

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

3
4 JOHNNY KENNON and DEBORAH KENNON,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF UNION,
10 *Respondent.*

11
12 LUBA No. 2024-021

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Union.

18
19 D. Rahn Hostetter filed the petition for review and argued on behalf of
20 petitioners. Also on the brief was Benjamin Boyd.

21
22 Paige Sully filed the respondent's brief and argued on behalf of
23 respondent.

24
25 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
26 Member, participated in the decision.

27
28 REMANDED 07/16/2024

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

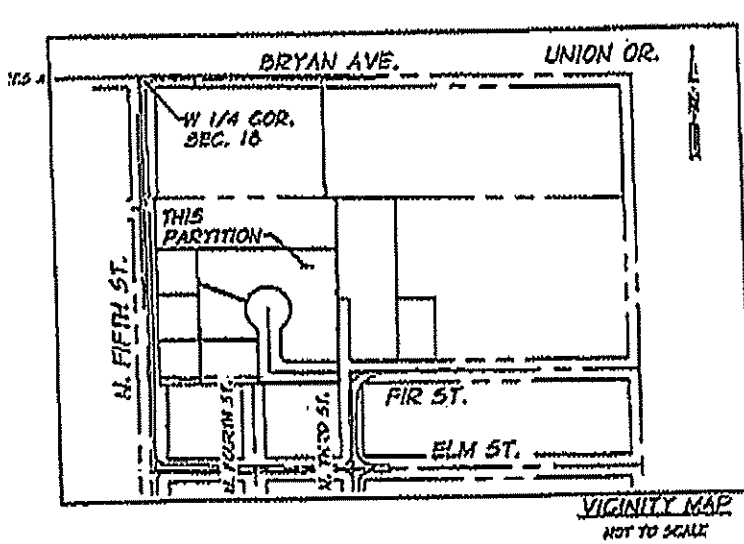
NATURE OF THE DECISION

Petitioners appeal a city council decision approving their application for a partition with a condition that requires petitioners to apply a chip seal surface to an adjacent city street.

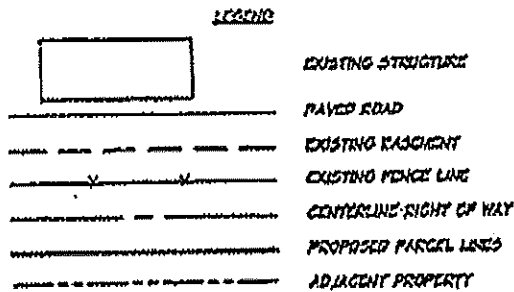
BACKGROUND

The subject property is approximately 68,000 square feet in size and zoned Residential R-1, which requires a minimum lot size of 7,500 square feet. On August 17, 2023, petitioners applied to partition the subject property into three lots: 21,185 square feet, 21,114 square feet, and 25,736 square feet in size.

The subject property has been included in prior partitions and is identified by the “THIS PARTITION” marking on the sketch copied below.



