BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE VALLEY ASSOCIATION OF REALTORS, Petitioner, vs. CITY OF ASHLAND, Respondent.	LUBA No. 97-260 FINAL OPINION AND ORDER

Appeal from City of Ashland.

David J. Hunnicutt, Tigard, filed the petition for review and argued on behalf of petitioner.

Paul Nolte, City Attorney, Ashland, filed the response brief and argued on behalf of respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 09/24/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner challenges a legislative post-acknowledgment decision that amends the city's acknowledged land use regulations.

FACTS

The city's acknowledged land use regulations include a chapter titled "Physical and Environmental Constraints." City of Ashland Land Use Ordinance (ALUO) Chapter 18.62. ALUO 18.62 includes definitions for "Floodplain Corridor Lands," Riparian Preserve Lands," "Erosive and Slope Failure Lands," "Wildfire Lands" and "Severe Constraint Lands." Development in any of these defined areas requires a "physical constraints review permit." ALUO 18.62.060 requires that the city adopt maps showing each of these defined lands. ALUO 18.62.040.E imposes criteria for approval of physical constraints review permits. In addition, "for all land use actions which could result in development in" any of these defined lands, specific development standards must be met.[1]

The decision challenged in this appeal (the Hillside Development Ordinance, or HDO) amends ALUO 18.62 in a number of ways. For purposes of this appeal, the more significant

[1]ALUO 18.62 imposes different development standards for each of the defined types of land. ALUO 18.62.070 (Floodplain Corridor Lands); 18.62.075 (Riparian Preserve Lands); 18.62.080 (Erosive and Slope Failure Lands); 18.62.090 (Wildfire Lands); 18.62.100 (Severe Constraint Lands). These standards apply in addition to any requirements imposed by the underlying zone.

changes are as follows:

1. Buildable area. The former definition of "buildable area" excludes lands with a slope of greater than 40%. The revised definition of "buildable area" excludes lands with a greater than 35% slope.[2]

2. Hillside Lands. Erosive and Slope Failure Lands are renamed "Hillside Lands," and the definition of such lands is expanded.[3]

3. New and more stringent development standards for Hillside Lands are adopted in place of the existing development standards for Erosive and Slope Failure Lands.[4]

MOTION TO STRIKE

Petitioner moves to strike a letter attached to respondent's brief. The letter is not included in the local government record in this appeal and is not subject to

---

[2]As a result of this change, lands with between 35% to 40% slopes, which were considered buildable before the change, are no longer considered buildable.

[3]Hillside Lands include: (1) lands that are "highly visible from other portions of the city" and (2) lands with a slope exceeding 25%. The existing definition of Erosive and Slope Failure Lands only includes lands with a slope of 40% or greater. With the challenged amendment, properties with a slope of between 25% and 40%, which were formerly excluded from the definition of "Erosive and Slope Failure Lands," are now included within the definition of "Hillside Lands."

[4]The development standards imposed on Hillside Lands under the challenged decision are discussed in more detail below.

official notice. The motion to strike is granted.

FIRST ASSIGNMENT OF ERROR

Petitioner contends the HDO violates certain provisions in ORS 197.295 through 197.312, which impose statutory obligations and limitations regarding "needed housing." A threshold issue under this assignment of error is whether the housing that the parties appear to agree will or may be affected by the regulations adopted by the challenged decision constitutes "needed housing." We turn to that question first.

A. Needed Housing Defined

As relevant in this appeal, ORS 197.303(1) provides:

> "As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:
>
> "(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
>
> "(b) Government assisted housing;
>
> "(c) Mobile home or manufactured dwelling parks * * *; and
>
> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use * * *." (Emphases added.)

Under ORS 197.303(1), the first inquiry is whether a local government has identified a need "for housing within an urban growth boundary at particular price ranges and rent levels."

If a local government does so, any housing types the local government determines to be necessary to meet the identified need is considered "needed housing."[5]

B. The Ashland Comprehensive Plan

The Ashland Comprehensive Plan (ACP) includes a "Housing Element." ACP Chapter VI. The ACP uses census information to identify household income ranges. ACP VI-3, Table VI-3. The plan assumes "25% of the monthly gross income would be applied towards rent" and that "28% of the monthly gross income would be used to make [mortgage] payments." ACP VI-4. The city then identifies the following housing categories as needed to satisfy the identified demand for housing: (1) "Subsidized or Shared Housing;" (2) "Rental;" (3) "Moderate Cost Purchase;" and (4) "High Cost Purchase". Immediately after identifying these four categories of housing,[6] the comprehensive plan identifies the following "housing types" as "housing types [that] have a place in Ashland:"

"a) Multi-family, multi-unit apartments

"* * * * *

"b) Townhouses

"* * * * *

---

[5]ORS 197.303(1)(a)-(d) limits the discretion certain local governments have to exclude certain housing types as "needed housing." For purposes of this appeal, cities like Ashland with populations of 2,500 or more must include detached single-family housing and the other specified housing types as "needed housing."

[6]The ACP refers to these four categories of housing as "types of housing." We will refer to them as categories of housing to avoid confusion with the statutory term "housing types."

"c) Mobile or manufactured homes

"* * * * *

"d) Attached single-family homes

"* * * * *

"e) Detached single-family homes[.]" ACP VI-6 through VI-9.[7]

Finally, the comprehensive plan includes a table that identifies the total number of housing units needed within each of the four housing categories identified above. The identified needed number of housing units within each housing category is then allocated among four "land categories."[8] Each of the four land categories accommodates one or more of the four housing categories.[9] The identified needed number of housing units within each land category is then used to determine the number of acres of land needed within each land

---

[7]Under ORS 197.303 there is no "needed housing" until a local government determines a need for housing "at particular price ranges and rent levels." The above-described ACP language is as close as the city comes to specifying particular price ranges and rent levels in the comprehensive plan itself. We do not know whether the plan language described in the text is derived from more specific background information concerning housing price ranges and rent levels. No issue is raised by any party regarding whether the city has determined a need for housing "at particular price ranges and rent levels." Therefore, for purposes of this opinion, we assume the plan language described in the text identifies the housing types that are needed to meet the city's future need for housing "at particular price ranges and rent levels."

[8]Those land categories are MFR (Multi-family); SR (Suburban Residential); SFR (Single-family Residential) and LDR (Low density Residential). The MFR and SFR categories are composed of more than one zoning district; the SR and LDR categories are composed of a single zoning district.

[9]The entire need for "subsidized" housing will be met on "MFR" lands. "Rental" housing needs will be met as follows: 40% on "MFR" lands, 30% on "SR" lands and 30% on "SFR" lands. Twenty percent of "moderate cost" housing need will be met on "SR" lands, and 80% will be met on "SFR" lands. Fifty percent of the "high cost" housing needs will be met on "SFR" lands, and 50% will be met on "LDR" lands.

category. ACP VI-10, Figure VI-2. These calculations are summarized below:

MFR 750 housing units (54 acres) (Subsidized and Rental).

SR 660 housing units (83 acres) (Rental and Moderate Cost).

SFR 1,550 housing units (388 acres) (Rental, Moderate Cost and High Cost).

LDR 190 housing units (127 acres) (High Cost). ACP VI-10, Figure VI-2.

In summary, the ACP identifies multi-family, multi-unit apartments, townhouses, mobile or manufactured homes, attached single-family homes and detached single-family homes as "needed housing" types. The above-noted acres of MFR, SR, SFR and LDR lands are required under the ACP to supply the needed number of housing units.

C. The City's General Defenses

The city's first general defense is that the statutory, Goal 10 (Housing) and OAR chapter 660, division 8, "needed housing" restrictions are inapplicable to "luxury residential hillside lots." Respondent's Brief 6. This defense is not available to the city for at least two reasons. First, the ACP identifies "a need * * * for housing within [the] urban growth boundary at particular price ranges and rent levels," as required by ORS 197.303(1) and 197.307(3)(a). High-cost housing is included in the housing needs identified in the ACP. Therefore, even if the city is correct that high-cost or luxury housing could be excluded from its identified needed

housing, the city has not done so in the ACP. Second, even if the ACP did exclude luxury housing from its needed housing, it does not appear that only luxury housing development will be affected by the HDO.

In addition, while we need not reach the question in this appeal, we question whether high-cost or luxury housing could be excluded as a needed housing type. The needed housing statutes were first adopted in 1981. Or Laws 1981, chapter 884, sections 5 and 6 (SB 419). SB 419 essentially codified LCDC's then-existing St. Helens Housing Policy. Testimony, Senate Environment and Land Use Committee, SB 419, June 10, 1981, Ex A (Testimony of F. Van Atta). The initial purpose behind that policy appears to have been to foreclose local government attempts to exclude certain housing types that traditionally satisfied lower, moderate or "least cost" housing needs.[10] However, OAR chapter 660, division 8, which was adopted in part to "implement ORS 197.303 through 197.307," appears to take an all-inclusive approach to "needed housing." OAR 660-008-0010 provides, in part, that "[t]he mix and density of needed housing is determined in the housing needs projection." OAR 660-008-0005(5) provides, in part:

> "'Housing Needs Projection' refers to a local determination, justified in the plan, of the mix of housing types and densities that will be:

[10]This purpose is reflected in ORS 197.307(1), which states "[t]he availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for seasonal and year-round farmworkers, is a matter of statewide concern."

> "(a) Commensurate with the financial capabilities of present and future area residents of <u>all income levels</u> during the planning period[.] * * *" (Emphasis added.)

In view of these rule provisions, we question whether high-cost or luxury housing could be excluded from "needed housing."[11]

The city's second general defense is that "buildable lands" for "needed housing" need not include lands with slopes over 25%.[12] Since one of petitioner's main objections to the HDO is that it defines properties with slopes of between 35% and 40% as unbuildable, when such properties were formerly considered buildable, the city argues petitioner's "needed housing" arguments should be rejected for that reason alone.

We do not agree. Petitioner's arguments are not limited to the increased regulation of lands with steep slopes. More importantly, the ACP specifically includes steeply sloped lands (up to 40% slopes) within its buildable lands inventory for single-family residential housing.[13] Under the OAR 660-

---

[11]A second potential obstacle to treating an identified need for high-cost housing as something other than "needed housing" is the approach taken in the ORS 197.303(1), Goal 10 and OAR 660-008-0005(11) definitions of "needed housing." Those definitions all define "needed housing" in terms of housing "types" and specifically require that certain housing types (including owner-occupied, detached, single-family housing) be considered "needed housing." The current ACP assumes all "high cost" housing will be owner-occupied, detached, single-family housing.

[12]LCDC's administrative rules implementing Goal 10 and ORS 197.303 through 197.307 appear at OAR chapter 660, division 8. OAR 660-008-0005 includes a definition of "buildable land" and provides, in part, that "[l]and with slopes of 25% or greater unless otherwise provided for at the time of acknowledgment * * * is generally considered unbuildable for purposes of density calculations."

[13]ACP XII-2 provides that "land which was over 40% average slope was not included in the buildable lands inventory." The parties cite nothing in

008-0005(2) definition of "buildable land," the city could map and distinguish between residentially zoned land that exceeds 25% slopes and land with lesser slopes, and rely exclusively on the latter to provide buildable land for needed housing. However, the ACP Buildable Lands Inventory (BLI) does not do so. The city has included lands with slopes exceeding 25% in the lands included in the BLI that are required for needed housing; the fact that it was not required to do so is irrelevant.[14]

D. Subassignments of Error

Petitioner alleges three subassignments of error, which we address separately below.

1. The Requirement for Sufficient Buildable Land for Needed Housing

ORS 197.307(3)(a) provides:

> "When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing * * * shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay

---

the ACP which indicates the city attempted to exclude lands with 25% to 40% slopes from the inventory of buildable lands that the city relies upon to supply land for needed housing. To the contrary, it is clear that the buildable lands that the city will rely upon to provide needed housing do include lands with such slopes and the disputed decision imposes regulations affecting lots and parcels with such slopes.

[14]It may be that the city could amend the ACP to distinguish between two categories of residentially zoned lands: (1) those with slopes of 25% percent or greater and (2) those with slopes of less than 25%. In that event, the city would be in a position to designate a sufficient number of residentially zoned acres with less than 25% slopes to satisfy identified "needed housing" requirements. If the city were to adopt such an approach, any additional residentially zoned acres (i.e. residentially zoned acres beyond the number of acres required for "needed housing") with slopes of 25% or greater would not be subject to statutory or OAR chapter 660, division 8, restrictions on planning for and regulation of "needed housing." Of course, any inclusion of excess residentially zoned acres would have to be justified under Goal 14 (Urbanization).

zones with sufficient buildable land to satisfy that need."

As explained above, the ACP identifies the number of housing units needed within each of the four land categories and the resulting number of acres within each land category that are needed to supply the required number of housing units. ACP Table XII-3 states that there are 342 acres of buildable SFR lands within the current city limits, or 46 acres less than the 388 acres of SFR land needed. However, Table XII-3 shows there are 160 additional acres of buildable, vacant SFR lands available outside the current city limits but inside the city's urban growth boundary. Table XII-3 shows this results in a surplus of 114 SFR zoned acres.[15]

The challenged decision recognizes that the HDO will reduce the amount of buildable land available for needed housing within city limits. However, based on a memorandum prepared by the city planning staff in response to concerns about the impact of the HDO on the BLI, the city found that the impact would not exceed a loss of 33 housing units.[16] The challenged decision points out there are many more acres of

[15]Table XII-3 also shows there is a surplus of 129 acres of LDR lands already within city limits. Although there is a shortage of SR and MFR lands currently within city limits, if all buildable lands outside the city limits but inside the UGB are considered, there is a surplus of 6 acres and 8 acres of SR lands and MFR lands, respectively.

[16]The planning staff's methodology and conclusions are set out at Record 39. The planning staff estimated that the HDO would result in the following losses in development potential: 5 units on SFR lands, 26 units on LDR lands and 2 units on Woodland Resource zoned lands.

residentially zoned land within the UGB than are needed to satisfy the 5-year supply required by ACP Policy XII-1.[17]

Petitioner advances several arguments why it believes the city cannot rely on the projected loss of only 33 housing units in concluding that the BLI remains adequate following adoption of the challenged decision. Petitioner first argues there is no "de minimis" exception to the requirement of ORS 197.307(3)(a) for a sufficient amount of appropriately zoned buildable land to meet housing needs. The city responds, and we agree, that it did not rely on a "de minimis" exception.

Petitioner next argues the city's analysis, which led to the conclusion that, at most, the residential development potential would be reduced by 33 units, was improperly limited to an analysis of vacant lands. Petitioner contends the analysis of the HDO's impact on buildable lands must include underdeveloped lands that may have their development potential reduced by the challenged ordinance.

The city responds that the ACP only includes vacant lands in the BLI, and it was therefore appropriate to limit the analysis to impacts on vacant parcels. The ACP explains the methodology used to determine the amount of buildable land:

> "The final totals shown on Table XII-2 are the City's best estimates of the lands which are vacant

[17]ACP Policy XII-1 states: "The City shall strive to maintain at least a 5-year supply of land for any particular need in the City limits. * * *" (Emphasis added.)

and available for building sites in the City limits." (Emphasis added.)[18] ACP XII-4.

In view of the above plan language, we reject petitioner's assertion that the city's analysis is flawed because it did not consider the impact of the challenged decision on underdeveloped land. The city apparently does not include underdeveloped lands in its BLI.

Petitioner next argues the city's analysis is flawed because it is not supported by substantial evidence. If we understand petitioner correctly, it contends the planning staff memorandum that the city council relied on in adopting the HDO does not constitute substantial evidence because there is an inadequate explanation for how determinations were made and how certain calculations were made.

We have previously held that planning staff testimony can constitute substantial evidence. Scott v. City of Portland, 17 Or LUBA 197, 202 (1988); Grover's Beaver Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 64 (1984); Meyer v. City of Portland, 7 Or LUBA 184, 197 (1983), aff'd 67 Or App 274 (1984). Petitioner does not explain why the explanation of the determinations and calculations in the staff memorandum are inadequate or what additional information would be required to adequately explain how those calculations were made. We conclude a reasonable decision maker would have

[18]The figures in Table XII-2 are also used in Table XII-3. As noted above in the text, it is Table XII-3 that establishes that there is a surplus of buildable land zoned for SFR housing, if all buildable lands within the UGB are considered.

relied on the evidence in the planning staff memorandum to reach the conclusions the city council reached. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988).

Finally, petitioner argues the city's findings do not establish that the 160 acres of SFR lands located outside the city limits but inside the UGB are "suitable or sufficient to allow the development of single family residential housing at the density levels needed to satisfy the loss of single family residential housing resulting from the adoption of the HDO." Petition for Review 7.

The city concedes the challenged decision could result in a reduced development potential of 33 residential units within the city limits; five of those lost units will be on SFR-zoned lands. The city did not consider the loss of development potential on SFR lands or other lands outside city limits but inside the UGB. The 160 acres of SFR lands inside the UGB but currently outside city limits will be relied on to supply a sufficient number of housing units to offset (1) the five-unit impact of the HDO on SFR lands inside city limits and (2) the existing 46-acre shortage of SFR lands. It seems unlikely that the 160 acres of SFR-zoned land located outside city limits but inside the UGB are so unsuitable for residential development that the HDO will render those lands unable to provide a sufficient number of residential units to meet these needs, even if the HDO makes some of those 160 acres unbuildable. Nevertheless, the challenged decision fails to

address that question, and we are in no position to perform that analysis.

This subassignment of error is sustained, in part. On remand the city must demonstrate that the 160 acres of unincorporated SFR lands outside city limits but inside the urban growth boundary can be developed under the HDO with a sufficient number of units (1) to offset the loss of 5 units on SFR zoned lands within the city limits under the HDO and (2) to address the existing 46-acre shortage of SFR lands within city limits.

2. The General Requirement for Clear and Objective Standards for Needed Housing

ORS 197.307(4) provides that while local governments must identify and plan for "needed housing," they retain the authority to:

> "(a) Set approval standards under which a particular housing type is permitted outright;
>
> "(b) Impose special conditions upon approval of a specific development proposal; or
>
> "(c) Establish approval procedures."

However, the rights preserved by ORS 197.307(4) are conditioned by ORS 197.307(6):

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."[19]

[19]A substantively identical requirement for clear and objective "standards, special conditions and procedures" appears at OAR 660-008-0015.

If the purpose of the requirement for "clear and objective" standards is to ensure certainty in the decision-making process, the requirement is a problematic way to achieve that purpose.[20]

LCDC's first administrative rule adopted to implement Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) required that certain programs adopted to limit uses which conflicted with inventoried Goal 5 resources contain "clear and objective" standards. OAR 660-016-0010(3). The Court of Appeals concluded a local code criterion that prohibited conflicting uses if they would have "any adverse impact" was sufficiently clear and objective under OAR 660-016-0010(3). 1000 Friends of Oregon v. LCDC (Hood River County), 91 Or App 138, 144, 754 P2d 22 (1988). The court's decision in Hood River County appears to be based on the absolute prohibition on "adverse effects" and does not expressly recognize or discuss the possible uncertainty that could be presented in determining whether an identified effect is "adverse" and therefore prohibited.

A somewhat different analytical approach to considering whether land use criteria are "clear and objective," was noted

---

[20]It may be obvious that numerical or absolute standards are clear and objective. For example, requirements that a building be set back 20 feet from a lot line or be no higher than 40 feet tall may be both clear and objective. However, even height limitations are not always entirely clear, because one must determine the point on the ground where height measurements begin. Because the ground elevation around a building and roof designs can vary significantly, zoning codes frequently include very complicated formulas for determining the reference points from which building heights are measured. See Wood v. City of Lake Oswego, 26 Or LUBA 121 (1993).

and followed in Callison v. LCDC, 145 Or App 277, 284 n 8, 929 P2d 1061 (1996). In that case the court concluded that clear and objective standards are not rendered otherwise simply because the local code also provides an optional, alternative set of approval standards that are not clear and objective.[21]

However, even if particular numerical or absolute standards are clear and objective, once one departs from the relatively small and shallow safe harbor of numerical and absolute standards, few tasks are less clear or more subjective than attempting to determine whether a particular land use approval criterion is clear and objective.[22] LCDC largely abandoned the requirement for clear and objective standards that is included in OAR 660-016-0010(3) when the new Goal 5 rule was adopted in 1996. OAR chapter 660, division 23. With this understanding of the difficulty presented in determining whether land use standards are "clear and objective," we turn to ORS 197.307(6).

An examination of the wording and context of ORS 197.307(6) is the first step in determining what is meant by clear and objective standards, special conditions and

---

[21]In 1997 revisions to ORS 197.307, the legislature expressly authorized the technique of providing an approval process with clear and objective approval standards, and an optional approval process with standards that are not clear and objective, when regulating "needed housing" or "housing development" based on "appearance or aesthetics." ORS 197.307(3)(d).

[22]Absent a statutory or rule requirement that land use standards be clear and objective, land use standards can be, and frequently are, unclear, subjective and highly discretionary. See e.g. Oswego Properties, Inc. v. City of Lake Oswego, 108 Or App 113, 814 P2d 539 (1991); Lee v. City of Portland, 57 Or App 798, 802, 646 P2d 662 (1982); Opus Development Corp. v. City of Eugene, 28 Or LUBA 670, 685-86 (1995).

procedures. PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P2d 1143 (1993). In addition to being clear and objective, the standards, special conditions and procedures regulated by ORS 197.307(6) and OAR 660-008-0015 must "not have the effect, either of themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." The legislative concern that apparently forms the basis of the statutory and rule prohibition is that standards, special conditions and procedures that are not clear and objective may be applied in a way that will discourage needed housing through unreasonable cost or delay. Dictionary definitions of "clear" and "objective" suggest that the kinds of standards frequently found in land use regulations lack the certainty of application required to qualify as "clear" or "objective."[23]

Neither the language nor the context of ORS 197.307(6) and OAR 660-008-0015 offers much assistance in the task of

---

[23] Webster's Third New International Dictionary includes the following definition for "clear":

> "[e]asily understood: without obscurity or ambiguity: thoroughly understood or comprehended: easy to perceive or determine with certainty: sharply distinguished: readily recognized: unmistakable * * *" Webster's Third New Int'l Dictionary, 419 (unabridged ed 1981).

The definition for "objective" includes the following:

> "[e]xisting independent of mind: relating to an object as it is in itself or as distinguished from consciousness or the subject: belonging to nature or the sensible world: publicly or intersubjectively observable or verifiable esp. by scientific methods: independent of what is personal or private in our apprehension and feelings: of such a nature that rational minds agree in holding it real or true or valid * * *[.]" Webster's Third New Int'l Dictionary, 1556 (unabridged ed 1981).

determining whether a particular land use standard, condition or procedure is clear and objective. We therefore turn to legislative history.

The legislative history confirms that the central concern of the legislature in adopting ORS 197.303 and 197.307 was that local governments should not be able to use their land use regulations to exclude certain housing types, particularly manufactured housing, which the legislature believed was needed to satisfy low and moderate-income housing demand. The legislative history also confirms that the current statute and administrative rule were derived (in many instances word-for-word) from the Land Conservation and Development Commission's St. Helens Housing Policy. A copy of the St. Helens policy is included in the legislative record of Oregon Laws 1981, chapter 884, sections 5 and 6 (SB 419). House Committee on Environment and Energy, SB 419, April 24, 1981, Ex E (Land Conservation and Development Housing Policy) (hereafter cited as "St. Helens Housing Policy").

The discussion on pages one through three of the St. Helens Housing Policy is difficult to follow.[24] However the discussion makes it reasonably clear that under the St. Helens Housing Policy "needed housing" may be subjected to numerical requirements ("one and one-half parking spaces per unit") or

[24]This discussion attempts to clarify the Oregon Supreme Court's attempt in Anderson v. Peden, 284 Or 313, 316, 587 P2d 59 (1978), to articulate three different meanings that may be conveyed by the term "conditional use."

very clear requirements such as "access to a paved public street." St. Helens Housing Policy 2 (Discussion of Approval Standards). The policy goes on to explain that special conditions may also be imposed, provided they are not used "as a device to exclude a need housing type, delay construction, or to push the cost of a proposal beyond the financial capabilities of the households for whom it was intended." Finally, the policy explains:

> "A third type of conditional use is where approval is discretionary and dependent upon vague criteria such as 'no adverse impact on the neighborhood,' or 'compatible with surrounding development.' Such criteria are inappropriate as a means for providing for a needed housing type. Discretionary criteria would be permissible only upon assurance that there is adequate buildable land to accommodate the need for a particular housing type in other zones in which discretionary criteria do not apply." St. Helens Housing Policy 3 (Discussion of Discretionary Criteria) (emphases added).

The above quoted discussion gives two explicit examples of standards that are not clear and objective. An attachment to the St. Helens Housing Policy provides additional examples of clear and objective approval standards[25] and conditions[26] as well as examples of discretionary criteria that are

---

[25]Each of the examples of clear and objective standards is either numerical ("landscaping exceeds 15% of lot area") or unambiguous (e.g. "the park is located on either a collector or arterial street paved to city standards.")

[26]The examples of clear and objective special conditions, while somewhat less objective than the examples of clear and objective approval standards, are also reasonably unambiguous ("screen unsightly development such as trash [receptacles], mechanical apparatus, storage areas, or windowless walls," "require staggering of units to avoid a 'barrack-like' effect").

inconsistent with the St. Helens Housing Policy.[27] An unmistakable picture emerges from the St. Helens Housing Policy discussion and the examples given therein. "Needed housing" is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community. Such standards, conditions or procedures are not clear and objective and could have the effect "of discouraging needed housing through unreasonable cost or delay."

Petitioner argues that a number of provisions included in the HDO are not clear and objective. We address each of the challenged provisions separately below:

---

[27]Examples of discretionary criteria that are not to be applied to "needed housing" are as follows:

> "-be in harmony with the surrounding neighborhood;
>
> "-preserve and stabilize the value of adjacent properties;
>
> "-encourage the most appropriate use of the land;
>
> "-have a minimal adverse impact on the livability, value and appropriate development of abutting properties and the surrounding area compared with the impact of development that is permitted outright;
>
> "-preserve assets of particular interest to the community;
>
> "-not be detrimental or injurious to property and improvement in the neighborhood or to the general welfare of the community;
>
> "-will not unduly impair traffic flow or safety in the neighborhood." St. Helens Housing Policy 4 (Examples of Standards and Conditions).

a. ALUO 18.62.040(H)(m)

ALUO 18.62.040(H)(m) simply requires submission of a plan that shows certain specified natural features on the property, as well as "natural features" on "adjacent properties" that are "potentially impacted by the proposed development."

