

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

3
4 PARKVIEW TERRACE DEVELOPMENT LLC,
5 *Petitioner,*

6
7 and

8
9 JOSEPHINE HOUSING AND COMMUNITY
10 DEVELOPMENT COUNCIL,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 CITY OF GRANTS PASS,
16 *Respondent,*

17
18 and

19
20 DAVID R. MANNIX, MELISSA S. CANON
21 EAVES, CAREY GILBERT, JAMES FREGO,
22 CYNTHIA FREGO, SHAUN HOBACK,
23 RANDY R. LEMMON, TONI J. LEMMON,
24 DAVID J. HOLMAN and JOANNA H. LOFASO,
25 *Intervenors-Respondents.*

26
27 LUBA No. 2014-024

28
29 FINAL OPINION
30 AND ORDER

31
32 Appeal from City of Grants Pass.

33
34 Michael C. Robinson, Portland, filed a joint petition for review and
35 argued on behalf of petitioner. With him on the brief were Seth J. King,
36 Perkins Coie LLP, Benjamin E. Freudenberg and Davis, Adams, Freudenberg,
37 Day & Galli.

38
39 Benjamin E. Freudenberg, Grants Pass, filed a joint petition for review

1 on behalf of intervenor-petitioner. With him on the brief were Davis, Adams,
2 Freudenberg, Day & Galli, Michael C. Robinson, Seth J. King, and Perkins
3 Coie LLP.

4
5 No appearance by City of Grants Pass.

6
7 David R. Mannix, Grants Pass, filed the response brief and argued on his
8 own behalf. Melissa S. Canon Eaves, Carey Gilbert, James Frego, Cynthia
9 Frego, Shaun Hoback, Randy R. Lemmon, Toni J. Lemmon, David J. Holman
10 and Joanna H. Lofaso, Grants Pass, represented themselves.

11
12 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board
13 Member, participated in the decision.

14
15 REVERSED 07/23/2014

16
17 You are entitled to judicial review of this Order. Judicial review is
18 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision denying its application for site plan approval and a variance from street and block length standards to permit construction of 50 units of federally assisted housing for low-income individuals.

INTERVENORS-RESPONDENTS

In a June 19, 2014 order, we allowed intervenor-respondent Mannix’s response brief. In that order, we determined we would not consider intervenor-respondent Gilbert’s response brief because it was not timely filed. No other intervenor-respondent filed a response brief. In this opinion, we therefore refer in the singular to the only intervenor-respondent who timely filed a response brief.

MOTION TO FILE REPLY BRIEF

Petitioner Parkview Terrace Development LLC, the applicant below, and intervenor-petitioner Josephine Housing and Community Development Council, which administers a federally supported housing voucher program and supports the proposal (together petitioners) move for permission to file a reply brief to respond to alleged “new matters” raised in the response brief. The reply brief is allowed.

MOTION TO STRIKE RESPONSE BRIEF

Petitioners move to strike portions of intervenor-respondent’s response brief, including three exhibits that are not included in the record filed by the city in this matter, as well as related passages in the response brief that rely upon those exhibits, and additional parts of the response brief that include

1 factual assertions that petitioners contend are not supported by evidence in the
2 record.

3 With exceptions that do not apply here, LUBA’s review is limited to the
4 record filed by the local government. ORS 197.835(2). The three exhibits
5 (exhibits A, C and D) are not included in the record, and we understand
6 intervenor-respondent to offer those exhibits for their evidentiary value.
7 Petitioners’ motion to strike the exhibits is granted.

8 With regard to the portions of the response brief that petitioners contend
9 rely on those exhibits and are not supported by the record, LUBA disregards
10 any allegations of material fact that are not supported by the record. However,
11 a lack of evidentiary support for arguments and factual allegations in a
12 response brief is not a basis for striking those portions of the brief. *Hammack*
13 *& Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff’d* 89 Or App
14 40, 747 P2d 373 (1987).

15 **STANDING**

16 In his response brief, intervenor-respondent challenges intervenor-
17 petitioner’s standing, arguing that the Josephine Housing and Community
18 Development Council, as an entity, did not “appear through counsel” in the
19 local proceedings in this matter. Intervenor-Respondent’s Brief 1. In our May
20 1, 2014 Order, we concluded that the Council had appeared through its
21 executive director and that intervenor-respondent failed to establish that the
22 Council was required under county procedures to appear through counsel.
23 Intervenor-respondent offers no reason in his response brief to question those
24 conclusions, and we adhere to them.

1 **FACTS**

2 The subject property is zoned High Density Residential (R-3) and
3 includes approximately 3.02 acres. There are residential townhouses (Maple
4 Park) to the south of the subject property, a warehouse to the north, a mini-
5 storage facility to the east, and a city park to the west. Many of the
6 intervenors-respondents reside in Maple Park.