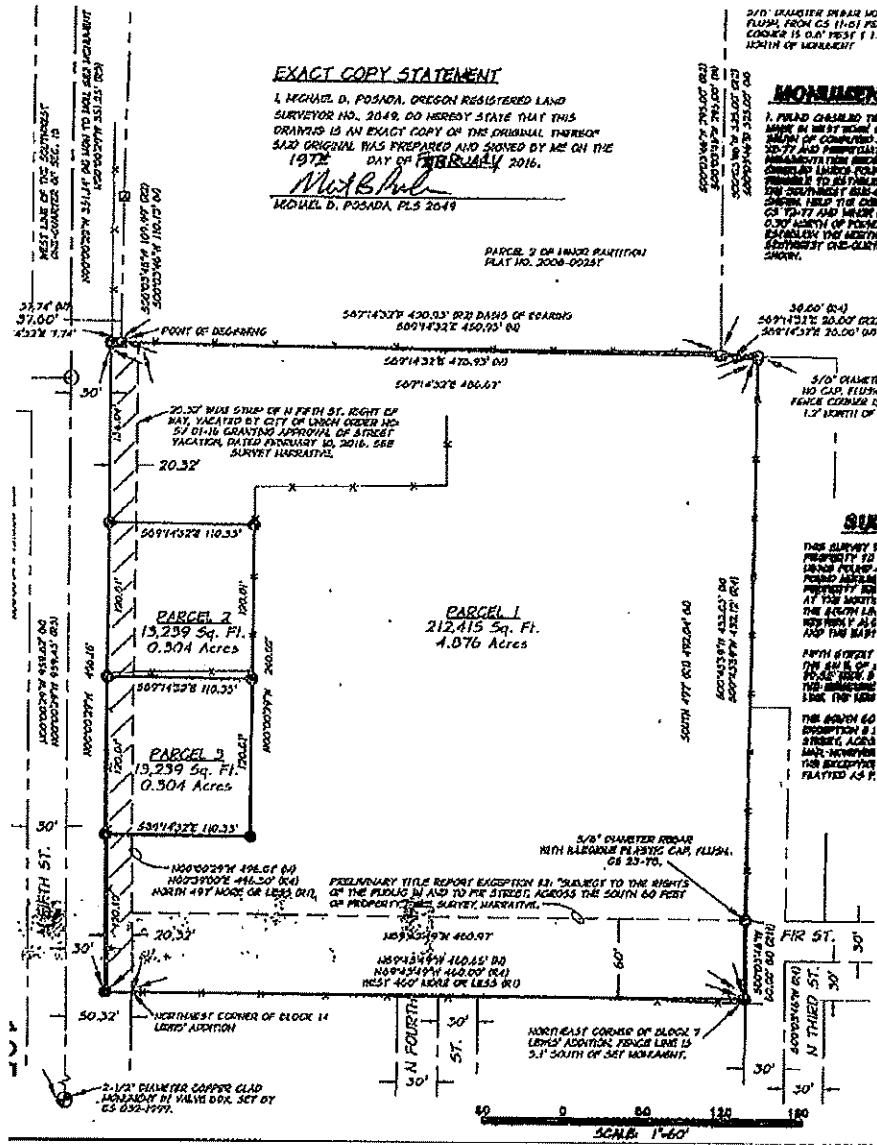
Curve Table					
Curve #	Length	Radius	Delta	Chord Orientation	Chord Length
C1	31.35'	20.00'	89°43'20"	S44° 22' 02"W	28.22'
C2	17.01'	20.00'	51°19'04"	S25° 39' 02"W	17.52'
C3	220.20'	60.00'	21°01'31"	N05° 42' 40"W	115.04'
C4	75.78'	60.00'	72°23'28"	S19° 08' 44"E	70.86'
C5	17.01'	20.00'	51°19'04"	N25° 40' 01"W	17.52'



1

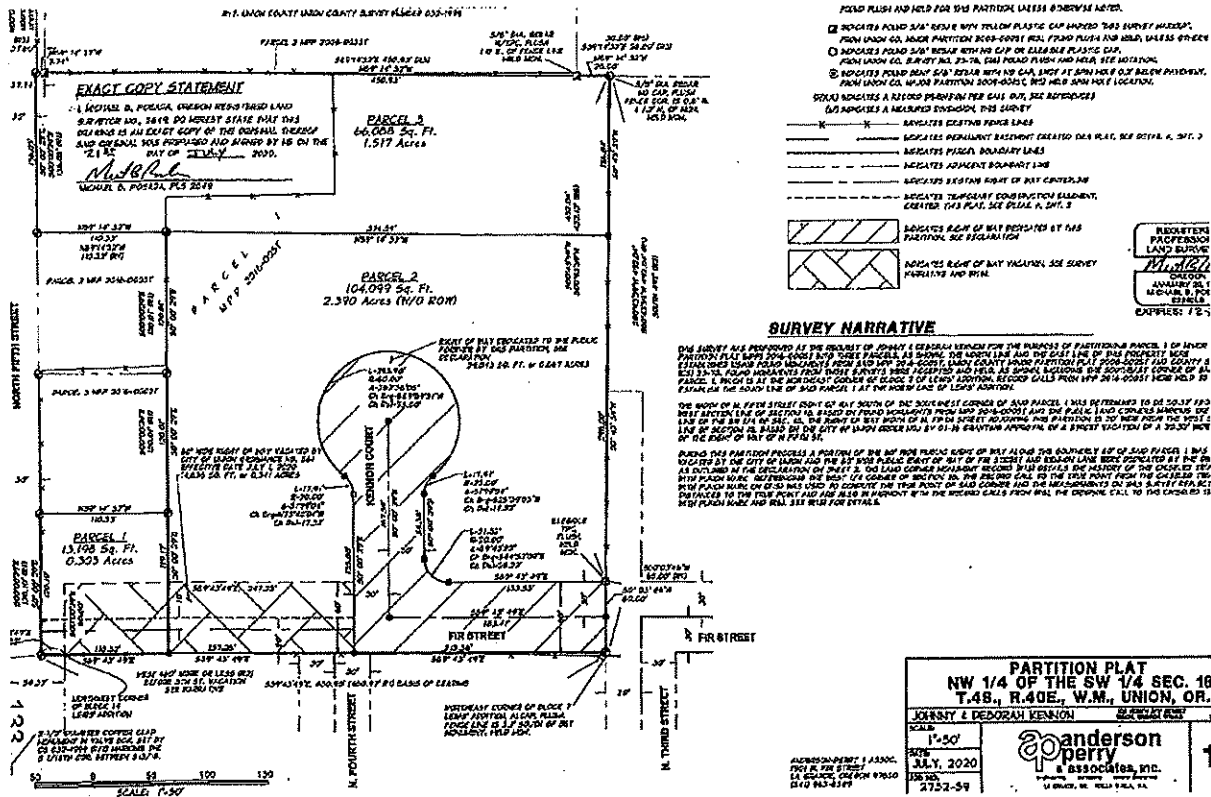
2 Record 126.

