained that accessing a subdivision would require a “public” crossing at Belmont Road.
16 ODOT Rail’s explained that the state’s policy is to “eliminate public at-grade crossings
17 whenever possible”³⁶ See ORS 824.202. Therefore “creating a ‘new’ public crossing at Belmont
18 Road would be contingent upon the closure of the existing public crossing to the southeast
19 named Public Road.”³⁷

21 ³⁴ ODOT Manual § 16.2.

22 ³⁵ *Id.* See ORS 824.204 (no public road or street may be constructed across any railroad track
without ODOT permission).

23 ³⁶ AR 134.

24 ³⁷ *Id.*

1 ODOT Rail explained that creating a public crossing at Belmont Road would require
2 grading work bells, lights & gates. The Public Road crossing is severely “humped” and would
3 be closed – removal of crossing surface panels and asphalted approaches. Neither ODOT Rail,
4 Jackson County, nor CORP volunteered to contribute to the cost of the new highway-rail
5 crossing.

6 The diagnostic noted that the new collector at Belmont Road would cross the TID canal.
7 A new box culvert wide enough to accommodate the collector road would be required. This
8 could have the effect of having to repair or replace the current channel lining.³⁸

9 The County stated that existing residents that utilize Public Road crossing must continue
10 to have access via a public crossing, whether it is upgraded Belmont Road or the continuation of
11 the Public Road crossing. ODOT Rail affirmed that the closure of Public Road would occur
12 simultaneously with opening an upgraded Belmont Road public crossing as part of the proposed
13 project. ODOT Rail would not support having Belmont Road upgraded to a public crossing
14 without the full closure of the Public Road crossing. “Simply put – the Department doesn’t
15 support one without the other (upgrade with closure).”³⁹

16 CORP stated that it wants to work with the City to close two additional crossings
17 (Pleasant View & Hilltop) as part of the project.⁴⁰ The City expressed a desire that the collector
18 street would include sidewalks and bike lanes on Belmont. That would be considered by ODOT
19 Rail in the crossing design and application.⁴¹ In terms of next steps, the City would be required
20 to submit an application for a new public at-grade highway-rail crossing at Belmont Road and

21
22 ³⁸ AR 135.

³⁹ AR 136.

⁴⁰ AR 137.

⁴¹ *Id.*

1 also submit application to close existing the Public Road crossing.⁴² ODOT requires 90% design
2 drawings for the application under OAR 741-200-0050. The Hearings Officer notes that
3 pursuant to state law “only a railroad company or the public authority in interest may file an
4 application for authority to construct, relocate, alter or close a crossing.” OAR 741-200-0030.
5 The City would be the public authority in interest because it is the government body “with
6 jurisdiction over the highway [Belmont Road] crossing the railroad track.” ORS 824.200(3).

7 ODOT Rail confirmed the applicability of the diagnostic in a recent (March 5, 2020)
8 email to a project neighbor from Naomi Zwerdling, Interim Rail Crossing Safety Manager of
9 ODOT Rail and Public Transit Division.⁴³ Ms. Zwerdling reached out to the City of Talent
10 Community Development Director to confirm that the subdivision application had not changed
11 since 2018 and learned it had not materially changed. “As a result, a new diagnostic meeting
12 will not need to be held for the Belmont Road and Public Road in the City of Talent.”⁴⁴ The next
13 step will be for the City to “submit the application for the construction of a new public at-grade
14 highway-rail crossing at Belmont Road and also submit the application to close the existing
15 Public Road highway-rail crossing to the southeast.”⁴⁵ In an email on August 20, 2020, ODOT
16 Rail explained that the City could apply for the permit to close the Public Road highway-rail
17 crossing as part of the permit application to establish the new highway-rail crossing at Belmont
18 Road, even though the City is not technically the “public authority in interest” for Public Road.
19 The County would simply be joined in the proceeding.⁴⁶

21 ⁴² *Id.*

22 ⁴³ AR 1248

23 ⁴⁴ *Id.*

24 ⁴⁵ *Id.*

⁴⁶ AR 1678.

1 **5. The TID Canal Crossing**

2 Upgrading Belmont Road to a collector cross-section would require a new crossing of the
3 TID Talent Canal. That bridge is currently approximately 16 feet in width.⁴⁷ The TID
4 commented that both the TID and the United States Bureau of Reclamation would have to
5 review and approve the installation of a new box culvert, which would have to be sufficiently
6 sized to allow a flow of 65 cfs.⁴⁸ The Bureau of Reclamation commented that consultation with
7 the State Historic Preservation Officer would also be required because the TID Talent canal is
8 eligible for listing on the National Register of Historic Places.⁴⁹

9 **6. Applicant’s Proposal**

10 Applicant’s proposed subdivision would develop 49 lots for single-family residences on
11 the Property. While Applicant felt that certain of the City’s requirements addressing stormwater,
12 sewer, municipal water and tree preservation were not clear and objective, the Applicant’s
13 proposal voluntarily met those standards. Applicant’s proposal is set out in a series of
14 application materials,⁵⁰ supplemental materials,⁵¹ technical memoranda from planner CSA
15 Planning,⁵² and memos from legal counsel.⁵³

16 Municipal water is available to the site. The Applicant also volunteers to sprinkle all
17 homes throughout. By doing this, the Applicant believes the project will qualify for Exception 1
18 under the Oregon Fire Code section 503.1.1. Under that section, the Fire Official may require a
19

20 ⁴⁷ Hearing testimony of Matsuura.

21 ⁴⁸ AR 281 – 282.

22 ⁴⁹ AR 532 – 533.

23 ⁵⁰ AR 22 – 145.

24 ⁵¹ AR 146 – 409.

⁵² AR 412 – 415; AR 416 – 479. (Not a complete list.)

⁵³ AR 278 – 279; AR 1097 – 1098. (Also not a complete list.)

1 secondary fire access, or may approve an exception like the one proposed by Applicant. Because
2 the Fire Code is administered by the Fire Official, and is not incorporated into the subdivision
3 code, the Hearings Officer need not address that issue.⁵⁴

4 The Applicant's engineer certified that the Application would comply with City
5 stormwater standards. Sewer service will be provided by Rogue Valley Sewer Services and can
6 connect to a line located in current Belmont Road. Police and fire service are available to the
7 site.

8 The lot design would provide frontage on a publicly dedicated street for all lots. The
9 slopes of over 35 percent in the southern portion of the Property will be placed in common area
10 owned by a homeowner association. There is a wetland located in the northeast corner of the
11 site. Applicant provided a wetland delineation and buffer calculation. The Application proposed
12 to dedicate the wetland area as a public park and objected to Staff's recommendation that the
13 wetland and buffer be owned by a homeowner association but still allow public access. At the
14 Hearing, the Applicant agreed that, consistent with City code, they would accept either a public
15 park solution or simply ownership and maintenance by a homeowner association, but not a
16 combination of the two. The allowable density calculations were provided by Applicant showing
17 the Application met the City's density requirements.

18 **a. Streets**

19 With respect to the proposed streets and sidewalks interior to the Property, the proposed
20 cross-sections appear to meet the standards in the City's TSP⁵⁵ with the exception of Belmont

21
22 ⁵⁴ See AR 455 – 458 wherein the Fire Chief appears to agree that one access would be sufficient
with required mitigation, including sprinkling throughout.

23 ⁵⁵ Hollyhock actually exceeds ROW width standards because Applicant dedicates enough right-
of-way for it to eventually be developed as a collector street as shown in the RDMP. The RDMP

1 Road from the south side of the CORP right-of-way to Hollyhock, which is required as a
2 connector. Applicant does provide a 70-foot right-of-way but does not include a full connector
3 cross-section. Applicant evidently takes the position that the connector is required because the
4 City's TSP plans for that section to be part of an eventual Railroad District connector, so it
5 would serve other properties and any required road improvement in excess of that needed for the
6 Applicant's subdivision would be a taking.

7 Applicant takes the same position with respect to the off-site section of Belmont Road
8 from Talent Ave to the north edge of the CORP right-of-way. Applicant volunteers to build out
9 a partial connector cross-section in the City's existing 60-foot right-of-way that would be
10 "consistent with" an eventual full connector build out by the City. The build out proposed by
11 Applicant would more than meet the needs of its 49-lot subdivision. Applicant's transportation
12 expert estimated that the subdivision would generate approximately 435 average daily trips and
13 49 PM peak hour trips.⁵⁶ The proposed partial buildout of the Belmont Road connector proposed
14 by Applicant would provide more capacity than required for the subdivision. Requiring any
15 more, according to Applicant, would be an unconstitutional taking.

16 The Applicant did not provide any proposed cross-section for the public highway-rail
17 crossing of the CORP right-of-way, evidently under the theory that the City would have to apply
18 for that highway-rail crossing and ODOT Rail would have exclusive jurisdiction to determine
19 how the cross-section would look. Applicant also did not provide any proposed grading plan for
20 the potential highway-rail crossing. Project neighbors presented evidence that the current rail

21
22 does not provide standards relevant to the subdivision ordinance, only the TSP does that, and the
23 TSP does not show a connector leading to the east from Belmont.