ALUO 18.62.040(H)(m) is a requirement for a plan or information to be submitted with the application rather than an approval criterion. Whether ALUO 18.62.040(H)(m) is one of the city's "procedures for approval," within the meaning of ORS 197.307(6), is a closer question. For purposes of this opinion, we will assume that it is.

While we tend to agree with petitioner that the city has not clearly and objectively described the nature of the plan and information that must be submitted, we do not believe that failure is fatal. Under ORS 227.178(2), when the city reviews an application for a permit, the city is required to "notify the applicant of exactly what information is missing within 30 days of receipt of the application," in the event an applicant fails to provide information the city believes is needed under ALUO 18.62.040(H)(m). We believe the ORS 227.178(2) requirement that the city's notice specify "exactly what information is missing" is itself a clear and objective requirement. The city's "procedure" for requiring application information, when viewed in context with ORS 227.178(2), is

sufficiently clear and objective to comply with ORS 197.307(6).[28]

b. ALUO 18.62.040(J)

ALUO 18.62.040(J) authorizes the city "to amend [the applicant's] plans to include any of the following conditions if it is deemed necessary to mitigate any potential negative impact caused by the development:

> "1. Require the retention of trees, rocks, ponds, wetlands, springs, water courses and other natural features.
>
> "2. Require plan revision or modification to mitigate possible negative or irreversible effect upon the topography or natural features that the proposed development may cause.
>
> "3. Require a performance guarantee as a condition of approval.
>
> "4. Require special evaluation by a recognized professional. * * * A fee for these services shall be charged to the applicant in addition to the application fee."

The fundamental flaw in ALUO 18.62.040(J) is that it gives the city authority to impose potentially significant and costly changes in an application to construct "needed housing," and thereby discourage construction of such housing. The only limit on the city's authority to require such changes is highly discretionary and subjective, i.e., that the changes

[28]For the same reason, we reject petitioner's challenge to ALUO 18.62.080(D)(2) (which requires information about whether inventoried existing trees are suitable for conservation) and 18.62.100(D) (which requires a detailed engineering geologic study for development of Severe Constraints Lands).

be "deemed necessary to mitigate any potential negative impact caused by the development."

We recognize that the conditions the city might actually impose under ALUO 18.62.040(J)(1) and (2) could turn out to be clear and objective. Similarly the conditions the city might actually impose under ALUO 18.62.040(J)(3) and (4) need not necessarily discourage housing through "unreasonable cost or delay." Nevertheless, under ORS 197.307(6) and OAR 660-008-0015, "any * * * procedures for approval adopted by a local government shall be clear and objective * * *." ALUO 18.62.040(J) is not a "clear and objective" procedure, within the meaning of ORS 197.307(6) and OAR 660-008-0015.

c. ALUO 18.62.080(B)(4)(c)

ALUO 18.62.080(B)(4)(c) governs hillside grading and requires a planting plan to revegetate cut slope terraces:

> "The vegetation used for these areas shall be native or species similar in resource value which will survive, help reduce the visual impact or the cut slope, and assist in providing long term slope stabilization."

We believe ALUO 18.62.080(B)(4)(c) is a clear and objective standard within the meaning of ORS 197.307(6) and OAR 660-008-0015. ALUO 18.62.080(B)(4)(c) requires the use of "native vegetation." That is a sufficiently clear and objective "standard" under ORS 197.307(6) and OAR 660-008-0015. The city's extension to the applicant of the option to use "similar species" under the specified conditions does not

render the clear and objective requirement for native vegetation otherwise.[29] Callison, 145 Or App at 284 n 8.

d. ALUO 18.62.080(B)(8)

ALUO 18.62.080(B)(8) governs site grading of hillside lands and requires that such grading "shall consider the sensitive nature of these areas," "[retain] exiting grades to the greatest extent possible [and] avoid an artificial appearance by creating smooth flowing contours of varying gradients." In addition, terraces "should be designed with small incremental steps," and "[p]ads for tennis courts, swimming pools and large lawns are discouraged."

The standards imposed by ALUO 18.62.080(B)(8) are not "clear and objective" within the meaning of ORS 197.307(6) and OAR 660-008-0015.

e. ALUO 18.62.080(D)(3)

ALUO 18.62.080(D)(3) requires that trees of a particular diameter be "incorporated into the project design whenever possible." Development must preserve "the maximum number of existing trees * * *." "Building envelopes [must] be located and sized to preserve the maximum number of trees * * *."

In particular cases, ALUO 18.62.080(D)(3) may be a difficult or onerous standard. While it is not as clear or

[29]Petitioner also challenges ALUO 18.62.080(B)(5)(d), which requires use of native vegetation to revegetate fill slopes. However, ALUO 18.62.080(B)(5)(d) also provides the applicant the option to use non-native vegetation, provided it is similar in resource value and will survive and stabilize the surface. For the same reason we find ALUO 18.62.080(B)(4)(c) to be clear and objective, we find ALUO 18.62.080(B)(5)(d) is clear and objective.

objective as a numerical setback or an absolute prohibition on cutting trees, it requires that trees must not be cut, unless it is not possible to build without doing so. If trees must be cut to build, no more trees may be cut than must be cut to build. While a "save if possible" standard may not be sufficiently clear and objective in all contexts, we conclude ALUO 18.62.080(D)(3) is a sufficiently clear and objective standard to comply with ORS 197.307(6) and OAR 660-008-0015.[30]

f. ALUO 18.62.080(D)(4)(e)

ALUO 18.62.080(D)(4)(e) authorizes the city to require compensation for any losses that may result if there is encroachment into a tree protection area, after a development proposal has been approved and construction has begun or been completed. ALUO 18.62.080(D)(4)(e) is therefore an after-the-fact enforcement provision to be used if tree protection areas required by an approved permit for residential development are violated. For that reason, ALUO 18.62.080(D)(4)(e) could not violate ORS 197.307(6) and OAR 660-008-0015, which only limit "standards, special conditions and procedures" for "approval" of needed housing.

g. ALUO 18.62.080(D)(5)

ALUO 18.62.080(D)(5) provides, in part,

---

[30]We caution, however, that the city's application of ALUO 18.62.080(D)(3) in the future to impose "special conditions" requiring changes in an application to preserve trees could nevertheless run afoul of the prohibition in ORS 197.307(6) and OAR 660-008-0015 against discouraging needed housing through "unreasonable cost or delay." We only conclude here that ALUO 18.62.080(D)(3) passes the statutory and rule requirement that the approval standard itself be clear and objective.

> "Development shall be designed to preserve the maximum number of trees on a site, when balanced with other provisions of this chapter * * *."

The balancing that is required by ALUO 18.62.080(D)(5) is not a clear and objective criterion.

h. ALUO 18.62.080(D)(6)(a)

ALUO 18.62.080(D)(6)(a) requires that "replacement trees shall be of similar resource value as the trees removed." We agree with petitioner that ALUO 18.62.080(D)(6)(a) is not a clear and objective standard.

i. ALUO 18.62.080(D)(6)(c)

ALUO 18.62.080(D)(6)(c) grants the city the discretion to require a revegetation plan in lieu of replacement trees. We agree with petitioner that ALUO 18.62.080(D)(6)(c) does not include clear and objective standards for when the revegetation plan may be required or what it must include.

j. ALUO 18.62.080(E)(2)(b)

ALUO 18.62.080(E)(2)(b) imposes the following requirement on building design: "Cut buildings into hillsides to reduce visual bulk." A diagram is included with ALUO 18.62.080(E)(2)(b). That diagram makes it clear that ALUO 18.62.080(E)(2)(b) requires that where cutting or filling is necessary to develop a level building pad, the level building pad is to be achieved by cutting rather than (1) filling or (2) a combination of cutting and filling. Viewed in context with the diagram, ALUO 18.62.080(E)(2)(b) is clear and objective.

k. ALUO 18.62.080(E)(2)(g)

ALUO 18.62.080(E)(2)(g) recommends "that color selection for new structures be coordinated with the predominate colors of the surrounding landscape * * *." We are uncertain whether ALUO 18.62.080(E)(2)(g) is simply a suggestion, that applicants are free to ignore, or a standard that must be satisfied. If ALUO 18.62.080(E)(2)(g) is merely a suggestion, it need not comply with ORS 197.307(6) and OAR 660-008-0015. If ALUO 18.62.080(E)(2)(g) is an approval standard, it violates ORS 197.307(6) and OAR 660-008-0015 because it is not clear and objective. If the city determines on remand that ALUO 18.62.080(E)(2)(g) is a standard, it must amend ALUO 18.62.080(E)(2)(g) to make it clear and objective.

l. ALUO 18.62.080(A)(4)

ALUO 18.62.080(A)(4) requires a detailed geotechnical study for all applications on hillside lands. Petitioner argues this requirement "could cost the landowner thousands of dollars and delay projects for an inordinate amount of time." Petition for Review 15. We agree. However the possibility that ALUO 18.62.080(A)(4) "could" result in cost or delay does not mean that it will, or that such cost or delay would be "unreasonable." We therefore reject petitioner's contention

that ALUO 18.62.080(A)(4) must be invalidated on the basis that it may result in delay or an increase in cost.[31]

It is not clear whether petitioner also argues ALUO 18.62.080(A)(4) violates the statutory and rule requirement for clear and objective standards and procedures for approval. If so, we conclude that ALUO 18.62.080(A)(4) is a requirement for information rather than a standard. Assuming ALUO 18.62.080(A)(4) is one of the city's "procedures for approval," the city is obligated to quickly and clearly identify any failure on the applicant's part to include all required information in the initial submittal and thereafter to allow the applicant an opportunity to make the application complete. ORS 227.178(2). In view of ORS 227.178(2), even if the ORS 197.307(6) and OAR 660-008-0015 requirement for clear and objective procedures for approval applies, ALUO 18.62.080(A)(4) does not violate the statute or rule.

m. ALUO 18.62.080(B)(5)(a)

ALUO 18.62.080(B)(5)(a) requires that "fill slope angles shall be determined in relationship to the types of materials of which they are composed." The city may intend to refer to standard tables that establish acceptable fill slope angles based on material type. However, ALUO 18.62.080(B)(5)(a) does

[31]For the same reason we reject petitioner's challenge to ALUO 18.62.080(B)(7)(b), which requires a performance bond or other financial guarantee to guarantee completion of required erosion control measures.

not identify such a table or any other standard that the city proposes to use to determine acceptable fill slope.

ALUO 18.62.080(B)(5)(a) does not satisfy the ORS 197.307(6) and OAR 660-008-0015 requirement for clear and objective standards and procedures.

This subassignment of error is sustained, in part.[32]

3. The Requirement for Clear and Objective Standards When Regulating Appearance or Aesthetics

ORS 197.307 was amended in 1997 to add a further refinement of the "clear and objective" requirement in ORS 197.307(6). ORS 197.307(3) repeats the requirement of ORS 197.307(6) that "approval standards or special conditions" be "clear and objective" and adds the requirement that such "standards or conditions shall not be attached in a manner that will deny the application or reduce the proposed housing density." The restrictions imposed on local governments under ORS 197.307(3) apply both to "needed housing" and to permits for "residential development" generally.

We have already concluded that certain ALUO provisions identified by petitioner are not "clear and objective" and, for that reason, violate ORS 197.307(6). Those provisions

[32]Summarizing our review of the plan sections challenged by petitioner under these subassignments of error, we conclude ALUO 18.62.040(J); 18.62.080(B)(8); 18.62.080(D)(5); 18.62.080(D)(6)(a); 18.62.080(D)(6)(c) and 18.62.080(B)(5)(a) are not clear and objective standards or procedures, as required by ORS 197.307(6) and OAR 660-008-0015. ALUO 18.62.080(E)(2)(g) is not clear and objective, but we remand to the city to determine in the first instance whether it is an approval standard or merely a suggestion.

therefore also may violate the ORS 197.307(3) requirement for clear and objective standards or special conditions "regulating appearance or aesthetics."

On remand the city potentially could correct the conflict between those ALUO provisions and ORS 197.307(6) by making them inapplicable to "needed housing." However, if those ALUO provisions remain applicable to "residential development" and constitute regulations of "appearance or aesthetics," they would continue to violate ORS 197.307(3).

We do not reach the question of whether the regulations petitioner believes constitute "appearance or aesthetics" regulations actually constitute regulations of "appearance or aesthetics." However, petitioner appears to contend that if a standard or special condition applied to housing has any effect on appearance or aesthetics or in any way is intended to affect appearance or aesthetics, it necessarily is the kind of standard or special condition regulated by ORS 197.307(3). We reject that contention.

ORS 197.307(3) only regulates standards or special conditions applied to needed housing or residential development generally, if the standards or special conditions regulate only for appearance or aesthetic purposes. In other words, if there are other planning purposes for such residential regulations, the fact that the regulations may also regulate for appearance or aesthetic purposes does not make ORS 197.307(3) applicable. On remand, the city will have

an opportunity to explain whether its HDO provisions regulate for purposes other than appearance or aesthetics.

This subassignment of error is sustained.

4. Petitioner's Remaining Arguments.

Petitioner argues that the revised standards adopted in ALUO 18.62.080 are "unnecessary" and that the city failed to demonstrate that "existing protections are inadequate." Petition for Review 15.

Petitioner cites no authority for the proposition that the city must establish that its existing regulations are inadequate or that new hillside regulations are necessary before it may amend its land use regulations to include revised hillside regulations. We are aware of no such authority or requirement and reject the argument.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

ORS 92.040(2) provides:

> "After September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction on the property unless the applicant elects otherwise." (Emphasis added.)

Petitioner alleges the city may apply the HDO to construction of previously approved subdivisions, in violation of ORS 92.040(2).

ORS 92.040(2) limits a city's authority to apply new land use regulations to construction of subdivisions that were approved after September 9, 1995. ORS 92.040 would prohibit application of the HDO to "construction" of a subdivision that was approved (1) after September 9, 1995, and (2) before the HDO was adopted. The city contends there is no reason to believe the city intends to apply the HDO contrary to ORS 92.040(2), and we agree.

Petitioner also argues that applying the HDO to construction of previously approved subdivisions would violate ORS 227.178(3). ORS 227.178(3) provides:

> "If the application [for a permit, limited land use decision or zone change] was complete when first submitted * * * and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

ORS 227.178(3) applies to decisions on applications for subdivision approval.[33] As the city correctly notes, ORS 227.178(3) does not apply to construction or development standards that may be adopted after an application for subdivision approval is granted.

The second assignment of error is denied.

---

[33]The definitions of "permit" and "limited land use decision" expressly include subdivisions. ORS 197.015(12)(limited land use decision); 227.160(2)(permit); 227.215(1)(development).

THIRD ASSIGNMENT OF ERROR

Petitioner argues the HDO violates Goals 5 and 10 and LCDC administrative rules that implement those Goals.

A. Goal 5

Petitioner's Goal 5 argument is based on an alleged failure to comply with LCDC's new Goal 5 administrative rule. OAR chapter 660, division 23. That rule is potentially applicable to post-acknowledgment plan amendments. OAR 660-023-0000. OAR 660-023-0010(5) defines "post-acknowledgment plan amendments" (PAPAs) as including amendments to acknowledged "land use regulations." However, OAR 660-023-0250(3) specifically provides that "[l]ocal governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource." OAR 660-023-0250(3) goes on to state that "a PAPA would affect a Goal 5 resource only if:

> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or
>
> "(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area."

Although neither petitioner nor respondent address OAR 660-023-0250(3)(a), (b) or (c), it does not appear that the

HDO qualifies under any of those subsections. The HDO amends existing land use regulations, but does not create or amend "a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5." Nor does the HDO allow any new uses or amend the UGB.

Petitioner has not established that Goal 5 applies to the HDO. This subassignment of error is denied.

B. Goal 10

The only two Goal 10-related provisions petitioner contends the HDO violates are OAR 660-008-010 and 660-008-015. Those provisions are in all material respects identical to the needed housing statutory requirements for sufficient buildable lands to satisfy needed housing requirements and for "clear and objective" standards and procedures. ORS 197.307(3)(a) and 197.307(6). We have already concluded that the HDO either violates or has not been shown to comply with those statutory provisions. If petitioner is correct that Goal 10 applies directly to the HDO, the HDO violates these Goal 10 rule provisions, as well.

The ALUO is a "land use regulation," as that term is defined by ORS 197.015(11). The HDO amends the ALUO. LUBA is required to "reverse or remand an amendment to a land use regulation" that is not consistent with one or more statewide planning goals, if:

> "The comprehensive plan does not contain <u>specific</u> policies or other provisions which provide the basis

> for the regulation, and the regulation is not in compliance with the statewide planning goals." (Emphasis added). ORS 197.835(7)(b) (emphasis added).

In other words, where the comprehensive plan includes specific policies or other provisions that provide the basis for the regulation, the statewide planning goals do not apply.

We explained in Melton v. City of Cottage Grove, 28 Or LUBA 1, 6 (1994), that comprehensive plan provisions that generally urged planning for tourist-commercial activities were not specific policies that could provide a basis for a particular interstate-oriented major retail facility. Similarly, in Ramsey v. City of Portland, 23 Or LUBA 291, 299, aff'd, 115 Or App 20, 836 P2d 772 (1992), we concluded a general provision urging conservation of natural resources did not amount to a specific plan policy that could provide the basis for a newly adopted procedure for case-by-case evaluation of development applications. However, in our recent decision in Cuddeback v. City of Eugene, 32 Or LUBA 418, 422-23 (1997), we explain that the requirement in ORS 197.835(7)(b) for "specific policies or other provisions which provide the basis for the regulation" does not require that the comprehensive plan policy or provision specify exactly how the plan is to be implemented.

The challenged decision includes 10 pages of findings that identify numerous plan policies, goals and other provisions. Record 33-43. The city specifically finds in its decision that these plan policies and other provisions

constitute the kind of "specific policies" required by ORS 197.735(7)(b), making the statewide planning goals inapplicable to the challenged decision. Record 33.

The policies cited by the city are somewhat more specific than the policies the cities attempted to rely upon in Melton and Ramsey to contend that statewide planning goals did not apply directly to the decisions challenged in those appeals.[34] Petitioner does not assign error to the city's finding that the cited plan policies and other provisions satisfy the requirement under ORS 197.735(7)(b) for "specific policies or other provisions which provide the basis for the regulation." At oral argument, petitioner contended the cited policies were not sufficiently specific, but did not explain why it believed the cited policies and other provisions lack the requisite specificity under ORS 197.735(7)(b).

In view of the city's unchallenged finding that the cited plan policies and other provisions make the statewide planning

---

[34]The following examples are representative of the plan policies and other provisions the city cites in its decision:

> "Areas of steep slope on highly erosive granitic soils are very sensitive to development activities. The best control to erosion is to limit development in areas that are sensitive." Record 34.
>
> "[D]evelopment [must] be accommodated to natural topography, drainage, and soils and make maximum use of existing vegetation to minimize erosion." Record 35.
>
> "Require site-preparation procedures and construction practices which minimize erosion and sedimentation." Id.
>
> "Restrict any new partitioning or subdivision of land on slopes greater than 40%." Record 36.

goals inapplicable to the HDO, we reject petitioner's contention that the HDO violates Goal 10 and the Goal 10 administrative rule.[35]

FOURTH ASSIGNMENT OF ERROR

In its final assignment of error, petitioner argues the HDO is inconsistent with a number of comprehensive plan provisions and for that reason must be reversed or remanded under ORS 197.835(7)(a).

A. ACP Chapter XII

As explained under the first assignment of error, the BLI includes "buildable lands presently available in the City limits." ACP XII-2. Table XII-3 shows there is a sufficient number of acres of land to meet identified land needs in each of the identified land categories. Petitioner contends the HDO will reduce development potential on SFR lands, making buildable lands shown on Table XII-3 inadequate to meet projected needs for single-family housing units.

We have already sustained petitioner's subassignment of error D(1) under the first assignment of error. On remand, the city will have to demonstrate that the 160 acres of SFR lands outside city limits but inside the UGB (which will also be subject to the HDO) are capable of supplying a sufficient number of housing units to (1) offset the impact of the HDO on

[35]Our conclusion here that the cited plan policies are sufficient to make the statewide planning goals inapplicable provides an additional basis for rejecting petitioner's allegations that the city should have applied Goal 5 when it adopted the HDO.

SFR lands currently within the city and (2) address the current shortage of 46 acres of SFR lands already within the city. If the city is unable to do so, we agree with petitioner that the BLI will have to be amended to add a sufficient number of acres of SFR lands to meet those needs.

This subassignment of error is sustained.[36]

B. ACP Chapter XII, Policies 2 and 3

Petitioner makes arguments that the HDO, by making certain lands within the city limits unbuildable, will violate ACP Chapter XII, Policies 2 and 3. Petitioner's arguments are based on a strained and incorrect understanding of what those policies mean and how they would have to be applied following adoption of the HDO. We reject petitioner's arguments concerning these policies without discussion.

This subassignment of error is denied.

The fourth assignment of error is sustained, in part.

The city's decision is remanded.

---

[36]The city once more attempts to rely on OAR 660-008-0005 for the proposition that its BLI is not required to include slopes in excess of 25% to meet identified housing needs. Again, this confuses what the city may do with what it in fact has done in the ACP. The BLI includes lands with greater than 25% slopes to meet identified housing needs. The HDO renders some of those lands included on the BLI unbuildable. The city may not avoid addressing that impact of the HDO by claiming it need not have included the affected acres in the BLI in the first place. The bottom line is that in adopting the HDO the city must ensure that it continues to have a sufficient number of acres of buildable land in its BLI to meet identified land needs.

In addition we are uncertain of the legal significance of the city's argument that Policy 1 at ACP XII-6, which states the city will strive to maintain a 5-year supply of land for any particular need in the city limits," is met. The relationship between that policy and Tables XII-1, XII-2 and X-II-3, which address land needs and vacant buildable lands for a longer planning period and consider lands outside city limits, is not clear.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SOUTHEAST NEIGHBORS
NEIGHBORHOOD ASSOCIATION,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

WEST CREEK LLC,
SOUTH PARK ASSOCIATES LLC,
and HOMEBUILDERS ASSOCIATION
OF LANE COUNTY,
Intervenors-Respondents.

LUBA No. 2013-004

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Daniel C. Snyder, Eugene, filed a petition for review and cross response brief and argued on behalf of petitioner.

Glenn Klein, City Attorney, Eugene, filed a response brief. Emily N. Jerome, Eugene, argued on behalf of respondent.

Bill Kloos, Eugene, filed a response brief and cross petition for review and argued on behalf of intervenors-respondents.

RYAN, Board Member; BASSHAM, Board Member, participated in the decision.

HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED 07/12/2013

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

Opinion by Ryan.

NATURE OF THE DECISION

Southeast Neighbors Neighborhood Association (Southeast Neighbors) appeals a decision approving a tentative planned unit development application.

REPLY BRIEFS

Southeast Neighbors and intervenors West Creek, LLC, South Park Associates, LLC and Homebuilders Association of Lane County (collectively, West Creek) each filed a response brief and each moves for permission to file a reply brief to respond to new matters raised in the other's response brief. The reply briefs are allowed.

FACTS

West Creek applied for tentative planned unit development (PUD) approval to create 75 residential lots on an approximately 26-acre property located in the South Hills area of the city. The subject property is zoned Low Density Residential (R-1), and is within the PUD overlay zone and the Water Resources (WR) overlay zone. The property is located south of the intersection of West Amazon Drive and Martin Street. Access to the property is proposed to be provided over an existing unimproved right of way that extends the developed portion of West Amazon Drive through the property from north to south, from Martin Drive to Fox Hollow Road. The entire property is included on the city's inventory of significant resources under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and the property is also included on the city's inventory of buildable lands under Statewide Planning Goal 10 (Housing). Three segments of Amazon Creek are located on the property.

The property is sloped. One provision of the Eugene Code (EC) that we set out and discuss later prohibits grading on portions of a development site that meet or exceed 20 percent slope. EC 9.8325(5). The slope of the property was and is a central question in this appeal. Based on a slope map of the property provided by West Creek that measured slope

using 5- foot contour intervals, planning staff prepared a slope map that showed that slopes on most of the eastern portion of the property exceed 20 percent. The city's planning staff initially recommended denial of the application for 75 lots because the plan proposed grading of slopes on the eastern portion of the property that exceed 20 percent. In the alternative, planning staff recommended a condition of approval that would limit the PUD to 47 lots located only on the western portion of the property where West Creek's 5-foot contour interval slope map shows there are no slopes greater than 20 percent. Thereafter, prior to the initial public hearing before the hearings officer, West Creek submitted an alternative site plan that sought approval for 47 lots by developing only the western portion of the property. West Creek requested that the city approve either the 75-lot proposal or the alternative 47-lot proposal.

During the proceedings before the hearings officer, Southeast Neighbors' expert, Matthews, submitted a slope map (the Matthews Slope Map) that measured slopes on the property using 5-foot contour intervals and showed more areas of the eastern portion of the property as well as some areas on the western portion of the property as meeting or exceeding 20 percent slope, compared to the 5-foot contour slope map prepared by staff. The hearings officer relied on the Matthews Slope Map to deny West Creek's 47-lot proposal (and 75-lot proposal) because he determined that both plans proposed grading of portions of the property that meet or exceed 20 percent slope.

Southeast Neighbors and West Creek both appealed the hearings officer's decision to the planning commission. The planning commission concluded, based on the slope map prepared by planning staff that was based on West Creek's 5-foot contour intervals slope map, that the 47-lot plan did not propose grading on slopes equal to or greater than 20 percent, and approved the application for 47 lots. Southeast Neighbors appealed the planning commission's decision to LUBA, and West Creek filed a cross petition for review.

SOUTHEAST NEIGHBORS' FIRST ASSIGNMENT OF ERROR/WEST CREEK'S FIRST AND SECOND CROSS ASSIGNMENTS OF ERROR

Southeast Neighbors' first assignment of error and West Creek's first and second cross assignments of error challenge various aspects of the planning commission's decision that are related to the question of the slopes on the property. We address West Creek's first and second cross assignments of error that challenge the ability of the city to apply EC 9.8325(5) at all to the proposal and then turn to Southeast Neighbors' first assignment of error that alleges that the planning commission committed procedural error.