3 The subject property was part of Partition 2016-005T, depicted below.



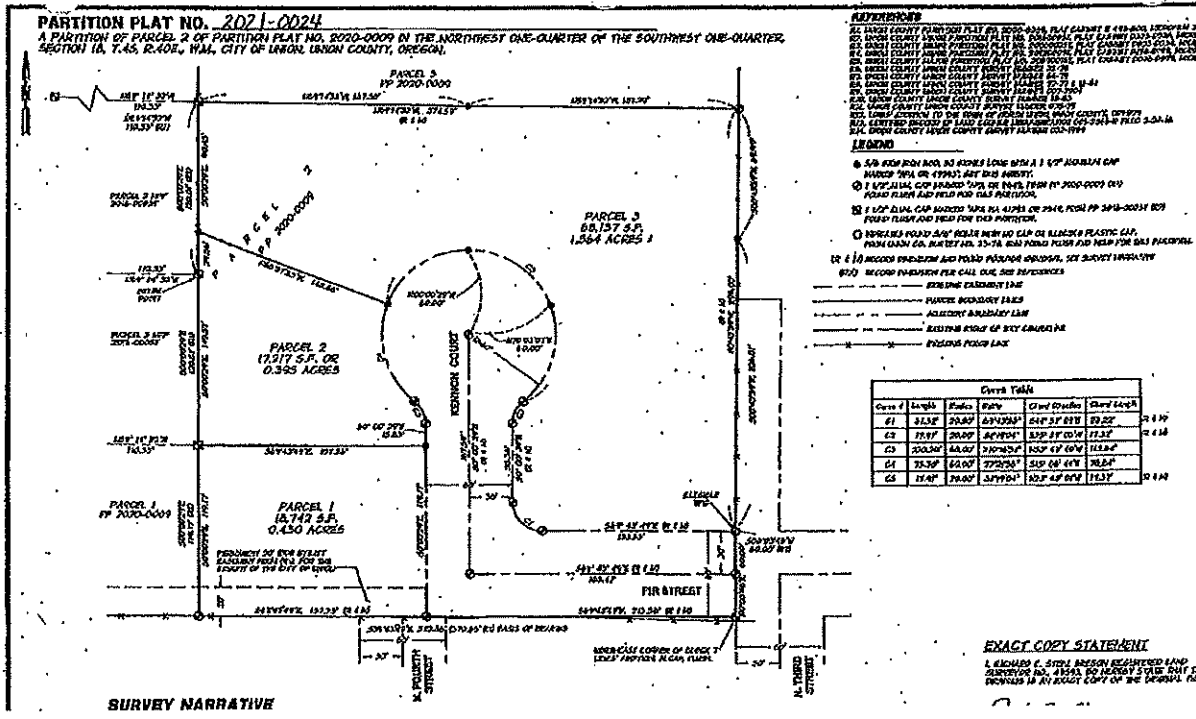
1

- 2 Record 135. Property included in Partition 2016-005T and including the subject
- 3 property was further divided in Partition 2020-009 as shown below. Partition
- 4 2020-009 created Kenyon Court, which, as we explain below, was dedicated to
- 5 the city in August 2020 and is a public street.



