BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JILL WARREN and PATRICIA FORSYTH,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

VENTURE PROPERTIES, INC.,
Intervenor-Respondent.

LUBA No. 2017-032

FINAL OPINION
AND ORDER

Appeal from Washington County.

Kenneth P. Dobson, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Washington County.

Michael C. Robinson and Seth King, Portland, filed the response brief and Seth King argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

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

REMANDED 11/06/2017

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by a county hearings officer approving a six-lot subdivision.

FACTS

Intervenor-respondent Venture Properties, Inc. (intervenor) applied to subdivide a single, 2.54-acre parcel zoned R-5 (Residential 5 Units Per Acre) into six lots. The subject property is located between S.W. Birch Street and S.W. Cedarcrest Street, 200 feet to the west of S.W. 80th Avenue, in the Metzger Progress area of the county, and is included in the Metro urban growth boundary.

Ash Creek flows through the north portion of the property from east to west. The county's Goal 5 Significant Natural Resources Map for the Metzger Progress Community Plan maps the property as including two of the significant natural resources described in the plan - "Wildlife Habitat," and "Water Area and Wetlands and Fish and Wildlife Habitat."[1] Record 386. As part of the

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[1] Washington County Community Development Code (CDC) 422-2.1 describes "Water Area and Wetlands" as as "100-year flood plain, drainage hazard areas and ponds, except those already developed."

CDC 422-2.2 describes "Water Area and Wetlands and Fish and Wildlife Habitat" as "Water areas and wetlands that are also fish and wildlife habitat."

CDC 422-2.3 describes "Wildlife Habitat" as "Sensitive habitats identified by the Oregon Department of Fish and Wildlife, the Audubon Society Urban

application, intervenor submitted two delineations of those significant natural resources.[2] Those assessments identified approximately 18,142 square feet of "Waters and Wetlands and Fish and Wildlife Habitat," mostly wetlands, riparian areas, and habitat, and approximately 38,000 square feet of "Wildlife Habitat," mostly areas with mature Douglas Fir trees.

Intervenor proposed to subdivide the property into six lots averaging approximately 6,000 square feet each, along with a private street to access three of the lots, and to create two open space tracts (Tracts A and B), totaling approximately 1.35 acres, on the northern part of the property. Intervenor proposed to develop approximately 26,000 square feet of the approximately 38,000 square foot area of the property that contains Wildlife Habitat with Lots

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Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands."

[2] CDC 422-3.1 requires, relevant part:

> "The required master plan and site analysis for a site which includes an identified natural resource shall:
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> "A. Identify the location of the natural resource(s), except in areas where a Goal 5 analysis has been completed and a program decision adopted pursuant to OAR 660, Division 23 (effective September 1, 1996);
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> "B. Describe the treatment or proposed alteration, if any. Any alteration proposed pursuant to Section 422-3.1 B. shall be consistent with the program decision for the subject natural resource; and
>
> "C. Apply the design elements of the applicable Community Plan * * *[.]"

4, 5 and 6, a portion of a storm water quality facility, and a portion of a private street.

During the proceedings before the hearings officer, intervenor argued that Washington County Community Development Code (CDC) Section 422-3.6, which is a standard that governs development within Significant Natural Resource Areas, is not a "clear and objective" approval standard within the meaning of ORS 197.307(4), and thus may not be applied to the application.[3] We set out and discuss ORS 197.307(4) below. Intervenor argued that the application is for "needed housing" as defined in ORS 197.303(1) and that "the property * * * is located on buildable land identified in the County's buildable land inventory." Record 360-61. The hearings officer concluded that CDC 422-3.6 was not met, but that ORS 197.307(4) prevents him from applying CDC 422-3.6 because the standard is not "clear and objective." The hearings officer found that all other clear and objective standards were met, and approved the application. This appeal followed.

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[3] CDC 422-3.6 provides in relevant part:

> "For any proposed use in a Significant Natural Resource Area, there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated. * * *"

FIRST ASSIGNMENT OF ERROR

The essential question presented in this assignment of error is whether ORS 197.307(4) prohibits the county from applying standards that are not "clear and objective" to intervenor's subdivision application. That question in turn requires a determination as to whether the proposal is a proposal for "needed housing on buildable land described in [ORS 197.307(3)] * * *." ORS 197.307(4).[4] Specifically, the question we are asked to resolve is whether the subject property is "buildable land" as that phrase is used in ORS 197.307(3) and as defined in ORS 197.295.

We begin with a summary of the relevant statutes and administrative rules before we proceed to resolve the issue presented in the first assignment of error.

