

**January 26, 2009**

**To: Affordable Housing Work Group**

**From: Al Johnson**

**Re: Clear and Objective Standards, Procedures, and Conditions:  
Examples from LUBA and the Court of Appeals  
From draft CLE Land Use Handbook Housing Chapter**

The examples below are taken from the draft chapter on housing by Bill Kloos, which was distributed to the committee last fall. Any update to the Goal 10 interpretive rules should include examples of what are and are not clear and objective standards and procedures. At the very least, the resulting list would codify the case law as to all but a very few of the following:

In *Rogue Valley* LUBA quoted verbatim from the St. Helens Policy to provide examples of language that flunks the standard. 35 Or LUBA at 158 n 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).

Provisions generally granting a city discretion to impose conditions if it is deemed necessary to mitigate any potential negative impact caused by the development” violate ORS 197.307(6).

*HBA*, 41 Or LUBA at 388; *Rogue Valley*, 35 Or LUBA at 159.

A requirement that replacement trees be of a “similar resource value” as the trees to be removed; *Rogue Valley*, 35 Or LUBA at 160

Code language giving the city discretion to require a revegetation plan in lieu of replacement trees; *id.* at 163

Requirement that hillside grading must retain existing grades “to the greatest extent possible [and] avoid an artificial appearance by creating smooth flowing contours of varying gradients” *id* at 161

Provision stating that terraces “should be designed with small incremental steps,” and that “[p]ads for tennis courts, swimming pools and large lawns are discouraged;” *id.* at 161.

Requirement that development “minimize” possible conflicts between pedestrians and vehicles, “where necessary” for traffic circulation.” *HBA*, 41 Or LUBA at 399-400

Provision allowing city to require, as a condition of approval, dedication of public ways “to facilitate community needs.” *Id.* at 403-404

Language allowing city to require right-of-way or other improvements to develop transit facilities “where a need” for such facilities “has been identified;” *id.* at 409.

Requirement that street alignment “minimize excavation and embankment”

Requirement that street alignment “avoid impacts on natural resources”

Requirement that street alignment “not prevent the adjoining property from developing consistent with applicable standards;” *id.* at 404, n 27

Requirement that applicant provide drainage facilities “adequate for the drainage of the area;” *id.* at 410;

Requirement that local streets be designed to discourage non-local traffic where, in the city’s discretion it was “necessary to insure safety,” and “promote the welfare of the general public, pedestrians, bicyclists and residents of the subject area;” *id.* at 388, n 16

Requirement that developer pave all streets and alleys offsite that the city manager determines are “impacted by the development”

Landscaping standards requiring installed plant materials to “meet current nursery industry standards,” and to be maintained “in a healthy and attractive manner

Language requiring building cul-de-sacs with an exception applicable when “topographic constraints, existing development or natural features” prevent compliance; *id.* at 415

Language requiring consistency with a “city-adopted natural resource inventory” was deficient when it was unclear whether this referred to only acknowledged Goal 5 inventories or might also include other natural resource inventories; *id.* at 396.

Requirement that the maximum number of trees be preserved, when balanced with “other provisions of this chapter.” *Rogue Valley*, 35 Or LUBA at 162.

Requirement that “fill slope angles” be determined according to the “types of materials of which they are composed,” without reference to clear and objective standards for how those determinations would be made. *Id.* at 164.

Numerical standards are normally clear and objective. However, they can become unclear and subjective based on their context. Setback and height limitations can be unclear because they rely on ambiguous or undefined terms, or the starting point for measurement is unclear. *Rogue Valley*, 35 Or LUBA at 154 n 20.

A requirement for a 100-foot buffer around rare plant or animal populations is unclear and subjective based on how the “area occupied” is determined. *HBA*, 41 Or LUBA at 393.

A 50 buffer protecting “waterways” from the “top of the bank” is unclear when the locational terms are undefined, have multiple meanings, and can lead to divergent or discretionary conclusions with different geographic consequences *Id.*

A requirement that all dwellings in a PUD be within one-quarter mile of a recreation area or open space is not clear if it fails to state whether the distance is to be measured along streets or as the crow flies. *Id.* at 415.

A standard that new dwellings be within a four-minute response time for emergency medical services is deficient for failure to explain how the time is measured, that is, what assumptions to make about traffic, time of day, and other variables. One solution would be response maps. *Id.* at 402-403.