Michaela Ramirez

From: Tamra Mabbott
Sent: Friday, September 19, 2025 10:40 AM
To: Michaela Ramirez
Cc: Clint Shoemake
Subject: Fw: September Planning Commission
Attachments: FINAL loop road LUBA decision.pdf

Michaela - please print this email and attachment for me and Clint.
We can discuss during staff meeting Tuesday. Clint will be out but I want to share with the rest of the team.

From: Jonathan Tallman <jonathan@tallman.cx>
Sent: Wednesday, September 17, 2025 9:23 PM
To: Michaela Ramirez <mramirez@morrowcountyor.gov>; Tamra Mabbott <tmabbott@morrowcountyor.gov>
Cc: August Peterson <apeterson@morrowcountyor.gov>
Subject: Re: September Planning Commission

[EXTERNAL EMAIL] - STOP and VERIFY - This message came from outside of Morrow County Gov

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Michaela and Tamra,

I am submitting this letter to be placed in the public record for the September 30, 2025 Planning Commission hearing regarding code updates and related matters. I intend to speak on this issue at the hearing as well.
My concern involves the BPA Park Blocks / Heritage Trail corridor, which is currently identified as being only 60% complete in draft form. As an adjacent property owner, and with Morrow County also a direct neighbor, I am requesting that several questions be addressed on the record before this project advances further:

1. Alignment and Boundaries
   – Where will the BPA Trail be aligned in relation to my property?
   – Will trail easements or buffers cross or affect private parcels, including mine?
2. Access and Connectivity
   – What formal access points are being planned, and do any assume connections across my frontage?
   – Has the County committed to managing trail access where it intersects with private property?
3. Design at 60% Stage
   – What elements of the trail design are still open for input, including fencing, buffers, and surfacing standards? What standards is the city using now?
   – How will nuisance impacts such as trespass, lighting, and noise be addressed for adjacent landowners?
4. Legal and Property Impacts
   – Will this project establish any new public easements or modify existing BPA easements?

– How does the trail corridor interact with zoning, the Comprehensive Plan, and prior findings in my LUBA (attached) case regarding road standards and access?
– Will adjacent landowners be indemnified against liability arising from trail users?

5. Public Records and Transparency
   – I have already submitted a public records request to the City of Boardman for documents related to this project, but have not received a response.
   – As you can see from the first map I attached, it clearly shows an RV Park designation, but in later versions this has been blurred out or omitted. How can such a change be made with no public discussion, and no paper trail showing who directed it? Please see attached below maps and Luba decision.
   – Will the County itself ask for these documents and require a full explanation of mapping changes for accountability and transparency, especially where they intersect with the BPA trail corridor? Please see attached video of meeting reference of BPA trail and Rv site.

Because the County is a neighboring landowner along this corridor, these questions directly affect both of us. I ask that this letter be incorporated into the hearing record so that my concerns are preserved, and so that they can be addressed transparently as part of the County's review process.
Thank you for your attention to this matter. I look forward to discussing it further at the upcoming hearing as well as have the county find out information for these concerns.
Sincerely,

Jonathan Tallman

City of Boardman RV site map

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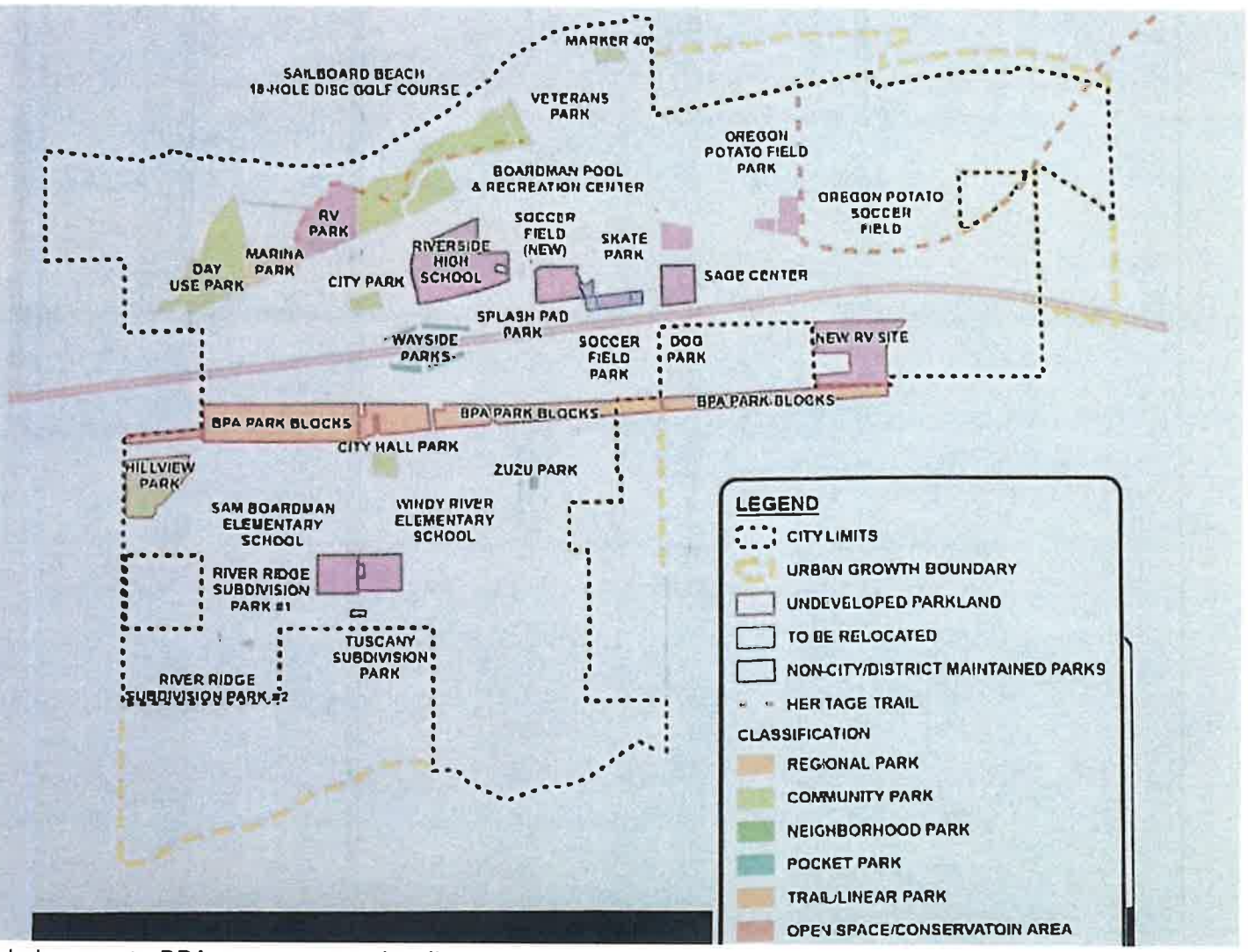
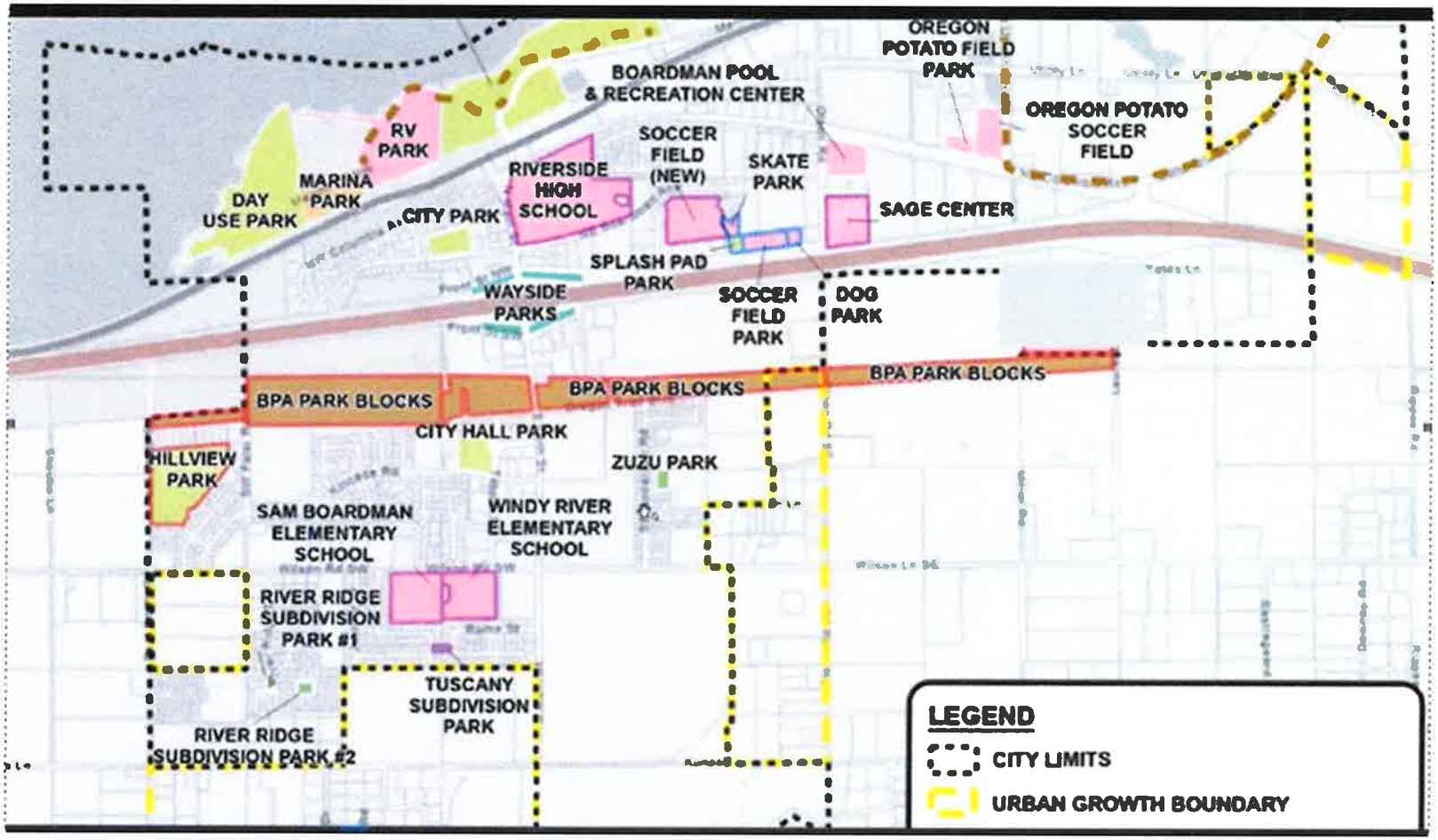