⁵⁶ AR 139 – 143.

1 crossing at Belmont Road was five feet above the grade of the roadway; and ODOT Rail requires
2 a level grade at the crossing which then must taper slowly (only a 13 inch drop or rise for the
3 next 30 feet), and this grade would create a retaining wall in front of their property and would
4 impair their access. Applicant did not rebut this evidence but testified at the hearing before the
5 Hearings Officer that best practices by the grading contractor would minimize those sorts of
6 problems.

7 **b. The Highway-Rail Crossing**

8 With respect to the proposed Belmont Road public highway-rail crossing over the
9 fee-owned CORP right-of-way property, the City staff asked the Applicant for a
10 preliminary design of the proposed Belmont Road crossing, how the Public Road
11 crossing could be closed (as required by the ODOT Rail diagnostic), and how residents
12 using the Public Road crossing would continue to have access.⁵⁷

13 In response, Applicant’s legal counsel sent the City a letter stating that the
14 Applicant does not propose to close the Public Road highway-rail crossing.⁵⁸ (Applicant
15 frequently ignores that it would be the City and not Applicant that would have to propose
16 the highway-rail crossing per OAR 741-200-0030.) Applicant’s counsel explained that
17 the Applicant is only proposing to convert the existing crossing at Belmont Road from a
18 private crossing to a public crossing. Applicant’s counsel recognized ODOT Rail’s
19 statement that the Public Road crossing would need to be closed, but asserted that the
20 diagnostic “demonstrates how the Public Road crossing can be closed. Such a closure
21
22

23 ⁵⁷ AR 150 – 152.

24 ⁵⁸ AR 278 – 279; AR 1097 – 1098.

1 will require action by the City or the railroad.”⁵⁹ Applicant’s counsel also recognized
2 that the “specific action item” in the ODOT Rail diagnostic was for the city to “submit an
3 application for construction of a new at-grade high-way rail crossing at Belmont and also
4 submit application to close the existing Public Road public highway-rail grade crossing to
5 the southwest.”⁶⁰ Applicant’s counsel went on to explain that, by stubbing streets to the
6 east property line, Applicant made it possible for the City to develop a collector street
7 from Public Road leading to the proposed streets in Applicant’s subdivision.⁶¹

8 More recently, Applicant produced an example of how a roadway connection
9 could lead from the stubbed road in Applicant’s proposed subdivision, through two
10 properties to the east of the Property – 700 feet through Tax Lot 900 (also owned by
11 Applicant) and 50 feet through Tax Lot 500 (owned by one of the neighbor opponents of
12 the project), and terminate at the Public Road highway-rail crossing.⁶² This created a
13 great deal of comment by neighbors (most highly negative). Applicant explained at the
14 Hearing that this was only a suggestion/example of how an alternate access could be
15 provided for the properties using the Public Road crossing and was not a proposal of the
16 Applicant.

17 In February 2020, Applicant’s representatives wrote to the City explaining that,
18 because the new Belmont Road highway-rail crossing “will be much more expensive than
19 a standard segment of collector roadway,” the City should provide System Development
20 Charge reimbursements to “reflect the cost of this expensive infrastructure

21
22 ⁵⁹ *Id.*

23 ⁶⁰ *Id.*

24 ⁶¹ *Id.*

⁶² AR 427 – 429.

1 improvement.”⁶³ In Applicant’s hearing memorandum to the Hearings Officer,
2 Applicant’s counsel also made clear that Applicant’s willingness to fund construction of a
3 highway-rail crossing at Belmont Road was “subject to SDC reimbursements.”⁶⁴

4 **c. Applicant’s Proposed Condition of Approval (Development Agreement)**

5 There is currently no proposed design for the Belmont Road highway-rail
6 crossing, including no grading design. There is no agreement on preparation costs for the
7 design and application preparation for the Belmont Road crossing permit required from
8 ODOT Rail. There is no agreement on the full funding for the construction of that
9 crossing improvement. There is no agreement on how the City would obtain right-of-
10 way across the CORP property. There is no agreement on how an alternate access could
11 be provided for property owners who currently use the Public Road public highway-rail
12 crossing (and no indication that ODOT Rail has changed its position on the requirement
13 to close that Public Road crossing). Applicant’s proposed solution is a condition of
14 approval in the approval of the Application. The condition of approval would provide for
15 the negotiation and execution of a development agreement between Applicant and the
16 City. As proposed by Applicant’s representative in their February 6, 2020, memorandum
17 to the City, the Applicant would provide a draft development agreement to the City that
18 sets forth at least the following:

- 19
- 20 1. A schedule and workplan for street improvement and crossing design
21 development, preparation and filing of the ODOT crossing permit
22 application. Major work tasks shall be identified, and key decision
23 deadline dates specified.

23 ⁶³ AR 418.

24 ⁶⁴ AR 1600.

2. Process for the City and subdivider to coordinate design team to work with neighbors in the area to review designs and provide constructive input on potential impacts and suggest design solutions.
3. Crossing design and permit application preparation and responsibilities.
4. Process to negotiate with the railroad and ODOT after the application has been submitted to ODOT Rail.
5. Process to negotiate SDC reimbursements for the project.
6. Process for the City and subdivider to coordinate design team to work with Jackson County Roads and TID to review designs and provide constructive input on potential impacts and suggest design solutions.⁶⁵

City Staff proposed a similar type of condition of approval in its recommendation to the Planning Commission. The Planning Commission denied the Application based on other reasons, including fire safety, vehicular access, failure to meet minimum right-of-way standards, and failure to provide a traffic impact study; and this appeal followed.

C. Resolution of Procedural Issues

1. Alleged Collateral Attack on Transportation System Plan

Applicant argues that the Planning Commission Decision was a “collateral attack” on the City’s Transportation System Plan (“TSP”). A “collateral attack” is an attempt to change a prior judgment or final decision in a subsequent public proceeding. *Ketcham v. Selles*, 304 Or 529, 534, 748 P.2d 67 (Or. 1988). Applicant argues that the TSP “calls for the construction of an improved railroad crossing on Belmont Street” and the Planning Commission determined that, as a matter of law, that crossing could not be developed. Applicant is incorrect. The Planning Commission Decision did not conclude anything about whether any of the planned projects in the TSP could be lawfully developed. The Commission Decision merely determined that this specific Application did not meet the standards in the City’s subdivision ordinance – including

⁶⁵ AR 418 – 419.

1 public safety standards, minimum right-of-way widths (as required by the TSP), access to public
2 streets, and the need for a transportation impact study. The Hearings Officer may disagree with
3 the Planning Commission's reasons for project denial, but the Planning Commission did not
4 collaterally attack the City's Comprehensive Plan. Even if the Planning Commission had
5 concluded that the TSP is legally impossible, and they did not, this proceeding is a *de novo*
6 review of the Application with no deference to the Planning Commission Decision, and any
7 mistakes made by the Planning Commission in characterizing the legality of the TSP can be
8 corrected.

9 **2. Consideration of Evidence Outside the Record**

10 Applicant argues that the Planning Commission unlawfully considered evidence of traffic
11 counts from businesses in the area. The Hearings Officer finds that several Commission
12 members did discuss facts outside the record, but there is no indication in the Planning
13 Commission Decision that they relied on those facts in reaching their decision. In LUBA
14 decisions, for example, it is the local government findings that are reviewed, not the statements
15 made during the adoption of a land use decision. *Toth v. Curry County*, LUBA 91-070 (Or.
16 LUBA 1991); *Gruber v. Lincoln County*, 160 Or. LUBA 456, 560 (1988). In this case, the
17 Hearings Officer gives no deference to the decision of the Planning Commission, and the
18 Hearings Officer is relying solely on the facts in the administrative record (and public documents
19 like the RDMP of which the Hearings Officer may take judicial notice), so any procedural error
20 by the Planning Commission will be cured.

21 **3. Undisclosed *Ex Parte* Contact/Prejudice**

22 Applicant argues that the Talent Mayor, who is an *ex officio* (and nonvoting) member of
23 the Planning Commission, should have recused herself because she testified against the project at

1 the ELD hearing before the City of Talent Referee. Nothing in the record shows any actual
2 prejudice on behalf of the Mayor, and the record shows that the Mayor did not even oppose the
3 project at the ELD hearing. Rather, at the ELD hearing, the Mayor explained why the City no
4 longer had a planned unit development ordinance (an earlier planned unit development proposal
5 which included the Property and an adjacent lot outside the City limits was denied in 2008).⁶⁶
6 There was no reason for the Mayor to recuse herself, and Applicant has not shown any
7 substantial prejudice from that failure to recuse.

8 Applicant also argues that Planning Commission Chair Joi Riley had ex parte contacts
9 with her neighbor, who is a firefighter, about substantive issues. That contact was not disclosed
10 at the beginning of the hearing, the specific substance of the conversation was not disclosed, and
11 Applicant was not given a chance to rebut the substance of the ex parte conversation. Ms. Riley
12 responded that she only asked her neighbor, who is a member of the Ashland Fire Department,
13 about what type of equipment might be transferred to Jackson County Fire District #5, which is
14 the fire district with jurisdiction over the Property. Her understanding was that a) as Planning
15 Commission Chair she did not need to ask herself about ex parte contact and b) only contacts
16 about the substance of a hearing with a person with an interest (a proponent or opponent) is an ex
17 parte contact that must be disclosed. Unfortunately, Ms. Riley's understanding is incorrect on
18 both accounts.

