

Council Business Meeting

August 3, 2021

Agenda Item	Initiation of an Ordinance Amendment Relating to Annexations; Ashland Municipal Code Chapter 18.5.8	
From	Bill Molnar	Community Development Director
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SUMMARY

The City Council is being asked to direct staff and the Planning Commission to draft code amendments to address a series of issues raised before the Land Use Board of Appeals during their review and final opinion on an application for annexation at 1511 Highway 99. Staff intends to evaluate ambiguous and inconsistent language within the Land Use Ordinance chapter 18.5.8 – Annexations, as well as to suggest amendments intended to make annexation approval criteria clearer and more measurable.

On May 12, the Oregon Land Use Board of Appeals (LUBA) provided their Final Opinion and Order and reversed the City's annexation approval that included two parcels totaling 16.87 acres at 1511 Highway 99N (Applicant: Kendrick Enterprise LLC and Casita Developments). In reversing the City's approval, LUBA determined that the City's annexation approval criteria do not allow for “Exceptions” to City adopted street standards because the application did not include a development proposal. Under the Ashland Municipal Code, Exceptions apply to proposals for new development or land divisions, neither of which were proposed as part of the annexation. Additionally, the appeal filed by the appellant, Rogue Advocates, identified other errors in the City’s decision that, in staff’s opinion, are the result of code language that is unclear and inconsistent. This request would authorize the Community Development Department to direct resources toward preparing specific code amendments to address and rectify language in the Annexation chapter to bring clear meaning and greater certainty to annexation standards and procedures.

POLICIES, PLANS & GOALS SUPPORTED

Council Goals and Priorities 2019; Value Services Tier 2 Moderate Priority – Housing Needs

PREVIOUS COUNCIL ACTION

The City Council has not previously reviewed this item.

BACKGROUND AND ADDITIONAL INFORMATION

On December 15, 2020, the City Council approved an ordinance annexing two parcels totaling 16.87 acres with a current Jackson County zoning of RR-5 (Rural Residential) and a proposed City of Ashland zoning of R-2 (Low Density, Multi-Family Residential), for the properties located at 1511 Highway 99 North. Adjacent railroad property and state highway right-of-way were included in the annexation to create a more logical and orderly boundary as described in AMC 18.5.8.060. While not part of the annexation proposal, the application included conceptual details for a future phased development of 196 apartments (1- and 2-Bedrooms, ranging from 480-701 square feet) in 14 two-story buildings. The application also included an Exception to Street Standards to deviate from city standard park-row and sidewalk improvements to respond to constraints in right-of-way width and existing physical encroachments.

Land Use Board of Appeals (LUBA) decision

On January 12, 2021, a Notice of Intent to Appeal was filed before the Land Use Board of Appeals (LUBA) by Rogue Advocates (Appellant). A Petition for Review was submitted by Rogue Advocates on February 19, which outlined three assignments of error for which they were seeking LUBA to remand or reverse the City’s decision. Following is a summary of the appellant’s points raised before LUBA:

First assignment of error - The City improperly construed the Municipal Code with respect to allowing for Exceptions. The appellant argued that the City incorrectly approved an Exception to City Street Standards by allowing a section of sidewalk to be installed at curbside, rather than separated from the curb by a seven- to eight-foot-wide planting strip with street trees. LUBA agreed with the appellant, noting that an Exception can only be granted as part of an application for “*development*” (emphasis added). The application before the City was for annexation only and did not include a concurrent proposal for new development. Since approval of an Exception without a proposal for development is prohibited, the annexation application could not satisfy the annexation criteria with respect meeting City street standards. Under LUBA’s ruling, the application would need to be substantially modified or a new application filed. Given the significance of this first assignment of error, LUBA reversed the city’s decision and therefore found it unnecessary to resolve the second and third assignments of error.

Second assignment of error - The city improperly construed AMC 18.5.8.060 and made findings not based upon substantial evidence.

AMC 18.5.8.060

When an annexation is initiated by a private individual, the Staff Advisor may include other parcels of property in the proposed annexation to make a boundary extension more logical *and* (emphasis-added) to avoid parcels of land which are not incorporated but are partially or wholly surrounded by the city. The Staff Advisor, in a report to the Planning Commission and City Council, shall justify the inclusion of any parcels other than the parcel for which the petition is filed. The purpose of this section is to permit the Commission and Council to make annexations extending the City’s boundaries more logical and orderly. The appellant argued that the City’s approval findings failed to provide sufficient detail to demonstrate how incorporating the railroad property and ODOT right-of-way were intended “to avoid parcels of land which are not incorporated but are partially or wholly surrounded by the City.”

Additionally, the appellant argued that specific terms, such as parcel, have specific meaning under Oregon Law, and the City’s decision failed to address the implications of such meaning in the decision.