7 In 2006, the City of Grants Pass approved the Maple Park planned unit
8 development (Maple Park PUD). The city's Maple Park PUD approval
9 decision authorized an 88-unit residential development in three phases.
10 Simultaneously, the city also approved a major variance to the street section
11 design, maximum cul-de-sac length, and street separation standards. The
12 Maple Park PUD developer constructed 28 townhouse units in developing
13 Phase I but failed to complete the remaining units that were to be constructed
14 as Phases II and III, apparently due to the recent recession. Petitioner is a
15 successor-in-interest to the original developer. Petitioner wishes to construct a
16 50-unit multi-family housing project (Parkview Terrace) in place of Phases II
17 and III of the Maple Park PUD. The 50 units would be multi-family rental
18 units, all owned by petitioner, rather than town houses that would be separately
19 owned.

20 In addition to seeking approval for the site plan, petitioner also sought
21 approval for a variance to the city's street block length standards. The city's
22 staff reviewed petitioner's applications and recommended approval, subject to
23 a number of conditions. The Urban Area Planning Commission (UAPC) held a
24 public hearing on the applications and, on December 11, 2013, approved the
25 site plan and variance applications with conditions.

1 On December 19, 2013, intervenors-respondents and others appealed the
2 UAPC's decision to the city council. The city council reversed the UAPC's
3 decision and denied petitioner's applications. This appeal followed.

4 **MAPLE PARK PUD PHASES II AND III**

5 Before turning to petitioners' assignments of error, we note that a
6 recurring point of dispute between the parties is the current status of Maple
7 Park PUD Phases II and III. Many of the parties' evidentiary disputes also
8 have to do with Maple Park PUD Phases II and III. The city council's decision
9 is a revision of the UAPC's decision with unchanged text, strikeouts (city
10 council deletions) and bold italic text (city council additions). In the city
11 council's decision, text from the UAPC's decision stating that that Maple Park
12 PUD Phases II and III are "active" is stricken through, indicating that text was
13 deleted from the city council's decision and findings. Record 13. The
14 following finding from the UAPC's decision was not changed by the city
15 council:

16 "The applicant has notified the Planning Department of its
17 withdrawal of the previous approval(s) for Phases II and III of
18 Maple Park PUD." *Id.*

19 According to petitioners, the reference to the applicant's withdrawal is a
20 reference to a January 17, 2014 letter from petitioner's executive director to the
21 planning department that makes the following request:

22 "As the owner of the property identified by Josephine County
23 Assessor's map ID #36-05-20-DC and tax lot #2201, we request
24 irrevocable termination of any and all land development
25 entitlement rights under the tentative PUD approval for Phase II &
26 Phase III of the Maple Park Townhomes * * * and hereby waive
27 any right to forever rely on any entitlement rights granted by said
28 approval." Record 201.

1 We understand the city council to have determined that the city’s approval for
2 Phases II and III of Maple Park PUD has been withdrawn or terminated and are
3 no longer active.

4 In his response brief, intervenor-respondent argues:

5 “This particular application ignored the existence of the PUD
6 when it submitted its plans. When opponents raised the question,
7 supporters of the application came up with an ad hoc series of
8 increasingly bizarre theories as to why the PUD did not currently
9 exist. The last one was that a successor in interest (3 parties away
10 from the original) could simply unilaterally revoke the PUD, and
11 accordingly, in mid-process (February 2014) submitted a letter to
12 the Planning Department saying in effect, ‘I revoke.’ The theory
13 that a successor in interest may years later simply unilaterally
14 revoke a PUD upon which many other parties have relied, is of
15 course, logical nonsense. * * *. Intervenor-Respondent’s Brief
16 18.

17 We understand intervenor-respondent to challenge the above finding that the
18 city’s approval of Maple Park PUD Phases II and III has been withdrawn.
19 Intervenor-respondent contends that the city’s approval of Maple Park PUD
20 Phases II and III remains effective and provides an independent basis for
21 affirming the city council’s decision to deny petitioner’s site plan, which is
22 inconsistent with Maple Park PUD Phases II and III.

23 There are two problems with intervenor-respondent’s position regarding
24 Maple Park PUD Phases II and III. First, the city council adopted the opposite
25 position from intervenor-respondent’s regarding the continued existence of the
26 city’s prior approval of Maple Park PUD Phases II and III. Intervenor-
27 respondent contends the above-quoted finding—that petitioner withdrew that
28 approval—was prepared by the planning staff and was not adopted by the city
29 council. While the above-quoted finding apparently was prepared by planning
30 staff and adopted initially by the UAPC, the city council adopted the UAPC’s

1 decision, including its findings, as its own, except where the city council
2 adopted additions and deletions. Those findings, as amended, were “Approved
3 by the City Council.” Record 24. Thus, while the city council may not have
4 been the author of the disputed finding, the city council clearly adopted the
5 finding.

6 The second problem with intervenor-respondent’s position is that
7 LUBA’s rules expressly authorize intervenors-respondents to assign error to
8 aspects of a decision on appeal, whether they agree or disagree with the
9 ultimate disposition in the decision.

10 “Cross Petition: Any respondent or intervenor-respondent who
11 seeks reversal or remand of an aspect of the decision on appeal
12 regardless of the outcome under the petition for review may file a
13 cross petition for review that includes one or more assignments of
14 error. *A respondent or intervenor-respondent who seeks reversal
15 or remand of an aspect of the decision on appeal only if the
16 decision on appeal is reversed or remanded under the petition for
17 review may file a cross petition for review that includes contingent
18 cross-assignments of error, clearly labeled as such.* The cover
19 page shall identify the petition as a cross petition and the party
20 filing the cross petition. *The cross petition shall be filed within the
21 time required for filing the petition for review and must comply in
22 all respects with the requirements of this rule governing the
23 petition for review, except that a notice of intent to appeal need
24 not have been filed by such party.*” OAR 661-010-0030(7)
25 (emphases added).