A. West Creek's First and Second Cross Assignments of Error

The application is for "needed housing" as that term is used in ORS 197.303(1).[1] EC 9.8325 provides the tentative PUD approval criteria for "needed housing." EC 9.8325(5) provides that for a PUD for needed housing "[t]here shall be no proposed grading on portions of the development site that meet or exceed 20% slope."

In its first and second cross assignments of error, West Creek argues that the city erred in applying EC 9.8325(5) to its application for several reasons. First, according to West Creek, the method for measuring slope is an application submittal requirement and failure to

---

[1] ORS 197.303(1) provides:

> "As used in ORS 197.307, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types:
>
> "(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
>
> "(b) Government assisted housing;
>
> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
>
> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
>
> "(e) Housing for farmworkers."

provide the requested information may not be used as a basis to deny an application. West Creek additionally argues that including instructions about how to measure slope on the city's application form is insufficient to make EC 9.8235(5) a "clear and objective standard[]" within the meaning of ORS 197.307(4).[2] Finally, West Creek argues that ORS 227.173 prohibits the city from requiring applicants to use the city's method for measuring slope where the method is not included in EC 9.8325(5). We address each argument in turn.

1. Information Requirement

The city's application form instructs applicants that for properties with slopes that exceed ten percent, an applicant should provide slope data using 5-foot contour intervals. Record 2315.[3] West Creek initially submitted a slope map that measured slopes on the property based on the difference in elevation between four sets of points on the property's outer boundary, a method similar to measuring the average slope between points on the property. Record 1851. By measuring slope using that method, the property's steepest slope would be 15.2 percent and no grading on the plan for 75 lots would run afoul of the criterion.

West Creek also submitted slope measurements using 5-foot contour intervals. That slope data showed that slopes on the property's eastern side meet or exceed 20 percent, and led the city's planning staff to recommend denial of the 75-lot proposal or approval with a condition limiting development to the western portion of the property. Finally, prior to the close of the initial public hearing before the hearings officer, West Creek submitted a slope map that measured slope using 20-foot contour intervals. Using that slope data, West

---

[2] ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

[3] The city moves to supplement the record with West Creek's application. No party opposes the motion and it is granted.

Creek's proposal for 75 lots would satisfy EC 9.8325(5). The hearings officer declined to rely on the 20-foot contour interval slope map, and the planning commission affirmed that decision. Record 12.

We agree with West Creek that a local government may not deny an application that is otherwise complete merely for failure to provide the information required by the application form or by the code. *Caster v. Silverton*, 54 Or LUBA 441, 450-51 (2007). Thus, the city could not have denied the application solely because petitioner failed to provide a slope map with 5-foot contours, as the application form requires, because such a slope map is only an informational requirement. However, that is not what occurred here. What occurred here is that the city requested that West Creek provide evidence regarding slopes on the property based on 5-foot contour intervals, and based on that evidence provided by West Creek, the city denied the 75-lot application but approved the alternate 47-lot application. The city chose not to rely on other evidence provided by West Creek that measured slopes using a different method. The city has discretion to rely on the evidence it chooses in making its decision. *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993). That West Creek desired that the city rely on different evidence to demonstrate slope on the property does not provide a basis for reversal or remand of the decision. *Younger v. City of Portland*, 305 Or 346, 358-60 (1988).

2. ORS 197.307(4)

ORS 197.307(4) allows the city to apply only "clear and objective standards" to West Creek's proposed PUD. *See* n 2. West Creek argues that EC 9.8325(5) is not a "clear and objective standard * * *" because nothing in EC 9.8325(5) or the city's comprehensive plan or other land use regulations specify how the applicant must demonstrate and how the city determines the "portions" of a development site that exceed a 20 percent slope. According to West Creek, EC 9.8325(5) is deeply ambiguous on this point. West Creek argues that while the city's application form requests that slope be demonstrated using 5-foot contours, that is

an arbitrary number chosen at staff's discretion, and using any other number yields very different results, as the different slope maps in the record reflect. According to West Creek, it is impossible to determine slope under EC 9.8325(5) without exercising judgment about what "portion[] of the development site" is evaluated using what contour intervals. For that reason, West Creek argues, EC 9.8325(5) requires the kind of "subjective, value-laden analyses" that are the hallmark of a non-clear and objective standard we set out in *Rogue Valley Realtors v. City of Ashland*, 35 Or LUBA 139, 155 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999).

In *Homebuilders Assn of Lane County v. City of Eugene*, 41 Or LUBA 370, 410-11 (2002), the petitioners argued that EC 9.8325(5) was not "clear and objective" on its face because it did not specify how slope is measured. LUBA rejected the petitioners' facial challenge to EC 9.8325(5), concluding that the city had demonstrated that EC 9.8325(5) is "capable of being imposed only in a clear and objective manner." *Id*. at 381. We concluded that "the slope of a property is an objectively determinable fact, and the absence of instructions on how to determine slope does not offend ORS 197.307(6)[(2001)]." *Id*. at 411.

West Creek argues that our decision in *Homebuilders* is not controlling in the present appeal because the present appeal is a challenge to EC 9.8325(5) as the city has applied it to West Creek. However, we see no difference in the challenge to EC 9.8325(5) that we rejected in *Homebuilders* and West Creek's challenge in the present appeal. We concluded in *Homebuilders* that "the absence of instructions on how to determine slope does not offend ORS 197.307(4)." The city subsequently interpreted EC 9.8325(5) to require that slopes on "portions of [a] development site" that have slopes that are greater than ten percent be measured using 5-foot contour intervals. The city provides instructions on the application form on how it will measure slope, and West Creek has not demonstrated that the city's interpretation of EC 9.8325(5) or its chosen method of measuring slope introduces subjectivity into the determination of the slope of a property. In instructing applicants on

how to measure slope, the city is not arbitrarily applying EC 9.8325(5) or otherwise engaging in "subjective, value-laden analyses" but merely giving effect to the language of EC 9.8325(5) that prohibits grading on "portions of the development site" that meet or exceed 20 percent slope. That EC 9.8325(5) requires some interpretation in order to apply the 20 percent slope standard does not necessarily mean that EC 9.8325(5) is not clear and objective, or that it requires a subjective, value-laden analysis. *See Rudell v. City of Bandon*, 249 Or App 309, 319, 275 P3d 1010 (2012) (city's interpretation of a defined term in its code is sufficiently clear and objective for purposes of ORS 197.307(6)(2009)).

West Creek also argues that if the city is going to choose an arbitrary contour interval with which to determine slope, the city must choose a contour interval that is based on and consistent with the city's adopted comprehensive plans. West Creek notes that the city's adopted refinement plan for the area, the South Hills Study, includes a US Geological Service (USGS) topographic map of the area that depicts slope using 20-foot contour intervals. However, EC 9.8325(5) applies in all areas of the city and there is no indication that in adopting EC 9.8325(5) the city relied on the South Hills Study or any maps contained in the study. Merely because a USGS map is included in the South Hills Study does not mean that the city is *required* to employ the contour intervals used on that map in order to determine slope under EC 9.8325(5).

Finally, West Creek argues that because the subject property is included in the city's Buildable Lands Inventory (BLI), the city erred in relying on 5-foot contour intervals to determine whether EC 9.8325(5) is satisfied. We understand West Creek to argue that the inclusion of the subject property on the BLI requires the city to measure slope in a way that will result in more development on property that is subject to the slope limit. However, beyond asserting that the property is included on the city's BLI, West Creek does not otherwise explain why that fact means the city must use a different measuring method to measure slope or that it erred in measuring slope based on 5-foot contour intervals.

West Creek's real disagreement with the city is that measuring slope based on 5-foot contour intervals precludes development of a "portion of the development site" under EC 9.8325(5). West Creek would prefer the city rely upon different evidence using a different contour interval, if that would result in approval of its preferred 75-lot PUD. But that disagreement does not convert an otherwise clear and objective standard into a standard that offends ORS 197.307(4).

3. ORS 227.173(1)

ORS 227.173(1) provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

ORS 227.173(1) requires approval standards that are "clear enough for an applicant to know what [it] must show during the application process." *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982). As we understand West Creek's challenge under ORS 227.173, it boils down to an argument that ORS 227.173(1) prohibits the city from applying EC 9.8325(5) because the standard does not specify how to determine 20 percent slope, and thus the standard is not clear enough to allow an applicant to determine what must be demonstrated in the application. According to West Creek, directions from planning staff on the application form to measure slope using a 5-foot contour interval are not sufficient to avoid the lack of clarity and subjectivity contained in EC 9.8325(5). West Creek argues that the necessary clarity and objectivity must exist in the city's acknowledged code provisions.

In our discussion above rejecting West Creek's argument that ORS 197.307(4) prohibits the city from applying EC 9.8325(5) to its application, we concluded that the 20 percent slope standard in EC 9.8325(5) is clear and objective on its face. We reiterate that conclusion here and conclude that EC 9.8325(5) is similarly "clear enough for an applicant to

know what [it] must show during the application process." *Lee*, 57 Or App at 802. In addition, we disagree that ORS 227.173(1) requires that a *method* of measuring slope must be included in the development ordinance in order to determine whether the 20 percent standard is met. No party disputes that the most straightforward way to determine slope, if not the only way, is to compare vertical rise to horizontal distance, expressed as a fraction ("rise/run"). EC 9.8325(5) does not specify the size of the vertical or horizontal distance being compared. The city's application form requests that applicants provide a slope map using a 5-foot vertical rise. West Creek submitted a total of three slope maps, one based on 5-foot intervals, one based on the width of the entire property, and one based on 20-foot contour intervals. The city chose to base its decision on the 5-foot interval slope map, and West Creek disagrees with that choice. But West Creek clearly understood how to demonstrate slope, and the fact that it preferred using a larger vertical or horizontal distance to determine slope than the city preferred does not demonstrate that EC 9.8325(5) is impermissibly vague or unclear in violation of ORS 227.173(1). *State ex Rel West Main Townhomes v. City of Medford*, 233 Or App 41, 225 P3d 56 (2009*), modified and adhered to on reconsideration* 234 Or App 343, 228 P3d 607 (2010).

West Creek's first and second cross assignments of error are denied.

B. Southeast Neighbors' First Assignment of Error

During the proceedings before the hearings officer, Southeast Neighbors submitted the Matthews Slope Map into the record. The Matthews Slope Map measured the slopes on the property based on a copy of the same staff map with 5-foot contour intervals, but used a different measuring tool than the tool that planning staff used to measure slopes on the property, also based on 5-foot contour intervals.[4] The Matthews Slope Map showed more areas of the property included within the 47-lot proposal that contain slopes equal to or

[4] Matthews used a 25-foot diameter (at scale) circle to measure slope and the planning staff used a 25-foot (at scale) square. Record 466.

greater than 20 percent than the staff map showed. Prior to the close of the record, West Creek argued to the hearings officer that he should not rely on the Matthews Slope Map because it was less reliable than the map prepared by the planning staff, for a number of reasons. Record 498. The hearings officer relied on the Matthews Slope Map to deny the applications for both a 75-lot subdivision and the alternative 47-lot subdivision.[5]

EC 9.7655(3) provides in relevant part that an appeal of a hearings officer decision to the planning commission is "* * * based on the record, and [] limited to the issues raised in the record that are set out in the filed statement of issues." EC 9.7655(2) provides that "[n]o new evidence pertaining to appeal issues shall be accepted" by the planning commission.[6] West Creek appealed the hearings officer's decision to the planning commission. In its appeal statement, West Creek asserted that the hearings officer erred in relying on the Matthews Slope Map for a number of reasons. Record 219-225. As an insert in its appeal statement, West Creek included graphics showing slopes, which it produced using the methodology that it understood Matthews had used. Record 221-22.

In response, Southeast Neighbors argued that West Creek's appeal statement sought to appeal issues that were not raised before the hearings officer in contravention of EC

---

[5] The hearings officer found:

> "Mr. Matthews' map shows that staff's approach was remarkably accurate. Mr. Matthews' map shows only a few large areas not included on staff's map, but all of those are outside of the specific spots shown for development. Additionally, Mr. Matthews' map shows slight increases in the size of the areas that staff had marked as slopes of 20 percent or greater. The hearings official believes that substantial evidence in the whole record shows that staff's map and Mr. Matthews' map accurately measured slope, but that Mr. Matthews' map provides slightly [more] accurate information of slopes equal to or greater than 20 percent. His approach is essentially identical to the staff's approach, except for the shape of the measure[ing] tool, so the hearings official concludes that Mr. Matthews' map shows the areas that the applicant must avoid pursuant to this criterion." Record 466.

[6] EC 9.0500 defines "evidence" to mean "[f]acts, documents, data, or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

9.7655(3), and to consider "new evidence" in contravention of EC 9.7655(2), where West Creek asserted that the hearings officer erred in relying on the Matthews Slope Map. The parties then engaged in a lengthy battle of motions, responses to motions, replies to responses, sur-replies to responses, etc. about whether the planning commission could consider the issues and whether West Creek improperly submitted new "evidence." Record 157-58; 179-181; 182-86. Additionally, during the single public hearing before the planning commission, Matthews testified and used an enlarged 2 foot by 3 foot version of West Creek's 47-lot site plan and measured slopes on the property with a ruler and a red pen to demonstrate slopes on the property.

In its final decision, the planning commission concluded that the issues presented in West Creek's appeal statement that challenged the Matthews Slope Map had been raised before the hearings officer. Record 7-8. The planning commission rejected as "new evidence" the two graphics that West Creek had included in its appeal statement and struck all references to the graphics contained in West Creek's appeal statement. The planning commission also determined that the Matthews demonstrative exhibit from his testimony at the planning commission hearing was "new evidence" under EC 9.7655(2) and rejected it. The planning commission then reversed the hearings officer's decision and concluded that the map prepared by the city's planning staff based on the map provided by West Creek was more reliable than the Matthews Slope Map, and approved the 47-lot PUD. Record 15-18.

ORS 197.835(9)(a)(B) provides that LUBA will reverse or remand a decision if the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" In its first subassignment of error under the first assignment of error, Southeast Neighbors argues that the planning commission committed a procedural error that prejudiced its substantial rights when it allowed West Creek to challenge the Matthews Slope Map in the appeal of the hearings

officer's decision, and that it erred in accepting and relying on new evidence relating to those appeal issues in contravention of EC 9.7655(2).

West Creek responds that the issues that it raised in its appeal statement regarding the Matthews Slope Map were raised before the hearings officer at Record 498 and that the planning commission did not err in correctly concluding that West Creek had raised the issues below. West Creek argues that the planning commission correctly interpreted EC 9.7655(3) as allowing the planning commission to consider West Creek's additional arguments related to issues that were properly raised below. Finally, West Creek responds that the planning commission correctly concluded that, except for the material that the planning commission struck as new "evidence," no new evidence was included in West Creek's submissions.

We agree with West Creek. First, Southeast Neighbors' arguments in the first subassignment of error conflate the "issues" that it alleges were not raised with the more detailed arguments on the issues that West Creek made to the planning commission. The planning commission interpreted the requirement in EC 9.7655(3) that an "issue" have been raised not to require that an appealing party must have raised all arguments in connection with that issue in order to make those arguments to the planning commission. Southeast Neighbors does not challenge that interpretation or otherwise explain why it is not correct. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995).

Second, Southeast Neighbors does not identify in the petition for review with any specificity the "new evidence" that it alleges was introduced before the planning commission.[7] The planning commission adopted detailed findings that identify the evidence it determined was "new evidence" contained in West Creek's and Southeast

[7] The petition for review refers to a chart at Record 328-29, but that chart does not identify with any specificity new "evidence" that Southeast Neighbors believes was introduced. Southeast Neighbors' Petition for Review 26.

Neighbors'/Matthews' submissions, and rejected that evidence. Southeast Neighbors does not challenge those findings or otherwise explain why those findings regarding new evidence are incorrect.

In its second subassignment of error, we understand Southeast Neighbors to argue that the planning commission erred in rejecting as "new evidence" under EC 9.7655(2) the Matthews demonstrative exhibit created at the planning commission hearing. Petition for Review 30. We understand Southeast Neighbors to argue that the Matthews demonstrative exhibit should not have been rejected because the planning commission allowed West Creek to introduce new evidence, and the demonstrative exhibit was merely Southeast Neighbors' response to that improperly introduced new evidence. We reject that argument. First, we have already determined above that the planning commission did not improperly accept any new evidence from West Creek. More to the point, EC 9.7655(2) is clear that "no new evidence * * * shall be accepted." Given such a prohibition, the remedy for correcting a planning commission error in accepting new evidence in contravention of EC 9.7655(2) is not to allow an evidentiary free-for-all in the form of more new evidence to be introduced before the planning commission in violation of EC 9.7655(2), but to remand the decision for the planning commission to make its decision without relying on *any* new evidence.

Southeast Neighbors' first assignment of error is denied.

SOUTHEAST NEIGHBORS' SECOND ASSIGNMENT OF ERROR/WEST CREEK'S SEVENTH CROSS ASSIGNMENT OF ERROR

EC 9.8325(13) requires an applicant for a planned unit development to show that:

> "[s]tormwater runoff from the PUD will not damage natural drainage courses either on-site or downstream by eroding or scouring the natural drainage courses or by causing turbidity, or the transport of sediment due to increased peak flows or velocity."

A. **West Creek's Seventh Cross Assignment of Error**

In West Creek's seventh cross assignment of error, it argues that EC 9.8325(13) may not be applied to the proposal because it is not a "clear and objective standard[]" within the meaning of ORS 197.307(4). According to West Creek, EC 9.8325(13) is a subjective standard because the city must determine what a "natural drainage course" is, since that term is not defined in the EC, and determine what constitutes "damage" to that natural drainage course.

Southeast Neighbors responds initially by arguing that West Creek is prohibited under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) from asserting the issue raised in its seventh cross assignment of error, because West Creek failed to raise the issue in its appeal before the planning commission. West Creek responds that the issue is merely raised as a "backup defense" in its cross-petition for review. West Creek also cites *Olstedt v. Clatsop County*, 62 Or LUBA 131, 139-40 (2012), for the proposition that *Miles* is inapposite because West Creek prevailed on the issue before the hearings officer, and therefore there was no "issue" to appeal to the planning commission in order to preserve the right to raise the issue at LUBA. Finally, West Creek also cites to the pages in the record where the issue was raised before the hearings officer.

We do not understand West Creek to contend that it raised the issue in its appeal or in any response to Southeast Neighbors' appeal. Where the issue of whether the city may apply EC 9.8325(13) at all to a proposal is raised as an assignment of error in West Creek's cross petition for review, the issue is not a "backup defense" as West Creek suggests. In that circumstance, we agree with Southeast Neighbors that West Creek may not assign error to the planning commission's decision on the basis that EC 9.8325(13) does not apply at all to the proposal, where the issue was not raised in West Creek's appeal to the planning commission or in any response to Southeast Neighbors' appeal to the planning commission. That differs from the situation in *Olstedt* that West Creek relies on. In *Olstedt*, the petitioners at LUBA

prevailed in the initial decision, and the applicants filed the local appeal, where they ultimately gained approval of their application. The petitioners at LUBA, therefore, had no reason to appeal the initial decision and we determined that *Miles* was inapplicable in those circumstances.

In contrast, here, West Creek and Southeast Neighbors both filed local appeals of the hearings officer's decision, and Southeast Neighbors assigned error to the hearings officer's determination that EC 9.8325(13) was met.[8] In that circumstance, we think that *Miles* requires West Creek to alert the planning commission, the final decision maker, that one of West Creek's positions is that EC 9.8235(13) violates the needed housing statute and that it may not be applied at all, in order to give the planning commission the opportunity to consider that issue. *Miles*, 190 Or App at 510. Having failed to do so, West Creek is precluded under ORS 197.825(1) and *Miles* from assigning error to the planning commission's decision on the basis that a criterion does not apply to the proposal, where the response amounts to an allegation that the city made a different error in applying EC 9.8325(13). That is the case whether the issue is raised in a cross petition for review or in a response brief.

West Creek's seventh cross assignment of error is denied.

B. Southeast Neighbors' Second Assignment of Error

In 2003 the city adopted the current version of EC 9.8235(13). Three years later, in 2006, the city adopted its stormwater standards at EC 9.6790 through 9.6797. EC 9.8325(7)(j) requires an applicant to show compliance with the city's stormwater standards, as relevant, "regarding * * * flow control for headwaters area [EC 9.6793] * * *."[9]

---

[8] During the proceedings before the hearings officer, West Creek also took the position that EC 9.8325(13) is not a clear and objective standard, but West Creek did not take that position before the planning commission.

[9] EC 9.6793 Stormwater Flow Control (Headwaters) provides in relevant part:

To address stormwater runoff from the proposed development, West Creek proposes to transmit stormwater from the streets and individual lots in underground pipes that will connect to the existing piped stormwater system in Martin Street located north of the subject property. That existing system is piped until it eventually outfalls to the Amazon Canal in an open drainage system some distance to the north of Martin Street. During the proceedings below, West Creek took the position that EC 9.8325(13) is satisfied by its agreement to satisfy EC 9.6793, Stormwater Flow Control (Headwaters), which does not otherwise apply to the proposed PUD because the open portion of the natural drainage course, the Amazon Canal, is located below 500 feet in elevation. EC 9.6793(3)(a). *See* n 10. The planning commission imposed a condition of approval that requires West Creek to include on the final PUD plans and final subdivision plat a requirement that each lot in the subdivision must have its own filtration stormwater system that meets EC 9.6793, and a condition that requires the

---

" (1) Purpose. The purpose of EC 9.6793 is to protect waterways in the headwaters area from the erosive effects [sic] of increases in stormwater runoff peak flow rates and volumes resulting from development.

" * * * * *

"(3) Standards.

"(a) Applications shall demonstrate, using methodology in the Stormwater Management Manual, that peak rates of flow delivered to an existing open waterway at a point above 500 feet in elevation will not increase during storms larger than the water quality design storm and smaller than the flood control design storm as a result of the development that is the subject of the application;

"(b) For purposes of designing the system as required by the standards in this section, the amount of impervious surface per lot is assumed to be the maximum lot coverage allowed for the use in the zone in which it is located, unless the applicant demonstrates otherwise.

"(c) All facilities to control the rate of stormwater runoff shall be sited, designed and constructed according to the flow control provisions and the facility design requirements set forth in the Stormwater Management Manual. Flow control facilities must be designed using one of the methodologies outlined in the Stormwater Management Manual.

"(d) The standards in EC 9.6793(3) may be adjusted pursuant to EC 9.8030(24)."

piped stormwater system located within the public streets to meet EC 9.6793. The planning commission concluded that the onsite detention of all stormwater runoff from the development in pipes "will not increase peak flows or velocity in such a manner as to cause damage to the open drainage system." Record 32. The planning commission concluded that with the conditions of approval that require onsite detention stormwater management systems on the subject property, the proposal demonstrated compliance with EC 9.8325(13):

> "The [planning commission] rejects [Southeast Neighbors'] arguments and finds that the [hearings officer] did make an independent evaluation of the criteria at EC 9.8325(7)(j) and EC 9.8325(13), which both relate to stormwater runoff from the proposed development. Although EC 9.8325(7)(j) does not require the development to meet EC 9.6793 Stormwater Flow Control (Headwaters), the [planning commission] endorses the hearings officer's imposition of this standard to ensure that the development provides onsite stormwater management facilities that detain post-development peak flows to pre-development levels, which is necessary to ensure compliance with EC 9.8325(13). The flow control standards * * * provide this detention and are the standards that city staff can readily implement during the building permit process. The [planning commission] finds that the [hearings officer] did not [err] by correlating the detention requirements of EC 9.8325(7)(j) to address the * * * 'increased peak flow or velocity' test of criterion EC 9.8325(13)." Record 33 (underlining in original).

In its second assignment of error, we understand Southeast Neighbors to argue that the planning commission misconstrued the applicable law when it determined that EC 9.8325(13) is satisfied because the planning commission imposed conditions that require EC 9.6793 to be satisfied for each lot and for the public stormwater system within streets and utility easements.[10] We understand Southeast Neighbors to argue that EC 9.8325(13) is concerned with ensuring that the proposed PUD will not "erod[e] or scour the natural drainage courses [either on-site or downstream] * * * or [] caus[e] turbidity, or the transport of sediment due to increased flows or velocity" and that EC 9.6793 does not address those issues. According to Southeast Neighbors, the city's stormwater standard at EC 9.6793 does

[10] Apparently EC 9.6793 does not apply to development of the western portion of the property because the open portion of the Amazon Canal is not above 500 feet in elevation. EC 9.6793(3).

not address eroding or scouring of the Amazon Canal, or turbidity in that open waterway due to increased flows or velocity.

Although the hearings officer's findings are not particularly clear, and the planning commission's attempt to clarify the hearings officer's findings is of limited value, we agree with West Creek that the planning commission correctly concluded that EC 9.8325(13) is satisfied by requiring compliance with EC 9.6793, Stormwater Flow Control (Headwaters). Record 32-33. EC 9.6793(1) provides that the purpose of the stormwater standards is "to protect waterways in the headwaters area from *the erosive effects* of increases in stormwater runoff peak flow rates and volumes resulting from development." (Emphasis added.) Southeast Neighbors does not explain why the purpose statement at EC 9.6793(1) and the provisions that follow in EC 9.6793 that require an applicant to demonstrate that "peak rates of flow delivered to an existing open waterway * * * will not increase during storms larger than the water quality design storm and smaller than the flood control design storm as a result of the development that is the subject of the application" do not also protect the downstream, open portion of the Amazon Canal from the "erosive effects" of increases in stormwater runoff, such as "* * * eroding or scouring of the natural drainage courses or * * * turbidity, or the transport of sediment due to increased peak flows or velocity." Given these overlapping concerns, the planning commission could reasonably conclude that preventing *any* increase in stormwater flows pursuant to EC 9.6793 is sufficient to ensure compliance with the EC 9.8325(13) requirement to prevent "eroding or scouring the natural drainage courses or by causing turbidity, or the transport of sediment due to increased peak flows or velocity."

Southeast Neighbors' second assignment of error is denied.

SOUTHEAST NEIGHBORS' THIRD ASSIGNMENT OF ERROR

As explained above, an unimproved portion of West Amazon Drive bisects the property from its intersection with Martin Street to the north to its intersection with Fox

Hollow Road to the south. The proposed development proposes multiple new streets within the PUD that directly or indirectly connect to West Amazon Drive.