Third assignment of error – The City’s findings under AMC 18.5.8.050 (E) are inadequate and not supported by substantial evidence

AMC 18.5.8.050

E. Adequate transportation can and will be provided to and through the subject property. For the purposes of this section "adequate transportation" for annexations consists of vehicular, bicycle, pedestrian, and transit transportation meeting the following standards.

The appellant noted that significant discussion occurred regarding the issue of safety as it relates to bicycle and pedestrian movements in the proposed annexation area. The appeal contended that the City’s decision lacked substantial evidence for a reasonable person to find that adequate transportation will be accommodated as required under 18.5.8.050.

Recent code amendments - Annexation Chapter

In January 2021, a series of land use code amendments became effective that addressed housing associated with annexations, zone changes, density bonuses for affordable housing, and conversion of apartments into condominiums. This was part of a comprehensive review during the 2019 and 2020 calendar years where the Housing and Human Services Commission, Planning Commission, and staff, worked on amendments to Ashland’s Affordable Housing Program to make the program easier to understand and increase predictability for those that participate in the program including households, non-profit and market rate developers, grant funders, and lenders. Several of the code amendments were intended to make the city’s annexation process more understandable and predictable. Below is a summary of key changes.

- Amended base density calculation provisions used for determining the number of required affordable housing units. Clarified that the base density of the property is calculated using the area to be

developed, excluding any portions of the property containing undevelopable areas such as wetlands, floodplain corridor lands, slopes greater than 35 percent, or land dedicated as a public park.

- Amended provisions within the Annexation chapter of the Land Use Ordinance that established the timeframe for developing the affordable units, clarifying that the dedication of land through transfer of title to a non-profit affordable housing provider will satisfy these requirements.
- Removed the provision within the Land Use Ordinance requiring affordable units to be distributed throughout the project.
- Amended code language relating to comparable building materials used for required affordable housing units to encourage construction of different housing types
- Removed code language that previously capped the density bonus for affordable housing as part of an annexation at 25 percent, increasing it to 35 percent to be consistent with other sections in the Land Use Ordinance.
- As suggested by the Housing Strategy Implementation Plan, removed the standard requiring the application demonstrate there is less than a 5-year supply of land in a particular residential category (i.e., multi-family) to be eligible for annexation.

The Ashland Municipal Code (AMC) allows the City Council to initiate ordinance amendments, a Type III legislative action, by motion (see code excerpts below).

18.5.1.100 City Council or Planning Commission May Initiate Procedures

The City Council or Planning Commission may initiate any Ministerial, Type I, Type II, or Type III planning action by motion duly adopted by the respective body designating the appropriate City department to complete and file the application.

18.5.1.070 Type III (Legislative Decision)

Type III actions are reviewed by the Planning Commission, which makes a recommendation to City Council. The Council makes final decisions on legislative proposals through enactment of an ordinance.

- A. Initiation of Requests.** The City Council, Planning Commission, or any property owner or resident of the city may initiate an application for a legislative decision under this ordinance. Legislative requests are not subject to the 120-day review period under subsection 18.5.1.090.B (ORS 227.178).

FISCAL IMPACTS

Identifying, evaluating, and improving code language and development standards that are potentially ambiguous and indeterminable can make the land use approval process more efficient. A clear understanding of the purpose of the annexation chapter and meaning associated with its approval standards may result in cost savings associated with greater efficiencies in staff time.

STAFF RECOMMENDATION

Staff recommends that the City Council direct staff to work with the Planning Commission in drafting amendments to the Annexation chapter as well as other municipal code sections to make the annexation process clearer and more understandable.

ACTIONS, OPTIONS & POTENTIAL MOTIONS

I move that the City Council direct staff and the Planning Commission to evaluate and draft code amendments to address issues raised on appeal before the Land Use Board of Appeals with the goal of addressing inconsistent and ambiguous language in the Annexation chapter.

REFERENCES & ATTACHMENTS

Attachment 1: Final Opinion and Order – LUBA No. 2021-009

Attachment 2: Long Range Planning Program – Project schedule and descriptions

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

ROGUE ADVOCATES,
Petitioner,

vs.

CITY OF ASHLAND,
Respondent,

and

KENDRICK ENTERPRISE, LLC, and
CASITA DEVELOPMENTS,
Intervenors-Respondents.

LUBA No. 2021-009

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

Sean T. Malone filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by City of Ashland.

Michael M. Reeder filed the response brief and argued on behalf of intervenors-respondents.

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REVERSED

05/12/2021

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

NATURE OF THE DECISION

Petitioner appeals a city council decision approving a request to annex two parcels totaling 16.87 acres.

MOTION TO INTERVENE

Kendrick Enterprise LLC and Casita Developments (intervenors), the applicants below, move to intervene on the side of the city. There is no opposition to the motion and it is allowed.

FACTS

Intervenors own two parcels (the property) totaling 16.87 acres that are located outside the city limits but within the city's adopted urban growth boundary (UGB). The property is zoned Rural Residential 5-acre minimum (RR-5) by Jackson County and contains an existing dwelling. The property slopes from the southeast to the northwest, with slopes generally between 10 and 15 percent. The portion of the property west of the existing residence contains steep slopes in excess of 35 percent.