26 Intervenor-respondent asks LUBA to reverse the finding regarding the city’s
27 prior approval of Maple Park PUD Phases II and III, so that the continued
28 viability of Maple Park PUD Phases II and III would provide an independent
29 basis for affirming the city council’s denial decision in the event LUBA
30 sustains one or more of petitioners’ assignment of error. Intervenor-respondent
31 did not file a cross petition for review with a contingent assignment of error

1 assigning error to the city council’s finding and making the arguments it makes
2 in its response brief.

3 Citing *BenjFran Development v. Metro Service Dist.*, 17 Or LUBA 1009,
4 1011-1012 (1988), intervenor-respondent contends it was not required to file a
5 cross petition for review. *BenjFran* was decided in 1988, when LUBA’s rules
6 simply authorized cross petitions for review, without specifying the
7 circumstances in which they are to be filed. The reason LUBA adopted OAR
8 661-010-0030(7) is to require that arguments such as the one intervenor-
9 respondent advances in its response brief be set out earlier in a cross petition
10 for review, to avoid the possibility of delay, since response briefs typically are
11 filed shortly before the date set for oral argument. Because intervenor-
12 respondent did not file a cross petition for review in accordance with OAR
13 661-010-0030(7), we do not consider intervenor-respondent’s arguments that
14 the city’s prior approval of Maple Park PUD Phases II and III remains effective
15 or that the possible continued existence of city approval for Phases II and III
16 provides an independent basis for affirming the city council’s decision to deny
17 petitioner’s application for site plan approval.

18 **FIRST ASSIGNMENT OF ERROR**

19 Under their first assignment of error, petitioners argue the proposal is a
20 proposal for “needed housing,” as that term is defined at ORS 197.303.¹
21 Because the proposal is a proposal for “needed housing,” petitioners contend
22 the proposal may only be subject to approval standards that are “clear and
23 objective.” Petitioners argue that the city was advised, during the proceedings
24 below, that petitioners took the position that a number of standards that would

¹ We set out the relevant statutory text later in this opinion.

1 otherwise apply to the proposal are not “clear and objective standards” and for
2 that reason may not be applied to deny the proposal. Petitioners contend that
3 the city council nevertheless applied a number of standards that are not “clear
4 and objective” to deny the application for site plan approval. Petitioners argue
5 the city council never responded to petitioners’ contention that those standards
6 may not be applied to a proposal for “needed housing.” Petitioners assign error
7 to the city’s failure to respond to this issue in its findings and separately assign
8 error to the city council’s decision to apply those standards as bases for denial
9 of the site plan.

10 **A. Needed Housing**

11 The Oregon Legislature has recognized a need to make housing available
12 to people earning low, middle, or fixed incomes. ORS 197.307(1).² ORS

² ORS 197.307 provides, in part:

“(1) 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.

“(2) Many persons of lower, middle and fixed income depend on government assisted housing as a source of affordable, decent, safe and sanitary housing.

“(3) 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 zones with sufficient buildable land to satisfy that need.

“(4) *[A] local government may adopt and apply only clear and objective standards, conditions and procedures regulating*

1 197.303 defines “needed housing” as “housing types determined to meet the
2 need shown for housing within an urban growth boundary at particular price
3 ranges and rent levels * * *.” Among other types, the statute identifies
4 “[g]overnment assisted housing” as a type of “needed housing.” ORS
5 197.303(1)(b). The city’s comprehensive plan identifies a need for over 4,100
6 housing units that are affordable to households with incomes of less than
7 \$37,200. Record 832. The proposal is for government assisted housing that is
8 affordable to persons with incomes of less than \$37,200 and therefore qualifies
9 as “needed housing.”

10 Intervenor-respondent does not really dispute that the proposal qualifies
11 as “needed housing,” but argues that the housing that would have been
12 provided if Phases II and III of Maple Park PUD were completed as approved
13 also qualifies as “needed housing.” The definition of “needed housing” in ORS
14 197.303 is so broad that intervenor-respondent is likely correct. However,
15 even if the proposal is a proposal to substitute one type of “needed housing” for
16 another type of “needed housing,” that does not mean the proposal is a proposal
17 for something other than “needed housing.”

18 **B. Petitioners’ Findings Challenge**

19 As we explain in more detail below, we agree with petitioners that a
20 number of standards that the city applied in this case to deny the proposal are
21 not “clear and objective standards,” as is required by ORS 197.307(4). Before
22 doing so, we agree initially with petitioners that it was error for the city not to

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.” (Emphasis added.)