Blurr e out omission and changes to BPA easement and trail.


OREGON POTATO FIELD PARK
BOARDMAN POOL & RECREATION CENTER
OREGON POTATO SOCCER FIELD
RV PARK
SOCCER FIELD (NEW)
SKATE PARK
MARINA PARK
DAY USE PARK
CITY PARK
RIVERSIDE HIGH SCHOOL
SAGE CENTER
SPLASH PAD PARK
WAYSIDE PARKS
SOCCER FIELD PARK
DOG PARK
BPA PARK BLOCKS
BPA PARK BLOCKS
BPA PARK BLOCKS
CITY HALL PARK
HILLVIEW PARK
ZUZU PARK
SAM BOARDMAN ELEMENTARY SCHOOL
WINDY RIVER ELEMENTARY SCHOOL
RIVER RIDGE SUBDIVISION PARK #1
TUSCANY SUBDIVISION PARK
RIVER RIDGE SUBDIVISION PARK #2
LEGEND
CITY LIMITS
URBAN GROWTH BOUNDARY

I. PETITIONERS' STANDING

Petitioners, 1st John 2:17, LLC and Jonathan Tallman, appeared before Respondent City of Boardman ("City") orally and in writing during the proceedings below and timely filed a Notice of Intent to Appeal the challenged decision. ORS 197.830(2). Petitioners have standing.

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision and Relief Sought

The challenged decision by the Boardman City Council governing body approves "Zoning Permit" #ZP21-068, which authorizes the reconstruction of Yates Lane, an existing unpaved, graveled City Street, and the development of Devin Loop, a new City street (collectively, the "Loop Road"). Rec-2-8 (City Council decision) (App-1); Rec-10-17 (ZP21-068) (App-2, p 2-9); Rec-311-43 (Plans).[1] The "Loop Road" will be situated south of I-84 and east of Laurel Lane. Rec-4. The decision states that the Loop Road will only be within the City's Commercial District-Service Center Sub District ("C-SC subdistrict"). Rec-4. However,

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[1] The challenged decision's findings attach three "attachments", including Petitioners' notice of appeal to the City Council and the Planning Commission's decision, which are not clearly incorporated as findings and are therefore not part of the challenged decision. *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992) ("if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated.").

Petitioners dispute that conclusion – surveys of the right-of-way dedications for the Loop Road in the record show that a portion of the Loop Road is within the 395-foot-wide BPA Transmission Line Easement. Rec-383-84. The BPA Transmission Line Easement has its own City zoning district – the Commercial District-BPA Transmission Easement Sub District ("BPA subdistrict"). BDC 2.2.210.[2] The Loop Road is also within the BPA subdistrict.

Petitioners seek reversal or remand of the challenged decision.

B. Summary of Arguments

The disputed Loop Road consists of the reconstruction of existing and construction of new City streets, which are "public transportation facilities" to which the standards of the Boardman Development Code (BDC) 3.4 expressly apply, the purposes for which are "to provide standards for attractive and safe streets that can accommodate vehicle traffic from planned growth, and provide a range of transportation options, including options for driving, walking and bicycling". BDC 3.4.000.A. The City misconstrued applicable law in concluding that the Loop Road does not require land use review when its land development code expressly provides otherwise.

BDC 3.4.100.A.2 requires that the "Development of new streets, and additional street width or improvements planned as a portion of an existing street

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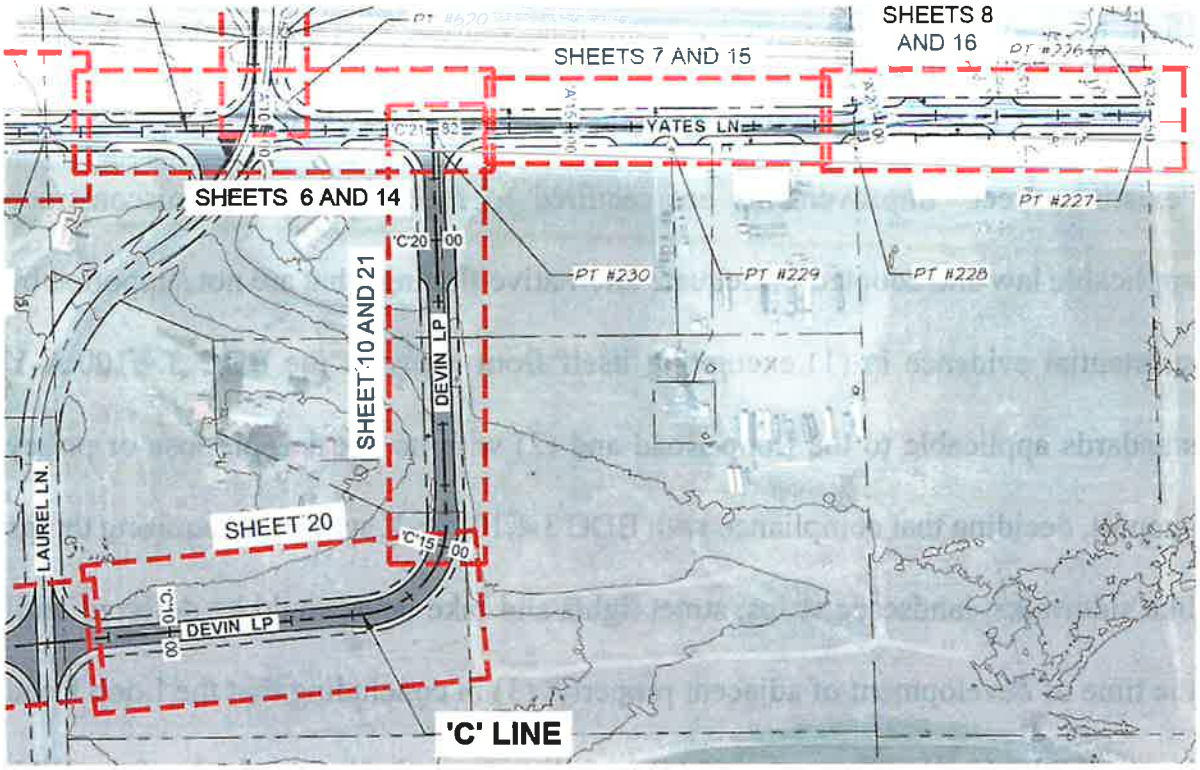
[2] Cited Boardman Development Code (BDC) provisions are App-5.

shall be improved in accordance with this Section." "This Section" is BDC 3.4.100.A-Y. BDC 3.4.100(A)-(Y) contain the standards that "new streets" and "existing street" improvements are required to meet. The City misconstrued applicable law and adopted inadequate alternative findings that are not supported by substantial evidence in (1) exempting itself from many of the BDC 3.4.100.A-Y standards applicable to the Loop Road and (2) with no textual, purpose or policy support, deciding that compliance with BDC 3.4.100.A-Y standards requiring things like sidewalks, landscape strips, street lights and bike lanes could be deferred until the time of development of adjacent property; (3) in concluding that the Loop Road is a "neighborhood collector"; and (4) in failing to apply the standards of the BPA subdistrict that expressly apply to the portions of the Loop Road that is approved to be developed in that subdistrict.