1

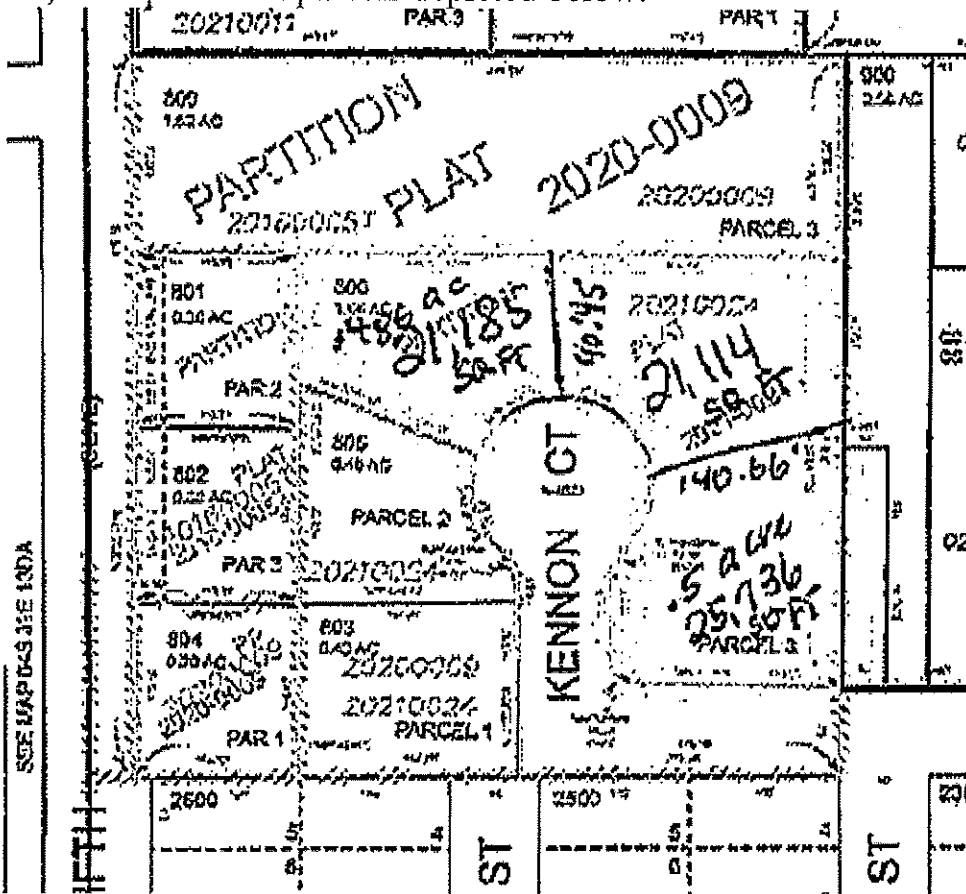
2 Record 133. Partition 2021-024 later divided property, including the subject
 3 property, further as depicted below:



4

1 Record 123.

2 Petitioners' August 17, 2023, application seeks to partition Parcel 3 of
3 Partition 2021-0024 to create the 21,185 square foot, 21,114 square foot, and
4 25,736 square foot parcels depicted below.



5
6 Record 122.

7 On September 30, 2023, and October 18, 2023, the planning commission
8 held public hearings on petitioners' partition application. On October 31, 2023,
9 the city mailed petitioners a copy of the planning commission decision approving
10 the partition with the following condition of approval:

11 "Prior to the development of any lots within the partition, [Kennon

1 Court] shall be completed to City of Union public works standards
2 with the required infrastructure beneath.

3 “a. 3 – lift chip seal

4 “i. 2 – $\frac{3}{4}$ ” lifts

5 “ii. 1 – $\frac{1}{2}$ ” lift”

6 Record 72.

7 On November 8, 2023, petitioners appealed the planning commission’s
8 imposition of the chip seal condition of approval to the city council. On January
9 17, 2024, the city council held a public hearing on the appeal. The city council
10 denied the appeal and retained the chip seal condition of approval. This appeal
11 followed.

12 **ASSIGNMENT OF ERROR**

13 In a single assignment of error, petitioners argue that the city council
14 decision should be reversed or remanded because it is an unlawful and
15 unconstitutional exaction unsupported by adequate findings or substantial
16 evidence. Petition for Review 4. We will reverse or remand a land use decision
17 if the local government made an unconstitutional decision. ORS
18 197.835(9)(a)(E). We will also reverse or remand a decision not supported by
19 substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial
20 evidence is evidence a reasonable person would rely upon to reach a decision.
21 *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

22 Adequate findings generally identify the relevant approval standard, the
23 evidence relied upon, and explain how the evidence leads to the conclusion that

1 the standard is or is not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556
2 (1992).