1 respond in its decision to the issue of whether those standards qualify as “clear
2 and objective standards.” As we explained in *Rosenzweig v. City of*
3 *McMinnville*, 64 Or LUBA 402, 410-11 (2011):

4 “LUBA has consistently held ‘that when a relevant issue is
5 adequately raised by testimony or other evidence in the record,
6 that issue must be addressed in the decision maker’s findings.’
7 *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989) (citing
8 *Norvell v. Portland Metropolitan LGBC*, 43 Or App 849, 852-53,
9 604 P2d 896 (1979)); *see also Friends of Umatilla County*, 55 Or
10 LUBA 333, 337 (2007); *Marcott Holdings, Inc. v. City of Tigard*;
11 30 Or LUBA 101, 107-08 (1995). However, as we pointed out in
12 *Faye Wright Neighborhood Planning Council v. Salem*, 1 Or
13 LUBA 246, 252 (1980), ‘not every assertion by a participant in a
14 land use decision warrants a specific finding.’ A petitioner at
15 LUBA must (1) identify the issue raised, (2) demonstrate that the
16 issue was *adequately* raised and (3) establish that the issue is
17 relevant in some way (usually by showing that the issue raises a
18 question regarding an applicable approval standard). * * *.”
19 (Emphasis in original.)

20 Petitioner identified seven standards that the city ultimately applied to
21 deny the proposal and took the position that they are not “clear and objective”
22 and could not be applied to deny petitioner’s request for approval of a proposal
23 for “needed housing.” Grants Pass Development Code (GPDC) 19.052(2)
24 (Record 261); GPDC 19.052(4) (Record 271); GPDC 19.052(5) (Record 272);
25 GPDC 19.052(6) (Record 272); GPDC 19.052(8)(a) and (e) (Record 273-74);
26 GPDC 19.052(9) (Record 274-75); GPDC 19.052(11) (Record 275).
27 Petitioners have adequately identified the issue and demonstrated that the issue
28 was adequately raised. Since the city relied on all of those subjective standards
29 to deny the application, the issue is relevant. The city should have responded
30 to that issue in its findings, and it erred by failing to do so.

31 **C. Clear and Objective Standards**

1 ORS 197.307(4) provides that local governments are only authorized to
2 apply “clear and objective standards, conditions and procedures” in reviewing
3 applications for “needed housing.” *See* n 2.

4 **1. Intervenor-Respondent’s Arguments**

5 Intervenor-respondent offers a number of reasons why he believes the
6 “clear and objective standards” requirement of ORS 197.307(4) either does not
7 apply or was satisfied in this case.

8 First, intervenor-respondent contends the requirement for “clear and
9 objective standards” only applies to “[a]esthetic criteria.” Intervenor-
10 Respondent’s Brief 13. Intervenor-respondent does not identify the basis for
11 that argument, and there is nothing in the text of ORS 197.307(4) that limits the
12 requirement for “clear and objective standards” to aesthetic criteria. Petitioners
13 speculate that intervenor-respondent may be relying on the pre-2011 version of
14 ORS 197.307(3)(b). If so, that version of ORS 197.307(3)(b) was repealed in
15 2011. Or Laws 2011, ch 354, sec 3. Intervenor-respondent also fails to
16 recognize that the pre-2011 version of ORS 197.307(3) subsections (b) and (c)
17 were a nested exception to the general requirement for “clear and objective
18 standards” for “needed housing” to allow certain large jurisdictions to impose
19 aesthetic regulations on “needed housing.” The pre-2011 version of ORS
20 197.307 also included a general requirement for “clear and objective
21 standards.” ORS 197.307(6) (2009).

22 Intervenor-respondent next argues that the requirement for “clear and
23 objective standards” only applies in cases where the applicant establishes
24 “impermissible bias or prejudice in the application process.” Intervenor-
25 Respondent’s Brief 14. Again, there is simply no text in ORS 197.307(4) that

1 limits the statute to cases where the decision maker exhibits bias or prejudice.
2 *See* n 2.

3 Next, citing *Rogue Valley Assoc. of Realtors v. City of Ashland*, 158 Or
4 App 1, 4, 970 P2d 685 (1999), intervenor-respondent contends a standard only
5 violates ORS 197.307(4) if the applicant demonstrates that the standards are
6 “categorically incapable of being clearly and objectively applied under any
7 circumstances where they may be applicable.” The appeal in *Rogue Valley* was
8 a facial challenge to an ordinance that adopted new standards and the
9 requirement imposed by the quoted language in the Court of Appeals’ decision
10 was limited to facial challenges. We do not understand petitioners to make a
11 facial challenge here. Even if they do, that part of the Court of Appeals’
12 decision was overruled by the legislature in 1999. ORS 197.831.³

13 Intervenor-respondent next argues that the ORS 197.307(4) “clear and
14 objective standards” requirement does not apply to requests for a variance.
15 Intervenor-respondent is correct. *Linstromberg v. City of Veneta*, 47 Or LUBA
16 99, 108-09 (2004). But petitioners do not argue the city’s standards for
17 granting a variance must be “clear and objective.” Rather, petitioners contend
18 the city erroneously concluded under the applicable variance standards that

³ ORS 197.831 provides:

“In a proceeding before the Land Use Board of Appeals 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.”

1 petitioner’s request for a variance could be denied.⁴ Petitioners’ “clear and
2 objective standards” challenge is limited to standards the city applied to the
3 proposed site plan.