19 In the land use context, an ex parte communication is a communication with a
20 decision-maker made outside the hearings process regarding a matter relevant to
21 the decision.

22 ⁶⁶ AR 1658 (written testimony of Joi Riley). The earlier PUD denial was appealed to LUBA and
23 upheld under *Artner v. City of Talent*, LUBA No. 2008-063 (Or. LUBA 2008). A copy of that
24 decision is in the record at AR 666 – 677.

1 1 Land Use (OSB Legal Pubs. 2010) §15.13 (and cases cited in that section). As a decision-
2 maker, Ms. Riley was required to disclose any ex parte communications as required under
3 TMC 19.80.050.D.6. Moreover, ex parte communications include any communication about the
4 substance of the hearing – not just communications with parties in interest. (Since fire safety
5 was a much-discussed topic at the Planning Commission hearing, the communication was about
6 the substance of the proceeding.) Ms. Riley violated Talent’s ordinance by failing to disclose the
7 communication, failing to disclose the substance of the communication at the hearing, and failing
8 to give parties a chance to rebut the substance of the communication.

9 Before the Oregon courts, the remedy for ex parte violations is frequently remand for a
10 revised decision (after disclosure and opportunity to rebut) or a full new hearing. Here, however,
11 the Hearings Officer is holding a full *de novo* hearing, with no deference to the Planning
12 Commission Decision, and will not rely on any portions of the Planning Commission Decision
13 below that might have been tainted by the uncured ex parte communication. That will cure the
14 procedural error by the Chair of the Planning Commission.⁶⁷

15 **4. ORS 197.522 Is Not Applicable**

16 Appellant argues that ORS 197.522 requires that the City and Hearings Officer must try
17 to make the Application consistent with the applicable land use criteria by imposing reasonable
18
19
20

21 ⁶⁷ The record also shows that Ms. Riley sent Applicant a letter less than a week after the
22 Planning Commission Decision. AR 1697 – 1702. The letter was in her capacity as a private
23 citizen. The letter suggested that the Applicant might be able to trade their Property to the City
24 for an 8-acre parcel in the City’s Parks Master Plan. While not technically illegal, this type of
action by a quasi-judicial decisionmaker, even in their private capacity, is unusual and has the
potential to be misunderstood.

1 conditions of approval.⁶⁸ See ORS 197.522(4). Appellant’s argument is contradicted by case
2 law from the Oregon Land Use Board of Appeals (“LUBA”).

3 ORS 197.522 is part of a group of statutes in Chapter 197 ORS dealing with moratoria.
4 See ORS 197.505 through ORS 197.540. Prior to 2009, LUBA decisions questioned whether
5 ORS 197.522 had any application outside the context of a declared or *de facto* moratorium. See,
6 e.g., *Oien v. City of Beaverton*, LUBA No. 2002-075 (Or. LUBA 2003) at 14 – 19. In 2009, that
7 question was presented directly to LUBA, and the court held that “ORS 197.522 does not apply
8 outside the context of a declared or *de facto* moratorium under ORS 197.520 or 197.524.”
9 *Reeder v. Multnomah County*, LUBA No. 2009-015 (Or. LUBA 2009) at 17. LUBA cases since
10 2009 have consistently followed the holding in the *Reeder* case.

11 Petitioners cite ORS 197.522 for the proposition that the city itself was obligated to
12 propose conditions of approval to ensure compliance with the tree preservation standards,
13 rather than deny the application. However, we held in *Reeder v. Multnomah County*, 59
14 Or LUBA 240, 254-55 (2009), that ORS 197.522 applies only in the context of a declared
15 or *de facto* moratorium
16 *Sage Equities, LLC v. City of Portland*, LUBA No. 2015-047 (Or. LUBA 2015) at f.n.8; see also
17 *Wilson v. Washington County*, LUBA No. 2011-007 (Or. LUBA 2011) at f.n. 5 (Accord);
18 *Konrady v. City of Eugene*, LUBA No. 2009-028 (Or. LUBA 2009) at 21 (“ORS 197.522 does
19 not apply outside the context of a declared or *de facto* moratorium”).

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

22 An applicant bears the burden of proof to demonstrate that an application complies with
23 applicable approval standards, and a local government is not required to approve a
24 noncomplying development proposal, even if conditions of approval might be imposed
that would render the proposal consistent with the applicable criteria. *Corporation*

68 AR 293

1 *Presiding Bishop v. City of West Linn*, 45 Or LUBA 77, 91 (2003), *rev'd on other*
2 *grounds*, 192 Or App 567, 86 P3d 1140 (2004).

3 *Wilson v. Washington County*, LUBA No. 2011-007 (Or. LUBA 2011) at 9.

4 **5. Incorporation of Comprehensive Plan Provisions Into Land Use**
5 **Regulations – ORS 197.195**

6 A decision on an application for a subdivision is a “limited land use decision” as defined
7 in ORS 197.015(12). For limited land use decisions the Oregon Legislature has required:

8 Within two years of September 29, 1991, cities and counties shall incorporate all
9 comprehensive plan standards applicable to limited land use decisions into their
10 land use regulations. . . . If a city or county does not incorporate its
11 comprehensive plan provisions into its land use regulations, the comprehensive
12 plan provisions may not be used as a basis for a decision by the city or county or
13 on appeal from that decision.

14 ORS 197.175(1). A general incorporation of the comprehensive plan is not sufficient. Rather,
15 the local government must make clear what specific provisions apply to a limited land use
16 decision. *Oster v. City of Silverton*, LUBA No. 2018-103 (Or. LUBA 2019).

17 In this case, a number of witnesses and commenters argued that policies and
18 implementation standards in Element F (Public Facilities) of the 2017 Talent Comprehensive
19 Plan were applicable to regulate the project – in particular, standards requiring a secondary
20 access. Others argued that general policies in the 2017 Comprehensive Plan about ensuring
21 safety should be applied to regulate the Application. None of those provisions have been
22 incorporated into the applicable City land use regulations (former Title 8, Chapters 2 and 3).
23 Accordingly, the Hearings Officer cannot consider those provisions as land use criteria
24 governing the Application.

25 The City is not limited by ORS 197.195(1) in other contexts. For example, if the City
26 considered entering into a development agreement (a contract) or considered amending its

1 system development charge program (legislation), it would appear not to be limited by ORS
2 197.195(1).

3 **D. Compliance With Land Use Criteria/Resolution of Issues Raised by the Parties**

4 The applicable subdivision ordinance and zoning ordinance are lengthy. They are not all
5 set out in full in this Decision and Final Order. The Hearings Officer has chosen to discuss in
6 detail only those provisions about which the parties raised issues or about which the Hearings
7 Officer has questions.

8 **1. Compliance with Section 8-2.110**

9 Section 8-2.110 of the applicable Subdivision Code is a section containing general
10 language about the purposes and goals of the Subdivision Code.

11 ***8-2.110 Purpose***

12 A. *Provide rules, regulations and standards governing the approval of land divisions and lot
13 reconfiguration including the following:*

- 14 1. *Subdivisions creating four or more lots from one parent lot, parcel or tract, within
15 one calendar year;*
- 16 2. *Planned Communities, Mixed-Use Developments and Multi-family Developments,
17 comprising subdivisions in conjunction with applicable design standards from the
18 Talent Zoning Code;*
- 19 3. *Partitions creating three or fewer lots within one calendar year;*
- 20 4. *Reestablishment of platted lot lines in the neighborhoods created by the Original
21 Town Plat and Wagner Addition, under certain circumstances; and*
- 22 5. *Lot line adjustments to modify lot lines or parcel boundaries that do not result in
23 the creation of new lots, and that may result in consolidation of lots.*

24 B. *Encourage neighborhood design that creates attractive transitions and efficient
connections between neighborhoods, parks, business and civic areas, as envisioned by the
Comprehensive Plan.*

C. *Encourage efficient use of land resources, carefully balancing needs for adequate land for*

1 *individual housing preferences and urban open spaces with a long-term commitment to*
2 *maintaining a compact town form to preserve open space and farmland on the perimeter.*

3 *D. Develop public facilities and service capability that will minimize public subsidies of new*
4 *development costs, continue to improve facilities and services for current residents, and*
5 *minimize ongoing maintenance and operations costs for all citizens.*

6 *E. Further develop a local transportation system that promotes walking, cycling and transit use in*
7 *addition to an adequate street system that will minimize traffic congestion and provide safe*
8 *ingress and egress in a variety of everyday and emergency situations.*

9 *F. Design stormwater management systems and protect wetlands, riparian areas and open*
10 *water in Wagner and Bear Creeks to maintain high water quality standards and conserve*
11 *natural systems.*

12 *G. Provide a healthy environment for all residents by encouraging designs that provide*
13 *adequate light, air, sunshine, open space and recreational opportunities and by preventing*
14 *overcrowding.*

15 *H. Build capacity for energy conservation by optimizing transportation choices and*
16 *recognizing opportunities for solar and other energy conserving applications*

17 The Planning Commission denied the Application based on general language in this section,
18 including the purpose of providing “safe ingress and egress.” These types of generally worded
19 purpose statements are not applicable land use criteria under controlling case law. *Baker v. City*
20 *of Garibaldi*, LUBA No. 2004-154, 49 Or LUBA 437, 449–450, *aff’d without opinion*, 201
21 Or App 299 (2005). The language relied on by the Planning Commission is also not clear and
22 objective as required by the ORS 197.307(4), and therefore cannot be used to regulate the
23 Application. The Hearings Officer concludes that TMC 8-2.110 does not apply to regulate the
24 Application.

