BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| ROGUE VALLEY ASSOCIATION OF REALTORS,<br><br>Petitioner,<br><br>vs.<br><br>CITY OF ASHLAND,<br><br>Respondent. | LUBA No. 97-260<br><br>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

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[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;
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> "(b) Government assisted housing;
>
> "(c) Mobile home or manufactured dwelling parks * * *; and
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> "(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

"* * * * *

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[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

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[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-

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[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

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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

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[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

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[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

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[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

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[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:

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[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,

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[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.

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[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

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[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.

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[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.