4 **2. The Challenged Site Plan Review Standards**

5 Petitioners contend that seven of the site plan review standards that the
6 city relied on in denying its application for site plan review approval are not
7 “clear and objective standards,” and thus may not be applied to the site plan.

8 **a. GPDC 19.052(2)**

9 GPDC 19.052(2) requires that the proposal comply “with applicable
10 elements of the Comprehensive Plan, including: Traffic Plan, Water Plan,
11 Sewer Plan, Storm Drainage Plan, Bicycle Plan, and Park Plan.” Record 19.
12 The UAPC found that the proposal satisfies GPDC 19.052(2) and adopted
13 findings to support that conclusion. The city council adopted the UAPC’s
14 findings. However, the city council struck through the part of the UAPC’s
15 findings that concluded “Satisfied with conditions,” and added the following
16 sentence at the end of the UAPC’s findings:

17 “The City Council found the request was not in compliance with
18 the Comprehensive Plan for traffic management (Element 11 ~
19 Master Transportation Plan).” Record 19. (Bold and italics
20 deleted.)

21 GPDC 19.052(2) includes no guidance for determining which elements
22 of the city’s comprehensive plan are applicable. The only element identified by
23 the city council’s decision is Element 11. Element 11 is the city’s Master
24 Transportation Plan. The Master Transportation Plan is eight chapters long.

⁴ We address petitioner’s challenge to the city’s variance findings later in this opinion.

1 One of those chapters is chapter 3, which is 13 pages long and sets out
2 numerous goals and objectives. Many of those goals and objectives are not
3 “clear and objective.”⁵ We assume the city council was not applying the entire
4 eight-chapter Master Transportation Plan, but the city council’s findings do not
5 identify what part it was applying. We agree with petitioners that in this case
6 the city council’s application of the Master Transportation Plan, without
7 identifying what part of that plan it was applying, applies a standard that is not
8 “clear and objective,” which is prohibited by ORS 197.307(4). The city
9 council erred in doing so.

10 **b. GPDC 19.052(4)**

11 GPDC 19.052(4) requires that “[p]otential land use conflicts have been
12 mitigated through specific conditions of development.” Record 21. The
13 UAPC decision found the proposal, with conditions, complies with GPDC
14 19.052(4). The City Council found that the criterion was “Not Satisfied,” but
15 did not identify why. Record 21. We agree with petitioners that a standard that
16 requires mitigation of “potential land use conflicts” is not a “clear and
17 objective” standard. *See Rogue Valley*, 35 Or LUBA 159-60 (a standard
18 requiring an applicant to “mitigate any potential negative impact caused by the
19 development,” is not “clear and objective”). GPDC 19.052(4) is not a “clear
20 and objective” standard, and the city council erred in applying it to deny site
21 plan approval.

⁵ For example, policy 2.4.1 provides:

“Policy 2.4.1: Integrate decisions about development and transportation investments to ensure the best fit between development in the urban area and the transportation facilities and services needed to serve it.”

1 **c. GPDC 19.052(5)**

2 GPDC 19.052(5) requires that “[a]dequate basic urban services are
3 available, or can be made available by the applicant as part of a proposed
4 development, or are scheduled by the City Capital Improvement Plan.” Record
5 21. The City Council found that this criterion was not satisfied. Record 21.⁶

6 Petitioners first argue that the meaning of the key terms “adequate”
7 “basic urban services” and “available” is not explained in GPDC 19.052(5),
8 and without some explanation, those terms are not “clear and objective.” We
9 agree with petitioners. *See Home Builders Association of Lane County v. City*
10 *of Eugene*, 41 Or LUBA 370, 410, 414 (2002) (code requirement to provide
11 “adequate” drainage is not “clear and objective;” a standard that requires an
12 applicant to show that “public facilities and services are available to the site”
13 but does not define the key terms “public facilities and services” or “available”
14 is not “clear and objective”). The city council erred in applying GPDC
15 19.052(5) to deny petitioner’s application for site plan approval.

16 **d. GPDC 19.052(6)**

17 GPDC 19.052(6) requires that the “[p]rovision of public facilities and
18 services to the site will not cause service delivery shortages to existing
19 development.” Record 21. The City Council found that this criterion was not
20 satisfied. *Id.*

⁶ The city council found:

“Based upon the testimony, the City Council found that the application did not provide adequate service area and internal circulation with regards to fire access and trash/refuse removal.” (Boldface and italics omitted.)

1 Petitioners argue that GPDC 19.052(6) provides no guidance regarding
2 the scope of “public facilities and services” or how to go about determining if
3 the proposal will “cause service delivery shortages to existing development” or
4 what qualifies as a “shortage.” Therefore, petitioners argue, GPDC 19.052(6)
5 is not “clear and objective.” We agree with petitioners. *See Home Builders*
6 *Association of Lane County v. City of Eugene*, 41 Or LUBA 370, 414 (2002) (a
7 standard that requires an applicant to show that “public facilities and services
8 are available to the site” but does not define the key terms “public facilities and
9 services” or “available” is not “clear and objective”). The city council erred
10 by applying GPDC 19.052(6) to deny petitioner’s application for site plan
11 approval.