The property is arrow-shaped, with the arrow "tip" at the southeastern end of the property:

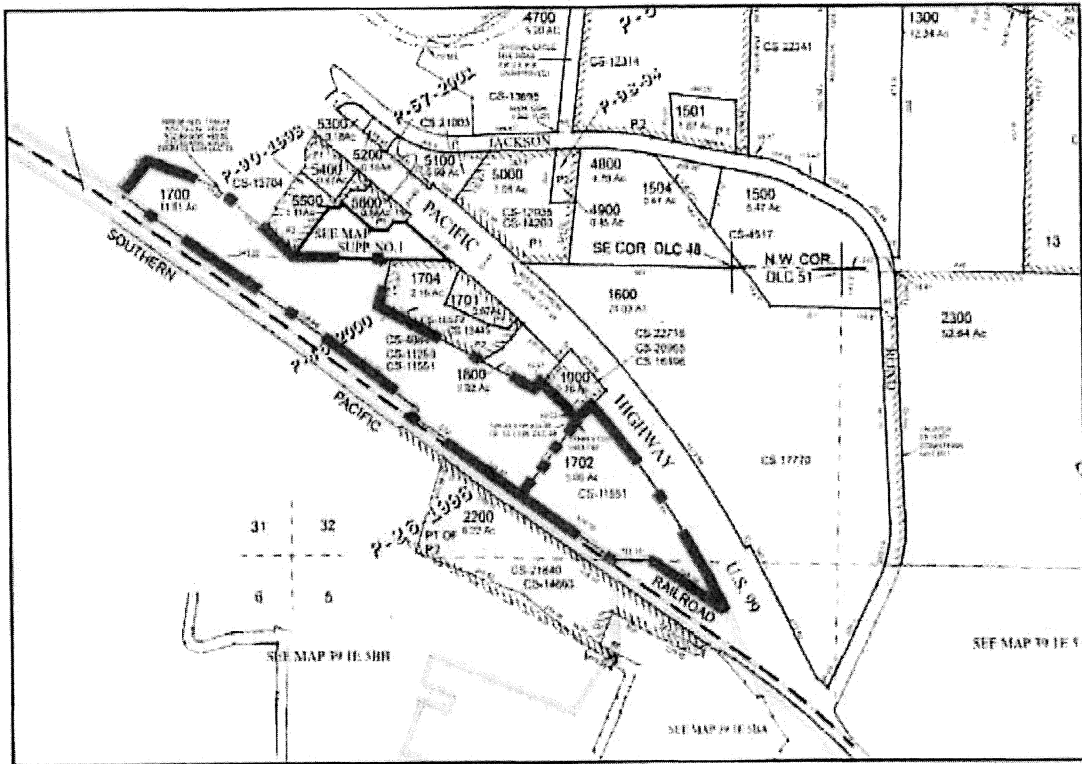


Figure 1: Assessor's Map

Record 943. The property is bounded on the west by Central Oregon and Pacific Railroad (COPR) tracks, which separate the property from the existing city boundary; on the south by the junction of the railroad tracks and Highway 99 North; on the east by Highway 99 North and commercial development adjacent to Highway 99 North; and on the north by commercial development on lands that are within the county's jurisdiction and within the city's UGB. Highway 99 North is owned and managed by the Oregon Department of Transportation (ODOT).

Intervenors applied to the city to annex the property and zone it Low Density Multiple Family Residential (R-2). City staff then included both the

1 adjacent COPR railroad tracks and the portion Highway 99 North adjacent to the
2 property in the annexation proposal.¹

3 Intervenor did not apply for site design review concurrently with their
4 annexation application but, instead, included a “conceptual multi-family
5 development plan * * * to demonstrate how the property could be developed to
6 the required minimum density in keeping with applicable standards” (Concept
7 Plan). Record 17. The Concept Plan includes conceptual details for the future
8 development of 196 apartments in 14 two-story buildings.

9 The Concept Plan originally proposed sidewalk improvements and was
10 later amended to also propose a new bus shelter and bus pull-out lane along the
11 property’s frontage on Highway 99 North. Record 947-48, 895. The
12 approximately 900 feet of Highway 99 North on which the property fronts

13 “has one motor vehicle travel lane in each direction separated by a
14 single, shared center turn lane, and bicycle lanes on shoulders. There

¹ Ashland Municipal Code (AMC) 18.5.8.060 provides:

“When an annexation is initiated by a private individual, the Staff Advisor may include other parcels of property in the proposed annexation to make a boundary extension more logical and to avoid parcels of land which are not incorporated but are partially or wholly surrounded by the City. The Staff Advisor, in a report to the Planning Commission and City Council, shall justify the inclusion of any parcels other than the parcel for which the petition is filed. The purpose of this section is to permit the Commission and Council to make annexations extending the City’s boundaries more logical and orderly.”