EC 9.8325(6)(c) provides that "[t]he street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street when the PUD exceeds 19 lots or when the sum of proposed PUD lots and the existing lots utilizing a local street as the single means of ingress and egress exceeds 19." The hearings officer concluded that West Creek's proposal satisfied EC 9.8325(6)(c):

> "The street layout disperses motor vehicle traffic onto more than one public local street, as all streets proposed within the development connect with West Amazon Drive, which extends beyond the development site to the north (connecting with Martin Street) and south (connecting with Fox Hollow Road). The applicant proposes to improve West Amazon Drive to provide this traffic dispersal; the PUD proposes no phasing of the development, which means that the street improvements will be in place prior to development of the lots, rather than on an incremental basis that would bring the 19-lot rule * * * into question.
>
> "The applicant additionally notes that there are two dispersion points-one to the north, which sends traffic onto the portion of the Eugene Street network leading to the 30th Ave./Hilyard grid, and one to the south connecting the portion of the Eugene street network comprised of Fox Hollow/Donald/Willamette Street. The applicant states that the two street networks are sufficiently separated that if a blockage occurred on one, the other would not be affected." Record 473.

The planning commission adopted findings that agree with the hearings officer's conclusion and further explain:

> "This standard stems from Fire Code about isolated access. The concern would be if West Amazon Drive dead-ended at the site. Instead, the Applicant proposes to improve West Amazon Drive between the existing street improvements at the north and south ends of the site. * * * Fire staff has confirmed that this meets their requirements for providing two points of access." Record 35.

In its third assignment of error, Southeast Neighbors argues that the planning commission erred in concluding that EC 9.8325(6)(c) is satisfied because West Amazon Drive, as it is proposed to be improved, is the single public street onto which traffic from the

subdivision will disperse. West Creek responds, and we agree, that the planning commission correctly concluded that EC 9.8325(6)(c) is met where West Amazon Drive will connect the street layout of the PUD with both of the existing street systems to the north and the south. Essentially, the planning commission concluded that the proposed street layout will result in the connection of the proposed development to "North" West Amazon Drive for the northern part of the development and to "South" West Amazon Drive for the southern part of the development, without creating two streets out of the existing unimproved West Amazon Drive right of way.

Southeast Neighbors' third assignment of error is denied.

SOUTHEAST NEIGHBORS' FOURTH ASSIGNMENT OF ERROR

EC 9.8325(7)(a) provides lot dimension standards and prohibits new lots where more than 33percent of the lot occupies the combined area of the Water Resources conservation setback and any portion of a Goal 5 water resource that extends beyond the setback. EC 9.8325(10) requires the PUD to comply with the solar lot standards at EC 9.2790. EC 9.2790 in turn provides that 70 percent of the lots in a proposed PUD must have a minimum north-south dimension of 75 feet and a front lot line orientation that is within 30 degrees of the true east-west axis.

The hearings officer found that West Creek's 47-lot proposal failed to satisfy EC 9.8325(7)(a) or EC 9.8325(10), and also denied West Creek's request for a modification of the lot dimension standards under EC 9.8325(11).[11] West Creek appealed the hearings officer's decision on the criteria and the modification to the planning commission, and the planning commission granted modifications to both standards. Record 21-25.

[11] EC 9.8325(11) allows a modification to applicable lot standards if consistent with the purposes of the standard. EC 9.2790 provides exceptions to the solar lot standards.

In its fourth assignment of error, we understand Southeast Neighbors to argue that the planning commission's approval of modifications to the lot dimension and solar lot standards misconstrues ORS 197.307(4)'s mandate that the city may only apply "clear and objective standards" to a proposal for needed housing, because the factors that the city must consider in a request for a modification under EC 9.8325(11) or a request for an exception to the solar lot standards under EC 9.2790 require the city to apply standards that are not "clear and objective." In essence, Southeast Neighbors seeks to use the needed housing statute's mandate to apply only "clear and objective standards" as a sword to prevent applicants for needed housing from gaining approval of needed housing projects under discretionary standards.

West Creek responds that nothing in the language of the needed housing statute prohibits the city from offering a discretionary process for approval of a proposal for needed housing as long as the non-discretionary process remains available to an applicant. In essence, West Creek argues that the needed housing statute is a shield for applicants to choose to use or not to use according to project demands. In *Homebuilders*, we concluded that "the city may provide a needed housing applicant with a choice between meeting a clear and objective standard by complying with its terms or by obtaining a discretionary variance or adjustment to that standard without offending ORS 197.307(6)[(2001)]." *Homebuilders*, 41 Or LUBA at 400. We agree with West Creek that the needed housing statute protects an applicant for a permit for needed housing from the city's imposition of discretionary standards without its agreement, but that an applicant may agree to be bound by discretionary standards without running afoul of the statute. *See Linstromberg v. City of Veneta*, 47 Or LUBA 99, 108-09 (2004) (ORS 197.307(4) does not require that a variance standard to an approval criterion for needed housing be clear and objective).

Southeast Neighbors' fourth assignment of error is denied.

SOUTHEAST NEIGHBORS' FIFTH ASSIGNMENT OF ERROR

EC 9.7007(2) requires an applicant to hold a meeting for surrounding property owners "prior to the submittal of an application." EC 9.7007(12) provides that "if the site plan submitted with an application does not substantially conform to the site plan provided at the meeting, the applicant shall be required to hold a new neighborhood/applicant meeting." Prior to submitting its application, West Creek met with surrounding property owners. As described above, during the proceedings before the hearings officer West Creek submitted an alternative site plan seeking a 47-lot PUD and that site plan was ultimately approved.

In its appeal to the planning commission, Southeast Neighbors argued that the planning commission should require West Creek to hold a new neighborhood meeting based on the modified site plan seeking a 47-lot PUD. The planning commission concluded that EC 9.7007(2) is an application requirement rather than an approval criterion, and that because West Creek's initial application was deemed complete, the planning commission had no authority to require West Creek to meet again with the neighborhood and surrounding property owners. Record 28-9. In its fifth assignment of error, Southeast Neighbors argues that the planning commission misconstrued EC 9.7007(2) in refusing to deny the application based on West Creek's failure to hold a new neighborhood meeting.

West Creek responds, and we agree, that the planning commission correctly concluded that it did not have the authority to deny the application based on EC 9.7007(2), where there was no dispute that West Creek held a neighborhood meeting prior to submitting its application, or that the site plan submitted with the application was the same site plan provided at the meeting. EC 9.7007(2) is concerned with ensuring that an applicant meets with the neighborhood and surrounding property owners prior to submitting its application and that the site plan submitted *with the application* does not differ significantly from the site plan provided at the meeting. EC 9.7007(2) plays no further role after the application is submitted.

Southeast Neighbors' fifth assignment of error is denied.

WEST CREEK'S FOURTH CROSS ASSIGNMENT OF ERROR

During the proceedings before the planning commission, West Creek argued that the planning commission should reject Southeast Neighbors' appeal because Southeast Neighbors' board of directors did not authorize the appeal prior to its being filed. Record 271-72. In its fourth cross assignment of error, we understand West Creek to argue that the planning commission misconstrued applicable law when it concluded that it lacked authority to consider whether Southeast Neighbors' appeal was authorized by the association's board of directors when it was filed. West Creek argues that the planning commission has "inherent authority" to consider whether an appeal is validly filed. West Creek Cross Petition for Review 38. West Creek also argues that "LUBA should find, based on uncontroverted evidence, that there was not a valid appeal filed by [Southeast Neighbors] within the deadline set by the code. To the extent issues raised by [Southeast Neighbors] in their appeal depend on * * * having been raised * * * in a local appeal, those issues were not raised. *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003)." West Creek Cross Petition for Review 39.[12]

In response, Southeast Neighbors moves to take evidence not in the record under OAR 661-010-0045, in order to demonstrate that the appeal of the hearings officer's decision was authorized by its board of directors.[13] West Creek responds, and we agree, that

[12] We understand West Creek to argue that if the planning commission had rejected Southeast Neighbors' appeal, then Southeast Neighbors would be barred from raising its assignments of error in the appeal to LUBA under Miles, and LUBA would be required to deny those assignments of error.

[13] OAR 661-010-0045(1) provides in relevant part:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence

Southeast Neighbors has not demonstrated a basis under OAR 661-010-0045 for LUBA to grant its motion to take evidence not in the record. While OAR 661-010-0045(1) allows a motion to take evidence in order to resolve "disputed factual allegations * * * concerning * * * standing," the reference in the rule to disputes over "standing" refers to standing to appeal a decision to LUBA, not to standing disputes that arise during the proceedings before the local government. Accordingly, Southeast Neighbors' motion to take evidence is denied.

However, we agree with Southeast Neighbors that West Creek's assignment of error provides no basis for reversal or remand. West Creek does not argue that Southeast Neighbors failed to satisfy the requirements of EC 9.7655(1) – (3) governing appeals of hearings officer decisions to the planning commission, and it appears that it did. West Creek does not point to any requirement in the EC or anywhere else that an organization must provide documentation that an appeal was authorized by the organization's officers or directors prior to the appeal being filed or that requires the local governing body to independently verify the validity of an appeal. Absent such a code requirement, LUBA will not require the local government to independently verify that an entity that files an appeal of a local decision is authorized to do so by its governing body.

West Creek's fourth cross assignment of error is denied.

WEST CREEK'S FIFTH CROSS ASSIGNMENT OF ERROR

EC 9.8325(3) requires the proposed PUD to provide a "buffer area between the proposed development and surrounding properties by providing at least a 30 foot wide landscape area along the perimeter of the PUD * * *." West Creek proposed to place a fence along the perimeter of the PUD so that the landscape buffer will be enclosed within the fence.

---

to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

The hearings officer concluded that West Creek's proposal satisfied EC 9.8325(3).[14]

Southeast Neighbors appealed that issue to the planning commission, and the planning commission concluded that the fence is not allowed within the landscaped buffer area under EC 9.8325(3). The planning commission imposed a condition of approval that "fencing is not allowed on the perimeter of the PUD or within the required 30' landscape buffer under the provisions of EC 9.8325(3) and EC 9.6210(7)." Record 34.

In its fifth cross assignment of error, West Creek argues that the planning commission erred in prohibiting the fence and that the plain language of EC 9.8325(3) does not support the planning commission's interpretation. We review the planning commission's interpretation of the relevant EC provisions to determine whether it is correct. *Gage*, 133 Or App 346, 349-50. We disagree with West Creek that the planning commission misinterpreted the plain language of EC 9.8325(3) when it prohibited a fence on the perimeter of the PUD or within the landscape buffer area. The planning commission's interpretation of EC 9.8325(3) is more consistent with the presumed purpose of the buffer requirement to provide a *landscape* buffer for the surrounding properties from the visual impacts of the PUD. If the landscaping is located behind a fence, then the fence, not the landscaping, is providing the buffer. Accordingly, the planning commission properly construed EC 9.8325(3) in prohibiting West Creek's proposed perimeter fence.

West Creek's fifth cross assignment of error is denied.

---

[14] The hearings officer found that the text of EC 9.8325(3) supports West Creek's proposal to place a fence on the perimeter of the property:

> "The hearings [officer] believes that the text of this criterion does not require [Southeast Neighbors'] proposed interpretation. This provision specifies a landscaped area between the proposed PUD and surrounding properties, and along, but not 'on' the perimeter. Here, where the applicant is proposing a 30-foot landscaped buffer up to the fence and the fence is on the perimeter, the landscaped buffer is 'between the proposed development and surrounding properties' and is 'along the perimeter.' Further, EC 9.6210(7)(a) lists 'Required Materials' for the landscaped area, but does not purport to exclude all other materials. For example, EC 9.6210(7)(a) does not use the phrase 'Allowable Materials,' which would suggest a list of only those materials allowed." Record 464.

WEST CREEK'S SIXTH CROSS ASSIGNMENT OF ERROR

As described above, the hearings officer denied West Creek's original proposal to develop 75 lots on the property, including on the steeply sloped eastern portion. West Creek's appeal challenged the hearings officer's denial of the 75-lot proposal. In this assignment of error we understand West Creek to attempt to keep the 75-lot proposal under consideration by the planning commission if the decision is remanded.

In various places in the decision the planning commission concluded that West Creek's application to develop 75 lots, including several on the steeply sloped eastern portion of the property, failed to comply with the stormwater standards that apply to development on the property. Record 12, 16, 30, 32, 33. In its sixth cross assignment of error, West Creek argues that the planning commission erred in concluding that the proposal to develop 75 lots fails to satisfy the stormwater standards with respect to the eastern portion of the property. According to West Creek, no party raised an issue regarding the eastern portion of the property's compliance with the stormwater standards in the appeals of the hearings officer's decision.

Initially, we note that West Creek cites "EC 9.8325(7)(b)" in its assignment of error and characterizes that provision as "the stormwater standards incorporated into EC 9.8325(7)(b)." However, EC 9.8325(7)(b) requires an applicant to show compliance with "EC 9.6500 through 9.6505 Public Improvement Standards" and there is no reference to stormwater standards in any of those sections. It is EC 9.8325(7)(j) that requires an applicant to demonstrate compliance with EC 9.6791 through 9.6797.

The planning commission findings that West Creek challenges in its petition for review at 45 and 46 address compliance with the standards at EC 9.6791 through 9.6797 as required by EC 9.8325(7)(j). Those standards were clearly at issue in the appeals of the planning commission's decision, as evidenced by our discussion and resolution of Southeast Neighbors' second assignment of error and West Creek's seventh assignment of error.

Moreover, West Creek appealed the hearings officer's decision to deny the 75-lot proposal and argued to the planning commission that it should be approved. The planning commission committed no error in finding as additional bases to deny the 75-lot proposal failure to satisfy the stormwater standards at EC 9.8325(7)(j).

West Creek's sixth cross assignment of error is denied.

The city's decision is affirmed.[15]

[15] West Creek's third contingent assignment of error is related to the EC's geotechnical standards at EC 9.6710 et seq. Southeast Neighbors did not challenge the city's conclusion that the geotechnical standards are satisfied, and accordingly we need not resolve the third cross assignment of error.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TOM WALTER,
and WALTER DEVELOPMENT COMPANY,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

LUBA No. 2016-024

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Law Office of Bill Kloos PC.

Anne C. Davies, Assistant City Attorney, Eugene, filed the response brief and argued on behalf of respondent.

RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REVERSED 06/30/2016

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a planning commission decision denying an application for planned development approval of a ten-lot subdivision.

FACTS

The subject property is a 5.19-acre parcel zoned Low-Density Residential (R-1) with a planned unit development (PUD) overlay. The property is located to the south of and abuts West Amazon Drive, a local street with a sixty-foot right-of-way and an eighteen-foot paved width. Record 495. The public right of way of West Amazon Drive extends from its intersection with Fox Hollow Road, located to the west of the subject property, northeasterly where it intersects with Martin Street. However, the right-of-way is currently improved only from its intersection with Fox Hollow Road to a point approximately 1,000 feet northeast of the subject property, where the improved road ends and a gate blocks motor vehicle access. Under current conditions, the only improved street access from the property to the city's improved street system is via West Amazon Drive to Fox Hollow Road. In 2014, the city purchased the properties surrounding the unimproved portion of the West Amazon Drive right of way between the gate and Martin Street. According to the staff report, the city plans to maintain that land as a natural area and part of a trail system.

Petitioners applied to divide the subject property into ten lots, with one open space lot. Three of the lots would have direct access onto West Amazon Drive, and the remaining seven lots would access West Amazon Drive via a shared driveway. The hearings officer denied the application for noncompliance with Eugene Code (EC) 9.8325(6)(c), which requires that "the street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street * * *." Petitioners appealed the decision to the planning commission. The planning commission affirmed the decision and adopted the hearings officer's decision as its own. This appeal followed.

SECOND AND FOURTH ASSIGNMENTS OF ERROR

A. The Needed Housing Statute

The application is for "needed housing" as that term is used in ORS 197.303(1).[1] Accordingly, ORS 197.307(4) requires that the city apply only

---

[1] ORS 197.303(1) provides:

> "As used in ORS 197.307, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types:
>
> "(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
>
> "(b) Government assisted housing;
>
> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;

"clear and objective standards" to the proposed PUD.[2] Relatedly, ORS 227.173(2) provides that for applications for permits:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999), *rev den* 359 Or 594, we explained that approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community."

ORS 197.831 places the burden on the local government to demonstrate, before LUBA, that standards and conditions imposed on needed housing that

---

> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
>
> "(e) Housing for farmworkers."

[2] ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

are required to be clear and objective "are capable of being imposed only in a clear and objective manner."[3] By its terms, the statute applies to decisions that "impos[e] the provisions of the ordinance[]."

B. EC 9.8325(6)(c) - The 19-Lot Rule

EC 9.8325 provides the tentative PUD approval criteria for "needed housing," and is sometimes referred to as the "needed housing track."[4] As relevant here, EC 9.8325(6)(c) (the 19-Lot Rule) provides that the applicant must demonstrate that "[t]he PUD provides safe and adequate transportation systems through compliance with all of the following:

> "The street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street * * * when the sum of proposed PUD lots and the existing lots utilizing a local street as the single means of ingress and egress exceeds 19."

As explained above, the paved portion of West Amazon Drive terminates approximately 1,000 feet to the northeast of the subject property, where it is

---

[3] ORS 197.831 provides:

> "In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner."

[4] ORS 197.307(6) allow a local government to provide for a development track for needed housing that does not have clear and objective standards, subject to several restrictions, including that the applicant has the option of proceeding under a clear and objective track.

blocked by a gate. The hearings officer's single basis for denying the application is that the hearings officer concluded that EC 9.8325(6)(c) was not met:

> "Here, where the 'layout' of the PUD relies on only one public street to disperse motor vehicle traffic, that traffic at a minimum must be able to go somewhere in two different directions that do not terminate in a dead end." Record 47.

The hearings officer also adopted the staff report, which concluded:

> "The proposal does not include any new streets within the PUD, and the unimproved segment of West Amazon Drive to the north precludes its use for dispersal of motor vehicle traffic onto more than one public local street. Yet, the applicant does not address the plain meaning of this requirement in consideration of the full text of the standard, except to assert that the unimproved street segment 'must be included in the analysis of the 19-Lot Rule' based on the definition of a street. *Their application materials do not address the fact that motor vehicles cannot actually use this unimproved right of way as a means of secondary access, and the reality that there is only one way in or out, where West Amazon Drive connects to Fox Hollow Road*. In other words, to satisfy this criterion, the proposal cannot simply rely on a line on a map." Record 45 (emphasis added).

In these findings, we understand the hearings officer to have concluded that the unimproved portion of West Amazon Drive does not qualify as a "public local street" within the meaning of EC 9.8325(6)(c). We also understand the hearings officer to have interpreted EC 9.8325(6)(c) as requiring the applicants to show that where access to a PUD is provided by a single public local street, a motor vehicle must be able to travel in either direction on that single street, and connect to other public streets. We understand the hearings officer to have

concluded that because the current paved portion of West Amazon Drive dead ends to the east, and does not currently connect to any public street in that direction, the proposed PUD does not "disperse motor vehicle traffic onto more than one public local street."

C. Second Assignment of Error

In their second assignment of error, petitioners argue that the 19-Lot Rule is not a "clear and objective standard[]" within the meaning of ORS 197.307(4), and therefore the city erred in applying it to petitioners' application. Petitioners seek reversal of the city's decision. ORS 197.835(10)(a)(A). Petition for Review 19, 49.

Petitioners argue that the number of different interpretations that the 19-Lot Rule is subject to render it so ambiguous as to allow the type of subjective, discretionary decision making that is prohibited under ORS 197.307(4). According to petitioners, the 19-Lot Rule can reasonably be interpreted in at least two ways:

> "Here there are two plausible interpretations: (1) Traffic must be able to leave the site in two directions on a 'public local street' as defined in the code, which includes an unimproved street; this is the 'get out' meaning; (2) Traffic must be able to leave the site in each direction and go around to the point of beginning; this is the 'go around' meaning; as explained by staff and the Hearings Official, it is the same as having 'secondary access.' As the Hearings Official said: 'Traffic at a minimum must be able to go somewhere in two different directions that do not terminate in a dead end.'" Petition for Review 24.

Petitioners' two arguably plausible interpretations are less than clear. The primary problem appears to be that the term "disperse" is not defined, and as used in the 19-Lot Rule it could have different meanings.[5] It could mean that dispersal is complete to two public local streets if West Amazon Drive (a local street) connects with the city's street system in both directions, without regard to whether West Amazon Drive is currently improved to allow such a connection today. We understand that to be petitioners' first interpretation—the "get out" meaning. But dispersal can also be interpreted to require that West Amazon Drive be currently improved sufficiently to actually provide an existing connection with the city's street system via Martin Street to the northeast, as well as the connection with the existing Fox Hollow Road to the west. That is petitioners' second meaning—the "go around" meaning.

As petitioners explain it, under the "get out" interpretation, the proposal satisfies the 19-Lot Rule because West Amazon Drive is a "public local street," while under the "go around" interpretation, which is the city's interpretation, the proposal does not satisfy the 19-Lot Rule. In such a circumstance, petitioners argue, the city cannot demonstrate that the 19-Lot Rule is "capable of being imposed only in a clear and objective manner" as required by ORS

[5] A secondary problem that the parties apparently do not recognize is that the 19-Lot Rule appears to apply only when the proposed PUD proposes a "street layout." The proposed PUD in this case proposes no new streets, only driveways that connect to existing streets. Since the parties do not address this point we do not address it further either.

197.831. In support, petitioners cite *Group B LLC v. City of Corvallis*, 72 Or LUBA74 (2015), *aff'd* 275 Or App 577, 366 P3d 847 (2015), *rev den* 359 Or 667 (2016). In *Group B*, we concluded that a condition of approval in a previous planned development approval that imposed a setback from a property line to the approved development was not "clear and objective" within the meaning of ORS 197.307(4) regarding whether additional development was allowed or precluded in the setback area, and that therefore the city was prohibited from applying the standard in a manner that prevented approval of an application for needed housing in the setback area.

The city concedes that the 19-Lot Rule contains some ambiguity, but argues that merely because it can be interpreted in more than one way does not mean it fails to be "clear and objective" as required by ORS 197.307(4). In support, the city cites *SE Neighbors v. City of Eugene*, 68 Or LUBA 51, *aff'd* 259 Or App 139, 314 P3d 1004 (2013), and *Rudell v. City of Bandon*, 64 Or LUBA 201, 208 (2011), *aff'd* 249 Or App 309, 275 P3d 1010 (2012). In *SE Neighbors*, we rejected an argument that EC 9.8325(5), a standard that prohibited grading on portions of a development site that meet or exceed 20 percent slope, was not "clear and objective," where the petitioner challenged the five-foot contour interval method that the city used to calculate whether portions of the site exceeded 20 percent slope. We concluded that the absence of language in the code provision requiring slope to be measured using five-foot contour intervals did not mean the provision was not clear and objective,

where the city's application form notified applicants that slope would be measured using five-foot contour intervals. In *Rudell*, we concluded that a city code provision that prohibited structures from being located on any "identified foredune" was "clear and objective," where the code defined the term "foredune" with reference to the "lee or reverse slope" of a dune, and the slope of a property is an objectively determinable fact.

We agree with petitioners that the 19-Lot Rule is not "clear" or "objective." *See Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 156 (quoting dictionary definitions of the words "clear" and "objective"). The 19-Lot Rule is much more similar to the standard at issue in *Group B* than the standards at issue in *SE Neighbors* and *Rudell*. As we have already noted, the biggest problem with the 19-Lot Rule is that the key term "disperse" is undefined and, because it is ambiguous when used in this context, it leads to very different results.

Further, although not always, where the purpose of a standard is clear from the text of the standard, that standard is more likely to be a "clear and objective" standard. A good example is EC 9.8325(5)'s slope standard, discussed above, the purpose of which is to prevent development on steep slopes.[6] Another example is EC 9.8325(9), which requires all proposed

[6] Petitioners move to strike a statement in the response brief that takes the position that EC 9.8325(5) is "* * * intentionally rigid to ensure adequate protections related to erosion and slope failure." Response Brief 21. Petitioners move to strike the statement and argue that the statement is not supported by

dwellings within a proposed PUD to be "within 1/4 mile radius (measured from any point along the perimeter of the development site) of an accessible recreation area or open space that is at least 1 acre in size and will be available to residents," the purpose of which is to ensure residents of a proposed PUD of proximate open space or recreation.

The 19-Lot Rule has been a part of various sections of the EC for many years. During the proceedings below, petitioners introduced a 1999 planning staff report from a multi-year code revision exercise that explained:

> "The '19 Lot Rule' is recommended for elimination due to the adoption of the Eugene Local Street Plan which incorporates a comprehensive set of requirements to address street connectivity. In general the street connectivity standards provide an effective tool for the City to acquire necessary right-of-way, including the appropriate alignment, as each land division application is submitted, *whereas the '19 Lot Rule' is intended to ensure that adequate street connections are already in place. However, this provision can severely impact the ability to develop infill parcels even though many sites can demonstrate compliance with the City's new connectivity requirements*. If there is interest to maintain the '19 Lot Rule,' staff recommends that it be revised to address existing deficiencies." Record 150-51 (italics and underlining added.)

When the code revision exercise concluded, the city decided to retain the 19-Lot Rule verbatim for applications under the needed housing track, but eliminated it altogether from the discretionary approval track when it adopted

---

the record. We do not think that the city is required to support to demonstrate that the record supports the statement, when the language of the code standard is clear that it is intended to prohibit grading on slopes that exceed 20 percent. Petitioners' motion is denied.

the two-track system in 2001.[7] Record 457, 459. It is not clear from the legislative history included in the record why the city chose to retain the 19-Lot Rule for needed housing, without apparently "address[ing] existing deficiencies" as advised by the planning staff.

Whatever its purpose, the 19-Lot Rule and the city's interpretation of it appear designed to "balance or mitigate" the impacts of a proposed PUD on the public street system and other developed properties in the vicinity of the proposed PUD, a subjective exercise that is contrary to the needed housing statute. *Rogue Valley*, 35 Or LUBA at 158. The multiple possible interpretations of the ambiguous language in the 19-Lot Rule, coupled with the lack of a clear purpose, allow the city to exercise significant discretion in choosing which interpretation it prefers to serve one or more unstated purposes, in order to approve or deny needed housing development.

ORS 197.831 places the burden of proof on the city to demonstrate that the 19-Lot Rule is capable of being imposed "only in a clear and objective manner." For the reasons explained above, we agree with petitioners that the city has not demonstrated that the 19-Lot Rule is "capable of being imposed only in a clear and objective manner."

The second assignment of error is sustained.