12 **e. GPDC 19.052(8)(a) and (e)**

13 GPDC 19.052(8) requires that “[t]he characteristics of existing adjacent
14 development have been determined and considered in the development of the
15 site plan. At a minimum, special design consideration shall be given to:

16 “(a) Areas of land use conflicts, such as more restrictive use
17 adjacent or across street from proposal. Mitigate by orienting
18 business operations away from use, additional setbacks,
19 screening/buffering, landscaping, direct traffic away from use.

20 “* * * * *

21 “(e) Lighting. Exterior lighting shall not impact adjacent
22 development or traveling motorist.” Record 22. (Underscoring in
23 original.)

24 The City Council found that these criteria were not satisfied. Record 22.

25 Neither the requirement to “mitigate” in GPDC 19.052(8)(a) nor the
26 methods of suggested mitigation are “clear and objective,” as ORS 197.307(4)
27 requires. Neither is the GPDC 19.052(8)(e) requirement that “[e]xterior

1 lighting shall not impact adjacent development or traveling motorist.” *See*
2 *Rogue Valley*, 35 Or LUBA at 158 (“[n]eeded housing’ is not to be subjected
3 to standards, conditions, or procedures that involved subjective, value-laden
4 analyses that are designed to balance or mitigate impacts of the development on
5 * * * adjoining properties or community”).

6 We agree with petitioners that GPDC 19.052(a) and (e) are not “clear
7 and objective standards,” as required by ORS 197.307(4). The city council
8 erred in applying GPDC 19.052(a) and (e) to deny petitioner’s application for
9 site plan approval.

10 **f. GPDC 19.052(9)**

11 GPDC 19.052(9) requires that “[t]raffic conflicts and hazards are
12 minimized on-site and off-site, as provided in Article 27.” Record 23. The
13 City Council found that this criterion was not satisfied. *Id.*

14 The GPDC 19.052(9) requirement that “[t]raffic conflicts and hazards
15 [be] minimized on-site and off-site” is not, by itself, “clear and objective.” *See*
16 *Home Builders Association*, 41 Or LUBA 399 (a standard that requires that
17 “on-site vehicular and pedestrian circulation shall be designed to minimize
18 vehicular/pedestrian conflicts at driveway crossings within parking lots and at
19 vehicle ingress/egress points,” is not “clear and objective”).

20 Petitioners next argue that GPDC’s 19.052(9)’s reference to Article 27 is
21 not sufficient to make GPDC 19.052(9) “clear and objective” because the code
22 does not identify which standards in Article 27 apply. Joint Petition for
23 Review 19. GPDC Article 27 is 32 pages long and includes a variety of
24 requirements. Petitioners point out that although GPDC 27.121(3) requires a
25 traffic impact analysis, and the city council found the applicant’s traffic impact
26 analysis was flawed, GPDC 27.121(3) does not mention “traffic conflicts.” A

1 different section of Article 27, GPDC 27.121(11)(h)(8), does mention “traffic
2 conflicts,” but GPDC 27.121(11)(h)(8) only applies to developments that
3 “abut[] or contain[] an existing or proposed arterial street.” The subject
4 property does not abut or contain an arterial street. Even if it did apply,
5 GPDC 27.121(11)(h)(8) requires that the development design “minimize the
6 traffic conflicts.” That is not a “clear and objective” standard.

7 We agree with petitioners that GPDC’s 19.052(9) is not “clear and
8 objective” as required by ORS 197.307(4), and the City Council erred in
9 applying GPDC’s 19.052(9) to deny petitioner’s application for site plan
10 approval.

11 **g. GPDC 19.052(11)**

12 GPDC 19.052(11) requires that “[t]here are adequate provisions for
13 maintenance of open space and other common areas.” Record 23. The City
14 Council found that this criterion was not satisfied. *Id.*

15 Petitioners argue that the City engaged in a subjective analysis to
16 determine whether the maintenance of open space and other common areas is
17 “adequate,” because neither the text nor context of the code defines “adequate.”
18 For the same reasons explained in our discussion of GPDC 19.052(5), we agree
19 with petitioners that a standard that requires an unguided inquiry to whether
20 something is “adequate” is not a “clear and objective” standard.

21 Accordingly, we agree with petitioners that GPDC 19.052(11) is not a
22 “clear and objective” standard, as it must be under ORS 197.307(4), if it is to
23 be applied to an application for land use approval of “needed housing.” The
24 City Council erred in applying GPDC 19.052(11) to deny petitioner’s
25 application for site plan approval.

26 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 Under the second assignment of error, petitioners argue that even if some
3 site plan approval criteria were not barred by ORS 197.307(4) because they are
4 not “clear and objective,” the city erred on the merits in its application of all ten
5 site plan approval standards it relied on to deny its application for site plan
6 approval. We have concluded under the first assignment of error that seven of
7 the nine site plan review standards that the city applied to deny petitioner’s
8 application for site plan approval are not “clear and objective” and should not
9 have been applied to petitioner’s application for “needed housing.” We
10 therefore need not and do not consider whether the city also erred on the merits
11 in applying those seven standards.