2. Compliance With Section 8-2.210

Section 8-2.210 of the applicable Subdivision Code contains open space requirements
as follows:

1 **8-2.210 OPEN SPACE**

2 A. *Purpose. To preserve the character of the City and to conserve natural resources by*
3 *encouraging development that incorporates open space and the natural features of the land*
4 *into neighborhood design, and by allowing density distribution within the development*
5 *project so that there is no penalty for creative design.*

6 B. *Open Space Standard. Designated Locally Significant Wetland and Riparian areas and a*
7 *fifty-foot “safe harbor” setback from these areas shall be maintained as permanent open*
8 *space, pursuant to 8-3H.2. Additional open space may also be required by the City or*
9 *dedicated by the developer of a subdivision, in conformance with the Comprehensive Plan*
10 *and the provisions of 8-2.220(D). The open space shall be shown on the preliminary plat,*
11 *and recorded with the final plat or separate instrument in accordance with one of the*
12 *following methods: [amended 15 October 2008; Ord. No. 847]*

13 1. *By dedication to the City as publicly owned open space. Open space proposed for*
14 *dedication to the City must be acceptable to the City Council with regard to the*
15 *size, shape, location, improvement, environmental condition (i.e., the applicant may*
16 *be required to provide a level-one environmental assessment), and budgetary and*
17 *maintenance terms; or*

18 2. *As private open space, by leasing or conveying title (including beneficial*
19 *ownership) to a corporation, homeowners association or other legal entity, with the*
20 *City retaining the development rights to the property. The terms of such lease or*
21 *other instrument of conveyance must include provisions (e.g., maintenance,*
22 *property tax payment, etc.) acceptable to the City, and shall establish that the*
23 *subject property may not be developed for any purpose other than that specified in*
24 *the approved plan. (Note: This section is intended to ensure that open space is used*
for open space or recreational purposes only.)

C. *Uses of Required Open Space. Subject to review and approval by the City Council, an open*
space dedication may be used to comply with the City’s wetland and riparian protection
codes and ordinances (8-3H.2 and 8-5) and/or mitigate parks and recreation impacts
related to the subject development.

D. *Open Space for Public Park Use. If determined by the Planning Commission to be in the*
public interest in accordance with the adopted Comprehensive Plan, the City may require
the dedication or reservation of areas within the subdivision of a character, extent and
location suitable for the development of parks and other public uses.

E. *Additional Open Space. If the developer is required to reserve additional land area in*
excess of conservation areas prescribed in Subsections B-D, above, for a park, playground,
or other public use, the land shall be acquired by the appropriate public agency within 24
months following final plat approval, at a price agreed upon prior to approval of the plat,
or the reservation shall be released to the property owner.

1 (Note: When the developer is required to reserve additional land area in excess of conservation areas,
2 *Dolan v. City of Tigard* findings should be in the staff report and decision to justify the exaction.)

3 F. System Development Charge Credit. Dedication of land to the City for public use areas
4 shall be eligible as a credit toward any required system development charge for parks.

5 The Application has a wetland of local significance that has been delineated and the fifty-foot
6 buffer has also been delineated by Applicant’s wetland consultant. The Applicant originally
7 proposed dedicating the area to the City under Section B.1 above, which was rejected by the
8 City. Instead, the City staff proposed that the wetland and buffer be owned by a homeowner
9 association but with public access. Applicant objected that the proposed requirement was not
10 consistent with either subsection B.1 or B.2. At the Hearing, the Applicant agreed that, if the
11 City did not desire a dedication, the project could comply with 8-2.210(B)(2) by placing the
12 wetland and buffer in a separate tract to be owned and maintained by a homeowner association.

13 The Hearings Officer finds that a condition requiring the wetland and buffer to be
14 owned and maintained by a homeowner association would be feasible. A “feasible condition”
15 means that solution posed by the condition is “possible, likely, and reasonably certain to
16 succeed.” *Meyer v. City of Portland*, 67 Or. App. 274, 678 P.2d 741, *rev. den.*, 297 Or. 82
17 (1984); *Just v. Linn County*, LUBA No. 96-157 (Or. LUBA 1997); *Osborne v. Lane County*, 5
18 Or. LUBA 172, 190 (1982). Here, the Applicant is already proposing to form a homeowner
19 association to hold and maintain other private open space on the Property (areas with slopes of
20 over 35 percent).

21 3. Compliance with Section 8-2.220

22 Section 8-2.220 of the applicable Subdivision Code contains general standards about
23 public facility construction specifications. It authorizes the City staff to establish construction
24 specifications and requires public facilities to be in place or guaranteed. When “existing streets”

1 are used, they need to be improved to “current standards.” The section also states that public
2 facilities required of applicant, and not agreed to by an applicant, must be roughly proportional
3 to the impact of the development.

4 Applicant is correct that this Section 220 merely provides a general statement about
5 how the City will implement public facility standards. Other sections of the Subdivision
6 Ordinance actually provide the standards applicable to subdivision approvals (e.g., Section 280
7 for storm drainage and surface water management; Section 270 for sanitary sewer and water;
8 Section 250 for transportation facilities). The reference to “current standards” in Section 220 is
9 not clear and objective because it does not identify the standards to which it is referring.
10 Accordingly, that requirement in Section 220 could not be used to regulate the Application.

11 **4. Compliance with Section 8-2.230**

12 Section 8-2.230 of the applicable Subdivision Code contains requirements for
13 pedestrian connectivity “within developments.” None of the provisions in this Section 230
14 expressly apply to pedestrian facilities outside the proposed subdivision. No party objected to
15 the Application’s compliance, internal to the subdivision itself, with Section 230. The Hearings
16 Officer finds that the internal pedestrian circulation plan provided by Applicant is sufficient to
17 show that the Application can meet the requirements of Section 8-2.230.

18 **5. Compliance with Section 8-2.240**

19 Section 8-2.240 of the applicable Subdivision Code contains requirements for street
20 trees. Street trees are required in planter strips on all arterial and collector streets, and are
21 encouraged on local streets. This Section 240 does not say where planter strips are required and
22 that is addressed in the street cross-section standards elsewhere in the applicable regulations.
23 The Hearings Officer finds that provision of street trees on any collector can be met by a

1 condition of approval. (No arterials are required or proposed by the Application.)

2 **6. Compliance with Section 8-2.270**

3 Section 8-2.270 of the applicable Subdivision Code contains requirements for sanitary
4 sewer and water service improvements. Applicant and City staff agreed that the Application
5 would conform to the City’s sizing and construction specifications. Submittals from Applicant’s
6 engineers stated that all City sewer and water service requirements could and would be met.
7 Accordingly, the Hearings Officer concludes the Application will be able to conform to the
8 requirements of Section 8-2.270.

9 **7. Compliance with Section 8-2.280**

10 Section 8-2.280 of the applicable Subdivision Code contains requirements for storm
11 drainage and surface water management improvements. This provision specifically incorporates
12 the City’s Stormwater Design Standards as adopted by Resolution 517. Applicant and City staff
13 agreed that the Application would conform to the City’s sizing and construction specifications
14 for stormwater management. Submittals from Applicant’s engineers stated that all City
15 stormwater management requirements would be met. No party raised any issue regarding
16 stormwater management or impacts. Accordingly, the Hearings Officer concludes the
17 Application will be able to conform to the requirements of Section 8-2.280.

18 **8. Compliance with Section 8-2.290**

19 Section 8-2.290 of the applicable Subdivision Code contains requirements for electrical
20 and other utilities. The section contains requirements for undergrounding (with potential
21 exceptions for physical constraints) and location of any surface mounted transformers,
22 connection boxes and/or meter cabinets. Applicant and City staff agreed that the Application
23 would conform to the City’s utility requirements. Submittals from Applicant’s engineer stated

1 that all City utility requirements would be met. No party raised any issue regarding utilities.
2 Accordingly, the Hearings Officer concludes the Application will be able to conform to the
3 requirements of Section 8-2.290.

4 **9. Compliance with Section 8-2.250**

5 Section 8-2.250 of the applicable Subdivision Code is a lengthy section (over eight
6 single-spaced pages) containing transportation facility standards. Because of the length of this
7 Section 250, only the sections relevant to this Decision and Final Order are reproduced and
8 discussed below.