1 are currently no curbs, park rows or sidewalks in place along the
2 property frontage, and roadside ditches are present in some
3 locations. On the opposite of the roadway, a guardrail is in place at
4 the outside edge of the bike lane.” Record 20.

5 In addition to proposing sidewalk improvements along the property’s frontage on
6 Highway 99 North, the Concept Plan also proposed sidewalk improvements
7 along Highway 99 North beyond the property’s frontage to connect to existing
8 sidewalks north and south of the property. Record 948-50.

9 Only a portion of the proposed sidewalk improvements would meet the
10 street design standard for park rows (also known as planting strips), due to limited
11 right-of-way, topographical constraints, roadside drainage ditches, a railroad
12 trestle, and the proposed bus pull-out lane.² Record 22, 305. Due to the inability
13 to meet street design standards along the entire proposed sidewalk improvements,
14 intervenors sought, along with the annexation, an “Exception to the Street Design
15 Standards” (Exception) pursuant to AMC 18.4.6.020(B). Record 22. We set out
16 and discuss that provision in detail below.

17 The planning commission held hearings on the annexation proposal and,
18 at the conclusion, voted to recommend approval of the proposal to the city

² The city’s Transportation System Plan classifies Highway 99 North as a boulevard or arterial. Record 20. The street design standards for three-lane boulevards in residential areas (such as the property, if zoned R-2 as requested) require a six-foot bicycle lane, a seven-to-eight foot landscape parkrow, and a six-foot sidewalk. AMC 18.4.6.040(F). A parkrow or planter strip is “[a] landscape area for street trees and other plantings within the public right-of-way, usually in the form of a continuous planter area between the street and sidewalk.” AMC 18.6.1.030

1 council. The city council held a hearing on the proposal and voted to approve the
2 annexation proposal and the Exception. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 We set out the relevant AMC provisions before turning to the first
5 assignment of error.

6 **A. AMC 18.5.8.050(E)**

7 AMC 18.5.8.050 provides, as relevant here:

8 “An annexation may be approved if the proposed request for
9 annexation conforms, or can be made to conform through the
10 imposition of conditions, with all of the following approval criteria:

11 “* * * * *

12 “E. Adequate transportation can and will be provided to and
13 through the subject property. For purposes of this section
14 “adequate transportation” for annexations consists of
15 vehicular, bicycle, pedestrian, and transit transportation
16 meeting the following standards.

17 “1. For vehicular transportation a 20-foot wide paved
18 access exists, or can and will be constructed, along the
19 full frontage of the project site to the nearest fully
20 improved collector or arterial street. All streets
21 adjacent to the annexed area shall be improved, at a
22 minimum, to a half-street standard with a minimum 20-
23 foot wide driving surface. The City may, after
24 assessing the impact of the development, require the
25 full improvement of streets adjacent to the annexed
26 area. *All streets located within annexed areas shall be*
27 *fully improved to City standards.* Where future street
28 dedications are indicated on the Street Dedication Map
29 or required by the City, provisions shall be made for

1 the dedication and improvement of these streets and
2 included with the application for annexation.

3 “2. For bicycle transportation safe and accessible bicycle
4 facilities exist, or can and will be constructed. Should
5 the annexation be adjacent to an arterial street, bike
6 lanes shall be provided on or adjacent to the arterial
7 street. Likely bicycle destinations from the project site
8 shall be determined and safe and accessible bicycle
9 facilities serving those destinations shall be indicated.

10 “3. For pedestrian transportation safe and accessible
11 pedestrian facilities exist, or can and will be
12 constructed. Full sidewalk improvements shall be
13 provided on one side adjacent to the annexation for all
14 streets adjacent to the proposed annexed area.
15 *Sidewalks shall be provided as required by ordinance*
16 *on all streets within the annexed area.* Where the
17 project site is within one-quarter (1/4) mile of an
18 existing sidewalk system, the sidewalks from the
19 project site shall be constructed to extend and connect
20 to the existing system. Likely pedestrian destinations
21 from the project site shall be determined and the safe
22 and accessible pedestrian facilities serving those
23 destinations shall be indicated.

24 “4. For transit transportation, should transit service be
25 available to the site, or be likely to be extended to the
26 site in the future based on information from the local
27 public transit provider, provisions shall be made for the
28 construction of adequate transit facilities, such as bus
29 shelters and bus turn-out lanes. All required
30 transportation improvements shall be constructed and
31 installed prior to the issuance of a certificate of
32 occupancy for any new structures on the annexed
33 property.” (Emphases added.)