C. Summary of Material Facts

The disputed "Loop Road" consists of a new City street (Devin Loop) and reconstruction of an existing, unpaved, graveled City street (Yates Lane) (Rec-313):



The Loop Road is proposed to be located south of the I-84/Laurel Lane interchange (aka Port of Morrow (POM) Interchange) and within the POM Interchange area. Rec-2. The POM Interchange area is the subject of the Port of Morrow Interchange Area Management Plan (POM IAMP), which was adopted by the City in 2012 as an amendment to its Transportation System Plan (TSP). Rec-2; App-3 (POM IAMP); App-3, p 2 (Ordinance 2-2012). The challenged decision approves reconstructing existing "Yates Lane" and its intersection with Laurel Lane and constructing new "Devin Loop" and its new intersection with Laurel Lane. The alignments for the improvements are identified in the POM IAMP, Figure 7-2 as "D" (Devin Loop) and "YATES LN" (App-3, p 98):

Project "D" is described in the POM IAMP, Table 7-1 (App-3, p 99) as:

"• Construct a new Collector street connection to Yates Lane that would access Laurel Lane just north of the existing BPA transmission easement.

"• Restrict the Laurel Lane/Yates Lane intersection to right-in/right-out access only."

And is further described in POM IAMP, p 81-82 (App-3, p 100-01) as:

"A new connection to Yates Lane from Laurel Lane will be constructed (at City Collector standards) just north of the existing BPA transmission easement. The existing Yates Lane intersection will remain as a right-in/right-out access. * * *"

While the alignment of existing Yates Lane and the restriction of its intersection with Laurel Lane to right-in/right out access only is identified in the POM IAMP, the full reconstruction of Yates Lane is not identified as an improvement. *See* POM IAMP, Table 7-1 (App-3, p 99).

Petitioner Jonathan Tallman is the managing member of 1st John 2:17, LLC. Rec-285. Petitioner 1st John 2:17, LLC owns property west of and abutting Laurel Lane (tax lots 3302, 3207 and 3205) and directly across Laurel Lane from the Loop Road improvements. Rec-285.

In September 2021, Petitioners learned that the City planned to start construction of the Loop Road later that year. The City provided no notice to Petitioners of that City decision to construct the Loop Road, even though as an owner of property within 250 feet of the Loop Road site, they were entitled to notice of that decision. BDC 4.1.400.C.1.a. Rather, Petitioners discovered by inquiring to the City that the City had entered into a contract with a construction company in August 2021 to build the Loop Road. Petitioners appealed that decision to LUBA on September 21, 2021 in LUBA No. 2021-086. That appeal is currently pending at LUBA awaiting a decision on the City's motion to dismiss.

On March 11, 2022, while LUBA No. 2021-086 was pending, again without any notice or opportunity for comment or hearing, the City's planning official approved a "Zoning Permit" authorizing the Loop Road construction at issue in

LUBA No. 2021-086 under the City's Type I procedures for "Ministerial" decisions. Rec-302.

Sometime after that "Zoning Permit" decision was made, the City decided that it should have been processed as a Type II "Administrative" decision requiring notice and opportunity for a public hearing and so on April 4, 2022, the City mailed notice of the "Administrative Decision" and provided an opportunity for comment and appeal. Rec-255, 301. Although the "Administrative" decision's findings purported to only approve construction of the Loop Road east of Laurel Lane, the "Zoning Approval" sheet signed off on by the planning official and an attached map of the improvements appeared to approve construction of the entirety of the Loop Road (including associated improvements to Laurel Lane) both east and west of Laurel Lane, including on Petitioners' property west of Laurel Lane, tax lots 3302, 3207 and 3205, over which there was and is no existing City right-of-way. Rec-306-08. Petitioners appealed that decision both locally and as a precaution to LUBA in LUBA No. 2022-037. LUBA No. 2022-037 is currently suspended.

The City took up the local appeal and held a public hearing before the Planning Commission on Petitioners' appeal. Rec-5, 225. At the public hearing, Petitioners argued that the City erred in approving the Loop Road on Petitioners' property over which there is no existing right-of-way and in not applying or finding compliance with any of the City's standards for transportation facilities. Rec-284-

91. The Planning Commission denied the appeal and affirmed the planning official's decision, but now "clarifying" that the "Administrative Decision" approved the Loop Road only on the east side of Laurel Lane. Rec-254. Petitioners appealed the Planning Commission's decision to the City Council who, after a public hearing, denied the appeal and upheld the Administrative Decision approving the Loop Road. Rec-2.

This appeal followed.

III. LUBA'S JURISDICTION

LUBA's jurisdiction is comprehensively governed by statute. ORS 197.825; *Lake Oswego Preservation Society v. City of Lake Oswego*, 69 Or LUBA 475, 481 (2014); *Conte v. City of Eugene*, 66 Or LUBA 95, 99 (2012). The challenged decision is a final "land use decision" over which LUBA has exclusive jurisdiction. ORS 197.825(1); ORS 197.015(10)(a). The challenged decision does not fall under the transportation facility exception to the definition of "land use decision" at ORS 197.015(10)(b)(D) because the Loop Road is not "consistent" with the City's comprehensive plan and land use regulations, as explained below.

1. The challenged decision is a "land use decision" under ORS 197.015(10)(a)(A).

The challenged decision erroneously takes the position that the City's approval of the Loop Road is "not a land use decision." LUBA affords no deference to a local government on issues of state law. *Forster v. Polk County*, 115 Or App

475, 478 (1992). A "land use decision" is expressly defined by statute to include "a final decision or determination made by a local government" that "concerns" the application of a comprehensive plan provision or land use regulation. ORS 197.015(10)(a)(A). LUBA has explained that a decision "concerns" the application of a comprehensive plan provision or land use regulation if a provision or regulation is actually applied or should have been applied in making the decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004); *Bradbury v. City of Independence*, 18 Or LUBA 552, 559 (1989); *Dorall v. Coos County*, 53 Or LUBA 32, 34 (2006). The challenged decision is the City governing body's final decision to approve the Loop Road. The Boardman Development Code is quintessentially a "Land Use Regulation."[3] In making the challenged decision, the City applied multiple BDC land use regulations for Type II Administrative decisions in BDC 4.1.400, certain standards for uses in the C-SC subdistrict in BDC 2.2.200, and certain transportation

[3] ORS 197.015(11) defines a "land use regulation" as "any local government zoning ordinance" or "similar general ordinance establishing standards for implementing a comprehensive plan." BDC 1.1.300 "Consistency with Plan and Laws" states that every "development and use application and other procedure initiated under this Code shall be consistent with the [City comprehensive plan] as implemented by this Code * * *." BDC 1.0 explains that the BDC "is a comprehensive land use and development code that governs all of the land" within the City. BDC 1.0 also explains under "Chapter 2" that "as required by state law, the zones or 'land use districts' conform to the Boardman Comprehensive Plan." BDC 1.0 under Chapter 3 further explains: "The design standards contained in Chapter 3 apply throughout the City. They are used in preparing development plans, and reviewing applications, to ensure compliance with City standards for access and circulation, landscaping, parking, public facilities, surface water management * * *."

standards in BDC 3.4.100. Rec-5 (the City processed the application as a "Type II land use decision"; "The application is being reviewed under Boardman Development Code ("BDC") Chapter 4 Applications and Review Procedures, 4.1 Types of Applications and Review Procedures, and 4.1.400 Type II Procedure (Administrative) G Appeal. * * * These findings address the applicable criteria in the development code[.]"; the application is "subject to BDC 2.2.200."); Rec-6 (finding that "the following standards apply to the proposed roadways" [application of BDC 3.4.100.C, E, F, J, O and N.1 follow]); Rec-8 (findings addressing BDC 3.4.100.X). And the City should have applied more.[4] *Jaqua*, 46 Or LUBA at 574. Accordingly, the challenged decision "concerns" the application of the City's land use regulations because many regulations were actually applied, and more should have been applied, in making the decision and, therefore, the challenged decision is a "land use decision" subject to LUBA's exclusive jurisdiction. ORS 197.015(10)(a)(A); *Jaqua*, 46 Or LUBA at 574.

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[4] BDC Chapter 4.2 (Development Review and Site Design Review); BDC Chapter 3.1 (Access and Circulation); BDC Chapter 3.2 (Landscaping, Street Trees, Fences and Walls); BDC 3.4.100.A (Development Standards); BDC 3.4.100.G (Traffic Signals and Traffic Calming Features); BDC 3.4.100.I (Street Alignment and Connections); BDC 3.4.100.K (Intersection Angles); BDC 3.4.100.L (Existing Rights-of-Way); BDC 3.4.100.Q (Development Adjoining Arterial Streets); BDC 3.4.100.T (Street Names); BDC 3.4.100.U (Survey Monuments); BDC 3.4.100.V (Street Signs); BDC 3.4.100.W (Mail Boxes); BDC 3.4.100.Y (Street Cross-Sections); BDC 3.4.400 (Storm Drainage); BDC 3.4.500 (Utilities); BDC Chapter 3.5 (Stormwater Management); BDC 2.2.210 (BPA Transmission Easement Sub District).

2. The transportation facility exception to the definition of "land use decision" at ORS 197.015(10)(b)(D) does not apply.