12 Petitioners do not argue that two of the site plan review standards are not
13 “clear and objective.” We therefore limit our consideration under the second
14 assignment of error to petitioners’ challenge to the city council’s decision with
15 regard to the variance application and the two site plan review standards that
16 petitioners do not argue the city was precluded from applying under ORS
17 197.307(4).

18 **A. The Remaining Site Plan Approval Standards**

19 **1. GPDC 19.052(3)**

20 GPDC 19.052(3) requires a site plan applicant to demonstrate the
21 proposal “[c]omplies with all other applicable provisions of this Code,
22 including off-street parking, landscaping, buffering and screening, signage,
23 environmental standards, and Special Purpose District standards.” Record 20.
24 The UAPC identified the off-street parking requirements set out at GPDC
25 25.042. GPDC 25.042 requires 1, 1.5 or 2 spaces per unit, depending on the
26 number of bedrooms in each unit. The UAPC concluded that the 86 parking

1 spaces petitioner proposed are sufficient to comply with GPDC 25.042. The
2 city council adopted that finding, but added the following finding: “[t]he City
3 Council found that the site plan did not provide adequate parking facilities.”
4 Record 20. (Boldface and italics deleted.)

5 Like the UAPC, the city council found that the proposal to provide 86
6 parking spaces complies with GPDC 25.042. *Id.* The city council did not
7 identify any GPDC or other standard that requires the applicant to demonstrate
8 that the proposed parking facilities are “adequate.” Even if there were such a
9 standard, it would not be “clear and objective” and could not be applied
10 consistently with ORS 197.307(4).

11 The city council erred in finding that the proposal does not comply with
12 GPDC 19.052(3). The city council found that the proposal satisfies the only
13 GPDC parking standard that it identified. The city council did not identify the
14 source of the “adequacy” standard it imposed to deny the application, and even
15 if such a standard existed, ORS 197.307(4) would preclude applying such a
16 standard to an application for approval for “needed housing.”

17 **2. GPDC 19.052(12)**

18 GPDC 19.052(12) requires that an applicant for site plan approval
19 demonstrate that “[i]nternal circulation is accommodated for commercial,
20 institutional and office park uses with walkways and bikeways as provided in
21 Article 27.” Record 23. The city council deleted the conditions of approval
22 that the UAPC relied on to determine that the proposal satisfies GPDC
23 19.052(12). The city council then concluded the standard is “Not Satisfied.”
24 Record 23-24.

25 Petitioners argue the City Council erred in denying its application based
26 on GPDC 19.052(12). Petitioners contend the text of GPDC 19.052(12) makes

1 it clear that it does not apply to its proposal for a *residential* development,
2 because GPDC 19.052(12) only applies to “commercial, institutional and office
3 park uses.” We agree with petitioners.

4 **B. The City Council’s Denial of the Variance**

5 As noted earlier, petitioner sought a variance from requirements for
6 “[b]lock length for local streets * * * and [t]otal length of a perimeter block for
7 local streets * * *. Record 9. The criteria that must be satisfied to grant the
8 requested variances are set out at GPDC 6.060. The UAPC applied a total of
9 12 variance criteria, finding that with conditions of approval that were imposed
10 by the UAPC and accepted by petitioner, all 12 variance criteria are satisfied.
11 Record 224-29. Four of those criteria are relevant in this appeal.

12 Variance criterion 1 requires the applicant to demonstrate the variance is
13 justified by a “unique physical constraint or characteristic of the property to
14 which the variance application is related.” Record 14. The UAPC found “[t]he
15 property is constrained by existing development patterns in the area.” *Id.* The
16 UAPC set out a number of examples of those existing development patterns.
17 *Id.*

18 Variance criterion 2 requires an applicant to establish that the unique
19 physical constraint or characteristic identified under criterion 1 was not “self-
20 created.” *Id.* If it was self-created, criterion 2 imposes additional
21 requirements. The UAPC found “[t]he existing constrains on the property were
22 not self-created.” Record 15.

23 In relevant part, variance criterion 3 requires the applicant to
24 demonstrate “that a variance is necessary to overcome at least one of three
25 situations:

1 “(a) Allow Reasonable Use of an Existing Property. Due to the
2 unique physical constraint or characteristic of an existing lot
3 or parcel, strict application of the provisions of the
4 Development Code would create a hardship by depriving
5 the owner of the rights commonly enjoyed by other
6 properties in the same zoning district subject to the same
7 regulation. *The variance is necessary for preservation of a*
8 *property right of the owner,* substantially the same as is
9 possessed by owners of other property in the same district
10 subject to the same regulation.

11 “* * * * *

12 “(c) Allow Flexibility for Expansion of Existing Development.
13 The location of existing development on the property poses
14 a unique constraint to expansion in full compliance with the
15 Code. The variance is needed for new construction and site
16 improvements in order to provide for efficient use of the
17 land or avoid demolition of existing development, where the
18 public purpose can be substantially furthered in alternate
19 ways with minimal deviation from standards.” Record 15
20 (emphasis added).

21 The UAPC found “[t]he variance is necessary to overcome the conditions
22 described under sub criterion (a) and (b) [of variance criterion 3] * * *.” *Id.*
23 For purposes of this appeal, this finding is particularly significant since in
24 finding the variance was necessary under sub criterion (a), the UAPC found the
25 variance was “necessary to preserve a property right.”