34 There is no dispute that the proposed sidewalk improvements do not comply with
35 city standards, specifically street design standards, and that the annexation

1 proposal therefore does not satisfy AMC 18.5.8.050(E)(1) and (3). The city
2 council’s decision explains that the proposed improvements along the property’s
3 frontage on Highway 99 North do not comply with street design standards
4 because “the sidewalk must be pushed to curbside [(i.e., with no planting strip)]
5 to accommodate the installation of a bus pull-out lane associated with a new
6 southbound bus stop.” Record 22. The decision also explains that, “due to
7 physical constraints in the form of roadside ditches and limited right of way[,]
8 standard parkrow planting strips with street trees cannot be installed” beyond the
9 property’s frontage. *Id.*

10 However, the city council concluded that it could approve the annexation
11 proposal by approving intervenors’ request for an Exception, pursuant to AMC
12 18.4.6.020(B), to the requirements in AMC 18.5.8.050(E)(1) and (3) that the
13 streets within the proposed annexation area conform to street design standards,
14 based on the improvements depicted on the Concept Plan.³ That Exception is the
15 central dispute in this appeal.

³ AMC 18.4.6.020(B) provides:

“Exceptions and Variances. Requests to depart from the requirements of this chapter are subject to chapter 18.5.5 Variances, except that deviations from section 18.4.6.040 Street Design Standards are subject to 18.4.6.020.B.1 Exceptions to the Street Design Standards, below.

“1. Exception to the Street Design Standards. The approval authority may approve exceptions to the standards section in

1 **B. Preservation of Error**

2 Intervenors respond, initially, by challenging petitioner’s statement in the
3 petition for review that the city’s decision is a legislative decision and, therefore,
4 petitioner is not required to demonstrate that the issue was preserved. According
5 to intervenors, the decision is quasi-judicial and, therefore, petitioner is required

18.4.6.040 Street Design Standards if all of the following circumstances are found to exist.

- “a. There is demonstrable difficulty in meeting the specific requirements of this chapter due to a unique or unusual aspect of the site or proposed use of the site.
- “b. The exception will result in equal or superior transportation facilities and connectivity considering the following factors where applicable.
 - “i. For transit facilities and related improvements, access, wait time, and ride experience.
 - “ii. For bicycle facilities, feeling of safety, quality of experience (i.e., comfort level of bicycling along the roadway), and frequency of conflicts with vehicle cross traffic.
 - “iii. For pedestrian facilities, feeling of safety, quality of experience (i.e., comfort level of walking along roadway), and ability to safety and efficiency crossing roadway.
- “c. The exception is the minimum necessary to alleviate the difficulty.
- “d. The exception is consistent with the Purpose and Intent of the Street Standards in subsection 18.4.6.040.A.” (Boldface and underscoring in original.)

1 to demonstrate that the issue was preserved. In the reply brief, petitioner responds
2 that the decision is a legislative one and ORS 197.763(1) therefore does not apply
3 but, even if it is quasi-judicial in nature, the issue presented in the first assignment
4 of error was discussed repeatedly during the proceedings before the planning
5 commission and the city council, citing Record 94, 116, 309 to 310, 314, 320,
6 340, and 366.

7 We tend to agree with petitioner that the challenged annexation decision is
8 a legislative decision because the record demonstrates that the city processed the
9 annexation application according to the AMC procedures for legislative
10 decisions. Record 215 (email from city staff explaining that the 120-day rule at
11 ORS 227.178 did not apply to the application because it was not a quasi-judicial
12 action); *see West Side Rural F.P.D. v. City of Hood River*, 43 Or LUBA 546, 551-
13 53 (2003) (explaining that the test for whether a decision is legislative or quasi-
14 judicial under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or
15 591, 601 P2d 769 (1979), does not control where a city abides by land use
16 regulations that prescribe a particular process for a particular type of decision).
17 However, because we agree with petitioner that the issue presented in the first
18 assignment of error was raised with sufficient specificity throughout the
19 proceeding leading to the city council's decision, as evidenced on the record
20 pages cited in the reply brief, we need not resolve the issue of whether the
21 decision is legislative or quasi-judicial.

1 **C. Availability of Exceptions to Annexation Criteria**

2 The city council interpreted the Exception standards at 18.4.6.020(B) to
3 apply to annexation proposals. The city council relied on AMC part 18.4, which
4 the purpose statement at AMC 18.4.1.010 explains

5 *“contains design standards for development.* The regulations are
6 intended to protect public health, safety, and welfare through
7 standards that promote land use compatibility, resource protection,
8 and livability, consistent with the goals and policies of the
9 Comprehensive Plan. Where an applicant requests an exception to a
10 design standard, the approval authority evaluates the request against
11 the purpose of the ordinance chapter in which the design standard is
12 located.”⁴ (Emphasis added.)

13 AMC 18.4.1.020 explains, in relevant part, “Part 18.4 applies to permits and
14 approvals granted under this ordinance, and other City actions, as summarized in
15 Table 18.4.1.020.” AMC 18.4.1.030(A) explains that, in AMC Table 18.4.1.020,
16 “[t]he individual chapters identify the standards which are subject to the
17 Exception and Variance processes.” AMC Table 18.4.1.020, in turn, sets out the
18 “Applicability of Design Standards to Planning Approvals and Permits.” The

⁴ AMC 18.4.6.010 provides that “[t]he standards of chapter 18.4.6 implement the public facility policies of the Comprehensive Plan.” AMC 18.4.6.040(1) provides the purpose of the street design standards:

“This section contains standards for street connectivity and design as well as cross sections for street improvements. The standards are intended to provide multiple transportation options, focus on a safe environment for all users, design streets as public spaces, and enhance the livability of neighborhoods, consistent with the Comprehensive Plan.”