The challenged decision does not fall under the transportation facility exception to the definition of "land use decision" at ORS 197.015(10)(b)(D) for decisions that determine "final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations". That exception expressly only applies if the transportation facility is "consistent" with the comprehensive plan and land use regulations. *7th Street Station v. City of Corvallis*, 58 Or LUBA 93, 99 (2008), *aff'd*, 227 Or App 506, 206 P3d 286 (2009). The Loop Road is not "consistent" with the City's comprehensive plan, the TSP (which is an element of the City's comprehensive plan (App-4, p 1)), the POM IAMP (which is an amendment to the City's TSP (App-3, p 2)), or the City's land use regulations expressed in the BDC. Accordingly, the transportation facility exception to the definition of "land use decision" does not apply.

In *Regency Centers, L.P. v. Washington County*, 69 Or LUBA 135 (2014), *aff'd*, 265 Or App 49, 335 P3d 856 (2014), LUBA held that a county decision authorizing certain improvements to an arterial street, which would result in a six-lane, 80-foot wide arterial street within a 101-foot right-of-way, did not fall under the transportation facility exception to the definition of "land use decision" where the street was inconsistent with the county's TSP and land use regulations – the

county's TSP designated the street to be no more than five lanes and the county's land use regulations specified the maximum width of arterial streets to be 74-feet wide within 98-foot rights-of-way. The circumstances here are the same as in *Regency* – the challenged decision approves roadways that are inconsistent with the City's comprehensive plan, including the TSP and POM IAMP, and land use regulations, and so the transportation facility exception to the definition of "land use decision" does not apply.

a. The Loop Road is not consistent with the City's comprehensive plan, which includes the City's TSP and POM IAMP.

The POM IAMP identifies Devin Loop as a "new Collector street connection" (App-3, p 82) and states that it will be constructed "at City Collector standards" (App-3, p 100). Existing Yates Lane east of Laurel Lane is not classified in the comprehensive plan, TSP or POM IAMP. The decision concludes that the Loop Road (Yates Lane and Devin Loop) is a "neighborhood collector". Rec-7. The TSP identifies five functional categories of roadways in the City: freeways, arterials, minor collectors, neighborhood collectors, and local streets. App-4, p 9. The TSP describes "neighborhood collectors" as a "subset of collectors". App-4, p 10. It is undisputed that the Loop Road is a some type of "collector". [5]

[5] Petitioners dispute that the Loop Road is a "neighborhood collector" and challenge the City's finding in this regard in their second assignment of error.

The comprehensive plan at Chapter XII (Transportation), p 3 provides that "[b]ikeways shall be included on all new arterials and collectors within the Urban Growth Boundary except on limited access freeways." App-4, p 3. No bikeways are included on Devin Loop, which is a "new collector" that is within the City's UGB and is not a limited access freeway. Rec-7, 311-43. There are also no bikeways on Yates Lane to the extent that it is a "new" collector. *Id.* The plan at Chapter XII, p 3 also provides that "[s]idewalks shall be included on all new streets within the Urban Growth Boundary except on limited access freeways." App-4, p 3. No sidewalks are included on Devin Loop, which is a "new street" and is not a limited access freeway. Rec-7, 311-43. There are also no sidewalks on Yates Lane to the extent that it is a "new street". The Loop Road is inconsistent with the comprehensive plan.

The City's TSP, Table 7 "Street Design Standards" provides standards for two types of "collectors" – "Collector – City Developed Alternative" and "Downtown Collector".[6] App-4, p 13. Table 7 provides that City Developed Alternative Collectors shall have 75-foot rights-of-way, turn lanes at intersections, 12-foot travel lanes, 8-foot bikeways, 5-foot sidewalks, and 7 feet for on-street parking. *Id.* The

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[6] The Loop Road cannot be a "Downtown Collector" because it is not located "downtown", which the TSP identifies as the area around the I-84/Main Street interchange (App-4, p 6).

Loop Road has a 60-foot right-of-way, no turn lanes at its intersections with Laurel Lane, and no bikeways, sidewalks or on-street parking. Rec-334; *see generally* Rec-311-43 (plans). The Loop Road is inconsistent with TSP, Table 7.

Confusingly, the TSP identifies two categories of "collectors" that differ from those listed in TSP Table 7: "Minor Collectors" and "Neighborhood Collectors". App-4, p 9. As noted above, the decision concluded that the Loop Road is a "ncighborhood collector" without any explanation. The TSP provides that it is "imperative" for the City to classify roadways in consideration of the adjacent properties and their uses and that each street "must be appropriately designed so as to accommodate local travelers (i.e., passenger cars, heavy trucks, pedestrians, and bicycles)." App-4, p 9. The City's cursory classification of the Loop Road as a neighborhood collector fails to consider that the POM IAMP Loop Road is intended to serve future heavy commercial development in the area and to accommodate a significant increase in traffic – a large proportion of which is estimated to be from large semi-trucks patronizing an expanded Pacific Pride truck stop on the corner of Laurel Lane and Yates Lane (App-3, p 49-52) and whether, given that intent, the neighborhood collector classification provides an appropriate design for the Loop Road. The City's bare conclusion that the Loop Road is a neighborhood collector is inconsistent with the TSP's policy for classifying roadways.

The TSP provides that "Neighborhood Collectors":

> "are a subset of collectors serving the objective of penetrating local neighborhoods to provide direct land access service and traffic circulation. These facilities tend to carry lower traffic volumes at slower speeds than typical collectors. On-street parking is more prevalent and bike facilities may be exclusive or shared roadways." App-4, p 10.

This is opposed to "Minor Collectors", which the TSP provides:

> "link arterials with the local street system. As implied by their name, collectors are intended to collect traffic from local streets and sometimes from direct land access, and channel it to arterial facilities. Collectors are shorter than arterials and tend to have moderate speeds.

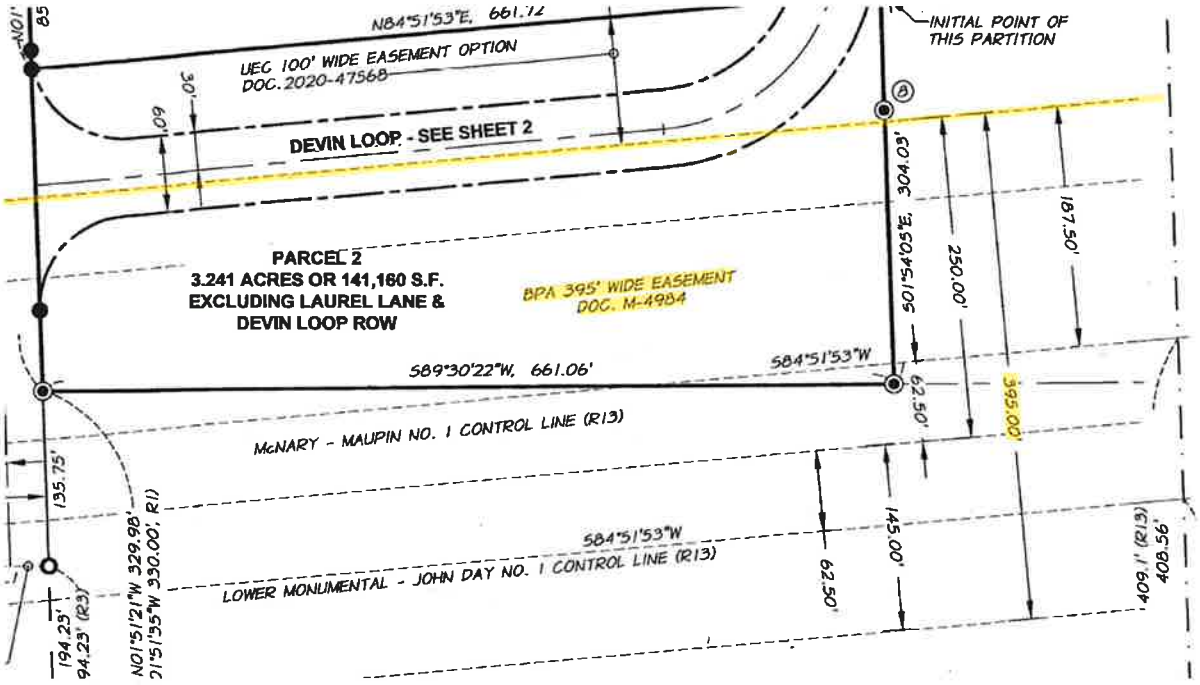
It is clear that the Loop Road will "link" Laurel Lane, a City arterial in this location (App-4, p 10), with a future local street system and will collect and channel that traffic to the Laurel Lane arterial. Rec-15-16 (showing Loop Road connections to Laurel Lane); Rec-318-19, 321 (plans showing access approaches for future roadways). Moreover, the TSP states that "all collector facilities in this TSP are considered to be Minor Collectors". App-4, p 10. The City's unexplained conclusion that the Loop Road is a Neighborhood Collector is unsupported by the plans in the record and is inconsistent with the description of neighborhood collectors in the TSP. The Loop Road is a Minor Collector.