---

[7] The discretionary approval track includes a requirement that applications "comply with the provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680 where applicable." EC 9.8320(5)(c).

D. Fourth Assignment of Error

EC 9.8325(3) requires petitioners to demonstrate that:

> "[t]he PUD provides a buffer area between the proposed development and surrounding properties by providing at least a 30 foot wide landscape area along the perimeter of the PUD according to EC 9.6210(7)."

The city did not require a landscape buffer along the northern boundary of the property that is adjacent to West Amazon Drive, where three lots will take access directly from West Amazon Drive, or across the proposed driveway that will provide access from West Amazon Drive to seven of the lots. The city required a landscape buffer along the eastern, southern and western property boundaries. Petitioners did not want to provide a landscape buffer along the western boundary of the property that is separated from Fox Hollow Road by a 20-foot wide city-owned riding trail. During the proceedings below, petitioners argued that EC 9.8325(3) is not "clear and objective" and therefore the city could not apply it to petitioners' application. Record 345-46. The hearings officer rejected petitioners' argument. Record 40-41. Petitioners now make the argument at LUBA.

The crux of petitioners' challenge is that the city's application of EC 9.8325(3) to not require a landscape buffer on areas of the proposed PUD that provide direct access to a street is inconsistent with the express language of EC 9.8325(3), which does not provide any express exception at all to the buffer area requirement. We understand petitioners to argue that, properly interpreted, EC 9.8325(3) requires a buffer around the entire PUD perimeter, including the

access points. Because no PUD could possibly gain access under EC 9.8325(3) as petitioners interpret it, that standard is essentially a prohibition on needed housing and therefore contrary to the needed housing statute. In any case, petitioners argue, the city's contrary interpretation of EC 9.8325(3) to not require a buffer in places where PUD access is required demonstrates that EC 9.8325(3) is not clear and objective, and therefore the standard cannot be applied to require petitioners to provide any buffers at all.

We disagree with petitioners that the city's application of the landscape buffer requirement as not applying to proposed driveways and streets in a manner that would require the landscape buffer to block the streets or driveways renders EC 9.8325(3) something other than clear and objective. Petitioners cannot manufacture an interpretation of a standard under which all development would be precluded, and thereby argue that the standard prohibits needed housing, and then complain that the standard is not clear and objective when the city rejects their interpretation. The city applied EC 9.8325(3) in the only way it can reasonably be applied: to allow access to the PUD. To the extent EC 9.8325(3) requires any interpretation, it is more consistent with the needed housing statues for the city to reject an applicant's proffered interpretation that effectively prohibits needed housing because of a lack of access to a site, and instead apply the standard in a way that allows needed housing.

The fourth assignment of error is denied.

FIRST AND THIRD ASSIGNMENTS OF ERROR

In their first assignment of error, petitioners argue that the hearings officer improperly construed the 19-Lot Rule when he interpreted it to require that motor vehicle traffic be able to travel to both Fox Hollow Road and Martin Street on West Amazon Drive. Because we determine in our resolution of the second assignment of error above that the 19-Lot Rule is not "capable of being imposed only in a clear and objective manner," the city may not apply it to prohibit petitioners' proposed PUD. Accordingly, we need not resolve petitioners' first assignment of error. We do not reach the first assignment of error.

In their third assignment of error, petitioners argue that the city committed a procedural error that prejudiced their substantial rights when the city attorney advised the planning commission that in her opinion the planning commission lacked authority to address petitioners' argument that the 19-Lot Rule is not "clear and "objective" within the meaning of ORS 197.307(4). For the reasons set forth in the city's response brief, we reject petitioners' argument.

The third assignment of error is denied.

REMEDY

We have sustained petitioners' challenge to the city's single basis for denial of the application. Petitioners argue that LUBA should reverse the city's

decision and order the city to approve the application. Petition for Review 2, 19. The city does not argue that remand is the appropriate remedy.

ORS 197.835(10)(a) provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

The question posed under ORS 197.835(10)(a)(A) is whether the city's decision to deny petitioners' application was "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]" The city denied petitioners' application on a single basis, a basis that is barred by ORS 197.307(4), because the application is an application for approval of "needed housing" and the standard that the city found was not met under its interpretation is not "clear and objective." The city's decision was therefore "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]" *Parkview Terrace Development, LLC v. City of Grants Pass*, 70 Or LUBA 37, 57 (2014).

The city's decision is reversed, and the city is ordered to approve petitioners' application.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TOM DREYER and CYNTHIA DREYER,
Petitioners,

vs.

11/20/18 PM12:53 LUBA

CITY OF EUGENE,
Respondent,

and

FAIRMOUNT NEIGHBORHOOD ASSOCIATION, LAUREL HILL VALLEY CITIZENS and THE JOINT RESPONSE COMMITTEE OF THE FAIRMOUNT NEIGHBORHOOD ASSOCIATION AND THE LAUREL HILL VALLEY CITIZENS,
Intervenors-Respondents.

LUBA No. 2018-074

FAIRMOUNT NEIGHBORHOOD ASSOCIATION, LAUREL HILL VALLEY CITIZENS and THE JOINT RESPONSE COMMITTEE OF THE FAIRMOUNT NEIGHBORHOOD ASSOCIATION AND THE LAUREL HILL VALLEY CITIZENS,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

TOM DREYER and CYNTHIA DREYER,
Intervenors-Respondents.

LUBA No. 2018-080

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review/cross-petition for review and response brief and argued on behalf of petitioners/intervenors-respondents Tom Dreyer and Cynthia Dreyer.

Sean T. Malone, Eugene, filed a petition for review and response brief and argued on behalf of petitioners/intervenors-respondents Fairmount Neighborhood Association et al.

Lauren A. Sommers, Assistant City Attorney, Eugene, filed a response and argued on behalf of respondent.

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

REMANDED 11/20/2018

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

Opinion by Bassham.

NATURE OF THE DECISION

In these consolidated appeals, the applicant and opponents appeal a hearings official's tentative approval of a 36-unit planned unit development (PUD).

BRIEFING

In LUBA No. 2018-074, the petitioners are the applicants Tom Dryer and Cynthia Dreyer (the Dreyers). In LUBA No. 2018-080, the petitioners are three organizations: Fairmount Neighborhood Association, Laurel Hill Valley Citizens, and the Joint Response Committee of the Fairmont Neighborhood Association and the Laurel Hill Valley Citizens. We refer to the petitioners in LUBA No. 2018-080 as the Neighbors. The Dreyers have intervened on the side of the city in LUBA No. 2018-080. The Neighbors have intervened on the side of the city in LUBA No. 2018-074.

The Dreyers filed a combined petition for review (in their capacity as petitioners in LUBA No. 2018-074) and cross-petition for review (in their capacity as intervenors in LUBA No. 2018-080). The Neighbors filed a petition for review in their appeal. Both the Dreyers and the Neighbors also filed response briefs in their respective capacities as intervenors-respondents. The city filed a single response brief responding to both appeals.

The Dreyers filed a reply brief to address new matters raised in the city's response brief. The Neighbors filed a reply brief to address new matters raised

in the Dreyers' response brief. There are no objections to either reply brief, and they are allowed.

FACTS

The subject property is a 13-acre area consisting of five tax lots, developed with three single-family dwellings and one multifamily dwelling. The property is planned and zoned for low density residential use (R-1), and included in the city's inventory of buildable lands. The property is located in the South Hills portion of the city, in an area of steep slopes (generally, slopes 20 percent or steeper). The western half of the property is part of the top of a ridgeline that is above 900 feet in elevation, where the existing dwellings are located. Capital Drive borders the western boundary and provides access to the property. The eastern half of the property slopes steeply down the ridgeline to the east, with slopes generally exceeding 20 percent and reaching 40 percent in some portions. East of the property is a heavily forested area that includes a public hiking trail, the Ribbon Trail. The 80-acre Hendricks Park borders the property to the north.

In 1974, the city adopted by resolution the South Hills Study (SHS) as a refinement plan to the city comprehensive plan. The SHS studied and offered recommendations with respect to over 8,000 acres of land around the southern perimeter of the city, including some lands then located in the county outside the city limits. In 1974, the subject property was located in the county outside city limits. One of the disputes in this appeal is whether the SHS applies to the

subject property, which was annexed into the city in the early 1980s. One of the SHS recommendations is that vacant property over 900 feet in elevation be preserved from an intensive level of development, with the exception of development under planned unit development procedures, if it can be demonstrated that the proposed development is consistent with the purposes listed in the Ridgeline Park section of the SHS.

On March 3, 2017, the Dreyers filed an application with the city for tentative PUD approval, seeking to develop the subject property with an additional 28-32 dwelling units, consisting primarily of single-family dwellings. There is no dispute that the subject application requests approval of "needed housing" as that term is defined in ORS 197.303(1).[1] As discussed below, ORS 197.307(4) requires local governments to apply only "clear and objective" development standards, conditions and procedures to needed housing. However, ORS 197.307(6) authorizes local governments to adopt an alternative process for approving needed housing under standards that are not clear and objective, as long as the applicant retains the option of proceeding under an

---

[1] The needed housing statutes at ORS 197.303 to 197.307 were modified in 2017 by SB 1051 (2017 Or Laws, ch 745), which became effective after petitioners filed their PUD application. As discussed below, petitioners argue that ORS 197.307 (2017) applies directly to the city's decision. As far as we can tell, none of the changes made by SB 1051 impact the analysis of the issues in this appeal, and the same arguments could be made (and were made below) under ORS 197.307 (2015). On appeal, all parties cite and quote to the 2017 ORS, and we do likewise.

approval process that complies with ORS 197.307(4). The City of Eugene has adopted such a two-track system for needed housing applications. For each type of development application that involves needed housing, the Eugene Code (EC) 9.8325 provides for a "general" approval process that includes some discretionary or unclear or subjective standards, and a "needed housing" approval process that includes only clear and objective standards. *See Home Builders v. City of Eugene*, 41 Or LUBA 370 (2002) (discussing the city's two-track system). The PUD "needed housing" track is set out in EC 9.8325. The PUD discretionary "general" track is set out in EC 9.8320. One of the general track PUD approval standards requires a finding that the PUD is consistent with applicable adopted refinement plan policies. EC 9.8320(2).

The Dreyers applied for PUD approval under the general track at EC 9.8320. However, the Dreyers submitted a memorandum arguing that, due to elevations and steep slopes on the subject property, little or no new development is possible on the property under the clear and objective PUD standards in the "needed housing" track at EC 9.8325, which forced the Dreyers to apply under the EC 9.8320 general track in order to gain approval.[2] The

---

[2] The most limiting EC 9.8325 standards, the Dreyers argued, are (1) a prohibition on grading of slopes 20 percent or steeper at EC 9.8325(5), and (2) a prohibition on creating any new lots above 900 feet in elevation, at 9.8325(12)(a). The Dryers submitted a diagram, found at App 149 to their petition for review and Record 285, illustrating their argument that these standards in combination would allow little or no new residential development

Dreyers argued that in the present case the option required by ORS 197.307(4) of proceeding under a clear and objective PUD approval track is illusory, because no new development of the subject property with needed housing could be approved under the needed housing track. Consequently, the Dreyers argued that, in order to comply with ORS 197.307(4) and (6), the city must process the PUD application under the general track at EC 9.8320, but cannot apply any of the discretionary or non-clear and objective standards in the general track. The Dreyers supplied the city with a list of EC 9.8320 standards that they argued were not clear and objective, including the EC 9.8320(2) requirement to show consistency with applicable refinement plan policies such as those in the SHS. As noted, the SHS allows intensive development on land above 901 feet in elevation only pursuant to a PUD in which the applicant demonstrates that the PUD is consistent with one or more of the purposes of the Ridgeline Park section of the SHS.

The hearings official held a public hearing on the Dreyers' application on March 7, 2018. Following open record periods, the hearings official approved the application with conditions on April 20, 2018. The hearings official found,

---

on the subject property. Planning staff responded to this argument in part by presenting a theoretical development scenario including a three-parcel partition to allow three new dwellings on the property, in addition to the existing dwellings, under the city's needed housing partition track. Record 1652-53. The Dreyers disputed that the staff response was sufficient to demonstrate that the Dreyers had a meaningful option to proceed under the clear and objective EC 9.8325 track to obtain PUD approval. Record 63.

in relevant part, that the SHS did not apply to the subject property or, alternatively, that the PUD application is consistent with at least one of the listed SHS purposes.

Both the Dreyers and the Neighbors appealed the hearings official's decision to the planning commission. The Dreyers argued in relevant part that the hearings official erred in applying discretionary, unclear or subjective standards under the general EC 9.8320 track. The Neighbors challenged findings that the application complied with several general track standards, including the EC 9.8320(2) requirement for consistency with the SHS. On June 14, 2018, the planning commission affirmed and adopted the hearings official's decision and approved the tentative PUD with modified conditions.

These appeals followed.

FIRST AND SECOND ASSIGNMENTS/CONTINGENT CROSS-ASSIGNMENTS OF ERROR (the Dreyers)

As noted, the Dreyers' combined petition for review includes two assignments of error, presented in their capacity as petitioners in LUBA No. 2018-074. The two assignments of error are also labeled as contingent cross-assignments of error, presumably in the Dreyers' capacity as intervenors-respondents in LUBA No. 2018-080.[3] Although the two sets of assignments of

---

[3] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal

error are identical in substance, as explained below their posture requires separate treatment.

A. Petition for Review

The first assignment of error argues that the city erred in applying discretionary, unclear or subjective standards to the proposed PUD under the city's general PUD track at EC 9.8320, without carrying its burden of showing that the Dryers had the option to proceed under the clear and objective needed housing track standards at EC 9.8325 with a realistic expectation of gaining PUD approval. The second assignment of error argues that the city erred in applying the SHS to the application, without showing that the SHS has ever been adopted and applied to the subject property by a governing body with planning authority.

---

regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

As explained, the hearings official and planning commission approved the PUD application under the EC 9.8320 general track standards. With respect to the SHS, the hearings official concluded that the SHS did not apply to the subject property, although for a different reason than argued by the Dreyers. In the alternative, however, the hearings official found that the application is consistent with the applicable SHS policies.

On appeal, the Dreyers explain in the "Relief Sought" section of the petition for review:

> "[The Dryers] want the benefit of the approval they received. They do not seek remand. In this appeal, however, [the Dreyers] want the benefit of two legal theories they pressed unsuccessfully before the decision makers. If [the Dreyers] are correct about their legal theories, LUBA's correction of the city's legal errors should still result in affirming the city decision, because the City has already concluded that the proposal satisfies the remaining applicable standards. In addition, resolution of the two legal theories should form a basis for LUBA to deny all of the [N]eighbors' anticipated assignments of error. [The Dreyers'] legal theories raised here should have been a more simple and direct route to city approval. [The Dreyers] should not have to defend 60 pages of city findings at LUBA and the Court of Appeals if they are right about the issues they raise here. LUBA should affirm but correct the legal errors by the City." Dreyers' Petition for Review 1-2 (footnote omitted; underscore in original).

The Dreyers cite *Recovery House IV v. City of Eugene*, 156 Or App 509, 965 P2d 488 (1998), for the proposition that an applicant has the right to submit an application under one set of standards while at the same time challenging whether those standards even apply to the proposed development. In *Recovery*

House IV, the applicant for a drug and alcohol addiction recovery facility in a residential zone applied for a conditional use permit for the use, while maintaining before the city and LUBA that the proposed use is a permitted use in the residential zone and no conditional use permit was necessary. *Id.* at 511. On appeal, the applicant raised no challenges to the conditional use permit approval itself, but argued that the city misconstrued the applicable law in requiring it to obtain a conditional use permit, and therefore the city lacked authority to impose any conditions of approval. LUBA rejected the applicant's interpretation of the code, and affirmed. *Recovery House VI v. City of Eugene*, 33 Or LUBA 327 (1997). The Court reversed and remanded, after agreeing with petitioner's code interpretation. 156 Or App 509. On remand, LUBA reversed the city's decision. *Recovery House IV v. City of Eugene*, 35 Or LUBA 419 (1999).

The city responds that LUBA lacks the authority to grant the relief the Dreyers seek, *i.e.*, to "affirm but correct the legal errors by the City." Dreyers' Petition for Review 2. We agree with the city. LUBA may resolve the merits of an appeal only by affirming, reversing, or remanding the decision on review. OAR 661-010-0070(1)(b). Because the Dreyers state they are not seeking reversal or remand in their petition for review, the only other relief the Board can possibly grant is to affirm the decision. However, the Dreyers cite no authority suggesting that LUBA can affirm the city's decision while at the same

time "correcting" the city's alleged errors.[4] *Recovery House IV* does not support that proposition. As explained, in *Recovery House IV* the ultimate conclusion that the city lacked authority to process the application as a conditional use permit meant that the decision must be reversed so that the city could process the application as a permitted use, and without imposing any conditions on the use. 156 Or App at 511. In the present case, the Dreyers do not seek relief from any conditions imposed or any aspect of the city's PUD approval under the general track. Instead, the Dreyers' petition for review asks LUBA to issue what is essentially an advisory opinion regarding the present case. Not only do we lack express statutory or cited judicial authority to issue an advisory opinion on the legal matters presented in the Dreyers' two assignments of error, but issuing such an advisory opinion would be contrary to one of the express statutory purposes of LUBA's review: that our review

---

[4] The only statutory authority that would potentially allow LUBA to affirm a decision notwithstanding a substantive error is ORS 197.835(11)(b), which provides that:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

should be consistent with "sound principles governing judicial review." ORS 197.805.

In sum, because the Dreyers' two assignments of error in the petition for review seek relief that is beyond our authority to grant, we decline to resolve those assignments of error.

B. Cross-Petition for Review

The Dreyers' two assignments of error are also labeled as contingent cross-assignments of error, presented in the Dreyers' capacity as intervenors-respondents in the Neighbors' appeal in LUBA No. 2018-080.[5] A contingent cross-assignment of error, by its nature, is one that LUBA would reach only if LUBA sustains at least one assignment of error in a petition for review and remands the decision under the petition. *See* OAR 661-01-0030(7), n 3; *Young v. Jackson County*, 49 Or LUBA 327 (2005) (under former version of OAR 661-010-0030(7), declining to reach a cross-assignment of error where all assignments of error in the petition for review were denied).

In the present case, we understand the Dreyers to request that LUBA resolve the two contingent cross-assignments of error only if we sustain one or more of the Neighbors' assignments that involve discretionary general track PUD standards, including consistency with the SHS, and where we would

---

[5] These arguments are also repeated, in briefer terms, in the Dreyers' response brief to the Neighbors' petition for review.

therefore remand under the Neighbors' petition for review. As discussed below, we deny the Neighbors' first assignment of error, which challenges the findings of consistency with the SHS. Accordingly, we have no need to address the Dreyers' second contingent cross-assignment of error.

However, as discussed below, we sustain portions of the Neighbors' second and third assignments of error, which concern consistency with two general track PUD approval standards that the Dreyers argue are not clear and objective: EC 9.8320(6) and EC 9.9630(3)(c). We understand the Dreyers to argue that we should therefore address the Dreyers' first contingent cross-assignment of error, which argues that the city cannot apply any discretionary general track standards to the PUD application. If we sustain the first contingent cross-assignment of error, then that would necessarily mean that the errors identified under the Neighbors' second and third assignments of error constitute only harmless error, and thus would not warrant remand under the Neighbors' petition for review.

We agree with the Dryers that it is appropriate to address and resolve the first contingent cross-assignment of error, which, if sustained, would have the effect of rendering any errors in applying EC 9.8320(6) and EC 9.9630(3)(c) harmless and not a basis for reversal or remand. However, for the reasons below, we deny the Dreyers' first contingent cross-assignment of error.

1. ORS 197.307

ORS 197.307(4) provides that local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing.[6] ORS 197.307(6) authorizes local governments to adopt an alternative process with approval standards that are not clear and objective, as long as the applicant "retains the option of proceeding under the approval process that meets the requirements of" ORS 197.307(4).[7] As noted,

---

[6] ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
>
> "(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

[7] ORS 197.307(6) provides:

> "In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

the city has adopted for all residential development a needed housing track limited to clear and objective standards, consistent with ORS 197.307(4), and a corresponding alternative or "general" track that includes some standards that are not clear and objective, as authorized by ORS 197.307(6). For their PUD application, the Dreyers applied under the general PUD standards at EC 9.8320 rather than the needed housing PUD standards at EC 9.8325. However, the Dreyers argue that they were forced into that choice after they concluded that, due to elevation and slopes on the subject property, they could not obtain approval under the PUD needed housing track standards. As noted, two needed housing track standards, EC 9.8325(5) and 9.8325(12)(a), prohibit grading on slopes over 20 percent, and prohibit creation of new lots or parcels over 901 feet in elevation, respectively. Because roughly half the property is over 901 feet in elevation, and most of the remainder exceeds 20 percent slopes, and because some grading is essential for road and driveway construction and

---

> "(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;
>
> "(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and
>
> "(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section."

individual building pads, the Dreyers argue that as a practical matter little or no further residential development of the subject property can be approved under the needed housing PUD track, and certainly a 36-unit PUD application similar to what they proposed under the general housing track would necessarily be denied.

The Dreyers argue that under ORS 197.307(4) and 197.307(6)(a) the city can apply approval standards that are not clear and objective to proposed housing development of the subject property only if the city "guarantee[s]" that the applicant has "a discretion-free path to residential approval through the code." Dreyers' Petition for Review 19. However, in the present case the Dreyers argue that the option of obtaining approval under the needed housing track is illusory, because the Dreyers contend they cannot obtain approval of the proposed PUD development, or any significant housing development, under the city's needed housing track. Because they have only an illusory right to obtain approval under the needed housing track, the Dreyers argue therefore that ORS 197.307(6) does not authorize the city to apply any general track approval standards to their proposed 36-unit PUD application that are not clear and objective. EC 9.8320(6) and EC 9.9630(3)(c) are among the general track approval standards that the city applied and found compliance with. However, the Dreyers argue (as cross-petitioners) that any errors the city made in finding compliance with those two standards are harmless, because those two standards

are not clear and objective, and therefore cannot be applied to the subject application.

The city responds that nothing in ORS 197.307 or elsewhere guarantees the Dryers that any proposed development of the subject property will be *approved* under clear and objective standards. According to the city, where a city has a two-track system authorized under ORS 197.307(6), under the express terms of that statute the applicant is guaranteed only to have the "option of proceeding" under an approval process that applies only clear and objective standards. The city argues that at all times the Dryers had the option of proceeding under the city's needed housing track. The city contends that even if it is the case that a particular type or intensity of development on the subject property is not approvable under the needed housing clear and objective standards, due to characteristics of the subject property such as elevation and steep slopes, that does not mean that the Dreyers have not been provided the "option of proceeding" under the needed housing track, as ORS 197.307(6)(a) requires.

Resolving the parties' dispute on this point requires interpreting ORS 197.307, examining its text, context and available legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). No party cites any context or legislative history, so we focus on the parties' textual arguments. The city is correct that nothing in the text of ORS 197.307

guarantees approval of any and all applications for housing. ORS 197.307(4) requires the city to apply only clear and objective standards to housing, but does not suggest that noncompliance with applicable clear and objective standards cannot be a basis to deny the application. The only express limitation in that regard is ORS 197.307(4)(b), which provides that clear and objective standards cannot have the effect of "discouraging needed housing through unreasonable cost or delay." However, no party argues that any of the city needed housing track standards that might limit development of the subject property discourage needed housing through unreasonable "cost or delay."

As the city notes, ORS 197.307(6)(a) authorizes the city to apply discretionary standards to housing applications as long as the applicant "retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section." ORS 197.307(6)(a) guarantees only the option of *proceeding* under an approval process that applies only clear and objective standards, not that an applicant proceeding under that process will necessarily obtain approval to develop a particular site.

The Dreyers argue that in *Home Builders v. City of Eugene*, 41 Or LUBA 370 (2002), a legislative challenge to adoption of the city's general and needed housing tracks, LUBA held that a clear and objective approval standard that was impossible for any development to meet on any property in the city is inconsistent with ORS 197.307(4) and (6), because it offers only an illusory option to proceed on the needed housing track, effectively forcing applicants to

apply under the discretionary general track. The Dreyers argue that the holding in *Home Builders* should be extended beyond circumstances where a clear and objective standard is impossible to meet for any development on any property in the city, to the present circumstances, where clear and objective standards arguably make it impossible to approve any significant development on a particular site, due to elevations and slopes present on that site.

We agree with the city that an extension of *Home Builders* is not warranted. As the city notes, clear and objective standards by their nature tend to be more rigid and less flexible than discretionary standards. Clear and objective standards must address in a "one-size-fits-all" way the city's legitimate regulatory interests in public health and safety, as applied to many different properties, each of which may have topographic or other challenges to development under inflexible cookie-cutter standards. Consequently, it may be inherent in a two-track system such as the city's that particular development proposals on particular properties may not be approvable under some clear and objective standards, due to site-specific topographic characteristics such as predominant steep slopes, although such proposals can be approved under more flexible discretionary standards, such as the general track PUD standards. Applicants in such circumstances will either have to modify their development proposal to one that complies with the applicable needed housing standards, or choose to apply under the more flexible general track standards. While there may be a strong incentive in many cases to choose the more flexible general

track, that does not mean that such applicants do not have the "option of proceeding" under clear and objective standards, as required by ORS 197.307(6)(a), or that that the option is only illusory.

Nonetheless, the Dreyers argue that the city has the burden in the present circumstance of demonstrating that *some* development of the subject property under the PUD needed housing track standards is approvable, and that the city has not met that burden. Because the city has not met that burden, the Dreyers argue, the city cannot rely upon ORS 197.307(6) to authorize imposition of discretionary approval standards under the PUD general track. As noted, the Dreyers submitted below a diagram showing that there are few areas of the subject property that (1) are lower than 901 feet in elevation and (2) have slopes lower than 20 percent, intended to show that no PUD application could be approved under EC 9.8325(3) and 9.8325(12)(a), which prohibit grading on slopes over 20 percent, and prohibit creation of new lots or parcels over 901 feet in elevation, respectively. According to the Dreyers, submittal of that evidence shifted the burden to the city to demonstrate that some PUD application with a substantial number of dwellings could be approved under the needed housing track standards. Instead, the Dreyers argue, staff responded only with a theoretical plan for creating three new parcels for three dwellings on a small portion of the property under the city's needed housing partition track.