1 table lists “Annexation” as a “Type of Action.” For that type of action, there is a
2 “Y” under “18.4.6 Public Facilities.” A footnote to the table explains that “Y”
3 means “yes, chapter is applicable.” The city council found:

4 “In considering the proposed frontage improvements in light of the
5 adequate transportation criterion, the City Council finds that the
6 criteria calling for streets within the annexation to be ‘*fully improved*
7 *to City standards*’ (AMC 18.5.8.050.E.1) and for full sidewalks to
8 be provided ‘*as required by ordinance*’ (AMC 18.5.8.050.E.3) are
9 intended to insure that at Annexation, streets are improved in
10 keeping with the standards and procedures of the city’s Public
11 Facilities chapter (AMC 18.4.6) which details the city’s street
12 standards not only in terms of the required cross-sections which
13 illustrate the specific improvements required for each street type, but
14 which also includes criteria in AMC 18.4.6.020.B for considering
15 Exceptions to the Street Design Standards where merited by site-
16 specific circumstances. In making this determination, the Council
17 notes that Table AMC 18.4.1.020, which details the applicability of
18 design standards to specific planning approval types, explicitly
19 provides that Annexations are subject to the Public Facilities
20 Chapter (AMC 18.4.6) rather than limiting Annexation only to the
21 Street Design Standards found in section 18.4.6.040. In addition,
22 AMC 18.4.1.030 makes clear that the individual chapters identify
23 the standards which are subject to the Exception process, and
24 Chapter 18.4.6 provides that deviations from the Street Design
25 Standards are allowed subject to Exceptions to the Street Design
26 Standards in AMC 18.4.6.020.B.1.” Record 22 (emphases and
27 underscoring in original).

28 In its first assignment of error, petitioner argues that the city council
29 improperly construed AMC 18.5.8.050 and AMC 18.4.6.020(B) when it
30 concluded that it could approve an Exception to the annexation approval criteria
31 in AMC 18.5.8.050(E)(1) and (3). According to petitioner, the express language
32 of AMC 18.5.8.050 requires conformance with “all of the following approval

1 criteria,” which means that the provision is not satisfied if an annexation proposal
2 conforms with only some of the criteria. In addition, petitioner argues that the
3 express language of AMC 18.5.8.050 provides the only two ways in which an
4 annexation application may satisfy the provision: either through conformance
5 with all of the street design standards at the time of the decision or through the
6 imposition of conditions that lead to future conformance with all of those
7 standards. That provision does not reference Exceptions as a means of satisfying
8 the criteria. Third, petitioner argues that the express language of AMC
9 18.5.8.050(E)(1), the provision requiring that “[a]ll streets located within
10 annexed areas * * * be fully improved to City standards,” does not authorize the
11 city to grant Exceptions to allow only some streets to be fully improved to street
12 design standards.

13 More importantly, petitioner argues, AMC 18.4.6.020(B) does not allow
14 the city to approve Exceptions to the annexation approval criteria. Petitioner
15 points to the plain language of AMC 18.4.6.020(A), which provides, “*Chapter*
16 *18.4.6 applies to all new development*, including projects subject to Land
17 Division (Subdivision or Partition) approval and developments subject to Site
18 Design Review, where public facility improvements are required. All public
19 facility improvements within the City shall occur in accordance with the
20 standards and procedures of this chapter.” (Emphasis added.) As petitioner points
21 out, the annexation application did not propose any development at all and was
22 therefore not a “project[] subject to Land Division (Subdivision or Partition)

1 approval [or] Site Design Review, where public facility improvements are
2 required,” to which AMC chapter 18.4.6 applies. Petitioner argues that the city’s
3 interpretation of AMC 18.4.6.020(A) and its reliance on the word “procedures”
4 in the last sentence of that subsection is implausible because, by its terms, AMC
5 chapter 18.4.6 applies only to “new development.” As petitioner puts it, “[t]he
6 City is engaged in a classic bootstrapping argument by looking at the very chapter
7 that allows Exceptions to justify an Exception.” Petition for Review 15. Petitioner
8 disputes the city’s interpretation of the inclusion of “Annexation” as a “Type of
9 Action” in AMC Table 18.4.1.020, and the confirmation in the table that “18.4.6
10 Public Facilities” applies to that type of action, to mean that an Exception is
11 available to excuse nonconformance with the annexation criteria. According to
12 petitioner, the table negates neither the express requirement in AMC
13 18.5.8.050(E) that “[a]ll streets * * * be fully improved to City standards” nor the
14 express limitation of AMC chapter 18.4.6’s applicability to “new development.”