The TSP provides that minor collectors will have "a right-of-way requirement of 70 feet", "two 12-foot travel lanes" and "an optional center turn lane", and that "[s]idewalks and bike lanes will not be required where a multi-use path is available[.]" App-4, p 14. The Loop Road has a right-of-way width of only 60 feet. Rec-6, 334. It does not have bike lanes and sidewalks, which are required by the

TSP because there is no "multi-use path". Rec-7; *see generally* Rec-311-43. The Loop Road is inconsistent with the TSP's requirements for a "Minor Collector".

Moreover, the TSP encourages the installation of sidewalks on all collector streets: "Sidewalks should be included in any full reconstruction of arterials or collectors." (App-4, p 24); "As properties develop/redevelop at urban densities in Boardman, the city should consider replacing the multi-use paths with sidewalks on all streets and bicycle lanes on arterial and collector streets." (App-4, p 26); "Provision of sidewalks along both sides of key collector and local roads not specifically identified in this plan is also encouraged." TSP, p 22, (App-4, p 26). And encourages the provision of street lighting to increase visibility on collector streets and at arterial/collector intersections. App-4, p 17, 26. The Loop Road is not consistent with the TSP.

Further, the POM IAMP, Figure 7-2, Table 7-1 and p 81-82 identify and describe the Loop Road improvements as being located "just north of" and outside the BPA Transmission Line Easement. App-3, p 98, 99, 100-01. However, as shown on the surveys for the right-of-way dedication for the Loop Road at Rec-349-97, a portion of the Loop Road is *within* the BPA Transmission Line Easement, inconsistent with the POM IAMP (Rec-349):



The Loop Road is inconsistent with the City's comprehensive plan, TSP and POM IAMP.

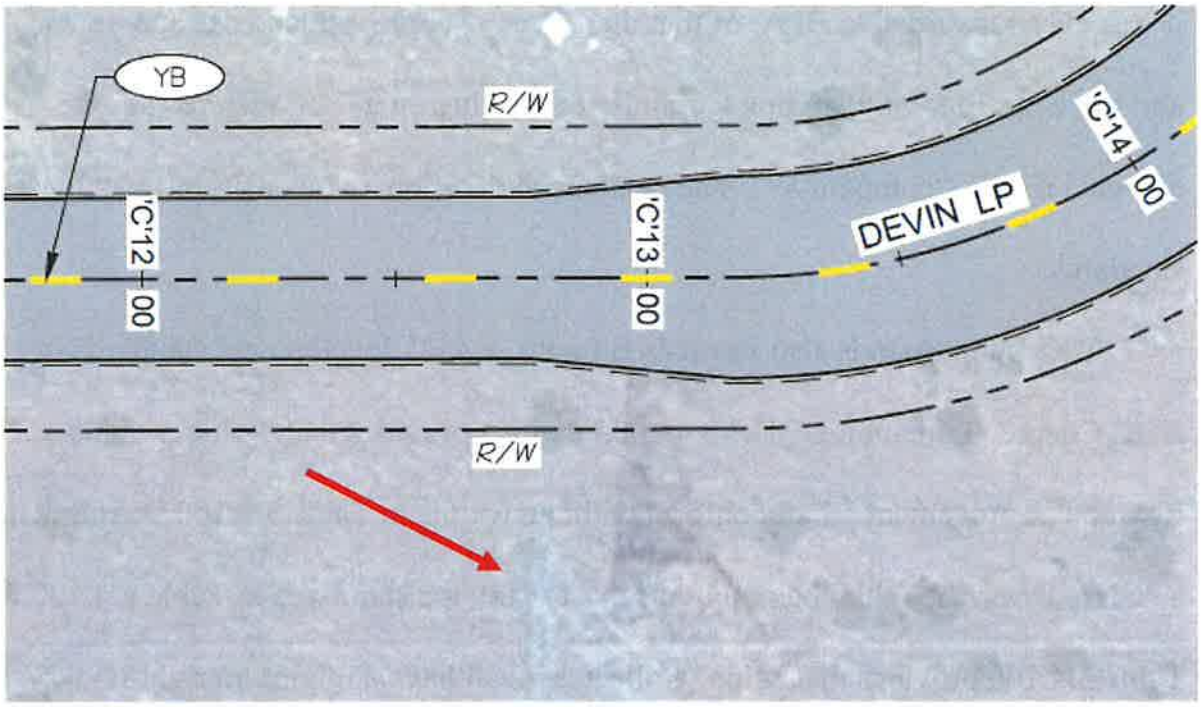
b. <u>The Loop Road is not consistent with the City's land use regulations</u>.

While the majority of the Loop Road is located within the City's C-SC subdistrict, a portion of the road is within the BPA Transmission Line Easement (Rec-383-84) and is therefore within the City's BPA subdistrict. BDC 2.2.210.A. BDC 2.2.210.B prohibits "permanent structures" within the easement area. The terms "permanent" and "structure" are undefined in the code, so their plain and ordinary meaning must be used. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). The dictionary definition of structure is broad: "something constructed

or built". *Webster's Third New Int'l Dictionary* 2267 (unabridged ed 2002). The term "structure" cannot be synonymous with the term "building" because those terms are used separately in the City's code. *See e.g.* BDC Chapter 1.2 (defining "development" to include "buildings" and "other structures"). "Permanent" is defined as "continuing or enduring (as in the same state, status, place) without fundamental or marked change : not subject to fluctuation or alteration : fixed or intended to be fixed : LASTING, STABLE". *Id.* at 1683. The Loop Road is "something constructed or built" – it is a new, paved street – and, as is the general nature of paved streets, fixed in place, or intended to be fixed in place. Accordingly, the Loop Road is prohibited in the BPA easement as a "permanent structure".

Standards for uses within the BPA subdistrict are at BDC 2.2.210. App-5, p 36-38. BDC 2.2.210.A provides: "All uses within the easement shall be approved by agreement with BPA prior to approval for development by the City." The challenged decision does not address this standard and there is zero evidence in the record of any agreement between the City and BPA to allow the development of the Loop Road. "Transportation infrastructure", specifically, is only allowed within "guidelines approved by BPA in writing." BDC 2.2.210.D. Again, the challenged decision does not address this standard and there is no evidence in the record BPA has approved written guidelines for the development of the Loop Road. BDC 2.2.210.E provides that all "activities" must be set back a minimum of 50 feet from

any transmission line tower and that such towers must be "protected from any traffic or other possible disturbance to the structural integrity of the towers." A road and related infrastructure is plausibly, if not certainly, an "activity". The challenged decision makes no findings with regard to this standard. Images in the record suggest that the Loop Road is plausibly within 50 feet of at least one tower. *See* Rec-31 (Loop Road Plans, Sheet 31: transmission tower visible south of Loop Road just below "R/W" notation on image; for scale, the right-of-way is 60-feet wide):



And, if the Loop Road is constructed to required widths and with required sidewalks and bike lanes, it is even more plausible that those "activities" will be within 50 feet of a tower.

Further, BDC 2.2.210.F provides that "Utility infrastructure including * * * transportation routes" can only be approved in a Conditional Use Permit process pursuant to BDC Chapter 4.4 and then only if the planning commission finds that they are "compatible" per BDC 2.2.210.F.13 and 4.4.400.D.1. BDC 2.2.210.F further provides that the application must be forwarded to BPA for an approved and signed Land Use Agreement prior to any hearing by the Planning Commission. The Loop Road was not approved as a conditional use permit, there is no evidence it was ever forwarded to BPA, or that there is any "approved land use agreement" and there has been no Planning Commission hearing on a CUP that decides the disputed road is "compatible". The challenged decision is inconsistent with these standards.

The Loop Road is also inconsistent with several development standards in BDC Chapter 3, including BDC 3.4.100.F, which provides that "[s]treet rights-of-way and improvements shall conform with the widths in Table 3.4.100." And that a "Class B variance shall be required * * * to vary the standards in Table 3.4.100." Table 3.4.100 provides that Minor Collectors shall have a minimum right-of-way width of 68 feet and a minimum roadway of 47 feet. The Loop Road has a right-of-way width of 60 feet and a roadway width that ranges from 32 feet to 40 feet,[7]

[7] The majority of the Loop Road's roadway is 32-feet wide (travel lane and shoulder). Rec-334. A small portion of the Loop Road (curve on southeast portion) is 40-feet wide. Rec-334.

(Rec-311-43), which are smaller than the minimum right-of-way and roadway width requirements of Table 3.4.100. Even if the Loop Road is a Neighborhood Collector as the City erroneously concluded (with no evidentiary support), Table 3.4.100 requires a minimum roadway width of 38 feet and the majority of the Loop Road's roadway is just 32 feet. Rec-334. The City has not obtained a Class B variance to these standards. The Loop Road is inconsistent with the City's land use regulations. BDC 3.4.100.J requires bicycle lanes, sidewalks, and plater strips. BDC 3.4.100.X requires streetlights. The challenged decision includes none of these and other required features of new and reconstructed City streets.

Because the Loop Road is inconsistent with the City's comprehensive plan, which includes the TSP and POM IAMP, and BDC land use regulations, the transportation facility exception to the definition of "land use decision" in ORS 197.015(10)(b)(D) does not apply. *7th Street Station*, 58 Or LUBA at 99; *Regency*, 69 Or LUBA at 141-45.