The city responds that it has no burden under any statute or code provision to submit plans or evidence demonstrating that a theoretical PUD

application or any particular type of development could be approved on the subject property, under the city's needed housing tracks. We agree with the city. The two statutes the Dreyers cite as imposing a burden on the city, ORS 197.831 and ORS 227.173(2), require the city to demonstrate only that the needed housing track standards are "capable of being imposed only in a clear and objective manner," and are "clear and objective on the face of the ordinance."[8] There is no dispute in the present case that the city's PUD needed housing track imposes only clear and objective standards, and that those standards are facially clear and objective. No statute or code provision cited to us imposes on the city the burden of coming forth with a plan for developing housing on the subject property that is guaranteed or likely to gain approval under any of the city's needed housing tracks.

---

[8] ORS 197.831 provides:

> "In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner."

ORS 227.173(2) provides:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

The Dryers also argue that a recent enforcement order issued by the Land Conservation and Development Commission (LCDC) provides some support for their position that the city cannot apply discretionary general track standards to the Dreyers' application. *LCDC Enforcement Order 17-ENF-001881* (Record 3054-72) (Corvallis Order). In the Corvallis Order, LCDC concluded that the city erred in applying a PUD overlay zone, with discretionary approval standards, to land on its buildable land inventory, and ordered that the city must allow the owner to seek development approval without application of the discretionary overlay standards. The Corvallis land use code apparently does not include a two-track system, such as the City of Eugene's, but required all housing development within the overlay zone to comply with discretionary overlay standards. Not surprisingly, LCDC concluded that such a single-track system is inconsistent with ORS 197.307(4). LCDC discussed, but did not resolve, a dispute over whether the proposed development can gain approval under clear and objective grading standards that limit cuts and fills on steep slopes, noting testimony that the application could be modified to comply with the grading standards, and also noting but not resolving arguments regarding whether the city could deny the application for noncompliance with the grading standards. Record 3070. Given the different single-track/dual-track schemes at issue in the Corvallis Order and the present case, and the unresolved issues in the Order, we conclude that the Order provides no particular support for the Dreyers' arguments under the first contingent cross-assignment of error.

In sum, ORS 197.307 does not, as the Dreyers' argue, allow the city to apply discretionary standards under its general PUD track only if the city demonstrates that the applicant is able to gain approval for some kind of PUD development on the subject property under its needed housing track. ORS 197.307(6)(a) requires only that the city allow the applicant the "option of proceeding" under the needed housing track, and does not require a guarantee or demonstration of any kind that development is likely to be approved under the clear and objective approval standards in the needed housing track. Even if it is presumed to be the case that, due to topography or other inherent features of the subject property, almost any conceivable application for PUD development of the property would be denied for noncompliance with clear and objective approval standards, in our view that presumption would not, as a consequence, preclude the city from applying discretionary approval standards to a PUD application filed under the general track.

The Dreyers' first contingent cross-assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (The Neighbors)

EC 9.8320(2) is a tentative PUD general track standard requiring a finding that the PUD is consistent with applicable refinement plan policies. As noted, the SHS is one of the city's refinement plans. The Ridgeline Park section of the SHS states, in relevant part:

"Specific Recommendations:

"That all vacant property above an elevation of 901 [feet] be preserved from an intensive level of development, subject to the following exceptions:

"1. Development of individual residences on existing lots; and

"2. Development under planned unit development procedures when it can be demonstrated that a proposed development is consistent with the purposes of this section.

"That the area specified for preservation be protected through a variety of techniques including but not limited to acquisition, scenic easements, density transfers, and dedication."

In discussing the above-quoted SHS language, the hearings official noted that the purpose statement of the Ridgeline Section of the SHS states that "any areas recommended for preservation or park usage should serve at least one of" seven listed purposes.[9] Because the "purposes of this section" appear to relate

---

[9] The Ridgeline Park section of the SHS states, in relevant part:

"The south hills constitute a unique and irreplaceable community asset. The strong dominant landforms and wooded character present there combine to provide distinct areas of contrast in terms of texture and color from the normal pattern of urban development. By virtue of this contrast, the south hills function as a strong visual boundary or edge to the city. The ridgeline of the south hills also marks the most southerly extension of the urban service area. Further, there are areas within the south hills that are especially suitable for park sites for recreational use by present and anticipated population. In view of these factors, any areas recommended for preservation or park usage should serve at least one of the following purposes:

"1. To insure preservation of those areas most visibly a part of the entire community;

only to "areas recommended for preservation or park usage," and because the hearings official concluded that the subject property is not an area that is "recommended for preservation or park usage," the hearings official found that the above-quoted SHS recommendation did not apply to the proposed PUD.

In the alternative, the hearings official evaluated whether the proposed PUD is consistent with at least one of the seven listed "purposes of this section," and concluded that the PUD is consistent with three of the seven listed purposes. Accordingly, the hearings official found that the PUD is consistent with the applicable SHS policies. The planning commission concurred with the hearings official's findings, quoting with approval a statement in a staff report that the "Ridgeline Park section of the [SHS] is primarily intended for areas

---

> "2. To protect areas of high biological value in order to provide for the continued health of native wildlife and vegetation;
>
> "3. To insure provision of recreational areas in close proximity to major concentrations of population;
>
> "4. To provide connective trails between major recreational areas;
>
> "5. To provide connective passageways for wildlife between important biological preserves;
>
> "6. To contribute to Eugene's evergreen forest edge;
>
> "7. To provide an open space area as a buffer between the intensive level of urban development occurring within the urban service area and the rural level of development occurring outside the urban service area."

within the south hills suitable as recreational parks[.]" Record 13. The planning commission also adopted the hearings official's alternative findings that the PUD is consistent with at least one of the purposes of the Ridgeline Park section.

On appeal, the Neighbors first challenge the hearings official's primary finding that the subject property is not in an area "recommended for preservation."[10] According to the Neighbors, the above-quoted SHS language itself constitutes an express designation that "all vacant property above an elevation of 901 [feet] be preserved from an intensive level of development," and therefore the portions of the subject property above 901 feet in elevation are "recommended for preservation." The Neighbors cite a LUBA opinion, *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13, 34 (1999), and legislative history of the SHS, to support their argument that the SHS is intended to preserve land above 901 feet in elevation, with the two exceptions listed, for a variety of purposes, *e.g.*, visual impacts, not limited to recreational or park use. The Neighbors note that the hearings official does not identify

---

[10] The Neighbors focus their arguments mostly on EC 9.9630(1), which codifies the above-quoted language from the SHS Ridgeline Park section in a code provision that applies refinement plan policies specifically to "subdivisions, partitions, and site review." EC 9.9500. The city argues that nothing in the EC codifies or applies the SHS Ridgeline Park section language with respect to a tentative PUD application. However, the city agrees with the Neighbors that the SHS policies apply directly to a tentative PUD application, pursuant to EC 9.8320(2).

anything in the SHS that expressly designates some areas, but not others, for preservation or park usage, except the language stating that land above 901 feet in elevation "be preserved." Finally, the Neighbors also challenge the hearings official's alternative findings that the proposed PUD is consistent with at least one of the seven purposes listed in the Ridgeline Park section of the SHS.

In its response brief, the city does not defend the hearings official's primary conclusion that the subject property is not designated for preservation and therefore the above-quoted SHS recommendation does not apply to the proposed PUD. The city argues, however, that the hearings official and planning commission correctly found that the PUD is consistent with at least one of the listed purposes of the SHS Ridgeline Park section, and thus consistent with the SHS.

Given the city's apparent reluctance to defend the hearings official's primary finding, we will assume without deciding that that finding is erroneous, and that the above-quoted SHS language has the effect of designating land above 901 feet in elevation for preservation, subject to the two listed exceptions, which require a finding of consistency with SHS purposes. However, that presumed error is harmless, because we agree with the city and the Dreyers that the Neighbors have not demonstrated that the hearings official erred in her alternative findings of consistency with at least one of the seven listed SHS purposes.

As noted, the western half of the subject property is above 901 feet in elevation, representing the relatively flat top of a ridgeline, where the existing dwellings are located and 21 of the proposed new dwellings will be located. The heavily-wooded eastern half of the property drops steeply to the east, and much of the eastern half will be protected as an open space tract and as buffer areas from the adjoining Ribbon Trail. The hearings official relied primarily upon the open space tract and buffer areas in the eastern half of the property, below the 901-foot elevation,[11] to find that the proposed PUD is consistent with

---

[11] The hearings official's findings state, in relevant part:

> "In order to buffer the proposed residential development from the Ribbon Trail, the proposed PUD designates 2.33 acres along the entire east property line of the proposed PUD (Tract A) for preservation. Additionally, a portion of each individual lot that borders Tract A, totaling approximately 2.08 acres, is also required to be preserved. Combined, the proposed development preserves a total of 4.41 acres of [land] along the eastern property line as a buffer between the residential development and the Ribbon Trail. The preserved areas will help to ensure the preservation of existing trees and vegetation while providing a continuous visual buffer between the adjacent Ribbon Trail and the future home sites. Preservation of Tract A and the preserved areas of the individual lots bordering Tract A are consistent with Policy 1.
>
> "In addition to the preservation areas in Tract A and on adjacent individual lots, the proposed PUD designates several smaller areas of land throughout the site (Tracts B, C and D) for preservation, bringing the total preservation area of the PUD site to approximately 4.54 acres. * * * These described preservation areas will be protected from any future construction and removal

Purposes 1, 2 and 5 listed in the Ridgeline Park section of the SHS, which we repeat here:

> "1. To insure preservation of those areas most visibly a part of the entire community;
>
> "2. To protect areas of high biological value in order to provide for the continued health of native wildlife and vegetation; [and]
>
> "* * * * *
>
> "5. To provide connective passageways for wildlife between important biological preserves."

The Neighbors challenge those findings, arguing that findings of consistency with one or more of the seven listed purposes must be based on the portions of the PUD above 901 feet in elevation. With respect to Purpose 1, the Neighbors argue that the proposed PUD will remove almost all trees on the top of the ridgeline and replace them with a dense cluster of housing, which is not consistent with "preservation of those areas most visibly a part of the entire community." That a number of trees will be preserved on lower slopes to the east, the Neighbors argue, does nothing to hide the denuded ridgeline and new

---

> of trees, therefore providing for the continued health of the native wildlife and vegetation, consistent with Policy 2.
>
> "In furtherance of Policy 5, the combined preservation areas of Tract A and the preserved areas of the eastern lots also act as an uninterrupted natural wildlife corridor, enhancing the existing wildlife corridor that the Ribbon Trail provides from the south of the site to Hendricks Park to the north." Record 68-69.

dwellings from view from other parts of the city. Similarly, with respect to Purposes 2 and 5, the Neighbors argue that preserving lower elevation trees while cutting down nearly all trees on top of the ridgeline is not consistent with those purposes. The Neighbors argue that these purposes are focused only on protecting habitat and wildlife connections on lands above 901 feet in elevation.

The Dreyers respond that nothing in the text of the SHS cited by the Neighbors limits evaluation of the purposes listed in the Ridgeline Park section to lands above 901 feet in elevation. The Dreyers note that the Final Joint Parks Committee report, a document adopted as part of the SHS, explains that the exceptions to the recommendation to preserve lands above 901 feet "should make provision for larger developments where the purposes of the basic recommendation may be satisfied more adequately through preservation of areas other than those above 901 feet." Dreyers' Response Brief, App 77.

We agree with the Dreyers that the Neighbors have not demonstrated that, in evaluating whether proposed PUD development is consistent with one or more of the listed purposes, the evaluation must be limited to lands above 901 feet in elevation. Nothing cited to us in the text of the SHS or elsewhere indicates that development of land that includes areas that are over 901 feet in elevation must consider only the portions of the property over 901 feet in evaluating consistency with the purposes of the Ridgeline Park section of the SHS. The Final Joint Parks Committee report cited by the Dreyers suggests that the city contemplated that preservation of areas below 901 feet might

suffice to show consistency with the listed purposes. Depending on the topography and other circumstances, preservation of trees on lower elevation slopes could limit impacts on the viewshed as well or better than concentrating development on lower elevation portions. And it is possible that concentrating development on a partially developed ridgeline away from existing lower elevation habitat and wildlife connective areas could be more consistent with Purposes 2 and 5 than concentrating development in lower elevation habitat and wildlife connective areas. The Neighbors have not demonstrated that, as a matter of law, evaluation of consistency with the listed purposes is confined to portions of the property with elevations above 901 feet.

Finally, the Neighbors argue that the record lacks substantial evidence to support the findings of consistency with Purposes 1, 2 and 5. The Neighbors' evidentiary arguments are premised on their view, rejected above, that only preservation of land above 901 feet in elevation can be evaluated in determining consistency with Purposes 1, 2 and 5. The Dreyers cite to the evidence that the hearings official and planning commission relied upon to find that the PUD is consistent with Purposes 1, 2 and 5. We agree with the Dreyers that the Neighbors have not established that the findings addressing consistency with Purposes 1, 2 and 5 are not supported by substantial evidence.

The first assignment of error (the Neighbors) is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR (The Neighbors)

Under the second and third assignments of error, the Neighbors challenge findings and conditions primarily related to EC 9.8320(6). We address both assignments of error together.

A. Significant Risk to Public Health and Safety

EC 9.8320(6) is a general track tentative PUD approval standard requiring a finding that "[t]he PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response." EC 9.9630(3)(c) requires that "adequate review of both on-site and off-site impacts of any development by a qualified engineering geologist occur under" specified conditions, including development on steep slopes.

To address EC 9.8320(6) and EC 9.9630(3)(c), the Dreyers submitted a "Geotechnical Investigation" by an engineering geologist, which was reviewed by the city public works department. The Geotechnical Investigation concluded that the subject property was suitable for development without significant risk to public health and safety, if specified measures are implemented in the design and construction of the PUD. The Geotechnical Investigation is based in part on 10 test pits dug at the site. The 10 test pits are located in the approximate center of the subject property, encompassing roughly 20 percent of the property. The Geotechnical Investigation noted two areas of moderate landslide activity in the steeper eastern portion of the site, and identified an "exclusion area"

encompassing the eastern portion of the property where no roads should be built and where residential construction should be subject to special consideration. Consequently, the site plan was revised to eliminate a private road in the vicinity of the two identified landslide areas. Among other recommendations, the Geotechnical Investigation recommended that within the "exclusion area" specific building foundation plans "should be reviewed on a case by case basis by qualified professionals prior to design and construction." Record 4758. As discussed below, the hearings official and planning commission ultimately found compliance with EC 9.8320(6) and EC 9.9630(3)(c), but based on the recommendation of the city public works department also imposed Condition of Approval 10, which requires that any application to construct public improvements or for a building permit include a geotechnical analysis by a certified engineer. We quote Condition of Approval 10, as modified by the planning commission, below.

The Neighbors' geotechnical consultant criticized the Geotechnical Investigation on a number of grounds, including the number and location of the test pits, arguing that the test pits were concentrated on the gentler slopes near the ridgeline and not located on the steeper portions of the property, or near the two identified slide areas. The consultant argued that the Geotechnical Investigation was therefore incomplete and essentially recommended deferring site-specific analysis to the building permit stage. For these reasons among others the geotechnical consultant argued that the Geotechnical Investigation

was inadequate to demonstrate compliance with EC 9.8230(6) and EC 9.9630(3)(c).

The hearings official considered the Geotechnical Investigation, as supplemented, and the criticisms of the Neighbors' geotechnical consultant, and chose to rely on the former to conclude that EC 9.8320(6) and EC 9.9630(3)(c) are met. The hearings official explained that choice by noting that the Neighbors' consultant failed to take into account the numerous, specific recommendations in the Geotechnical Investigation. Record 104. However, the hearings official agreed with the city public works department that a condition of approval was appropriate "to ensure that the PUD will not create any significant risk of slope failure." *Id.* The hearings official imposed Condition of Approval 10, requiring that any applications for public improvements or building permits must be accompanied by a site-specific geotechnical analysis from a certified engineer and must adhere to the recommendations in the Geotechnical Investigation and the site-specific analyses.

On appeal to the planning commission, the Neighbors argued in relevant part that the hearings official improperly deferred findings of compliance with applicable criteria, including EC 9.8320(6), to a subsequent proceeding that does not provide an opportunity for notice or public participation, contrary to *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). In response to arguments regarding compliance with EC 9.8230(6), to the effect that the Geotechnical Investigation was only a "preliminary" analysis that did not

adequately consider both on-site and off-site impacts, the planning commission modified Condition of Approval 10 to state:

> "A geotechnical analysis from a certified engineer, with specific recommendations for design and construction standards, shall be provided with any applications for Privately Engineered Public Improvements (PEPI) permits, as well as building permits and site development permits for the initial construction of infrastructure and residences on individual lots. The development proposed with each permit shall adhere to the recommended standards for design and construction as contained in the ~~related~~ *preliminary* geotechnical analysis *approved for the tentative PUD, as well as any additional geotechnical analyses required for individual permits. The geotechnical analyses required for individual permits shall also address potential off-site impacts*." Record 17. (Strikethrough text deleted by the planning commission; italicized text added by the planning commission).

Under the second assignment of error, the Neighbors argue that the hearings official and planning commission's findings of compliance with EC 9.8320(6) based on the Geotechnical Investigation are not supported by substantial evidence in the record. Relatedly, under the third assignment of error, the Neighbors argue that the planning commission erred in imposing Condition of Approval 10, because the condition represents an impermissible deferral of finding compliance with EC 9.8320(6) to a subsequent building permit approval process that does not provide notice or public participation, contrary to *Rhyne*, 23 Or LUBA 442.

The city's response brief adopts the Dreyers' response to the second assignment of error, but makes no response of its own. The Dreyers argue that

the Neighbors' findings and evidentiary challenges represent a classic battle of the experts, and that the hearings official is entitled to choose which expert testimony to believe, as long as the testimony chosen constitutes substantial evidence. The Dreyers argue that the hearings official adequately explained why she chose to rely on the Geotechnical Investigation. That explanation cited the measures recommended by the Geotechnical Investigation, one of which was for a "case-by-case" professional evaluation of specific building foundations on the steeper lots.

As noted above, the Neighbors' expert consultant criticized the Geotechnical Investigation as inadequate or incomplete, in part because it relied upon a cluster of 10 test pits located in the more gently sloped center of the property, encompassing only 20 percent of the property, and did not dig test pits or evaluate soil stability on the steeper slopes, including on or near the two sites identified as showing evidence of landslide activity. The Geotechnical Investigation acknowledges that the test pits "represent a very small portion of the site" (Record 4757), but elsewhere states that it assumes that the 10 test pits "are representative of the subsurface conditions throughout the site." Record 4754. However, the basis for that assumption is not explained. As noted, the site plan was subsequently revised to eliminate a private road near an identified landslide area, but as the Neighbors point out the revised site plan still proposes a private driveway and residential development in that area. Although the Dreyers' expert later submitted supplemental information, the Dreyers do not

cite us to any expert response to criticisms regarding the location or adequacy of the test pits to evaluate conditions over the entire area proposed for development. The hearings official and planning commission adopted no findings addressing that issue, or explaining why it need not be addressed. However, the planning commission seemed to recognize the incomplete nature of the Geotechnical Investigation in modifying Condition 10.

The decision-maker is entitled to choose between conflicting expert testimony, as long as the testimony relied upon constitutes substantial evidence, *i.e.*, evidence a reasonable person would rely upon. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, *aff'd* 258 Or App 534, 311 P3d 527 (2013). However, if the expert relied upon fails to respond to a critical issue raised by other expert testimony, there may be no conflicting expert evidence on that particular issue. Depending on the nature of the issue, the failure to rebut or provide any response regarding a critical issue may so undermine the expert testimony relied upon that the testimony as a whole does not constitute evidence a reasonable person would rely upon.

In our view, a reasonable decision maker would not have relied upon the Geotechnical Investigation to find compliance with EC 9.8320(6) and EC 9.9630(3)(c). We conclude this based in part on the apparently unrebutted expert testimony of the Neighbors' consultant that no reliable conclusions can be drawn regarding potential for slope failure on the site, based on test pits clustered on the least steep portion of the property, encompassing only 20

percent of the property, and some distance from two identified areas of soil instability on which development is proposed. Our conclusion is also based on the unexplained assumption that the test pit locations are representative of the subsurface conditions on the remainder of the property. Moreover, we agree with the Neighbors that Condition of Approval 10 appears to represent an attempt to overcome acknowledged evidentiary inadequacies in the Geotechnical Investigation. As such, the city erred in specifying that the more detailed and comprehensive geotechnical analyses required by Condition of Approval 10 be reviewed and approved outside of the scope of any public proceeding on the application. *Rhyne*, 23 Or LUBA 442.

The Neighbors' consultant also criticized the Geotechnical Investigation for failing to address off-site impacts of PUD development. As noted, EC 9.9630(3)(c) requires an "adequate review of both on-site and off-site impact[.]" The Neighbors appear to be correct that the Geotechnical Investigation provides at best conclusory statements regarding off-site impacts. The hearings official and planning commission rejected all challenges to the Geotechnical Investigation, including criticism regarding inadequate consideration of off-site impacts. But the findings do not cite to any evidence addressing off-site impacts or explain why the Geotechnical Investigation provides an adequate review of off-site impacts. The apparent lack of evidence on this point may be the reason that the planning commission felt compelled to modify Condition of Approval 10, to require that all public improvement and

building permits include a site-specific geotechnical analysis that addresses, among other things, "potential off-site impacts." A condition of approval that requires that additional or confirming information be submitted at the building permit stage could, in other circumstances, represent a permissible "belt and suspenders" approach to ensuring compliance with an approval criterion, if the local government adopts an adequate finding, supported by substantial evidence, that the approval criterion is satisfied. In the present case, however, the apparent lack of specific evidence and findings in the present record regarding off-site impacts suggests that the modification to Condition of Approval 10 was intended to overcome evidentiary insufficiencies in determining compliance with EC 9.8320(6) and EC 9.9630(3)(c).

For the foregoing reasons, we agree with the Neighbors that remand is required for the city to adopt more adequate findings, based on substantial evidence, regarding compliance with EC 9.8320(6) and EC 9.9630(3)(c). If the city cannot determine based on substantial evidence in the record that EC 9.8320(6) and EC 9.9630(3)(c) are complied with, and the city chooses to defer that issue to a subsequent proceeding, that subsequent proceeding must provide notice and opportunity for public participation, consistent with *Rhyne*, 23 Or LUBA 442; *see also Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007).

B. Impediment to Emergency Response

As noted, EC 9.8320(6) requires a finding that the PUD will not be "an impediment to emergency response." Access to the PUD is via Capital Drive, a narrow winding street, 18-feet wide, that dead-ends just past the subject property at Hendrickson Park. The Fire Marshal's original comments expressed several concerns, including: (1) the roads leading up to the PUD are narrow and windy, with potential for delayed response times if there are collisions, road construction, downed trees, heavy traffic, etc.; and (2) the need for an emergency vehicle turnaround triggered by the dead-end status of Capital Drive. To improve response times, the Fire Marshal recommended that no parking signs be posted on the streets leading to the area. Subsequently, the city Traffic Engineer issued an order placing no parking signs along the approach route. In addition, the applicants proposed a loop road through the PUD that allows an emergency vehicle turnaround. On February 20, 2018, the Fire Marshal issued an updated comment noting these two improvements, and commenting in relevant part that the no-parking signs provide "improved emergency access and evacuation capabilities along this route." Record 2932. Based on the Fire Marshal's updated comments, the hearings official found that the PUD would not be an impediment to emergency response.[12]

---

[12] The hearings official found:

> "[T]he Fire Marshal's office comments indicate that the parking prohibition [on streets] leading to the proposed PUD could

On appeal, the Neighbors argue that the no-parking signs do not completely address the Fire Marshal's larger concerns with the narrow and windy nature of the approach route, and that the Fire Marshal's updated comments, although noting that the no-parking signs improved emergency access, did not retract all of the original concerns with the approach route or positively state that the PUD is not an impediment to emergency response. Accordingly, the Neighbors argue that the hearings official's findings on this point are not supported by substantial evidence.

Substantial evidence is evidence that a reasonable person would rely upon to support a finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). In our view, a reasonable person could conclude from the Fire

---

> alleviate current issues in navigating the existing street system. The [updated] February 20, 2018 comments do not state that, with the addition of no-parking signs, the proposed development would create an impediment. Moreover, to the extent the emergency response issues relate to the ability of trucks to maneuver and turnaround, the proposed PUD could improve the existing situation. By providing a loop road (Cupola Drive) near the end of Capital Drive, emergency vehicles can more efficiently maneuver the streets. Eliminating the need to turnaround, the vehicles can negotiate the existing street system more efficiently.
>
> "Based on the Fire Marshal's updated comments, and with the addition of a loop street that allows greater maneuverability of emergency vehicles, the evidence in the record indicates the proposed PUD will not be an impediment to emergency response[.]" Record 105.

Marshal's updated comments that the Fire Marshal was not (or no longer) asserting that the PUD was an impediment to emergency response. The original comments requested two specific measures to improve emergency access. After two responsive measures were put in place or proposed, the Fire Marshal issued updated comments noting the two measures and the improved emergency access. The improved comments did not expressly state, one way or another, whether the Fire Marshal believed that the PUD constituted an impediment to emergency response, considering the two measures in place. Nonetheless, a reasonable person could conclude that with the two measures in place, responding to the only two specific requests made by the Fire Marshal, and in the absence of an express statement otherwise, that the Fire Marshal did not claim (or no longer claimed) that the PUD is an impediment to emergency response. Accordingly, the Neighbors have not demonstrated that the hearings official's findings on this issue are unsupported by substantial evidence.

C. Adequate Screening

EC 9.8320(3) requires a finding that the PUD "will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height." The hearings official found compliance with EC 9.8320(3), based on: (1) the proposed open space tracts on the property, which the hearings official found would provide substantial screening; (2) the proposed residential development on the western half of the property would be mostly obscured from view from the adjacent residential area to the

west due to slopes and trees; and (3) a condition of approval requiring any trees in buildable areas that are removed must be replaced at a one-to-one ratio. The hearings official also noted that while lot locations and configuration must be evaluated under EC 9.8320(3), no future buildings must be evaluated.[13] The hearings official noted that future building construction will be subject to review for compliance with R-1 zone development standards, as part of building permit review, including any bulk or height standards, and that if the applicant proposes to adopt Covenants, Conditions or Restrictions (CC&Rs)

---

[13] The hearings official's decision states, in part:

> "The [Neighbors] note that, to the extent the applicant relies upon future CC&Rs [Covenants, Conditions and Restrictions] to establish compliance with this (or any other) approval criterion, the applicant has failed to establish compliance with the criterion. However, neither EC 9.8320(3) nor any other PUD approval criterion requires that the PUD include proposed buildings. While the proposed lot locations and configurations must be evaluated for compliance with this criterion, future buildings are not subject to this review, and evaluation for compliance with this criterion does not include consideration of those future buildings. At the time residential dwellings are proposed for any of the approved lots, they must be evaluated for compliance with the R-1 zone development standards, and the bulk and height must be consistent with those development standards. To the extent the developer requests any deviations or modifications to those standards, those requests would be subject to the city's review process. Thus, compliance with this criterion does not rely on any specifications that may be included in future CC&Rs." Record 82-83.

that modify any R-1 developments standards, such modifications must undergo city review and approval.