9 The key issue raised by project opponents with respect to these standards is the
10 Applicant's proposal for improvements to the existing Belmont Road right-of-way from Talent
11 Avenue to the north boundary of the CORP right-of-way (which is where the City's current
12 Belmont Road right-of-way terminates). For convenience of reference, the Hearings Officer will
13 refer to this section (existing Belmont Road from Talent Ave to CORP) as "Belmont Road
14 Section #1." Opponents argue that the City's minimum right-of-way width and minimum street
15 cross-section development standards are not met for Belmont Road Section #1, and no variance
16 was applied for, so the Application must be denied.

17 As discussed above, another Applicant-proposed section of Belmont Road (the section
18 on the Property running from the south boundary of the CORP right-of-way to proposed
19 Hollyhock Road) also does not meet minimum cross-section development standards. For
20 convenience of reference, the Hearings Officer will refer to this section (proposed Belmont Road
21 on the Property from CORP to Hollyhock) as "Belmont Road Section #2."

22 The Applicant has not proposed any street section or design for the proposed portion of
23 Belmont Road that would cross the CORP property and connect Belmont Road Section #1 to

1 Belmont Road Section #2. The City currently has no right-of-way across the CORP property
2 within which to propose a street design.

3 Subsection 8-2.250.B provides as follows:

4 *B. Development Standards. No development shall occur unless the development has*
5 *frontage or approved access to a public street, in conformance with the provisions of*
6 *Section 260—Access and Circulation, as well as Article 8-3J.6, and the following*
7 *standards are met:*

- 8 1. *Streets within or adjacent to a development shall be improved in accordance with*
9 *the Transportation System Plan Standards;*
- 10 2. *Development of new streets, and additional street width or improvements planned*
11 *as a portion of an existing street, shall be improved in accordance with this*
12 *Section, and public streets shall be dedicated to the applicable City, county or*
13 *state jurisdiction;*
- 14 3. *The City may accept a future improvement guarantee*

15 This provision incorporates the City’s TSP standards with respect to “Streets within or adjacent
16 to a development.” The TSP Standards are found in the City’s TSP (Element D of the Talent
17 Comprehensive Plan) at Section 6. The Standards include functional classifications for all
18 existing and planned streets and complete standards for the development of arterial, collector and
19 local streets.

20 Subsection 8-2.250.B.1 would clearly apply the TSP standards to Belmont Road
21 Section #2, which is within the development. Applicant argues that this subsection does not
22 apply to Belmont Road Section #1 because the term “adjacent” is not clear and objective. The
23 Hearings Officer believes Applicant is correct in that argument. However, Subsection 8-
24 2.250.B.2 requires that, when portions of existing streets are improved, they must meet the
standards of “this Section” (i.e., Section 8-2.250). Belmont Road Section #1 is an existing street.
And subsection 8-2.250.F of “this Section” requires that all street rights-of-way and
improvements shall be within the range of appropriate width adopted in the TSP. This clearly

1 incorporates the TSP and applies it to Belmont Road Section #1. (Applicant also admitted in its
2 Application that the TSP applies to all proposed street improvements.)

3 Belmont Road is classified as a collector street in the TSP, because it is planned to
4 eventually serve as a connection for the Railroad District collector through the Railroad District.
5 Collector streets are required to have at least 70 feet of right-of-way.⁶⁹ A multi-use path cross-
6 section is allowed with 36-foot paved curb-to-curb, a multi-use path on one side with a sidewalk
7 on the other side, and a parkrow on both sides.⁷⁰ Here, the City only owns a 60-foot right-of-
8 way for Belmont Road Section #1. Applicant does not suggest acquiring additional right-of-way
9 and did not apply for a variance. The cross-section proposed by Applicant includes only 31-foot
10 paved curb-to-curb, a multi-use path on one side but no sidewalk on the other side, and a
11 parkrow on only one side. Thus, neither the right-of-way width nor the proposed cross-section
12 meet the required standards of the City's TSP.

13 The Applicant argues that the TSP allows the City to modify right-of-way width and
14 allowable cross sections when an existing street is being upgraded:

15 Where the City is upgrading existing streets and cannot obtain more right-of-way,
16 it shall not be bound by a strict application of the standard cross-sections. Safety
17 and efficiency for all modes should be the primary concern when designing the
18 upgrade.⁷¹

19 The difficulty with Applicant's argument is that there is no evidence in the record showing that
20 the proposed design is based on "Safety and efficiency for all modes." The Hearings Officer
21 notes that "Safety and efficiency for all modes" is also not a clear and objective standard that can
22 be used to regulate a project proposing needed housing.

23 ⁶⁹ TSP at 49.

24 ⁷⁰ TSP at 51.

⁷¹ TSP at 50.

1 Applicant also argues that the proposed buildout of Belmont Road Section #1 exceeds
2 any transportation utility needed to address the impacts of the Application. (The proposed 49-lot
3 subdivision would generate approximately 435 trips daily.) The reason that Belmont Road
4 Section #1 is required to be a collector is not because of Applicant's subdivision, but because
5 this section of Belmont Road is planned to be a future portion of the Railroad District connector
6 that would provide access to all properties through the Railroad District. Therefore, under the
7 nexus and rough proportionality rules of *Nollan-Dolan*,⁷² there is no showing that a greater
8 buildout of Belmont Road Section #1 should be required of Applicant over and above what
9 Applicant has voluntarily offered to develop.

10 The Hearings Officer agrees with Applicant's argument under *Nollan-Dolan*. The
11 Hearings Officer finds that Applicant has volunteered to build out Belmont Road Section #1 to a
12 condition that would at least meet the impacts attributable to the Application, and that
13 Applicant's proposed buildout is not inconsistent with any future right-of-way expansion or
14 greater cross-section improvements that the City might want to pursue. Accordingly, the
15 Application may not be denied for failure of the proposed Belmont Road Section #1
16 improvements to meet the Talent TSP right-of-way width and street cross-section standards.

17 With respect to Belmont Road Section #2, that road segment is also classified as a
18 collector by the TSP. This short segment is also planned to be part of a future Railroad District
19 collector through the Railroad District. Applicant has proposed a 70-foot right-of-way
20 (consistent with TSP requirements for right-of-way width), but the proposed cross-section does
21 not have a sidewalk and parkrow on one side of the buildout. Normally, an on-site improvement

22
23 ⁷² *Nollan v. California Coastal Commission*, 483 U.S. 85 (1987); *Dolan v. City of Tigard*, 512
U.S. 374 (1994).

1 is not subject to a *Nollan-Dolan* takings analysis; it would simply be a multi-factor balancing
2 *Penn Central*⁷³ analysis as to whether the local government had gone “too far” in regulating the
3 private property. Here, however, the Hearings Officer finds that, as with Belmont Road
4 Section #1, the only reason for requiring a collector buildout for Belmont Road Section #2 is that
5 the road could be a potential future link in the Railroad District collector. Accordingly, the
6 *Nollan-Dolan* analysis would apply. The Hearings Officer concludes that the Belmont Road
7 Section #2 buildout at least addresses the impacts of the proposed development, and the
8 Application may not be denied for failing to provide the full collector cross-section for Belmont
9 Road Section #2.

10 Another issue related to Section 8-2.250 involved the location of a street adjacent to the
11 railroad right-of-way. When a subdivision is adjacent to a railroad right-of-way, a street
12 approximately parallel to the right-of-way is required under subsection 8-2.250.Q. The
13 Application demonstrated that the exception to this requirement should apply because of the
14 location of the on-site wetland.

15 The Hearings Officer also notes that private streets are not allowed to provide access to
16 more than two single-family lots by subsection 8-2.250.U. No private streets are proposed by the
17 Application.

18 **10. Compliance with Section 8-2.260**

19 Section 8-2.260 of the applicable Subdivision Code contains requirements for vehicular
20 access and circulation. Subsection 8-2.260 of the Subdivision Code provides three options for
21 access:

22 *F. Access Options. When vehicle access is required for development, access shall be provided
23 by one of the following methods (a minimum of 10 feet per lane is required). These methods*

24 ⁷³ *Penn Central Transp. Co. v. New York City*, 438 U.S. 478 (1978).

1 are “options” to the developer/subdivider.

2 1. Option 1. Access is from an existing or proposed alley or mid-block lane. If a property
3 has access to an alley or lane, direct access to a public street is not permitted.

4 2. Option 2. Access is from a private street or driveway connected to an adjoining
5 property that has direct access to a public street (i.e., “shared driveway”). A public
6 access easement covering the driveway shall be recorded in this case to assure access
7 to the closest public street for all users of the private street/drive.

8 3. Option 3. Access is from a public street adjacent to the development parcel. If
9 practicable, the owner/developer may be required to close or consolidate an existing
10 access point as a condition of approving a new access. Street accesses shall comply
11 with the access spacing standards in Subsection G, below.