15 Under ORS 197.829(1), as construed in *Siporen v. City of Medford*, 349
16 Or 247, 259, 243 P3d 776 (2010), LUBA must defer to a local governing body’s
17 interpretation of its comprehensive plan and land use regulations, unless the local
18 government’s interpretation is inconsistent with the express language, purpose,
19 or underlying policy of the comprehensive plan or land use regulation. *Crowley*
20 *v. City of Hood River*, 294 Or App 240, 244, 430 P3d 1113 (2018). In *Crowley*,
21 an appeal that involved the city council’s interpretation of the city’s
22 comprehensive plan, the Court of Appeals explained:

1 “Whether the city’s interpretation of its comprehensive plan is
2 inconsistent with the plan, or the purposes or policies underlying
3 that plan, depends on whether the interpretation is plausible, given
4 the interpretive principles that ordinarily apply to the construction
5 of ordinances under the rules of *PGE v. Bureau of Labor and*
6 *Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), as modified
7 by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).” *Id.*
8 (internal quotation marks and brackets omitted).

9 The standard of review under ORS 197.829(1) and *Siporen* is “highly deferential”
10 to the city, and the “existence of a stronger or more logical interpretation does
11 not render a weaker or less logical interpretation ‘implausible.’” *Mark Latham*
12 *Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012).

13 Our task in this appeal is to determine whether the city council’s
14 interpretation of the relevant provisions of the AMC plausibly accounts for the
15 text and context of those provisions. For the reasons explained below, we agree
16 with petitioner that the city council’s interpretation is inconsistent with the
17 express language of AMC 18.5.8.050 and AMC 18.4.6.020(A), and does not
18 plausibly account for the text and context of those provisions.

19 First, nothing in the language of AMC 18.5.8.050, governing annexations,
20 expressly or impliedly allows the city to approve an annexation application that
21 demonstrates only substantial or incomplete conformance with the approval
22 criteria through an Exception. The provision requires either full conformance at
23 the time of the decision or future full conformance through the imposition of
24 conditions. In contrast, AMC 18.5.2.050(E), governing site design review,
25 expressly allows exceptions to the site development and design standards in

1 certain circumstances.⁵ Accordingly, AMC 18.5.2.050(E) demonstrates that,
2 when the city intends to allow exceptions to approval criteria, the city knows how
3 to do so expressly.

4 Second, AMC chapter 18.4.6, including the Exception standards at AMC
5 18.4.6.020(B), expressly applies “to new development.” AMC 18.4.6.020(A). As
6 noted, no development is proposed here. Thus, the city’s interpretation that the

⁵ AMC 18.5.2.050(E) provides:

“Exception to the Site Development and Design Standards. The approval authority may approve exceptions to the Site Development and Design Standards of part 18.4 if the circumstances in either subsection 1, 2, or 3, below, are found to exist.

- “1. There is a demonstrable difficulty meeting the specific requirements of the Site Development and Design Standards due to a unique or unusual aspect of an existing structure or the proposed use of a site; and approval of the exception will not substantially negatively impact adjacent properties; and approval of the exception is consistent with the stated purpose of the Site Development and Design; and the exception requested is the minimum which would alleviate the difficulty;
- “2. There is no demonstrable difficulty in meeting the specific requirements, but granting the exception will result in a design that equally or better achieves the stated purpose of the Site Development and Design Standards; or
- “3. There is no demonstrable difficulty in meeting the specific requirements for a cottage housing development, but granting the exception will result in a design that equally or better achieves the stated purpose of section 18.2.3.090.”

1 Exception standards can apply to an annexation proposal is expressly inconsistent
2 with AMC 18.4.6.020(A).⁶

3 The city council's interpretation also relies on AMC Table 18.4.1.020's
4 inclusion of "Annexation" as a "Type of Action" and the confirmation in the table
5 that "18.4.6 Public Facilities" applies to that type of action. However, the table
6 negates neither the express requirement in AMC 18.5.8.050 that streets be fully
7 improved to street design standards nor the express limitation of AMC chapter
8 18.4.6's applicability to "new development." Further, and more importantly, the
9 text of AMC 18.4.1.030(A), which immediately precedes the table, explains that
10 "[t]he individual chapters identify the standards which are subject to the
11 Exception and Variance processes." While the table states that AMC chapter
12 18.4.6 applies to annexation proposals, AMC chapter 18.4.6 itself provides that
13 the chapter applies only to "new development."

14 For those reasons, we conclude that the city council's interpretation that
15 the Exception standards at AMC 18.4.6.020(B) apply to annexation applications
16 is inconsistent with the express language of AMC 18.4.6.020(A), which provides
17 that AMC chapter 18.4.6 applies to new development that proposes public
18 improvements. The city council's interpretation is also inconsistent with AMC
19 18.5.8.050, which requires full conformance with the street design standards.