Under the third assignment of error, the Neighbors argued that the hearings official erred in "deferring" a finding of compliance with EC 9.8320(3) to a subsequent proceeding that does not provide notice or opportunity for public participation. According to the Neighbors, whether the PUD provides "adequate screening" for purposes of EC 9.8320(3) depends in part on the bulk and height of the particular future dwellings that will be proposed at the building permit stage, and the permissible bulk and height of those dwellings could be subject to future-adopted CC&Rs that could include modified bulk and height standards, modifications that would be reviewed and approved by city staff in a discretionary, but non-public process.

We disagree with the Neighbors. The hearings official correctly noted that nothing in EC 9.8320(3) or any other tentative PUD approval requires that the city evaluate any particular dwellings that might be applied for at the future building permit stage. Because the PUD application did not propose any particular buildings, EC 9.8320(3) does not require that in evaluating whether the PUD provides "adequate screening" the city must also evaluate the bulk or height of the actual dwellings that would be proposed at the building permit stage. The Neighbors do not argue that subjecting building permit approvals to R-1 development standards that govern bulk and height represents a "deferral" of any aspect of finding compliance with EC 9.8320(3). Instead, the Neighbors

speculate that the applicant might in the future request that the city approve CC&Rs that include bulk or height standards that vary from the R-1 development standards. That possibility also does not represent a potential "deferral" of findings of compliance with EC 9.8320(3), as any such review proceeding to approve CC&Rs or modification of R-1 development standards would not concern the application of EC 9.8320(3) at all, and the hearings official did not rely (indeed, expressly rejected any reliance) on such a future review proceeding in order to establish compliance with EC 9.8320(3). The Neighbors' arguments on this point do not provide a basis for reversal or remand.

D. Conclusion

For the reasons stated above, the Neighbors' second and third assignments of error are sustained in part and denied in part.

The city's decision is remanded.

03/10/21 AM11:32 LUBA

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

TONY NIETO and TORY NIETO,
Petitioners,

vs.

CITY OF TALENT,
Respondent,

and

VERNON J. DAVIS, MARY A. TSUI,
LAURIE E. CUDDY, and FOREST L. DAVIS,
Intervenors-Respondents.

LUBA No. 2020-100

FINAL OPINION
AND ORDER

Appeal from City of Talent.

Tommy A. Brooks filed the petition for review and argued on behalf of petitioners. Also on the brief was Cable Huston LLP.

No appearance by City of Talent.

Christian E. Hearn filed the response brief and argued on behalf of intervenors-respondents. Also on the brief was Davis Hearn Anderson & Turner PC.

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

REVERSED 03/10/2021

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a hearings officer decision denying their application for a subdivision.

FACTS

The subject property is 26.58 acres and is zoned Single Family – Low Density (RS-5). The property was annexed to the city in 1990. Record 188. It is a "peninsula" of incorporated territory bordered on the east, south, and west by unincorporated areas. It is bounded to the north by a 60-foot-wide railroad right-of-way owned by the Central Oregon & Pacific Railroad (COPR). The property is accessible only from the north, via Belmont Road, which is a one-block-long city right-of-way extending from Talent Avenue south to the railroad right-of-way. From there, the property is accessible via a private gravel road which crosses the railroad right-of-way pursuant to an easement from COPR.

In 2018, petitioners applied to subdivide the property into 49 lots for development with single-family dwellings. Petitioners' application proposes to improve the portion of Belmont Road north of the railroad right-of-way and extend Belmont Road to and through the subject property by (1) upgrading and converting the private railroad crossing to a public crossing and (2) improving and dedicating a public right-of-way over the gravel road south of the railroad.

In a staff report dated July 1, 2020, the planning department recommended that the planning commission approve the application.[1] On July 31, 2020, the planning commission denied the application, and petitioners appealed that decision to the hearings officer. On September 1, 2020, the hearings officer held a hearing and, on September 9, 2020, denied the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' assignment of error includes three subassignments of error that challenge the hearings officer's decision to deny their application. We begin with a fairly detailed description of the single standard that the hearings officer concluded was not met before turning to the assignment of error.

---

[1] Petitioners submitted their subdivision application on March 23, 2018, and the application was deemed complete on May 9, 2018. The application proposed an "expedited land division" (ELD) under ORS 197.360(1). On July 6, 2018, the planning department denied the request for ELD review. Petitioners appealed the planning department's decision to a referee appointed to hear and decide ELD appeals in accordance with ORS 197.375. On September 5, 2018, the referee denied the appeal, upheld the planning department's decision, and remanded the application to the city for consideration through ordinary subdivision proceedings. Petitioners appealed the referee's decision to the Court of Appeals, which affirmed. *Nieto v. City of Talent*, 295 Or App 625, 436 P3d 82 (2019). On January 16, 2020, petitioners requested that the city proceed with the application on remand.

A. Background

Talent Municipal Code (TMC) title 17 is the city's subdivision code. TMC 17.10.060(F) is one of the subdivision code's development and design standards for vehicular access and circulation. That standard provides:

> "When vehicle access is required for development, access shall be provided by one of the following methods (a minimum of 10 feet per lane is required). These methods are 'options' to the developer/subdivider.
>
> "1. Option 1. Access is from an existing or proposed alley or mid-block lane. If a property has access to an alley or lane, direct access to a public street is not permitted.
>
> "2. Option 2. Access is from a private street or driveway connected to an adjoining property that has direct access to a public street (i.e., shared driveway). A public access easement covering the driveway shall be recorded in this case to assure access to the closest public street for all users of the private street/drive.
>
> "3. Option 3. Access is from a public street adjacent to the development parcel. If practicable, the owner/developer may be required to close or consolidate an existing access point as a condition of approving a new access. Street accesses shall comply with the access spacing standards in subsection (G) of this section.
>
> "4. Subdivisions Fronting Onto an Arterial Street. New residential land divisions fronting onto an arterial street shall be required to provide alleys or secondary (local or collector) streets for access to individual lots.
>
> "5. Double-Frontage Lots. When a lot has frontage onto two or more streets, access shall be provided first from the street with the lowest classification. For example, access shall be provided from a local street before a collector or arterial street. Except for corner lots, the creation of new double-

> frontage lots shall be prohibited in the residential district, unless topographic or physical constraints require the formation of such lots. When double-frontage lots are permitted in the residential district, a landscape buffer with trees and/or shrubs and ground cover not less than 10 feet wide shall be provided between the back yard fence/wall and the sidewalk or street; and maintenance shall be assured by the owner (e.g., through homeowners' association, etc.)."

The planning department concluded that petitioners' application satisfied TMC 17.10.060(F)(3) because each lot within the subdivision would front and take access from a public street. Record 312. The planning commission denied the application on different bases that are not at issue in this appeal.

On appeal of the planning commission's decision, the hearings officer denied the application on the single basis that the application failed to satisfy TMC 17.10.060(F). The hearings officer concluded that TMC 17.10.060(F) applied because petitioners' subdivision application proposed "development," including the extension of Belmont Road over the railroad right-of-way and to and through the subject property. Record 48-49. The hearings officer concluded that this standard was not met because petitioners proposed upgrading and converting the private railroad crossing to a public crossing but did not submit detailed proposals regarding the design and construction of the upgraded crossing; the acquisition of a rail-crossing permit from the Oregon Department of Transportation, which has approval jurisdiction over the rail crossing; the acquisition of a public right-of-way from COPR; and related funding. Record 49-50. The hearings officer rejected petitioners' proposal that the hearings officer

impose a condition of approval requiring petitioners and the city to negotiate a development agreement addressing those issues.

In their first assignment of error, petitioners include three subassignments of error: (1) that TMC 17.10.060(F) is not "clear and objective," as required by ORS 197.295 to ORS 197.314 (the Needed Housing Statutes); (2) that TMC 17.10.060(F) is not applicable because petitioners' subdivision application does not propose "development;" and (3) that the hearings officer's conclusion that TMC 17.10.060(F) was not met is not supported by substantial evidence, as required by ORS 197.835(9)(a)(C).[2] As we explain below, we agree with petitioners that TMC 17.10.060(F) it is not a "clear and objective standard[]" and, therefore, the city may not apply that provision to petitioners' application. Because our resolution of that subassignment of error is dispositive, we need not address petitioners' other subassignments of error which argue that the application does not propose "development" and that the hearings officer's decision is not supported by substantial evidence.

We proceed with a discussion of the Needed Housing Statutes.

---

[2] Petitioners also argue that the city has failed to satisfy ORS 197.831, which places the burden on local governments to demonstrate, in an appeal before LUBA, that standards and conditions imposed on "needed housing" "are capable of being imposed only in a clear and objective manner." In *Home Builders Assoc. v. City of Eugene*, we discussed the genesis of the enactment of ORS 197.831. 41 Or LUBA 370, 377-83 (2002).

B. The Needed Housing Statutes

The statutes that are set out at ORS 197.295 to ORS 197.314 are commonly referred to as the Needed Housing Statutes. With their initial enactment forty years ago this year, in 1981,[3] those statutes incorporated into law the "St. Helens Policy," which was adopted as a policy by the Land Conservation and Development Commission (LCDC) in 1979. *See Robert Randall Company v. City of Wilsonville*, 15 Or LUBA 26 (1986) (so explaining).[4]

ORS 197.307(1) provides, "The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern." ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government *may adopt and apply only clear and objective standards, conditions* and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

---

[3] Or Laws 1981, ch 884, §§ 5-6.

[4] *See also* Testimony, Senate Environment and Land Use Committee, SB 419, June 10, 1981, Ex A (statement of F. Van Natta). The initial purpose behind the St. Helens Policy was to end local government attempts to exclude certain housing types that met lower, moderate or "least cost" housing needs. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 148 (1998).

"(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."[5] (Emphasis added).

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, we explained that approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999). We also noted that ORS 197.307(4) requires the standards and conditions that apply to needed housing to be *both* "clear" *and* "objective." *Id.* at 155-56 ("Dictionary definitions of 'clear' and 'objective' suggest that the kinds of standards frequently found in land use regulations lack the certainty of application required to qualify as 'clear' or 'objective.'"); *Id.* at 156 n 23 (quoting the dictionary definitions of "clear" and "objective").[6]

---

[5] ORS 197.307(6) allows a local government to adopt an alternative approval process for applications for needed housing if the alternative approval process authorizes a density that is greater than the density authorized under the "clear and objective standards" described in ORS 197.307(4). There is no dispute that the city has not adopted such an alternative approval process.

[6] We note again here, as we noted in *Rogue Valley*, that the two words have different meanings. The dictionary includes the following definition for "clear":

> "**3 a :** easily understood **:** without obscurity or ambiguity * * * **:** thoroughly understood or comprehended * * * **:** easy to perceive or determine with certainty * * * **:** sharply distinguished **:** readily recognized **:** UNMISTAKABLE[.]" *Webster's Third New Int'l Dictionary* 419 (unabridged ed 2002).

C. TMC 17.10.060(F)

Petitioners argue that TMC 17.10.060(F) is not "clear and objective" and, therefore, ORS 197.307(4) prohibits the city from applying that standard to their application. As a result, petitioners argue, the city's decision to deny the application was "[o]utside the scope of authority of the decision maker." ORS 197.828(2)(c)(A). In support of their argument, petitioners point to the fact that the planning department and the planning commission interpreted TMC 17.10.060(F) as addressing access and circulation *within* a proposed subdivision and concluded that the application satisfied the criterion, whereas the hearings officer interpreted that standard as addressing access *to and from* a proposed subdivision. Petitioners also point out that, while TMC 17.10.060(F) requires the *provision* of vehicle access, it does not specify the *timing* of that provision. Petitioners argue that, while the hearings officer interpreted TMC 17.10.060(F) to require access at the time of tentative subdivision plat approval, the standard could also be interpreted to require access to and from a subdivision only after the streets *within* the subdivision have been constructed. Because TMC

The definition for "objective" includes the following:

> "**1** * * * **b** * * * (2) **:** existing independent of mind **:** relating to an object as it is in itself or as distinguished from consciousness or the subject (3) **:** belonging to nature or the sensible world **:** publicly or intersubjectively observable or verifiable esp. by scientific methods **:** independent of what is personal or private in our apprehension and feelings **:** of such nature that rational minds agree in holding it real or true or valid[.]" *Id.* at 1556.

17.10.060(F) can be interpreted in multiple ways, petitioners argue that that standard is not "clear and objective." The city has not appeared in the appeal, and intervenors-respondents' response brief does not address or respond to petitioners' argument.

We agree with petitioners. In *Walter v. City of Eugene*, we concluded that a standard which required "[t]he street layout of [a] proposed [planned unit development (PUD) to] disperse motor vehicle traffic onto more than one public local street" was not "clear and objective." 73 Or LUBA 356, 360-64 (2016). Although the proposed PUD in that case abutted a right-of-way which connected with two public local streets located a short distance from the property, that right-of-way was improved to allow a connection with only one of the streets at the time of the application. *Id.* at 357. The petitioners argued that, while the standard could be interpreted to require *improved* connections with two public local streets at the time of the application, the standard could also be interpreted to require merely that the connections *exist* at the time of the application, regardless of whether both of them are improved. *Id.* at 361. We agreed with the petitioners that, because the term "disperse" was undefined, and because the purpose of the standard was not clear from its text, the standard was subject to multiple interpretations and was therefore ambiguous. *Id.* at 361-63. We explained that "[t]he multiple possible interpretations of the ambiguous language * * *, coupled with the lack of a clear purpose, allow[ed] the city to exercise significant discretion in choosing which interpretation it prefer[red] to serve one or more

unstated purposes." We noted that the city apparently chose the interpretation which it subjectively believed would best "balance or mitigate" the impacts of the development on the public street system and other developed properties in the vicinity. *Id.* at 363 (citing *Rogue Valley*, 35 Or LUBA at 158). We reversed the city's decision and ordered it to approve the application. *Id.* at 366.

Like the standard at issue in *Walter*, the purpose of TMC 17.10.060(F) is not clear from its plain text. It is not clear whether it applies to access and circulation within a proposed subdivision, as the planning department and the planning commission concluded, or whether it requires access to and from a proposed subdivision, as the hearings officer concluded. Moreover, it is not clear from the plain text whether the standard requires that such access be provided at the time of tentative plat approval or whether it requires merely that access eventually be provided through one of the five listed options, regardless of whether it exists at the time of tentative plat approval. Like the provision at issue in *Walter*, the multiple possible interpretations of TMC 17.10.060(F), coupled with the lack of a clear purpose, allowed the hearings officer to exercise significant subjectivity in choosing their preferred interpretation. That interpretation, which concluded that petitioners are required to demonstrate that access to and from a proposed subdivision exists at the time of tentative plat approval through detailed proposals regarding the design, construction, and funding of access improvements, appears designed to balance the impacts from the proposal on the subject property, adjoining properties, and the community.

Rogue Valley, 35 Or LUBA at 158. Accordingly, TMC 17.10.060(F) is not "clear and objective," and the city erred in applying it to deny petitioners' application for housing.

The first assignment of error is sustained.

REMAINING ASSIGNMENTS OF ERROR

In their second assignment of error, petitioners argue that the city's decision denying their application is inconsistent with the city's adopted Transportation Systems Plan (TSP), which identifies and includes several transportation improvements proposed by petitioners.[7] In their third assignment of error, petitioners argue that the hearings officer denied their application because petitioners stated their unwillingness to fully fund certain public infrastructure projects identified in the TSP, but the hearings officer failed to adopt findings regarding whether imposing a condition that required petitioners to fund and construct those infrastructure projects would be constitutional under *Nollan v. California Coastal Comm'n*, 483 US 825 (1987), and *Dolan v. City of Tigard*, 512 US 374 (1994), as required by *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595 (2013). In their fourth assignment of error, petitioners argue, similar to their first assignment of error, that TMC 17.10.060(F) "ha[s] the effect

[7] ORS 197.175(2)(d) requires the city to make decisions in compliance with its acknowledged comprehensive plan.

* * * of discouraging needed housing through unreasonable cost or delay," as prohibited by ORS 197.307(4)(b).

We sustained petitioners' first assignment of error and concluded that the city may not apply TMC 17.10.060(F) to petitioners' application because it is ambiguous and requires a subjective, value-laden analysis designed to mitigate impacts from the development. The hearings officer's single basis for denying the application was its failure to satisfy that TMC provision. Accordingly, we need not and do not reach the second, third, and fourth assignments of error that assert alternative bases for reversing or remanding the hearings officer's decision.

DISPOSITION

We have sustained petitioners' challenge to the hearings officer's sole basis for denial of the application. Petitioners ask LUBA to reverse the city's decision and order the city to approve the application. Petition for Review 37.

ORS 197.835(10)(a) provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

The hearings officer denied petitioners' application on a basis that is barred by ORS 197.307(4), because the application is for approval of "housing" and the standard that the hearings officer found was not met is not "clear and objective."

The hearings officer's decision was therefore "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Parkview Terrace*, 70 Or LUBA at 57.

In *Parkview Terrace*, we reversed a city council decision denying site plan approval and a variance for a needed housing development. We concluded that all 10 of the reasons that the city council gave for denying the petitioner's applications were "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Id.* at 57-58. Accordingly, we reversed the city council's decision and ordered the city to approve the petitioner's applications. We instructed that the city council's decision to approve the applications could include conditions of approval imposed by the urban area planning commission to which the petitioner had agreed. *Id.* at 58 (citing *Stewart v. City of Salem*, 58 Or LUBA 605, 622, *aff'd*, 231 Or App 356, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010)). Accordingly, here, the hearings officer's decision to approve the application may include conditions of approval imposed by the planning department to which petitioners have agreed.

The city's decision is reversed, and the city is ordered to approve petitioners' application.

Argued and submitted October 4, affirmed December 15, 2021

Stanley ROBERTS
and Rebecca Roberts,
Petitioners,

v.

CITY OF CANNON BEACH;
Haystack Rock, LLC; and
Oregon Coast Alliance,
Respondents.

Land Use Board of Appeals
2020116; A176601

504 P3d 1249

Petitioners seek judicial review of a decision of the Land Use Board of Appeals (LUBA) affirming the City of Cannon Beach's denial of their application for a development permit to construct a residence. Petitioners raise two assignments of error in which they argue that LUBA's decision is unlawful in substance because it affirms the city's application of the oceanfront setback established in Cannon Beach Municipal Code section 17.42.050(A)(6) to their application. *Held*: The oceanfront setback is a clear and objective standard, ORS 197.307(4), and ORS 227.175(4)(c) and (e) did not prohibit application of the oceanfront setback to petitioners' application.

Affirmed.

W. Michael Gillette argued the cause for petitioners. Also on the brief were Schawabe Williamson & Wyatt, P.C., and Wendie L. Kellington, and Kellington Law Group, PC.

William K. Kabeiseman argued the cause for respondent City of Cannon Beach. Also on the brief were Carrie A. Richter and Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

William L. Rasmussen argued the cause for respondent Haystack Rock, LLC. Also on the brief were Steven G. Liday and Miller Nash, LLP.

Sean Malone filed the brief for respondent Oregon Coast Alliance.

Bryan W. Cavaness filed the brief *amicus curiae* for Stafford Land Company.

James D. Howsley filed the brief *amicus curiae* for Home Builders Association of Metropolitan Portland. Also on the brief was Jordan Ramis, PC.

Patricia M. Mulvihill filed the brief *amicus curiae* for League of Oregon Cities.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.

ARMSTRONG, P. J.

Affirmed.

ARMSTRONG, P. J.

Petitioners seek judicial review of a decision of the Land Use Board of Appeals (LUBA) affirming the City of Cannon Beach's denial of their application for a development permit to construct a residence. Petitioners raise two assignments of error in which they argue that LUBA's decision is unlawful in substance because it affirms the city's application of the oceanfront setback established in Cannon Beach Municipal Code (CBMC) section 17.42.050(A)(6) to their application.[1] As explained below, we conclude that the oceanfront setback is a clear and objective standard, ORS 197.307(4), and that ORS 227.175(4)(c) and (e) do not prohibit application of the oceanfront setback to petitioners' application. Accordingly, we affirm.

We begin by considering petitioners' first assignment of error. Before recounting the facts, we set out the relevant code provisions, which we take from LUBA's opinion:

> "The purpose of the [oceanfront management (OM)] overlay zone
>
> "'is to regulate uses and activities in the affected areas in order to: ensure that development is consistent with the natural limitations of the oceanshore; to ensure that identified recreational, aesthetic, wildlife habitat and other resources are protected; to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of beach and dune areas; and to reduce the hazards to property and human life resulting from both natural events and development activities.' Cannon Beach Municipal Code (CBMC) 17.42.010.
>
> "The OM overlay zone includes all 'lots abutting the oceanshore.' CBMC 17.42.020(A)(1). '"Lot abutting the oceanshore" means a lot which abuts the Oregon Coordinate Line or a lot where there is no buildable lot between it and the Oregon Coordinate Line.' CBMC 17.04.320. CBMC 17.42.050(A)(6) provides the oceanfront setback standard

[1] *Amici* Stafford Land Company and Homebuilders Association of Metropolitan Portland have filed briefs further addressing the assignments of error raised by petitioners. Because the three briefs present overlapping arguments, we do not distinguish among them for purposes of this opinion. Generally, we refer to the arguments raised by petitioners and their supporting *amici* as petitioners' arguments.

for lots abutting the oceanshore, establishing the 'ocean yard.' '"Ocean yard" means a yard measured horizontally at right angles from the most easterly of [the] Oregon Coordinate Line or the western property line, to the nearest point of a building. An ocean yard may be a front yard, a rear yard or a side yard.' CBMC 17.04.578. The only structures permitted in the ocean yard are fences, decks, or beach access stairs. CBMC 17.42.060(A)(9). Accordingly, a dwelling cannot be constructed in the ocean yard.

"The oceanfront setback and resulting ocean yard established by CBMC 17.42.050(A)(6) are at the center of the city's denial and petitioners' arguments in this appeal. CBMC l 7.42.050(A)(6) provides:

"'Oceanfront Setback. For all lots abutting the oceanshore, the ocean yard shall be determined by the oceanfront setback line.

"'a. The location of the oceanfront setback line for a given lot depends on the location of buildings on lots abutting the oceanshore in the vicinity of the proposed building site and upon the location and orientation of the Oregon Coordinate Line.

"'b. For the purpose of determining the oceanfront setback line, the term "building" refers to the residential or commercial structures on a lot. The term "building" does not include accessory structures.

"'c. The oceanfront setback line for a parcel is determined as follows:

"'i. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines.

"'ii. Determine the setback from the Oregon Coordinate Line for each building identified in subsection (A)(6)(c)(i) of this section.

"'iii. Calculate the average of the setbacks of each of the buildings identified in subsection (A)(6)(c)(ii) of this section.

"'d. If there are no buildings identified by subsection (A)(6)(c)(i) of this section, then the oceanfront setback line shall be determined by buildings that are located two hundred feet north and two hundred feet south of the parcel's side lot lines.

"'e. Where a building identified by either subsection (A)(6)(c)(i) of this section or subsection (A)(6)(d) of this section extends beyond one hundred feet of the lot in question, only that portion of the building within one hundred feet of the lot in question is used to calculate the oceanfront setback.

"'f. The setback from the Oregon Coordinate Line is measured from the most oceanward point of a building which is thirty inches or higher above the grade at the point being measured. Projections into yards, which conform to Section 17.90.070, shall not be incorporated into the required measurements.

"'g. The oceanfront setback line shall be parallel with the Oregon Coordinate Line and measurements from buildings shall be perpendicular to the Oregon Coordinate Line.

"'h. The minimum ocean yard setback shall be fifteen feet.

"'i. Notwithstanding the above provisions, the building official may require a greater oceanfront setback where information in a geologic site investigation report indicates a greater setback is required to protect the building from erosion hazard.

"'j. As part of the approval of a subdivision, the city may approve the oceanfront setback for the lots contained in the subdivision. At the time of building construction, the oceanfront setback for such a lot shall be the setback established by the approved subdivision and not the oceanfront setback as it would be determined by subsections (A)(6)(a) through (i) of this section. Before granting a building permit, the building official shall receive assurance satisfactory to such official that the location of the oceanfront setback for said lot has been specified at the required location on the plat or has been incorporated into the deed restriction against the lot.'"

Roberts v. City of Cannon Beach, ___ Or LUBA ___, ___ (LUBA No. 2020-116, July 23, 2021) (slip op at 7-10) (brackets in LUBA opinion; internal footnotes omitted).

The subject property is a 5,394-square-foot lot on a steep hillside facing the Pacific Ocean in the Tolovana Park subdivision. Petitioners submitted an application to construct a new 2,712-square-foot residence on the property.

The city determined that petitioners' lot and the lot immediately to the north of petitioners' lot were both "lots abutting the oceanshore," CBMC 17.42.020(A)(1), and, consequently, that the oceanfront setback, CBMC 17.42.050(A)(6), applied. The city determined that the required method of determining the oceanfront setback was, as set out in CBMC 17.42.050(A)(6)(c), to identify the "affected buildings" and average the oceanfront setbacks of those buildings. The city determined that, in this case, there was only one affected building, the house on the lot to the north of petitioners' lot. Applying CBMC 17.42.050(A)(6)(c), the city averaged the setbacks of the "affected buildings" and concluded that the average was the same as the setback of the single affected building.

Ultimately, the city denied the permit on the ground that petitioners' proposed house did not comply with the oceanfront setback. Petitioners challenged the denial before LUBA, and LUBA affirmed the denial. On judicial review, petitioners contend that LUBA's decision is unlawful in substance because LUBA misapplied the statutory requirement that approval standards for housing be "clear and objective." ORS 197.307(4).[2]

We review LUBA's construction of a statute for legal error. *Central Oregon LandWatch v. Deschutes County*, 285 Or App 267, 276-77, 396 P3d 968 (2017). As explained below, we reject petitioners' view that a standard is not "clear and objective" any time that one of its terms, considered apart from its context, has more than one plausible meaning, and we agree with LUBA that the challenged terms of the oceanfront setback are clear and objective.