3 “LUBA frequently analyzes findings challenges and evidentiary
4 challenges separately. In fact, we generally analyze findings
5 challenges first, because our resolution of the findings challenge
6 frequently affects our resolution of the evidentiary challenge or
7 makes it unnecessary to decide the evidentiary challenge. *Friends of*
8 *Linn County v. Linn County*, 37 Or LUBA 844, 856 (2000); *1000*
9 *Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476
10 (1994); *Holliday Family Ranches v. Grant County*, 10 Or LUBA
11 199, 205 (1984).” *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or
12 LUBA 261, 277 (2006).

13 We begin by addressing the adequacy of the findings.

14 **A. Adequacy of Findings**

15 Petitioners argue that the findings are inadequate because they reference
16 only general, unspecified impacts that may result from the previous partitions and
17 fail to identify any specific impacts attributed to the subject partition application.
18 Petition for Review 5. Petitioners also argue that the city council findings do not
19 explain the rationale behind the imposition of the chip seal condition of approval,
20 which petitioners argue imposes a significant financial burden on them. Petition
21 for Review 6.

22 Petitioners point out that in August 2020 the city accepted dedication of
23 Kennon Court, which is a cul-de-sac providing access to at least five abutting
24 lots. Record 128. Petitioners point out that the maintenance and improvement of
25 Kennon Court is thus the city’s responsibility, and that the city’s applicable road
26 standards require only a 2” gravel surface on a marginal access road. Petitioner

1 argues: "The City cannot now impose on Petitioners, without explanation, a
2 condition of approval for an otherwise outright use, the financial burden to 'chip
3 seal' Kennon Court." Petition for Review 6.

4 The city council found, in part:

5 "3. It is within the discretion of the Planning Commission to
6 condition approval of land use permits and application on
7 requirements that are reasonably related to the mitigation or
8 remediation of impacts that may result from the approval as
9 authorized by Oregon State Statutes and the City of Union's
10 Planning Code.

11 "4. [Petitioners'] third sequential minor partition application for
12 creation of new parcels from the same parent parcel is permitted
13 under the City's planning code, but it is within the discretion of the
14 Planning Commission and the City Council to take into
15 consideration the impact of sequential minor partition plats on
16 surrounding properties as well as the long-term prospects for the
17 road and cul-de-sac.

18 "5. This is especially the case as it will be the City's obligation to
19 maintain and repair the road once it has been approved and accepted
20 by the City in writing, at which point the cumulative impacts of
21 traffic from the multiple new parcels created by [Petitioners] will be
22 manifested.

23 "6. City of Union road standards as set forth in Section 152.10 set
24 forth the minimum standards to which various types of roads must
25 be constructed, and do not prevent the imposition of a higher
26 standard of construction should context and conditions make it
27 reasonable to do so.

28 "7. There is no evidence in the record that the condition of
29 approval number 4 is unreasonable or not lawfully related to
30 addressing the possible negative impacts of [Petitioners'] requested
31 Minor Partition Plat." Record 23.

1 In finding 6 above, the city council found that the road standards in Union City
2 Code (UCC) 152.10 are minimum standards and do not prevent the imposition of
3 a higher standard of construction. Petitioners do not challenge this finding or the
4 city council’s interpretation of its code.¹ The city council also concludes in
5 finding 7, however, that there is no evidence in the record that its chip seal
6 condition of approval is “unreasonable or not lawfully related to addressing the
7 possible negative impacts of [Petitioners’] requested Minor Partition Plat.”
8 Record 23. This finding reflects the city’s misunderstanding of its burden when

¹ ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

We generally affirm a local government’s interpretation of its local code so long as it is not inconsistent with the regulation’s express language, purposes, or underlying policies. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

1 imposing exactions as a condition of approval of development. For the reasons
2 set out below, we agree with petitioners that the city council’s findings are
3 inadequate.