26 Finally, criterion 9 imposes the following requirement:

27 “Mitigate Adverse Impacts. Adverse impacts shall be avoided
28 where possible and mitigated to the extent practical. If a variance
29 is not necessary to preserve a property right, or if the unique
30 constraint in Subsection (1) was self-created, adverse impacts may
31 be grounds for denial.” Record 17.

32 Variance criterion 9 requires mitigation of adverse impacts, but may be
33 grounds for denial in only two circumstances: (1) where the “variance is not

1 necessary to preserve a property right” and (2) where the unique physical
2 constraint or characteristic identified under criterion 1 is found to be self-
3 created under criterion 2. The UAPC found criterion 9 was satisfied:
4 “[a]dverse impacts that may occur as a result of approval of the requested
5 variances can be mitigated by the conditions of approval listed below.”⁷

6 In its decision, the city council adopted the UAPC’s findings regarding
7 11 of the 12 variance criteria, including criteria 1, 2, and 3. The only deviation
8 from the UAPC’s findings in the city council decision was for criterion 9. The
9 city council struck through the UAPC’s criterion 9 finding that “[a]dverse
10 impacts that may occur as a result of approval of the requested variances can be
11 mitigated by the conditions of approval listed below.” The city council added
12 the following finding:

13 **Not Satisfied.** The City Council found that the applicant did not
14 provide adequate mitigation to avoid the adverse impacts of the
15 development for traffic entering Fruitdale Drive.” Record 17-18.

16 Under variance criterion 9, the city council could have required
17 additional mitigation if it believed additional mitigation is required to avoid
18 adverse traffic impacts on Fruitdale Drive. But variance criterion 9 authorizes
19 the city council to deny the variance based on adverse impacts in only two
20 circumstances: (1) where the “variance is not necessary to preserve a property
21 right” and (2) where the unique physical constraint or characteristic identified
22 under criterion 1 is found to be self-created under criterion 2. In the city’s
23 council’s findings addressing criteria 1, 2 and 3, the city council found that

⁷ A large number of conditions of approval were attached to the UAPC decision. Record 216-220.

1 neither of those circumstances is present here. The city council erred by
2 applying criterion 9 to deny the application.

3 The second assignment of error is sustained.

4 **REMEDY**

5 Petitioners argue LUBA should reverse the city council’s decision and
6 order the city to approve its applications for a variance and site plan approval.

7 ORS 197.835(10)(a)(A). ORS 197.835(10)(a) provides, in part:

8 “The board shall reverse a local government decision and order the
9 local government to grant approval of an application for
10 development denied by the local government if the board finds:

11 “(A) Based on the evidence in the record, that the local
12 government decision is outside the range of discretion
13 allowed the local government under its comprehensive plan
14 and implementing ordinances[.]”

15 The question posed under ORS 197.835(10)(a)(A) is whether the city
16 council’s decision to deny petitioner’s site plan and variance application was
17 “outside the range of discretion allowed the local government under its
18 comprehensive plan and implementing ordinances[.]” The city council gave a
19 total of ten reasons why it denied the applications. Seven of the site plan
20 review criteria the city council relied on to support its denial decision are
21 barred by ORS 197.307(4), because the application for site plan approval is an
22 application for approval of “needed housing” and those standards are not “clear
23 and objective.” As to those seven standards, the city council’s decision was
24 “outside the range of discretion allowed the local government under its
25 comprehensive plan and implementing ordinances[.]”

26 Under GPDC 19.052(3), the city council relied on an “adequate” parking
27 standard, but there is no “adequate” parking standard and the proposal

1 complies with the only identified parking standard. Accordingly, as to GPDC
2 19.052(3), the city council’s decision was “outside the range of discretion
3 allowed the local government under its comprehensive plan and implementing
4 ordinances[.]”

5 GPDC 19.052(12) applies to “commercial, institutional and office park
6 uses.” GPDC 19.052(12) does not apply to the “residential” use proposed by
7 petitioner. Therefore, as to GPDC 19.052(12), the city council’s decision was
8 “outside the range of discretion allowed the local government under its
9 comprehensive plan and implementing ordinances[.]”

10 Finally, variance criterion 9 can only be applied to deny a request for
11 variance approval in two circumstances. The city council found that neither of
12 those circumstances is present here. Therefore as to variance criterion 9, the
13 city council’s decision was “outside the range of discretion allowed the local
14 government under its comprehensive plan and implementing ordinances[.]”

15 Because the city council’s application of all ten of the reasons it gave for
16 denying petitioner’s applications for variance and site plan approval were
17 “outside the range of discretion allowed the local government under its
18 comprehensive plan and implementing ordinances,” the city council’s decision
19 is reversed and the city is ordered to approve petitioner’s application.

20 The UAPC imposed a number of conditions of approval in its decision
21 granting site plan and variance approval. Record 216-20. Since petitioner
22 agreed to all of the conditions of approval that were imposed by the UAPC, the
23 city council’s decision to approve the application may include all of those
24 conditions of approval. *Stewart v. City of Salem*, 58 Or LUBA 605, 622
25 (2009).

26 The city council’s decision is reversed.