12 Here, access will not be from an alley or midblock lane (Option 1) or from a private
13 street⁷⁴ or driveway (Option 2). The only possibility for access is from a public street –
14 Belmont Road. This is consistent with the City’s TSP Project #47, which envisions that
15 Belmont Road would be upgraded to a collector standard and extend across the CORP right-of-
16 way to intersect a future Railroad District Collector.

17 Applicant argues that 8-2.260(F) does not apply because the Application for subdivision
18 approval not “development.” Applicant’s argument has no merit. While no residences would
19 be developed until after final subdivision approval, Applicant is clearly proposing development
20 – including the development of Belmont Road Section #1 and Belmont Road Section #2, which
21 would have to be connected across the CORP property by a new City right-of-way and street
22 section. Moreover, a public highway-rail crossing (as required by ODOT Rail) clearly requires
23 a highway. A “highway” is a public street. ORS 824.200(2). The City of Talent is the “public
24 authority in interest,” because it is the government body “with **jurisdiction over the highway**

74 As noted above, a private street cannot provide access for more than two single-family residential lots. Section 8-2.250.U

1 crossing the railroad track.” ORS 824.200(3) (emphasis supplied). Accordingly, there is no
2 doubt that the connection across the 60-foot wide CORP property will have to be a public street
3 owned by the City of Talent.

4 There is currently no proposal for a cross-section design for the section of Belmont Road
5 that would cross the CORP right-of-way. Presumably, it would match in some fashion the street
6 sections, but Applicant has not provided any proposal and has not responded to City requests for
7 a proposed design from the City.⁷⁵ Applicant’s response has been to repeat its statement that
8 Applicant proposes to convert existing Belmont Road crossing “from a private crossing to a
9 public crossing” and the ODOT Diagnostic shows this is feasible.⁷⁶ Applicant’s intransigence
10 may stem from the fact that Applicant has argued the ODOT Rail “will assume jurisdiction” over
11 Belmont Road for a distance equal to the safe stopping distance.⁷⁷ The assumed jurisdiction
12 referenced by Applicant is only for the safety regulation of the crossing (signage, safety devices,
13 illumination). The City of Talent will remain the “public authority in interest” with ownership
14 and “jurisdiction over the highway” per state statute. ORS 824.200(3). While ODOT Rail gets
15 the last word on all regulatory safety measures, the state statutes are absolutely clear that the
16 public authority in interest maintains jurisdiction over its highway. ORS 824.214 (ODOT Rail’s
17 authority over highway-rail crossing is “in addition to and not in lieu of the authority of any city,
18 county or other political subdivision of the state”). The City of Talent will also have
19 maintenance responsibility for the public street (the “highway” in the highway-rail crossing),
20
21

22 ⁷⁵ See AR 150 – 152.

23 ⁷⁶ AR 278 – 279.

24 ⁷⁷ OAR 741-100-0005

1 except for that narrow area between the ends of the rail ties, which is maintained by the railroad.
2 OAR 741-120-0010.

3 Neither the Application nor materials from the City address how the City will establish a
4 right-of-way across the CORP property. The City’s right-of-way for Belmont Road currently
5 ends at the north boundary of the CORP property. Applicant will dedicate right-of-way
6 beginning at the south boundary of the CORP property. But the City will need to acquire
7 (presumably by purchase) a right-of-way across the 60-foot wide CORP property. A right-of-
8 way is a property interest, typically in the form of an easement. *Realvest Corp. v. Lane County*,
9 196 Or. App. 109, 100 P.3d 1109 (Or. App. 2004). Both CORP and ODOT Rail agree that the
10 City will need to acquire an easement right in order to establish the public street across the
11 CORP property.⁷⁸ Acquisition of that real property interest will require action by the Talent City
12 Council.⁷⁹

13 For its part, Applicant is unwilling to pay for the full cost of the Belmont Road highway-
14 rail crossing improvements. Applicant is correct that it will be an expensive improvement, and it
15 may well provide greater capacity than needed solely for Applicant’s subdivision (certainly if
16 developed to collector street level as envisioned by the TSP). Applicant is willing to improve the
17 Belmont highway-rail crossing to some extent, but at a minimum the Applicant wants the City to
18 enact reimbursement system development charges (SDCs) for Applicant’s benefit,⁸⁰ and argues
19 that these SDCs should be greater than normal because the crossing will be such an expensive
20

21 ⁷⁸ AR 464 (“once the City has determined a course of action, such as securing a public ROW
22 over a crossing, it is necessary to file an application” with ODOT Rail; AR 1225 (“This project
23 will likely require a new or additional easement from the CORP”).

⁷⁹ Talent City Charter, Chap. II §6 (vesting all City powers in the City Council).

⁸⁰ AR 418; AR 1600.

1 improvement.⁸¹ Establishing SDCs for this improvement would also require legislative action by
2 the Talent City Council. ORS 223.297 through ORS 223.314. The statute expressly provides
3 the establishing or modifying SDCs is not a land use decision. ORS 223.314. Rather, it is a
4 legislative decision committed to the discretion of the City Council.

5 In terms of funding, another unresolved issue is the Public Road highway-rail crossing.
6 The ODOT Rail diagnostic flatly requires the closure of the existing Public Road highway-rail
7 crossing to happen simultaneously with the opening of the new public Belmont Road highway-
8 rail crossing. ODOT Rail was clear that “creating a ‘new’ public crossing at Belmont Road
9 would be contingent upon the closure of the existing public crossing to the southeast named
10 Public Road.”⁸² ODOT’s position in this matter is consistent with the planning documents in
11 the record. Applicant relies on the RDMP, but that planning document proposes that “the Public
12 Road/CORP crossing should be closed in exchange for a fully improved crossing at Belmont
13 Road.”⁸³ Similarly Applicant relies on TSP Project #47 in the Comprehensive Plan, but that
14 project calls is to “upgrade [Belmont Rd] railroad crossing & restrict other crossings (Pleasant
15 View, Hilltop, public to south).”⁸⁴ As late as March 2020, ODOT Rail affirmed the ODOT Rail
16 diagnostic.⁸⁵

17 All parties agree that an alternate access for the properties currently using the Public
18 Road highway-rail crossing would be needed if the Public Road crossing is closed. The
19 difficulty is that there is no evidence in this record showing a source of funds to pay for either
20

21 ⁸¹ AR 418.

22 ⁸² *Id.*

23 ⁸³ RDMP at 10.

24 ⁸⁴ TSP at 29.

⁸⁵ AR 1248

1 the closure of the Public Road highway-rail crossing or the provision an alternate access. The
2 Applicant certainly has no willingness to do so, and argues forcefully that closure of the Public
3 Road highway-rail crossing (and any replacement access) has no nexus or rough proportionality
4 to the impacts of its proposed subdivision. Applicant’s answer is that the ODOT Rail diagnostic
5 provides a simple answer – the City and the railroad should be responsible for that funding.
6 Commitment of City funds for a project of that nature would, of course, also require action by
7 the City Council.

8 As described above, this leaves a number of significant issues unresolved before there
9 can be any certainty on when a public street can be established providing access to Applicant’s
10 proposed subdivision. Applicant’s proposed solution is for the Hearings Officer to impose a
11 condition to the effect that the City and the Applicant will negotiate a development agreement
12 addressing all the problems. A development agreement can be either statutory under ORS
13 94.504 through 94.508 (in which case it is a “land use decision”) or non-statutory pursuant to the
14 City’s charter authority. *ZRZ Realty Co. v. City of Portland*, LUBA No. 2004-098 (Or. LUBA
15 2005); *Workers for a Livable Oregon v. City of Albany*, LBA No. 2007-256 (Or. LUBA 2008).
16 A development agreement is a contract,⁸⁶ and it would also require the approval of the Talent
17 City Council.

18 The Hearings Officer finds it impossible to write the kind of condition of approval
19 requested by Applicant.

20 The problem here is not so much the ODOT rail requirement for a crossing permit
21 as the City permitting requirement that a subdivision have street access. The Hearings
22

23 ⁸⁶ *ZRZ Realty* at 9.

1 Officer can only defer compliance with the permit requirement if the record shows, more
2 likely than not, the proposed solution in the condition is “feasible.” A “feasible
3 condition” means that the solution posed by the condition is “possible, likely, and
4 reasonably certain to succeed.” *Meyer v. City of Portland*, 67 Or. App. 274, 678 P.2d
5 741, *rev. den.*, 297 Or. 82 (1984); *Just v. Linn County*, LUBA No. 96-157 (Or. LUBA
6 1997); *Osborne v. Lane County*, 5 Or. LUBA 172, 190 (1982).

7 Here, the proposed condition – allowing the Applicant to try to negotiate a
8 development agreement with the City – has numerous hurdles. The development
9 agreement would need to resolve: the design of the highway-rail crossing, including
10 grading design; the costs for the preparation and pursuit of the ODOT Rail highway-rail
11 crossing permit; the acquisition of City right-of-way over the CORP property; the
12 funding for construction of the street section over the CORP property (including action
13 by the City Council to establish SDCs for the project). Applicant also wants to include
14 processes to work with ODOT Rail; and a process to work with Jackson County and the
15 TID to “review designs and provide constructive input on potential impacts and suggest
16 design solutions.”⁸⁷ Much of Applicant’s requested condition of approval is phrased in
17 somewhat nebulous terms, but in large part it seeks to set up a shadow land use process to
18 resolve the difficulties of establishing street access to the Property outside the normal
19 public process. This is precisely the type of deferred, non-public process that the Land
20 Use Board of Appeals rejected in *Western Express v. Umatilla County*, LUBA No. 2007-

23 ⁸⁷ AR 418.