⁶ We express no opinion about whether the city could rely on the Exception standards to waive compliance with the annexation criteria if an annexation application included a concurrent proposal for "new development."

1 Accordingly, the city council improperly construed AMC 18.5.8.050 and AMC
2 18.4.6.020(B) to find that, pursuant to an Exception, the annexation could be
3 approved in spite of its nonconformance with the street design standards. ORS
4 197.835(9)(a)(D).

5 The first assignment of error is sustained.

6 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

7 In its second assignment of error, petitioner challenges the city council's
8 concurrent annexation of the COPR property and Highway 99 North, ODOT's
9 property, pursuant to AMC 18.5.8.060. *See* n 1. In its third assignment of error,
10 petitioner argues that the city's findings regarding AMC 18.5.8.050(E), quoted
11 in full above, are inadequate and not supported by substantial evidence in the
12 record. Because we conclude that the city may not rely on the Exception
13 standards to approve an annexation application that does not satisfy the
14 annexation criteria, as we explain below, the city's decision is prohibited as a
15 matter of law. Accordingly, we need not and do not resolve the second and third
16 assignments of error.

17 **DISPOSITION**

18 Petitioner requests that LUBA reverse or remand the decision. ORS
19 197.835(9)(a)(D) allows LUBA to reverse or remand a decision where the local
20 government "[i]mproperly construed the applicable law." OAR 661-010-
21 0071(1)(c) provides that LUBA will reverse a decision that "violates a provision
22 of applicable law and is prohibited as a matter of law." OAR 661-010-0071(2)(d)

1 provides that LUBA will remand a decision that “improperly construes the
2 applicable law, but is not prohibited as a matter of law.”

3 We sustain petitioner’s first assignment of error and conclude that the
4 city’s decision improperly construed the relevant provisions of the AMC, and
5 that the city may not rely on the Exception standards to approve an annexation
6 application that fails to comply with the applicable approval criteria. Although
7 intervenors argue that the decision should be affirmed, they do not argue that
8 remand, rather than reversal, is the appropriate remedy if the first assignment of
9 error is sustained. When compliance with an applicable approval criterion would
10 require more than insignificant changes to the application, if not a new
11 application, reversal is the appropriate remedy. *Richmond Neighbors v. City of*
12 *Portland*, 67 Or LUBA 115, 129 (2013).⁷ As far as we can tell, demonstrating

⁷ As we explained in *Richmond Neighbors*:

“OAR 661-010-0071 provides that LUBA shall reverse a decision when ‘[t]he decision violates a provision of applicable law and is prohibited as a matter of law,’ while LUBA shall remand a decision when ‘[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law.’ * * * [W]hether reversal or remand is appropriate depends on whether it is the decision or the proposed development that must be corrected. If the identified errors can be corrected by adopting new findings or accepting new evidence, * * * then remand is appropriate. If the identified errors require a new or amended development application, then reversal is appropriate.” 67 Or LUBA at 129 (citing *Angius v. Washington County*, 35 Or LUBA 462, 465-66 (1999); *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992)).

1 compliance with AMC 18.5.8.050(E)(1) and (3), if possible, will require at a
2 minimum more than insignificant changes to the application, if not a new
3 application. Absent some assistance from intervenors on this point, we conclude
4 that reversal is the appropriate remedy.

5 The city's decision is reversed.

Long Range Planning Project Schedule

Community Development Department



Project	2021						2022											
	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June	July	Aug	Sep	Oct	Nov	Dec
Housing Capacity (Needs) Analysis																		
Housing in Employment Zones																		
Annexation Code Update																		
E. Main Emergency Housing Shelter																		
Housing Production Strategy																		

Planning Commission

City Council

Long Range Planning Project Descriptions

Community Development Department



Project	Project Description	Start Date	Target Completion Date
Housing Capacity (Needs) Analysis	The Housing Capacity Analysis is a housing need projection addressing housing types and price levels, residential needs analysis, buildable lands inventory and identification measures for accommodating needed housing as required by HB 2003.	October 2020	August 2021
Housing in Employment Lands	Review existing ground floor area requirements for commercial uses and create greater flexibility for the development of housing in the commercial and employment zones.	April 2021	December 2021
Annexation Code Update	Review existing annexation approval criteria to address issues in LUBA's reversal of the 1511 Hwy 99 decision.	August 2021	January 2022
E. Main Emergency Housing Shelter	Establish and operate a 49-occupant shelter for individuals experiencing homelessness through June of 2022 in partnership with Rogue Retreat. Prepare grant application and obtain Emergency Solutions Grant (ESG) Coronavirus Relief ("ESG-CV") program funds for shelter.	March 2021	November 2021
Housing Production Strategy	After the completion of the Housing Capacity Analysis, prepare a strategy that identifies specific actions the City will take, such as revising regulations or providing financial incentives, to promote the development of needed housing within community as required by HB 20023.	October 2021	September 2022