LUBA has jurisdiction.

IV. FIRST ASSIGNMENT OF ERROR

The City Misconstrued the Applicable Law in Concluding that the Loop Road Does Not Require Land Use Review.

A. Preservation of Error

Petitioners raised the issue below that the Loop Road requires land use review and approval. Rec-70. Demonstrating that the issue is preserved, the challenged

decision addressed that issue, deciding that construction of Yates Lane and Devin Loop are "within the existing right-of-way; identified in the IAMP, which is a part of the TSP, and they do not require further land use review" (Rec-21; App-1, p 5) and that the challenged decision is a "ministerial decision that approves a transportation facility that is consistent with the IAMP and TSP". Rec-7-8; App-6-7.

B. Standard of Review

LUBA will remand a land use decision that misconstrues the applicable law. ORS 197.835(9)(a)(D); OAR 661-010-0071(2)(d).

LUBA owes no deference to governing body interpretations that are inconsistent with the express text and context of the standard or that are implausible. *Kaplowitz v. Lane County*, 285 Or App 764, 773-75 (2017) (*citing Siporen v. City of Medford*, 349 Or 247, 262 (2010)); ORS 197.829(1).

C. Argument

Citing BDC Table 2.2.200.B, the challenged decision finds that: "The city has acquired the right-of-way for Yates Lanc and Devin Loop. Therefore, construction of the roads is the installation of improvements within existing right-of-way. The roads are also identified in the IAMP, which is part of the TSP, and *they do not require further land use review*. Accordingly, roads are a permitted use in the zone." Rec-6. (Emphasis added).

There is no dispute that the approved construction of the elements of the Loop Road on the east side is a "permitted use" in the C-SC zone. But the City's apparent interpretation that being a permitted use in the zone is the equivalent of an exemption from other mandatory BDC standards that apply, is wrong and implausible. Table 2.2.200B lists as permitted uses in the zone: "Installation of improvements within the existing right-of-way." That does not mean that every improvement in the right-of-way is exempt from otherwise applicable standards. Turning to the standard the challenged decision interpreted, the C-SC zone, Table 2.2.200.B.2.e.3 lists as a permitted use: "Projects identified in the adopted Transportation System Plan not requiring *future* land use review and approval". (Emphasis added). The City apparently interpreted this use authorization to mean that because the Loop Road is identified in the POM IAMP, which is part of the TSP, it does not require land use review. The challenged decision's leap from a use being permitted in the zone to mean that the use is therefore exempted from land use standards that expressly apply to the construction and reconstruction of public streets, lacks any support in the express words, purpose, policy or context of the Table. The fact that a project, such as a rail, air or pipeline, or road project is in the right-of-way and discussed in the TSP, simply does not mean that such improvement is exempt from the BDC standards that expressly apply.

There is Nothing About a Use Being Listed as Permitted in a Zone that Suggests the Use is Therefore Exempt from Standards the BDC Applies to that Exact Use. Rather, a Use Being Listed in the Zone Allows it to be Reviewed Against Other Applicable Provisions of the BDC.

There is nothing in Table 2.2.200.B that remotely suggests that the Table's list of uses that are permitted in the C-SC zone (or in any other zone for that matter), means that the use is thereby exempted from compliance with other City standards that expressly apply to that use. Here, the City's apparent interpretation otherwise means that no permitted use in the C-SC zone would *ever* need to comply with the City's "Public Facility Standards" standards in BDC 3.4. App-5, p 60. This is because no permitted (or conditional) use in *any* Commercial zone says anything about complying with the City's Chapter 3.4 "Public Facilities Standards". In fact, the City's use tables say the same thing – that certain uses are "permitted" in the particular zone, no more and no less. None of the City's Commercial zone permitted use tables say *anything* about permitted (or conditional uses), complying with the City's "Public Facilities Standards". *See* BDC Table 2.2.110.A (App-5, p 20); *and* BDC Table 2.2.180.A (App-5, p 20).

The fallacy and disingenuous nature of this interpretation is revealed by other inconsistent positions the challenged decision takes. For example, the challenged decision inconsistently insists that City road standards in fact do apply, but can somehow wait to be applied until adjoining properties develop. For example, the

challenged decision claims that BDC 3.4.100.J's requirement for "sidewalks, planter strips and bicycle lanes" "are intended to apply at the time of site development of the adjacent property." Rec-7. If the Loop Road is exempted from land use review, then why would these standards apply when adjoining property develops? The Loop Road is either exempt from applicable standards or it is not. Another example is the challenged decision acknowledges that BDC 3.4.100.F (App-5, p 62), requires that street "improvements shall confirm with the widths in Table 3.4.100", which includes minimum widths for rights-of-way and minimum widths for roadways for each type of street. The challenged decision then claims for compliance that "Yates Lane" is approved to have a right-of-way width of 60 feet, but makes no findings that it complies with the required roadway width. Rec-6. And there are no findings that Devin Loop meets the required widths, and it does not. Rec-334 (App-5, p 64).

The proper interpretation of the City code is that it the Loop Road is not exempted from the BDC 3.4 standards, as the decision makes plain in punting compliance or erroneously finding compliance. The City can't have it both ways.

Properly interpreted, the structure of the BDC relies upon BDC standards self-announcing their applicability. Thus, the requirement for compliance comes from the express terms of the applicable mandatory BDC standards that, here, require that all new or reconstructed streets comply with City street standards.

In this regard, BDC 3.4.000.B expressly states that "construction," and "reconstruction" of "transportation facilities" "shall" comply "with the standards of this Chapter." The challenged decision approves both the construction of the new street "Devin Loop" and the reconstruction of "Yates Lane." That means that by the express terms of BDC 3.4.100.B, the challenged decision's approval of those streets' construction and reconstruction must comply with BDC 3.4. The challenged decision's conclusion otherwise is implausible.

"This Chapter" that the construction and reconstruction of public streets must comply with is BDC 3.4 and it contains several mandatory standards that apply to street construction or reconstruction. For example, BDC 3.4.100.J requires that "Sidewalks, planter strips and bicycle lanes *shall* be installed in conformance with the standards in Table 3.4.100 * * *" and BDC 3.4.100.X that requires that "Streetlights shall be installed" at "intervals of 300 feet," among others.[8] App-5, p 62, 67, 70. Instead of interpreting the City code, the challenged decision improperly amends it by interpretation. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993) (city many not amend the development code in the guise of interpreting it).

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[8] The challenged decision also inconsistently says these standards in fact do apply, they just apply later when adjoining property develops. There is no support in the express words, purpose, policy or context of the standard for that interpretation as explained below.

In regards to "development", the City's code requires "all developments in the City" to undergo Site Design Review.[9] BDC 4.2.200.A. Site Design Review "ensures compliance with the basic development standards of the land use district (e.g., building setbacks, lot coverage, maximum building height), as well as the more detailed design standards and public improvement requirements in Chapters 2 and 3." *Id.* The Loop Road is subject to Site Design Review as "development", which the City's code defines as "*[a]ll improvements on a site*, including buildings, other structures, parking and loading areas, landscaping, *paved or graveled areas, grading*, and areas devoted to exterior display, storage, or activities. Development includes improved open areas such as plazas and walkways, but does not include natural geologic forms or landscapes." BDC Chapter 1.2 (Emphasis added). Site Design Review is subject to either Type II or Type III land use review and approval. BDC 4.2.400.A. There can be no doubt that the Loop Road, as "development", requires land use review and approval.

Moreover, part of the Transportation Planning Rule, OAR 660-012-0050(3)(b), which specifies the circumstances in which transportation "project development" involves "land use decision-making", requires the City to make findings of compliance with applicable acknowledged comprehensive plan policies

[9] Site Design Review applies to all developments, except for those developments specifically listed under BDC 4.2.200(B) that are subject to Development Review. Transportation improvements are not listed under BDC 4.2.200(B).

and land use regulations for the Loop Road. *Regency*, 69 Or LUBA at 153. "Project development addresses how a transportation facility or improvement authorized in a TSP is designed and constructed" and "involves land use decision-making to the extent that issues of compliance with applicable requirements requiring interpretation or the exercise of policy or legal discretion or judgment remain outstanding at the project development phase." OAR 660-012-0050(3) and (3)(b). Further, OAR 660-012-0050(3)(c) provides that local governments may rely on and reference *earlier* findings of compliance with applicable local standards if compliance with local requirements has already been determined during the transportation system planning phase. LUBA in *Van Dyke v. Yamhill County*, 78 Or LUBA 530, 541 (2018), explained that OAR 660-012-0050(3) is clear that "project development can avoid application of land use standards and decision making only if all applicable standards have been applied and required decision making have been made by the time of project development." As explained above, neither the City's TSP nor the POM IAMP, or any other prior City decision, made any findings of compliance with applicable local standards for the Loop Road.