1 010 (Or. LUBA 2007) (post-decision condition to negotiate and execute development
2 agreement in order to resolve a code compliance issue was illegal).

3 Moreover, there is no evidence in the administrative record that Applicant's
4 request to negotiate a development agreement is either likely or reasonably certain to
5 succeed. To be successful, it would have to result in multiple, discretionary decisions by
6 the Talent City Council to acquire right-of-way; to establish SDC's for the as-yet-
7 undesigned highway-rail crossing; to go forward with the ODOT Rail crossing permit
8 application for Belmont Road in the face of ODOT's insistence that the City
9 contemporaneously submit an application to close the Public Road crossing; and perhaps
10 to fund the closure of the Public Road crossing and alternate access (there is no other
11 financial contributor for this available and no evidence that ODOT Rail will change its
12 position from the diagnostic). There is no evidence in the administrative record showing
13 any interest by the City Council in negotiating a development agreement outside the
14 public process to resolve these issues. Accordingly, the Hearings Officer is unable to
15 conclude that such a condition solution would be "likely, and reasonably certain to
16 succeed."

17 In making those decisions, the Council would not be limited to the subdivision
18 code and Comprehensive Plan provisions incorporated therein. Rather, the Council could
19 consider other portions of the Comprehensive Plan (such at the Public Facilities element),
20 the City budget, the City's transportation and funding priorities, or any other legitimate
21 purpose of government. The Hearings Officer has no influence over what the City
22 Council might consider and does not wish to influence the City Council. But there is no
23 evidence in this record that Applicant's proposed development agreement solution is

1 likely and reasonably certain to succeed. (The Hearings Officer is also reluctant to
2 impose a condition that would not be clear and objective – in violation of the Needed
3 Housing statute.)

4 Even without considering Applicant’s proposed development agreement solution,
5 and without considering the difficulty posed by ODOT’s requirement to close the Public
6 Road highway-rail crossing as a condition of approving the Belmont Road highway-rail
7 crossing, the Applicant has stated an unwillingness to fully fund the expensive Belmont
8 Road highway-rail crossing (without at least some level of SDC reimbursement from the
9 City) and there is no evidence in the record showing that the SDC reimbursement funding
10 (which requires legislative action by the City Council) or other funding from the City is
11 available (including evidence of how needed right-of-way would be procured). Even
12 under those limited facts, the Hearings Officer cannot conclude that there is public street
13 access to the Property.

14 In sum, the Hearings Officer concludes that the Applicant has not shown that
15 there is public street access to the Property, or that it can be feasibly provided as a
16 condition of approval given the facts in this record. Accordingly, the Application must
17 be denied.

18 **11. Zoning Code Issues**

19 Having determined the Application does not meet the Subdivision Code, there is
20 no need to go through the applicable Zoning Code in detail. The only separate issue
21 regarding the Zoning Code was the requirement for a Traffic Impact Study, which is
22 discussed below.

1 **12. Other Arguments of the Parties**

2 **a. Feasibility of ODOT Rail Crossing Permits**

3 Project opponents argue that the Application must be denied because it is
4 impossible for Applicant to obtain a crossing permit for the Belmont Road highway-rail
5 crossing given that: 1) only the City can even apply for that permit; 2) the ODOT Rail
6 diagnostic (recently affirmed) requires the closure of the Public Road highway-rail
7 crossing simultaneously with opening any new Belmont Road highway-rail crossing;
8 3) Jackson County will require alternate crossing access for properties currently using the
9 Public Road highway-rail crossing, and 4) there is no entity willing to fund (including
10 required property condemnations) the an alternate crossing access for the Public Road
11 crossing.

12 When another agency permit is required for a project, the courts typically hold that
13 acquiring the other agency permit should be a condition of approval, to be satisfied prior to
14 permit issuance. LUBA cases hold that the applicant need only show “that the applicant is not
15 precluded from obtaining such state agency permits as a matter of law”⁸⁸ *Bouman v. Jackson*
16 *County*, LUBA No. 92-082 (Or. LUBA 1992) at 25. In *Bouman*, the applicant’s project needed
17 approvals from the Oregon Water Resources Department (“WRD”). The applicant could apply
18 for that permit, and there was no argument that WRD was precluded as a matter of law from
19 issuing the requested permits. *Bouman v. Jackson County*, LUBA No. 92-082 (Or. LUBA 1992)
20 at 25 – 26. In *Wal-Mart Stores*, mitigation for the proposed project required widening an
21 existing city road across a railway right-of-way. The City of Bend and ODOT Rail had already
22

23 ⁸⁸ This standard applies equally to agencies other state agencies.

1 agreed to a condition of approval that applicant would pay for and process the crossing approval
2 process. LUBA held that the “city decision approving the subject application simply requires
3 that there be substantial evidence in the record that the applicant is not precluded from obtaining
4 such state agency permits as a matter of law.” *Wal-Mart Stores, Inc. v. City of Bend*, LUBA No.
5 2006.040 (Or. LUBA 2006) at 22 – 25.

6 Applicant argues that there was an at-grade crossing approved at this location in 1995
7 that expired,⁸⁹ so that proves a crossing is feasible. Applicant’s consultant also testified that a
8 below-grade crossing has been approved at one point in the crossing’s history.⁹⁰ While
9 interesting, a permit from 25 years ago is not evidence of current feasibility. The best evidence
10 of feasibility is the January 2018 ODOT Rail diagnostic which plainly required closure of the
11 Public Road crossing as a condition of opening any new at-grade public highway-rail crossing at
12 the Belmont Road location. While not a final order from ODOT Rail, there is no evidence it has
13 or will change its position on that issue.

14 The cases above and all the cases reviewed by the Hearings Officer are factually
15 distinguishable from the facts in this case. In every case reviewed by the Hearings Officer, the
16 applicant had a legal right to apply for the permit or, as in *Wal-Mart*, the allowable permit
17 applicant had approved the application. Here, Applicant has no legal right to apply for a crossing
18 permit; and the City has significant hurdles to clear before deciding to apply, including right-of-
19 way acquisition, crossing design, and design and construction funding by the City (legislative
20 action to establish SDCs acceptable to Applicant at a minimum). Being “precluded as a matter
21 of law” is a high standard, however, and ODOT Rail is not precluded by law from issuing a
22

23 ⁸⁹ AR 464 – 471.

24 ⁹⁰ AR 1223.

1 crossing permit – no matter how many difficulties there may be in actually getting to an
2 application or no matter how unlikely it may be to obtain a permit that does not also require
3 closure of the Public Road crossing. Therefore, the Hearings Officer declines to conclude that
4 the ODOT crossing permit for the potential new public highway-rail crossing at Belmont Road is
5 legally impossible.

6 Applicant also states that the ODOT diagnostic as just a “starting point.” Applicant relies
7 on language out of the ODOT Design Manual but does not give the full context:

8 The field diagnostic team will meet on-site to determine the required safety
9 upgrades to the railroad crossing. The findings from the field diagnostic review
10 will be the starting point for:

- 11 • Identifying design constraints and work to be done;
- 12 • Completing the Railroad-Highway Public Crossing Safety Application
13 (which is required to obtain the Rail Crossing Order from Rail Division);
- 14 and
- 15 • Obtaining any Region and/or State Traffic Roadway Engineer approvals.

16 ODOT Manual § 16.2. This shows that the field diagnostic actually makes safety
17 determinations, and the next steps are identifying design constraints and making applications.

18 There is no indication that a diagnostic is a final decision that cannot be modified, but it is
19 helpful to understand that the field diagnostic is a serious step in the ODOT Rail process and not
20 a mere “starting point.”

21 **b. Failure to Provide Traffic Impact Study**

22 Project opponents argue that the Application must be denied because Applicant failed to
23 provide a Traffic Impact Study (“TIS”). Subdivision Code Section 8-2.260.D requires a TIS for
24 a subdivision application when the standards in Section 8-3L.9 of the Zoning Code. Subsection
25 8-3L.920.A requires a TIS under the following four circumstances:

*A. Transportation Impact Study (TIS) shall be required if any of the following actions
26 exist:*

- 1 *1. A zoning or comprehensive plan map or text amendment is projected to generate 500*
or more net daily vehicle trips.
- 2 *2. A development proposal is projected to generate fifty (50) or more net peak hour trips*
on an arterial or collector segment or intersection.
- 3 *3. A land use action or development proposal will impact known safety, congestion or*
capacity problems.
- 4 *4. A land use action or development proposal is on a highway segment with special*
access controls

5 Only reasons 2 and 3 are potentially relevant here. Applicant's expert transportation
6 consultant, using accepted professional standards, determined the reason 2 was not met because
7 the 49-lot subdivision would generate 49 PM peak trips. The consultant determined reason 3
8 was not met because there were no known safety, congestion or capacity problem in the area of
9 the proposal. Opponents argued that the transportation expert failed to account for possible
10 accessory dwelling units that might be constructed in the future and failed to account for the
11 property owners who currently using the Public Road rail crossing and who would use the
12 Belmont Crossing in the future. The Planning Commission denied the Application for the same
13 reason.