4 The United States Supreme Court recently discussed the constitutionality
5 of land use exactions in *Sheetz v. El Dorado County*. 601 US 267, 144 S Ct 893,
6 218 L Ed 2d 224 (2024). *Sheetz* challenged a traffic mitigation fee imposed as
7 condition of approval of a building permit to construct a small, prefabricated
8 dwelling on a residential parcel. The Court explained that it has previously
9 discussed the intersection of the permitting process and the takings clause in
10 *Nollan v. California Coastal Comm’n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d
11 677 (1987) and *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed
12 2d 304 (1994):

13 “There, we set out a two-part test modeled on the unconstitutional
14 conditions doctrine. See *Perry v. Sindermann*, 408 U. S. 593, 597
15 (1972) (government ‘may not deny a benefit to a person on a basis
16 that infringes his constitutionally protected interests’). First, permit
17 conditions must have an ‘essential nexus’ to the government’s land-
18 use interest. *Nollan*, 483 U. S., at 837. The nexus requirement
19 ensures that the government is acting to further its stated purpose,
20 not leveraging its permitting monopoly to exact private property
21 without paying for it. See *id.*, at 841. Second, permit conditions must
22 have ‘rough proportionality’ to the development’s impact on the
23 land-use interest. *Dolan*, 512 U. S., at 391. A permit condition that
24 requires a landowner to give up more than is necessary to mitigate
25 harms resulting from new development has the same potential for
26 abuse as a condition that is unrelated to that purpose. See *id.*, at 393.
27 This test applies regardless of whether the condition requires the
28 landowner to relinquish property or requires her to pay a ‘monetary
29 exactio[n]’ instead of relinquishing the property. *Koontz*, 570 U. S.,

1 at 612–615.” *Sheetz*, 601 US at 268.

2 Here, the city council made no findings explaining the nexus between the
3 chip seal condition of approval and the government interest. In the response brief,
4 the city cites *Conte v. City of Eugene*, 77 Or LUBA 69 (2018) and *Devin Oil Co.*
5 *v. Morrow County*, 65 Or LUBA 104 (2012) as examples of situations where a
6 local government imposed a condition of approval requiring road improvement.
7 In *Conte*, the planning commission found that the condition was necessary in
8 order for the application to comply with Eugene Code 9.8320(5)(b). 77 Or LUBA
9 at 80. In *Devin Oil Co.*, the county concluded that “demonstrating compliance
10 with [Morrow County Code] 3.090(H) and 6.020(C) d[id] not require a detailed
11 engineering analysis for a left turn lane to determine engineering details * * *.”
12 65 Or LUBA at 118. Differently, here the city council’s findings do not identify
13 any city provision that the chip seal condition is intended to address. Further,
14 there is no discussion of the cost of the chip seal condition, or explanation of why
15 the chip seal cost is roughly proportional to the impacts associated with the
16 additional parcels that would be created by approval of the partition. The city
17 council found in finding 4 that it is entitled to consider the impact of previous
18 partitions and “long term prospects for the road and cul-de-sac,” but does not
19 explain the relevance of prior partition decisions to this decision or the anticipated
20 impacts from the partition at issue in this appeal.

1 The city also responds that if we determine that the findings are inadequate,
2 we should nonetheless affirm the decision under ORS 197.835(11)(b), which
3 provides:

4 “Whenever the findings are defective because of failure to recite
5 adequate facts or legal conclusions or failure to adequately identify
6 the standards or their relation to the facts, *but the parties identify*
7 *relevant evidence in the record which clearly supports the decision*
8 *or a part of the decision*, the board shall affirm the decision or the
9 part of the decision supported by the record and remand the
10 remainder to the local government, with direction indicating
11 appropriate remedial action.” (Emphasis added.)

12 The city identifies *no evidence* of the impacts of the partition or rough
13 proportionality of those impact is to the cost of the chip seal and we do not
14 address ORS 197.835(11)(b) further.

15 The subassignment of error that the decision lacks adequate findings is
16 sustained.

17 **B. Constitutionality of Condition**

18 Because we agree with petitioner above that the city’s findings are
19 inadequate to explain how the chip seal condition is consistent with the Fifth
20 Amendment to the U.S. Constitution, it is premature at this stage to address
21 petitioners’ argument that the decision is unconstitutional. We do not address it.

22 **C. Substantial Evidence**

23 Petitioners’ substantial evidence argument is that there is no evidence in
24 the record to support imposition of the chip seal condition. Petition for Review

1 6. The city responds that there is substantial evidence in the whole record
2 sufficient to support the imposition of the condition of approval.²

3 We have held that where the findings are inadequate to explain the local
4 government's rationale for a decision, remand for that explanation is appropriate.
5 Accordingly, it would be premature for us to reach petitioners' substantial
6 evidence challenge.

7 The assignment of error is sustained, in part.

8 The decision is remanded.

² We observe that neither party discusses the staff reports or testimony submitted below to support their broad positions concerning the evidence or lack thereof in the record. We note that we have previously held that we will not address assignments of error inadequately developed for our review. *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982).