Local governments have long been required to "adopt and apply only clear and objective standards, conditions and procedures regulating the development" of "needed housing." ORS 197.307(4); *see Nieto v. City of Talent*, ___ Or LUBA ___, ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 8) (explaining that the needed-housing statutes were enacted in 1981). When clear and objective standards are required for needed housing, "the local government

[2] We reject without discussion petitioners' other arguments raised in the first assignment of error.

imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner." ORS 197.831.

In 2017, the legislature extended the "clear and objective" requirement to the development of all housing. *See* Or Laws 2017, ch 754, § 5; *see also Warren v. Washington County*, 296 Or App 595, 598, 439 P3d 581, *rev den*, 365 Or 502 (2019) (after the 2017 amendments, ORS 197.307(4) "provides that local government can regulate the development of housing only through clear and objective standards, conditions, and procedures").[3] The legislature accomplished that change by simply amending the provision that formerly addressed only needed housing to apply to "housing, including needed housing." Or Laws 2017, ch 745, § 5 ("[A] local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of **housing, including** needed housing ***." (Boldface added.)). In our view, that change was meant to expand application of the existing "clear and objective" standard to all housing; it did not demonstrate any intention to change or reformulate the existing "clear and objective" standard.

LUBA, and, to a lesser extent, this court, have articulated and refined the "clear and objective" standard under ORS 197.307 over many years. We agree with petitioners that, fundamentally, the standard has two parts: First, a standard, condition, or procedure must be objective. As LUBA has explained, "objective" means "existing independent of mind." *Nieto*, ___ Or LUBA ___, ___ (slip op at 9 n 6). Standards are not objective "if they impose 'subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.'"

[3] The legislature has also provided that discretionary permit approvals must apply clear and objective standards. ORS 227.173(2). In this case, there has been some debate about whether this is a discretionary approval. As LUBA did, we observe that our resolution of petitioners' arguments applies with equal force under both ORS 197.307(4) and ORS 227.173(2). *Ruddell v. City of Bandon*, 249 Or App 309, 320, 275 P3d 1010 (2012) ("[W]e conclude that our resolution of petitioners' arguments related to ORS 197.307(6) (2009) apply with equal force to their claims under ORS 227.173.").

Legacy Dev. Grp., Inc. v. City of The Dalles, ___ Or LUBA ___, ___ (LUBA No 2020-099, Feb. 24, 2020) (slip op at 7) (quoting *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999)); *id.* at ___ (slip op at 14) ("Terms such as 'necessary' and 'consistent' are designed to balance or mitigate impacts from development and, therefore, are not objective." (Some internal quotation marks and brackets omitted.)); *see also Ruddell v. City of Bandon*, 249 Or App 309, 319, 275 P3d 1010 (2012) (quoting and applying the same standard from LUBA's opinion in *Rogue Valley Assoc. of Realtors*).

Second, as LUBA observed in this case, standards must also be clear. "[T]he term 'clear' means 'easily understood' and 'without obscurity or ambiguity.'" *Roberts*, ___ Or LUBA at ___ (slip op at 19) (quoting *Nieto*, ___ Or LUBA ___, ___ (slip op at 9 n 6)). This second prong of the analysis is better developed in LUBA's case law than in our own. *See, e.g.*, *Group B, LLC v. City of Corvallis*, ___ Or LUBA ___, ___ (LUBA No 2015-019, Aug 25, 2015) (slip op at 13-14), *aff'd*, 275 Or App 557, 364 P3d 355 (2015), *rev den*, 359 Or 667 (2016) (a condition that could be construed "to support either of two diametrically opposed conclusions" "is not a 'clear and objective' standard or condition within the meaning of ORS 197.307(4)"). Ultimately, in the context of ORS 197.307(4), the degree of clarity required for standards, conditions, and procedures for housing development represents a balance between the need of applicants for an understandable route to approval of the applied-for development and the need of local governments for code-drafting requirements that are realistically achievable. *See, e.g.*, Video Recording, House Committee on Human Services and Housing, HB 2007, Apr 13, 2017, at 29:55 (statement of Rep. Tina Kotek), *available at* https://olis.oregonlegislature.gov (accessed Dec 7, 2021) (indicating that it would be achievable for cities to apply only clear and objective standards to all housing).

Here, however, we need not delve into the details of the required degree of clarity, because, as explained below, we disagree with the basic premise of petitioners' argument. As we understand their view, a standard cannot be clear and objective if any of its terms, considered apart from their

context, are capable of a meaning different from the one advanced by the local government. In support of that view, they rely on *Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000), *rev den*, 331 Or 674 (2001).

As explained below, we disagree with petitioners' characterization of our holding in *Tirumali*. At the outset, we observe that, in that case, we were construing ORS 197.015(10)(b)(B), which addresses LUBA's subject-matter jurisdiction. Although the statute at issue here, ORS 197.307(4), also refers to "clear and objective standards," we note that the two statutory contexts are, in some ways, different. *See generally Garcia-Solis v. Farmers' Ins. Co.*, 365 Or 26, 35, 441 P3d 573 (2019) ("[T]he assumption of consistency is only an assumption. The text and context of a statute can refute that assumption.").

However, granting that our holding in *Tirumali* is at least relevant in this context, our reasoning in that case does not support petitioners' argument in this case. In *Tirumali*, the parties disputed whether, under the Portland City Code, the height of a building built on a steep lot should be measured from the lowest original grade on the property, or whether it should be measured from the top of any fill that was added during construction. 169 Or App at 245-46. LUBA noted that the code's definition of "grade" referred to a "finished surface" and concluded that that reference demonstrated that the building should be measured from the "finished" grade, that is, the top of any fill that was added during construction. *Id.*

We explained that, in that context,

> "our inquiry *** is not to determine what the relevant terms in fact mean but only to determine whether they can plausibly be interpreted in more than one way. If so, they are ambiguous, and it would follow that the relevant city provisions are not 'clear and objective,' ORS 197.015(10)(b)(B)[.]"

Id. at 246. For purposes of that analysis, we noted that, although the term "finished surface" in the definition of "grade" was appropriate context to consider in resolving the ambiguity in the text of the provision itself, that term was also ambiguous. *Id.* One potential meaning of "finished" undercut the view that "finished surface" referred to the

final grade, and the other supported it. *Id.* We particularly noted that "[n]o context of which we are aware resolves the ambiguity," nor had the parties provided persuasive legislative history. *Id.* Finally, canons of construction also led in conflicting directions. *Id.* at 246-47. Based on our conclusion that the city's standard was ambiguous, we held that it was not clear and objective for purposes of ORS 197.015(10)(b)(B), and, consequently, that LUBA had jurisdiction.

Here, petitioners rely on *Tirumali* as support for their view that, to meet the statutory requirement of a clear and objective standard, the city must show that none of the terms of the oceanfront setback provision are ambiguous, even when they are considered apart from their context and the purpose of the ordinance. But *Tirumali* does not stand for that proposition. Rather, in *Tirumali*, we considered the text of the ordinance, in the context of relevant definitions and all other relevant context (of which there was none); then we considered legislative history (of which there was also none); then we considered canons of construction. None of those steps yielded an answer. In short, we conducted a full construction of the ordinance and concluded that, even after that exercise, it remained ambiguous. *Tirumali*, 169 Or App at 246-47. For *that* reason, we concluded that the ordinance was not "clear and objective" for purposes of ORS 197.015(10)(b)(B). Our analysis in *Tirumali* does not support petitioners' view that we must consider only the individual terms of the ordinance and that it is immaterial whether reference to their context or the purpose of the ordinance resolves any ambiguity.

Nearly 20 years ago, LUBA rejected the view that petitioners assert:

> "In *Home Builders Assoc. v. City of Eugene*, [41 Or LUBA 370, 393 n 20 (2002),] we explained that 'the ultimate question under ORS 197.307[(4)] is whether the *standard* is clear and objective, viewed in context. That the standard may contain imprecise or ambiguous terms is a relevant and, depending on the terms and their function in the standard, perhaps sufficient, consideration in answering that ultimate question. However, the existence of imprecise or ambiguous terms in a standard does not *necessarily* resolve whether that standard violates ORS 197.307[(4)]."

Knoell v. City of Bend, ___ Or LUBA ___, ___ (LUBA No 2020-037, Aug 20, 2021) (slip op at 4) (emphases in *Home Builders Assoc.*; second and third brackets in *Knoell*); *see also Ruddell*, 249 Or App at 320 (relying on LUBA's construction of "clear and objective standards" in *Home Builders Assoc.*). That reasoning by LUBA is consistent with the statutory text, which provides that "a local government may adopt and apply only *clear and objective standards, conditions and procedures* regulating the development of housing," ORS 197.307(4) (emphasis added), and with our case law. We adopt that reasoning and, consequently, reject petitioners' proposed analysis for whether an approval standard is adequately clear.

Having done that, we agree with LUBA that each of petitioners' text-specific arguments fails. Petitioners argue that the term "average," which the oceanfront setback applies, in some circumstances, to a single number; the undefined term "Oregon Coordinate Line"; and the term "lot" are ambiguous. In light of our rejection of petitioners' argument that any ambiguous term, standing alone, prevents a standard from being clear and objective, the question is whether any ambiguity in those terms makes the oceanfront setback standard itself ambiguous in a way that cannot be resolved by reference to its context, its purpose, or some other appropriate consideration.

As we will briefly explain, we conclude that it does not. First, although petitioners are correct that an average is usually calculated based on a set containing more than one value, in context, it is clear that CBMC 17.42.050(A)(6)(c) contemplates that, in some cases—cases exactly like this one, where there is a single building within 100 feet of the side lot lines of the affected property—the average will be calculated from a set containing one number.[4]

[4] As set out above, the relevant text of CBMC 17.42.050(A)(6) provides, as follows:

> "c. The oceanfront setback line for a parcel is determined as follows:
>
> "i. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines.
>
> "ii. Determine the setback from the Oregon Coordinate Line for each building identified in subsection (A)(6)(c)(i) of this section.

Second, regarding the Oregon Coordinate Line, LUBA explained that "a reasonable person reading CBMC 17.42.050, which is in the CBMC chapter governing the OM overlay zone, would understand that 'Oregon Coordinate Line' is the only statewide surveyed line that crosses the state of Oregon from north to south along the state's ocean-front." That line is the one identified in ORS 390.770 by reference to surveyed points. We agree with LUBA that, in the context of the oceanfront setback, the term "Oregon Coordinate Line" in CBMC 17.42.050(A)(6)(c) is neither ambiguous—because there is only one line to which it could reasonably refer—nor obscure.[5]

Finally, we consider the various arguments that petitioners advance about the term "lot" in CBMC 17.04.320, the provision that defines the group of lots—"lots abutting the oceanshore"—to which the oceanfront setback applies. As set out above, a "lot abutting the oceanshore" includes "a lot where there is no buildable lot between it and the Oregon Coordinate Line." CBMC 17.04.320. Petitioners argue that the term "lot" in "buildable lot" is ambiguous because the definition of "lot" includes the term "plot," and a plot, according to a dictionary definition, is a measured piece of land. They point out that the neighboring property on which the city relied in calculating the ocean-front setback includes enough property to allow another house to be built on it sometime in the future. Thus, they

---

"iii. Calculate the average of the setbacks of each of the buildings identified in subsection (A)(6)(c)(ii) of this section.

"d. If there are no buildings identified by subsection (A)(6)(c)(i) of this section, then the oceanfront setback line shall be determined by buildings that are located two hundred feet north and two hundred feet south of the parcel's side lot lines."

CBMC 1.04.040 provides, in turn, that, unless it is apparent from the context that a different construction is intended, "[t]he singular number includes the plural and the plural includes the singular."

[5] We also reject petitioners' suggestion that even a clear reference to the statutorily established line in ORS 390.770 violates the requirement that the standard be clear and objective because the statutory line—established by a list of surveyed points along the ocean shore—is too difficult for an applicant to understand. The standard is required to be "clear and objective," ORS 197.307(4), not simplistic. For the same reason, we reject the arguments of *amicus* Homebuilders Association of Metropolitan Portland that the oceanfront setback standard is not clear and objective because it contains too many words in general and too many conjunctions in particular.

argue, there is a buildable "plot" on the neighboring property, and, as a consequence, the oceanfront setback does not apply to the house that is currently on the neighboring property.

Petitioners' efforts to create ambiguity in the ordinance fail once again here. Accepting, for the sake of argument, petitioners' premise that a plot is a measured piece of land, their argument fails to account for the fact that the measured area must be a *piece* of land. Here, as LUBA observed, it is possible that, at some time in the future, the neighboring property could be divided so as to create a buildable piece of land between the neighboring house and the ocean. However, presently, there is no buildable plot between the neighboring house and the ocean.

Petitioners also contend that, for a variety of reasons, a platted right-of-way that runs between their property and the ocean is a "lot," and that that demonstrates ambiguity in the term "lot." However, in those arguments, petitioners have not addressed LUBA's conclusion that, regardless of the possible breadth of meanings of the term "lot," the right-of-way is not a "buildable lot" under the terms of the ordinance. That the term "lot," considered apart from its context, may be ambiguous is immaterial because, based on a part of LUBA's reasoning that petitioners do not dispute, the term "buildable lot," as used in CBMC 17.04.320, is clear and objective.

In short, petitioners' arguments rely on potential ambiguity in various terms when they are considered without reference to their context and the purpose of the ordinance. As explained above, that is not what the "clear and objective" standard requires. We reject petitioners' first assignment of error.

In petitioners' second assignment of error, they contend that ORS 227.175(4)(c) and (e) prohibit application of the oceanfront setback to their application because that statute prohibits cities from applying any setback or other clear and objective standard of any kind that has the effect of reducing the maximum density of development that is otherwise

allowed by code.[6] We agree with LUBA that ORS 227.175(4)(c) and (e) do not prohibit denial of an application based on noncompliance with a clear and objective standard that has the incidental effect of reducing the density of the development below the maximum density otherwise allowed in the zone.

We take the additional facts relevant to this assignment of error from LUBA's opinion. As explained above, petitioners applied for a development permit to build a 2,712-square-foot house on their lot. The proposed house had less than the maximum floor area allowed for the lot under the relevant code section. CBMC 17.10.040(D) ("The maximum gross floor area for a permitted or conditional use on a lot of more than five thousand square feet, but less than six thousand square feet, shall not exceed three thousand square feet.").

City planning staff approved the application, subject to the condition that the residence comply with the oceanfront setback. To comply with the oceanfront setback, the floor area of the residence would have had to be substantially less than 2,712 square feet. Petitioners appealed to the planning commission, arguing, among other things, that the oceanfront setback did not apply to their application in light of ORS 197.175(4)(c) and (e). The planning commission

---

[6] As discussed further below, ORS 227.175(4)(c) provides, as follows:

> "A city may not condition an application for a housing development on a reduction in density if:
>
> "(A) The density applied for is at or below the authorized density level under the local land use regulations; and
>
> "(B) At least 75 percent of the floor area applied for is reserved for housing."

ORS 227.175(4)(e) provides, as follows:

> "Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal. Notwithstanding ORS 197.350, the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction."

"Authorized density level" means "the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations." ORS 227.175(4)(f)(A).

denied the application, reasoning that the oceanfront setback applied and that petitioners' proposed dwelling could not comply with it. Petitioners appealed the planning commission decision to the city council, which affirmed the planning commission denial.[7]

Petitioners appealed to LUBA, again contending that the oceanfront setback did not apply to their application. As relevant here, petitioners argued that ORS 227.175(4)(c) and (e) prohibited the city from applying the oceanfront setback because the oceanfront setback had the effect of reducing the density of petitioners' proposed residence by reducing its floor area. LUBA rejected that argument, reasoning that ORS 227.175(4)(c) and (e) did not prohibit the city from denying petitioners' application for failure to comply with the oceanfront setback because the setback is a clear and objective standard that only incidentally affected the allowed floor area, and, thus, the density, of petitioners' dwelling.

On judicial review, petitioners again contend that, in light of ORS 227.175(4)(c), the city was not permitted to apply the oceanfront setback to their application. For their part, respondents contend that those statutory provisions do not preempt cities' setback provisions or other clear and objective standards—for example, clear and objective standards requiring sidewalks or parking—that have the incidental effect of reducing the density of development below the maximum otherwise allowed by code.

The parties' arguments raise a question of statutory construction, which we resolve through the familiar method articulated by the Supreme Court in *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). With the aim of discerning the legislature's intentions, we begin by considering the text of the statute in context. To the extent that it is helpful to our analysis, we consider the legislative history of the statute. Finally, if any ambiguity remains after we consider the text, context, and legislative history, we apply maxims of statutory construction. *Id.*

[7] Both the planning commission and the city council noted that petitioners could apply for a setback reduction from the planning commission pursuant to CBMC 17.64, but that they had not done that.

ORS 227.175 sets out procedural and substantive requirements for a city's consideration of applications for "a permit or zone change." ORS 227.175(1); *see also* ORS 227.175(2) ("The governing body of the city shall establish a consolidated process by which an applicant may apply at one time for all permits or zone changes needed for a development project."). Subsection four of the statute provides standards for approval, imposition of conditions, and denial of applications. It provides, as follows:

> "(a) A city may not approve an application unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation.
>
> "(b)(A) A city may not deny an application for a housing development located within the urban growth boundary if the development complies with clear and objective standards, including clear and objective design standards contained in the city comprehensive plan or land use regulations.
>
> "(B) This paragraph does not apply to [two situations that are not at issue here, namely, city or regional centers and optional alternative approval processes.]
>
> "(c) A city may not condition an application for a housing development on a reduction in density if:
>
> "(A) The density applied for is at or below the authorized density level under the local land use regulations; and
>
> "(B) At least 75 percent of the floor area applied for is reserved for housing.
>
> "(d) A city may not condition an application for a housing development on a reduction in height if:
>
> "(A) The height applied for is at or below the authorized height level under the local land use regulations;
>
> "(B) At least 75 percent of the floor area applied for is reserved for housing; and

"(C) Reducing the height has the effect of reducing the authorized density level under local land use regulations.

"(e) Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal. Notwithstanding ORS 197.350, the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction.

"(f) As used in this subsection:

"(A) 'Authorized density level' means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations.

"(B) 'Authorized height level' means the maximum height of a structure that is permitted under local land use regulations.

"(C) 'Habitability' means being in compliance with the applicable provisions of the state building code under ORS chapter 455 and the rules adopted thereunder."

Before LUBA, the parties disagreed about the meaning of paragraphs (4)(c) and (e) in several ways. They disputed whether those paragraphs apply to applications for permits that the city approves as a matter of right, or only to applications for permits that the city approves as a matter of discretion, and, if the latter, whether this application qualifies. They disputed whether those paragraphs have any effect when a city denies an application, rather than approving the application subject to conditions. They disputed whether the paragraphs prohibit a city from applying clear and objective standards that do not expressly, but rather only incidentally, require a reduction in density. And they disputed whether, in this case, application of the oceanfront setback was "necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal." ORS 227.175(4)(e). The parties renew many of those arguments on appeal.

We resolve only one of those questions.[8] As explained below, we conclude that ORS 227.175(4)(c) and (e) do not prohibit a city from applying clear and objective standards that incidentally require a reduction in density. In other words, we agree with respondents that, in enacting ORS 227.175(4)(c) and (e), the legislature did not intend to preempt the ability of local governments to apply clear and objective standards, like setbacks, that have a purpose other than reducing density but nevertheless have the effect of reducing the floor area or number of lots or dwelling units below the maximum otherwise allowed for the zone. Accordingly, we need not, and do not, consider any of the other issues raised by the parties. We affirm LUBA's decision.

The two paragraphs of the statute that are at issue—ORS 227.175(4)(c) and (e)—phrase the prohibited action in essentially the same way: "A city may not condition an application for a housing development on a reduction in density ***." ORS 227.175(4)(c); *see also* ORS 227.175(4)(e) ("[*A*] *city may condition an application for a housing development on a reduction in density or height* only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal." (Emphasis added.)). Petitioners contend that that text forbids application of any standard (other than one that "is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal," ORS 227.175(4)(e)) that has the effect of reducing the allowed density of the development, whether it does so directly or only incidentally. To illustrate, in petitioners' view, ORS 227.175(4)(c) prohibits a city from approving an application subject to a condition stating, "the floor area will be reduced to half of the floor area allowed under the maximum floor area ratio for the zone," and equally prohibits a city from approving an application subject to a condition stating that a building must comply with a clear and objective side setback requirement, if the result of applying the setback requirement to the lot at issue is that

[8] Moreover, we express no opinion on whether petitioners' proposed dwelling is a "housing development" within the meaning of ORS 227.175(4)(c).

the building cannot achieve the maximum floor area ratio allowed for the zone.[9]

For their part, respondents posit that the legislature did not intend to prohibit application of clear and objective standards that, though they are aimed at achieving other goals, have the incidental effect of reducing density below the maximum allowed. Respondents contend that that understanding of the statute is supported by its text, context, and legislative history, as well as the principle that a legislative intention to preempt local law—in this case, a purported legislative intention to preempt a variety of clear and objective local standards, including setbacks—must be stated unambiguously.

Given the plain meaning of the text—in particular, the lack of specificity of the text, "condition an application *** on a reduction in density"—either construction of the statute is plausible. An application could be "condition[ed] on *** a reduction in density" whenever the effect of the city's application of any standard is to reduce density—as petitioners contend—or only when the decision expressly requires a reduction in density, as respondents contend. *See Webster's Third New Int'l Dictionary* 473 (2002 ed unabridged) ("condition," as a transitive verb, means "to invest with, limit by, or subject to conditions **:** burden with a condition **:** make conditional *** **:** restrict or determine as a condition"). The text provides no clues as to the legislature's intention on that issue.

With that in mind, we turn to context. ORS 227.175(4)(d), which immediately follows ORS 227.175(4)(c), was enacted as part of the same bill as ORS 227.175(4)(c). *See* Or Laws 2017, ch 745, § 3. It provides, as follows:

> "A city may not condition an application for a housing development on a reduction in height if:
>
> "(A) The height applied for is at or below the authorized height level under the local land use regulations;

---

[9] As noted above, we need not, and do not, consider whether the text of ORS 227.175(4)(c) applies only when a city approves an application but imposes conditions, or whether it also applies when a city denies an application. For simplicity, we use approval with conditions in our examples.

> "(B) At least 75 percent of the floor area applied for is reserved for housing; and
>
> "(C) Reducing the height has the effect of reducing the authorized density level under local land use regulations."

For purposes of both ORS 227.175(4)(c) and (d), "authorized density level" means "the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations." ORS 227.175(4)(f)(A).

We agree with respondents that paragraph (4)(d) strongly suggests that the legislature did not intend paragraph (4)(c) to prohibit application of clear and objective standards that incidentally, rather than expressly, reduce density below the maximum allowed for the zone. If petitioners' understanding of paragraph (4)(c) were correct—if that paragraph prohibited application of any standard that even incidentally reduces density below the maximum allowed—there would be no need for the legislature to prohibit cities from conditioning applications on reductions in height that have "the effect of reducing the authorized density level under local land use regulations." All height restrictions that have the effect of reducing the authorized density level below the maximum density allowed under local land use regulations would already be prohibited by paragraph (4)(c). Petitioners' understanding of paragraph (4)(c) renders paragraph (4)(d) surplusage. Accordingly, in our view, the paragraph's context strongly suggests that respondents' proffered construction is correct.

We do not find the legislative history of ORS 227.175(4) to be particularly helpful on this question. On one hand, one of the purposes of the bill in which ORS 227.175(4)(c) and (e) were enacted was, as petitioners summarize it, to "remove local governments' opportunity to reduce density at the maximum floor area ratio that the zone allowed." On the other hand, the legislative history makes clear that the legislature did not intend to strip local governments of their authority to regulate housing through application of clear and objective standards like setbacks, which is the situation that would exist if petitioners' understanding of ORS 227.175(4)(c) were correct. *See, e.g.*, Staff Measure Summary, House Committee on Rules, SB 1051 A, July 3,

2017 (explaining that the bill would require local jurisdictions to allow "at least one accessory dwelling unit (ADU) for each single-family home in areas zoned for single-family dwellings" and noting that "[l]ocal jurisdictions may impose reasonable regulations related to approval of ADUs including, but not limited to, design and site-specific consideration like infrastructure"); Testimony, House Committee on Human Services and Housing, HB 2007, Apr 13, 2017, Ex A (Testimony of Rep. Tina Kotek) ("It is possible to have a permitting process that allows for local control regarding design and clear and objective standards related to those design preferences." (Underscoring in original.)).[10]

Finally, we agree with respondents and *amicus curiae* League of Oregon Cities that, under the circumstances presented here—where the legislature has enacted an ambiguous provision that, under one construction, would have the effect of divesting local governments of their ability to regulate in an area that has long been within local control—home-rule principles undercut the argument that the legislature intended the statutory text to have broad meaning. *See Owen v. City of Portland*, 368 Or 661, 674, 497 P3d 1216 (2021) (plaintiffs' argument that a statute prohibiting "enact[ment of] any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit" should be construed to prohibit an ordinance that influenced, but did not expressly restrain or direct, the amount of rents was "unavailing," "[p]articularly when considered in light of our cases holding that state law can preempt home-rule authority only when, and to the extent that, the party urging preemption can demonstrate that the legislature unambiguously expressed its intent—a high bar to overcome" (internal quotation marks omitted)); *LaGrande/Astoria v. PERB*, 281 Or 137, 148-49, 576 P2d 1204, *adh'd to on reh'g*, 284 Or 173, 586 P2d 765 (1978) ("It is *** reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent." (Internal footnote omitted.)).

[10] The relevant bill was introduced as HB 2007 (2017), but it was enacted as SB 1051 (2017). *Compare* HB 2007 (2017), *with* SB 1051 A (2017).

Accordingly, we reject petitioners' argument that ORS 227.175(4)(c) and (e) prohibit application of all standards that have the effect of reducing density below the maximum density allowed for the zone. Here, the city denied petitioners' application on the ground that the proposed dwelling failed to comply with the oceanfront setback, a clear and objective standard that only incidentally affected the allowed density of petitioners' proposed dwelling. That denial did not violate ORS 227.175(4)(c) or (e).

Affirmed.