The City's apparent interpretation of the use table that merely listing a use as permitted means it is exempted from mandatory requirements that apply, is contrary to well-established canons of interpretation set forth in ORS 174.010 that when constructing an enactment, the object is to "ascertain and declare what is * * *

contained" in the enactment, that it is improper "to insert what has been omitted, or to omit what has been inserted", and that the goal "where there are several provisions" is that the reviewer should interpret the provisions to "give effect to all."

Nothing in the TSP Suggests that the Loop Road Constituent Parts of Either Devin Loop or Yates Lane is Exempt from Future Land Use Review.

The provision the City relies upon to exempt the challenged decision from land use review is Table 2.2.200.B that states just that a permitted use in the C-SC zone includes transportation projects "identified in the adopted" City TSP "not requiring future land use review." As explained above, that is not what that listing says or means. Moreover, the improvement to Yates Lane approved in the challenged decision is not discussed at all in the TSP or POM IAMP. The POM IAMP talks only about restricting the existing Yates Lane intersection with Laurel Lane to right-in/right-out access only and that a new connection *to* Yates would be constructed. App-3, p 83, 99. It is impossible that the TSP contemplates that there will be no further review of the Loop Road, the constituent parts for which includes both Devin Loop and the reconstructed Yates Lane, when that Yates Lane improvement is not even discussed or listed in the TSP or POM IAMP.

A Road Project Being Discussed in the TSP does not show the Road Project is "Not Subject to Future Land Use Review".

The City's apparent interpretation that if an improvement is in the road right-of-way and is discussed in the TSP, it is not subject to land use review, is implausible

because it ignores the required element that the transportation project is not subject to "future review." The mandatory standards of BDC 3.4 make it clear that the east Loop Road approved in the challenged decision is subject to those standards and there is nothing in the TSP, POM IAMP or the C-SC zone use table that comes close to suggesting otherwise.

In fact, the decision does not identify any previous land use review undertaken or approval given for the constituent parts or the whole of the approved east side Loop Road. Neither the TSP nor the POM IAMP determine the Loop Road's compliance with applicable City requirements; those documents simply propose an alignment of the Loop Road and specify that Devin Loop will be constructed "at City Collector standards". App-3, p 100. Simply because some of the approved the Loop Road improvements are *identified* in the City's TSP/POM IAMP does not mean that the Loop Road that the City approved is exempt from otherwise required application of the City's land use regulations applicable to the development of transportation facilities and "development" in general.

Although the City wrongly determined that the Loop Road did not require land use review and approval, as explained above, it nevertheless identified "approval criteria" applicable to the Loop Road and applied those criteria and concluded they were met. Rec-5-7. Petitioners addresses those findings in the second assignment of error.

The Loop Road requires land use review and approval; the City's findings otherwise misconstrue the applicable law.

V. SECOND ASSIGNMENT OF ERROR

The City Misconstrued Applicable Law and Adopted Inadequate Findings Not Supported by Substantial Evidence in Concluding that Certain City Standards Applicable to the Loop Road were Met, in Interpreting Other Standards to Not Apply Until the Time of Development of Adjacent Property, and in Not Applying Other Applicable Standards.

A. Preservation of Error

Petitioners raised the issue that the Loop Road must, but does not, comply with applicable City standards below. Rec-64-65, 150-54.

With regard to the fourth subassignment of error, Petitioners can raise the issue at LUBA that the City was required to apply, but failed to apply, the standards of the BPA Easement Subdistrict to the proposal. The reason the issue was not raised below is that the fact that the Loop Road construction is approved to occur in the BPA subdistrict was not identified in any City notice or during the local proceedings or disclosed by the City during those local proceedings.

To further explain. During the local proceedings the City failed to identify BPS subdistrict standards applied or attempt to comply with those standards. The City did not provide a copy of the "guidelines approved by BPA in writing" that BDC 2.2.210.D states governs whether and the extent to which "streets, electrical, water, sewer, telephone, gas and "other essential services infrastructure" can be

allowed in the BPA Easement and then only with BPA's consent. The City did not process the approval of the Loop Road as a conditional use permit, which BDC 2.2.210.F.13 expressly requires. Further, per BDC 2.2.210.F, applications for "Allowed uses" in the BPA Easement Subdistrict must be forwarded to BPA "for an approved and signed Land Use Agreement prior to any Conditional Use Hearing by the Planning Commission" and the record includes no evidence of these steps.

Accordingly, Petitioners did not raise that issue below, because they were unaware that the City contemplated constructing any part of the Loop Road in the BPA Subdistrict. Contrary to ORS 197.797(3)(b)[10], no City notice ever suggested that any part of the Loop Road or any part of the reconstruction of Laurel Lane would occur on land in the BPA subdistrict and no City notice ever identified any BPA Subdistrict standards as applicable to the challenged decision. (Rec-302, 142, 4).

The surveys that show that parts of the Loop Road are to be constructed in the BPA subdistrict, surfaced for the first time when the City filed its record. The City did not disclose these facts during the local proceedings – they did not discuss them, write findings about them and did not post on the City's website (where the local

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[10] ORS 197.797(3)(b) provides:

"(3) The notice provided by the jurisdiction shall"

"* * *

"(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

record was nested for public review – *see* City notices at Rec-136, 278), the dedication deeds and surveys that appear at Rec-349-97. Petitioners noticed these new items for the first time when the City filed its record in this proceeding. However, Petitioners did not object to their inclusion in the record, because their inclusion seemed harmless and that an objection would serve no purpose other than delay.

As noted, because the City did not list the standards of the BPA subdistrict in their notice of the decision, planning commission proceedings or city council proceedings, under ORS 197.835(4)(a), Petitioners are entitled to raise at LUBA that the challenged decision is required to but fails to comply with the BPA Subdistrict standards.

B. Standard of Review

Petitioners incorporate the standard of review from their first assignment of error with the following supplement. LUBA will remand a land use decision that adopts inadequate findings or is unsupported substantial evidence. ORS 197.835(9)(a); OAR 661-010-0071(2)(a) and (b).

Adequate findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards." *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Findings must address relevant

issues that are adequately raised. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92, 97 (2015).

Substantial evidence is evidence that a reasonable person would rely upon in reaching a decision. *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 119 (1984). In reviewing for substantial evidence, LUBA considers and weighs all the evidence in the record and determines whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60 (1998).

C. Argument

1. Subassignment of Error 1: The City erred in concluding that the Loop Road is a "neighborhood collector".

Many of the City's errors in determining that the transportation standards in BDC Chapter 3.4 were met flow from its conclusory determination that the Loop Road is functionally classified as a "Neighborhood Collector". Petitioners disputed below that the Loop Road is a neighborhood collector and argued that it is a minor collector, but the decision does not explain why or how the City came to its contrary conclusion. *Space Age Fuel, Inc.*, 72 Or LUBA at 97. The findings simply state:

> "Under the applicable standards in the IAMP, TSP and development code described in the findings above, staff concludes that the proposed roadways are a neighborhood collector and comply with all of the relevant standards for a neighborhood collector." Rec-8.

The "findings above" simply state that the Loop Road is a neighborhood collector without any explanation of why that is so. *See e.g.*, Rec-7 ("Yates Lane and Devin Loop are a neighborhood collector.").

The POM IAMP designates the Loop Road only as a "Collector" street and does not determine whether it is a "neighborhood collector" or a "minor collector", the two types of "collectors" described in the City's TSP. *See e.g.*, App-3, p 100 ("A new connection to Yates Lane from Laurel Lane will be constructed (at City Collector standards)"); App-3, p 99 ("Construct a new Collector street connection to Yates Lane that would access Laurel Lane just north of the existing BPA transmission easement.").

As explained in the statement of LUBA's jurisdiction, the function of the Loop Road is consistent with that of a "Minor Collector" – it will collect traffic from the area and channel it to Laurel Lane, which is a City arterial in this location (App-4, p 10). The neighborhood collector designation does not provide for channeling traffic to arterials. Moreover, the Loop Road is intended to accommodate increased traffic, a significant proportion of which is estimated to be from large semi-trucks patronizing the existing or an expanded Pacific Pride truck stop on the corner of Laurel Lane and Yates Lane, and future commercial development in the area. Rec-5; App-3, p 49-52. The Loop Road is simply not intended to provide local neighborhood access as a smaller neighborhood collector would provide; it is

intended to accommodate future intense commercial development and semi-truck travel for which a minor collector designation is appropriate.

The City erred in concluding that the Loop Road is a neighborhood collector.

2. Subassignment of Error 2: The City erred in determining the certain transportation standards in BDC 3.4.100 were met and in interpreting other standards to not apply until the time of development of adjacent property.

The City applied the transportation standards BDC 3.4.100.C, E, F, J and O, N.1 and X to the Loop Road as if it were a neighborhood collector. Rec-6-8. Each standard is addressed in turn.

BDC 3.4.100.C concerns the creation of rights-of-way for streets and provides that "the City may approve the creation of a street by acceptance of a deed, provided that the street is deemed essential by the City Council for the purpose of implementing the Transportation System Plan, and the deeded right-of-way conforms to the standards of this Code." App-5, p 62. "This Code" includes BDC Table 3.4.100.F, which provides that the minimum right-of way for a neighborhood collector is 60 feet and for a minor collector is 68 feet. The City found that the Loop Road is a neighborhood collector and meets the standard because the deeded right-of-way is 60 feet. Rec-6. However, if the Loop Road is a minor collector as Petitioners argue, the Loop Road does not meet the standard, which requires a 68-foot right-of-way.