14 The decision by the Planning Commission was incorrect. The plain language of
15 8-3L.920.A only requires the trips from the "development proposal" to be calculated and not
16 trips from some hypothetical future condition where a lot owner might add an accessory unit or
17 where other properties might also use the same highway-rail crossing. The "development
18 proposal" is for 49 single-family residences and Applicant's expert calculated the number of
19 trips correctly.

20 The Applicant did prepare and present a TIS at the Hearing before the Hearings Officer
21 which confirmed that the proposed projects impacts were well within the scope allowed by the
22 City of Talent street capacity and level of service standards.

1 **c. City’s Contractual Commitments Under 1977 Arndt Easement**

2 Applicant argues that the City has a contractual duty in good faith to work cooperatively
3 with Applicant to resolve any issues regarding the application for the Belmont Road highway-
4 rail crossing permit. Applicant is incorrect.

5 The easement document in question is a 1977 Deed and Grant of Easement.⁹¹ In 1977,
6 the City acquired land from Arndt (Applicant’s predecessor) to use for municipal water storage
7 tanks; a 20-foot with a pipeline and road ingress/egress; and drainage easement; and a temporary
8 construction easement. The easement is poorly written, but the City’s obligations have nothing
9 to do with cooperating in any development of access to the Property.

- 10 • For the pipeline/road easement, if the “fee simple” is ever developed, the City
11 agrees to allow the easement area to be part of a dedicated road at the request of
12 the “fee simple owner.” The terms “fee simple” and “fee simple owner” are not
13 legally described or identified, so the enforceability of this provision is open to
14 question.
- 15 • For the surface drainage easement, the easement says that if there is a
16 development “of the land” the developer can relocate the drainage to pipes
17 sufficient to accommodate the drainage, and the City will maintain the outflow.
18 The right to relocate a drainage easement is unremarkable. Again, the term “the
19 land” is not legally described, so the enforceability of this provision is also open
20 to question.

23 ⁹¹ AR 422 - 426.

1 Nothing in the 1977 Deed and Grant of Easement requires the City to take undertake action or
2 undertake any expense with respect to the Applicant’s access issues.

3 **d. Applicant’s Duty to Implement the Comprehensive Plan**

4 The Applicant also repeatedly states that its proposal is “fully consistent” with the
5 RDMP, the TSP and the ODOT diagnostic. While it is true that Applicant’s proposals for
6 Belmont Road are not inconsistent with the RDMP, the TSP and the ODOT diagnostic, they also
7 ignore elements of those documents. Applicant ignores the portions of the RDMP that state that
8 the Public Road crossing should be closed “in exchange for” an improved Belmont Road
9 crossing. Applicant also ignores the full scope of TSP Project #47 which links upgrading the
10 Belmont Road crossing to restrictions of other crossings, including the Public Road crossing to
11 the east. Applicant agrees that the ODOT diagnostic also explicitly requires closure of the Public
12 Road crossing before the opening of any upgraded Belmont Road crossing. This does not mean
13 that Applicant should be required to pay for the Public Road crossing closure or the revisions of
14 other crossings. But Applicant’s arguments paint an incomplete picture of what the City’s
15 planning documents, which were done with the involvement of all stakeholders, actually say.

16 Applicant also argues that the City has an affirmative duty to implement its TSP and fund
17 “vital infrastructure” such as the Belmont Road highway-rail crossing. Applicant seems to
18 believe that City failure to provide funding now for access to Applicant’s Property violates the
19 City’s land use planning obligations. The Applicant provides no authority for this statement.
20 The City’s TSP identifies 50 projects with a total estimated cost of over \$35 million, which is
21 likely an underestimate of the costs. Many of the projects are identified as high priority, which
22 the City would like to accomplish in the near term. The three projects in the Railroad District are
23 classified as low priority projects. This does not mean they will never happen, it just means they

1 are lower priority than other projects. The City’s planning documents do include projects that
2 would provide public collector streets to the Property; they are just low priority projects, and the
3 City is not required to fund those projects immediately. Oregon case law recognizes that
4 municipalities have discretion on opening streets, even when the right-of-way has already been
5 dedicated. *E.g., Muzzy v. Wilson*, 259 Or. 512, 518, 487 P.2d 875 (1971) (no duty to open
6 dedicated street); *Prosch v. LaGrande*, 14 Or. App. 546, 549, 514 P.2d 351 (1973) (acceptance
7 of dedication does not obligate city to construct improvements).

8 **e. Applicant’s Takings Claims**

9 In many of its submittals, the Applicant emphasizes that the City may not impose
10 exactions that are not related to and roughly proportional to the impacts of the proposed project.
11 *See Nollan v. California Coastal Commission*, 483 U.W. 825 (1987) (exactions require an
12 essential nexus between the condition imposed and a legitimate state interest); *Dolan v. City of*
13 *Tigard*, 512 U.S. 374 (1994) (the condition public easement imposed had to be roughly
14 proportional to the impacts of the project); *Koontz v. St. Johns River Management District*, 570
15 U.W. 595 (2013) (*Nollan/Dolan* analysis applies to permit denial if the denial is based on
16 applicant’s refusal to comply with an unconstitutional condition to perform off-site mitigation, or
17 to pay for such mitigation).

18 The Hearings Officer recognizes that the Applicant has objected to any suggestion that it
19 would be required to pay any portion of the closure of the Public Road highway-rail crossing.
20 Applicant also objects to any requirement to pay any portion of an alternative access for property
21 owners affected by closure of the Public Road crossing. Applicant has also argued that it may
22 not be required to bear the cost to fully build out the Belmont Road connector from Talent
23 Avenue to the CORP right-of-way boundary, but Applicant has voluntarily proposed to fund the

1 road cross-section shown in its Application. The Hearings Officer understands that Applicant
2 has also voluntarily agreed to construct the box culvert that will be required by TID and the
3 Bureau of Reclamation. With respect to design and construction of the actual Belmont Road
4 highway-rail crossing section (the 60-foot road section across the CORP right-of-way including
5 acquisition of right-of-way and associated grading of Belmont Road that would be required by
6 ODOT Rail), the Hearings Officer understands that the Applicant is unwilling to fund the entire
7 project and, at a minimum, would want to the City to enact SDCs to reimburse some portion of
8 the expense. The exact amount of that improvement that Applicant would willing to fund is
9 unclear, which is presumably what the Applicant wanted to negotiate with the City in a post-
10 approval development agreement. But this decision does not require Applicant to contribute any
11 more than Applicant is willing to contribute voluntarily. With respect to the City's need to
12 acquire right-of-way for the Belmont Road highway-rail crossing, the Hearings Officer is not
13 assuming that Applicant would contribute anything toward that acquisition. As far as the
14 Hearings Officer can tell from the record, Applicant and the City have had no discussions with
15 each other or with CORP on the acquisition of a right-of-way easement.

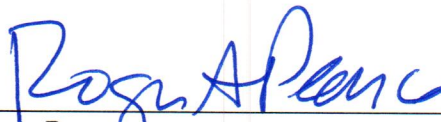
16 The Hearings Officer wishes to make it clear that this Decision and Final Order is not
17 premised on Applicant's refusal to agree to fund any off-site improvements or other exactions or
18 Applicant's refusal to comply with any off-site mitigation. With respect to any of the
19 improvements discussed in this section, the Hearings Office does not expect Applicant to fund
20 more than what has been voluntarily proposed by the Applicant. Put another way, the Hearings
21 Officer cannot (and will not) require Applicant to fully fund the improvements required to
22 effectuate the public highway-rail crossing to the Property, but the Hearings Officer cannot
23 require any other party fully fund those improvements either.

1 **IV. ORDER**

2 Having reviewed all of the evidence, arguments, and applicable criteria, the Land Use
3 Hearings Officer for the City of Talent ORDERS as follows:

- 4 1. The appeal of Applicant Tony and Tory Nieto is hereby DENIED.
- 5 2. The Application for subdivision approval to the City of Talent under File No. SUB
6 2020-001 and APL 2020-002 is hereby DENIED

7 Dated this 9th day of September 2020.

8 
 9 _____
 10 Roger Pearce,
 11 City of Talent Land Use Hearings Officer

12 **APPEAL NOTICE**

13 The Hearings Officer's Decision and Final Order is the final decision of the City of Talent on
 14 this application. This decision may be appealed to the Oregon Land Use Appeals Board (LUBA)
 15 within 21 days of the date it is mailed. This decision is being mailed on _____,
 16 2020. Please contact LUBA for specific information at DSL Building, 775 Summer Street NE,
 17 Suite 330, Salem, OR 97301-1283 or by phone at (503) 373-1265.