BDC 3.4.100.E concerns street location, width and grade and provides that the location, width and grade of streets "shall conform to the [TSP]". App-5, p 62. The City found that this standard was met because the minimum "width" as described in BDC Table 3.4.100.F is "60 feet" and that the Loop Road right-of-way is 60 feet. Rec-6. There are several problems with this finding. For one, the table in BDC 3.4 is not the TSP. A finding of compliance with the table in BDC 3.4 does not demonstrate compliance with the TSP. Two, in any event, the "width" requirement in BDC Table 3.4.100.F requires minimum right-of-way *and* roadway widths and the finding does not address whether the Loop Road meets the required roadway width. Three, the POM IAMP, which is part of the TSP, requires the Loop Road to be constructed to "City Collector standards". App-3, p 100. The TSP identifies street design standards for only two types of "collectors" – "Downtown Collector" and "Collector – City Developed Alternative". App-3, p 13. It does not identify standards for a neighborhood collector. The Loop Road cannot be a "Downtown Collector" because it is not located "downtown", which the TSP identifies as the area around Main Street. App-3, p 7. The only other option is a "Collector – City Developed Alternative", which describes the standard for right-of-way width as 75 feet. App-3, p 13. The Loop Road only has a right-of-way width of 60 feet and does not conform with the required widths in the TSP.

BDC 3.4.100.F concerns the minimum rights-of-way and street sections and requires that street rights-of-way and improvements "shall conform with the widths in Table 3.4.100. A Class B variance shall be required in conformance with Section 3.4.1.B to vary the standards in Table 3.4.100." App-5, p 62. Table 3.4.100 provides minimum required widths of both the "right-of-way" and the "roadway" for each type of street. App-5, p 64. For minor collectors, the minimum required right-of-way width is 68 feet and minimum required roadway width is 47 feet. For neighborhood collectors, the minimum required right-of-way width is 60 feet and minimum required roadway width is 38 feet. The City found that "Yates" complies with this standard because it is a neighborhood collector and the construction plans show a right-of-way width of 60 feet. Rec-7. Again, there are several errors with this finding. First, the finding is only for "Yates"; it does not address Devin Loop. Second, the City made no findings of compliance (for either street) with the minimum required *roadway* width, which if the Loop Road is a neighborhood collector, requires 38 feet. The Loop Road plans in the record show that the majority of the Loop Road's roadway (travel lanes plus shoulder) is just 32-feet wide. Rec-334. Moreover, if the Loop Road is a minor collector, as Petitioners argue, the Loop Road does not meet either standard.

BDC 3.4.100.N.1 concerns street curves and provides that centerline curve radii "shall not be less than * * * 350 feet on minor collectors, or 100 feet on other

streets". The City found that the curve radius in the southeast corner of the Loop Road is 150 feet and, as a neighborhood collector, the Loop Road meets the standard. Rec-7. The Loop Road construction plans do in fact show that the centerline curve radius of the curve in the southeast corner is 150 feet. Rec-331. However, if the Loop Road is a minor collector, it does not meet the standard which requires a minimum radius of 350 feet.

BDC 3.4.100.J requires that sidewalks, planter strips and bicycle lanes "shall be installed in conformance with the standards in Table 3.4.100, applicable provisions of the [TSP], the Comprehensive Plan, and adopted street plans. Maintenance of sidewalks, curbs, and planter strips is the continuing obligation of the adjacent property owner." BDC 3.4.100.O requires that concrete curbs, curb cuts, wheelchair, bicycle ramps and driveway approaches ramps and driveway approaches "shall be constructed in accordance with standards specified in Chapter 3.1 – Access and Circulation." BDC 3.4.100.X requires that streetlights "shall be installed in accordance with City standards which provides for installation at intervals of 300 feet." The City interpreted these standards not to apply to the development of the Loop Road, but rather at the time the property adjacent to the Loop Road is developed. Rec-7-8.

The City's interpretations are inconsistent with the text and context of the standards and are implausible. *Kaplowitz*, 285 Or App at 773-75. BDC 3.4.100.J,

O and X use the mandatory phrases "shall be installed" or "shall be constructed". The City's interpretation that these standards do not apply to the development of the Loop Road, but rather apply at the time property adjacent to the Loop Road is developed, is contrary to the express text of the standards and inserts words that have been omitted contrary to ORS 174.010. The City's interpretation is also not plausible. An interpretation is not plausible if, in order to reach it, the local government must add text essentially re-writing the local provision. *Friends of Hood River Waterfront v. City of Hood River*, 263 Or App 80, 90 (2014). By way of example, the City would have LUBA look at BDC 3.4.100.X, which provides, in full: "Streetlights shall be installed in accordance with City standards which provides for installation at intervals of 300 feet", and affirm its interpretation that the standard actually means: "Streetlights shall be installed in accordance with City standards which provides for installation at intervals of 300 feet, *unless properties adjacent to the proposed street are currently undeveloped, then the required streetlights shall be installed by the developer of an adjacent property at the time that property is developed.*" The City's interpretation impermissibly rewrites BDC 3.4.100.J, O and X.

Moreover, in regards to context, BDC 3.4.000.B provides that "the standard specifications for construction, reconstruction or repair of transportation facilities * * * within the City *shall* occur in accordance with the standards of this Chapter. No

development may occur unless the public facilities related to development comply with the public facility requirements established in this Chapter." (Emphasis added). BDC 3.4.100.A.2 provides that "Development of new streets * * * *shall* be improved in accordance with this Section[.]" (Emphasis added). Accordingly, the express text and context of the standards require compliance with the requirements of BDC 3.4.100 at the time of development. The City cannot shirk its obligation, as the developer of the Loop Road, to fully comply with these mandatory standards to a "someday" developer of adjacent property.

In any event, the evidence in the record shows that several properties adjacent to the Loop Road are already developed – there is a Pacific Pride truck stop at the corner of Laurel Lane and Yates Lane, a warehouse, as well as several residences on parcels adjacent to and that will be served by the Loop Road. Rec-313, 16.

The City erred in determining that these standards in BDC 3.4.100 were either met or do not apply until the time adjacent properties are developed.

3. Subassignment of Error 3: The City erred in not applying other applicable standards in BDC Chapter 3.

The City did not apply the following standards applicable to the Loop Road: BDC Chapter 4.2 (Development Review and Site Design Review); BDC Chapter 3.1 (Access and Circulation); BDC Chapter 3.2 (Landscaping, Street Trees, Fences and Walls); BDC 3.4.100.A (Development Standards); BDC 3.4.100.G (Traffic Signals and Traffic Calming Features); BDC 3.4.100.I (Street Alignment and

Connections); BDC 3.4.100.K (Intersection Angles); BDC 3.4.100.L (Existing Rights-of-Way); BDC 3.4.100.Q (Development Adjoining Arterial Streets); BDC 3.4.100.T (Street Names); BDC 3.4.100.U (Survey Monuments); BDC 3.4.100.V (Street Signs); BDC 3.4.100.W (Mail Boxes); BDC 3.4.100.Y (Street Cross-Sections); BDC 3.4.400 (Storm Drainage); BDC 3.4.500 (Utilities); or BDC Chapter 3.5 (Stormwater Management).

As explained in Petitioners' statement of jurisdiction and first assignment of error, the City was required to apply the above standards, but failed to do so. To avoid duplication, Petitioners direct LUBA to their arguments regarding the City's failure to apply applicable standards in those sections.

4. Subassignment of Error 4: The City erred in not applying the standards in the BPA subdistrict. BDC 2.2.210.

To avoid duplication, Petitioners direct LUBA to their arguments in the statement of jurisdiction regarding the Loop Road's noncompliance with the standards of the BPA subdistrict.

The City applied none of the BPA subdistrict standards and the Loop Road cannot comply with BDC 2.2.210.B, which prohibits permanent structures within the easement area, and potentially BDC 2.2.210.E, which requires all activities to be set back a minimum of 50 feet from any transmission line tower. If LUBA finds that these standards apply and the Loop Road is prohibited, it must reverse. OAR 661-010-0071(1)(c).

VI. CONCLUSION

For the foregoing reasons, LUBA should reverse or, in the alternative, remand the City's decision.

Dated this 25th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limitation in OAR 661-010-0030(2)(b) and that the word count of this brief is 9,599 words.

I further certify that this brief complies with the font limitation in OAR 661-010-0030(2)(e) and that the font size is not smaller than 14 point for both the text of the brief and footnotes.

Dated this 25th day of August, 2022.

KELLINGTON LAW GROUP PC

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 25, 2022, I filed the original plus four copies of this PETITION FOR REVIEW, by FIRST CLASS U.S. MAIL, postage prepaid, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283.

I further certify that on August 25, 2022, I served a true and correct copy of this PETITION FOR REVIEW, by FIRST CLASS U.S. MAIL, postage prepaid, on the following person(s):

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