A. ORS 197.295 *et seq*

An application for a single family residential subdivision can be an application for "needed housing" as that term is used in ORS 197.303(1). ORS 197.307(4) provides in relevant part that "a local government may adopt and apply only clear and objective standards, conditions and procedures regulating

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[4] ORS 197.307(4) was amended in 2017 by Senate Bill 1051, which includes different effective dates for different provisions of the Act. No party argues that the amended version of the statute applies to the application.

the development of needed housing on buildable land described in subsection (3) of this section."[5]

ORS 197.295(1) defines "buildable land" for "ORS 197.295 to ORS 197.314" as "lands in urban and urbanizable areas that are suitable, available and necessary for residential uses." The Land Conservation and Development Commission (LCDC) has adopted administrative rules implementing Statewide Planning Goal 10 (Housing) and the needed housing statutes at OAR chapter 660, division 8, and has adopted special rules for the Metro area at OAR chapter 660 division 7.[6]

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[5] ORS 197.307(3) 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 zones with sufficient buildable land to satisfy that need.*" (Emphasis added).

[6] OAR 660-008-0000 provides:

> "(1) The purpose of this division is to ensure opportunity for the provision of adequate numbers of needed housing units, the efficient use of buildable land within urban growth boundaries, and to provide greater certainty in the development process so as to reduce housing costs. This division is intended to provide standards for compliance with Goal 10 'Housing' and to implement ORS 197.303 through 197.307.
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> "(2) OAR chapter 660, division 7, Metropolitan Housing, is intended to complement and be consistent with OAR chapter 660, division 8 and Statewide Planning Goal 10

OAR 660-007-0005(3) provides that "buildable land" is:

> "[R]esidentially designated land within the Metro urban growth boundary, including both vacant and developed land likely to be redeveloped, that is suitable, available and necessary for residential uses. * * * Land is generally considered 'suitable and available' unless it:
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> "(a) Is severely constrained by natural hazards as determined under Statewide Planning Goal 7;
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> "(b) Is subject to natural resource protection measures determined under Statewide Planning Goals 5, 6 or 15;
>
> "(c) Has slopes of 25 percent or greater;
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> "(d) Is within the 100-year flood plain; or
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> "(e) Cannot be provided with public facilities."

The rule presumes that land is "buildable land" and "suitable and available" unless it possesses one or more of the characteristics listed in the rule, in which case Metro may exclude it from its inventory of buildable land. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 211, 216 (2010).

Statewide Planning Goal 10 (Housing) and two statutes, ORS 197.307(3) and ORS 197.296, work together to require local and regional governments to plan and zone sufficient buildable land to accommodate "needed housing." Goal 10 requires in relevant part that Metro inventory "buildable lands for residential use." ORS 197.307(3) requires, for land in urban growth

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> Housing (OAR 660-015-0000(10). Should differences in interpretation between division 8 and division 7 arise, the provisions of division 7 shall prevail for cities and counties within the Metro urban growth boundary."

boundaries, that local governments permit needed housing "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." ORS 197.296 and ORS 197.299 require Metro to provide for sufficient buildable land to accommodate estimated housing needs for a 20-year period and to evaluate the sufficiency of that inventory every six years. ORS 197.296(4) provides requirements for the inventory:

> "(a) For the purpose of the inventory described in subsection (3)(a) of this section, 'buildable lands' includes:
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> "(A) Vacant lands planned or zoned for residential use;
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> "(B) Partially vacant lands planned or zoned for residential use;
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> "(C) Lands that may be used for a mix of residential and employment uses under the existing planning or zoning; and
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> "(D) Lands that may be used for residential infill or redevelopment.
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> "(b) For the purpose of the inventory and determination of housing capacity described in subsection (3)(a) of this section, the local government must demonstrate consideration of:
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> "(A) The extent that residential development is prohibited or restricted by local regulation and ordinance, state law and rule or federal statute and regulation;
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> "(B) A written long term contract or easement for radio, telecommunications or electrical facilities, if the written contract or easement is provided to the local government; and

"(C) The presence of a single family dwelling or other structure on a lot or parcel.

"(c) Except for land that may be used for residential infill or redevelopment, a local government shall create a map or document that may be used to verify and identify specific lots or parcels that have been determined to be buildable lands."

B. First Assignment of Error

As noted, intervenor asserted to the hearings officer that the subject property is "needed housing" that is included in the "County's buildable lands inventory." Record 360. The hearings officer determined that the prohibition in ORS 197.307(4) on applying standards that are not clear and objective prevented him from applying CDC 422-3.6, but he did not specifically address the issue of whether the subject property is "buildable land" as defined in ORS 197.295.

In their first assignment of error, petitioners argue that the hearings officer misconstrued ORS 197.307(4) because the property is not "buildable land" as defined in ORS 197.295(1) and OAR 660-007-0005.[7] That is so, petitioners argue, because pursuant to OAR 660-007-0005(3)(b), the property is "subject to natural resource protection measures determined under Statewide

[7] Petitioners cite OAR 660-008-0005, which applies outside of the Metro area. Intervenor points out that LCDC has adopted rules for the Metro area and the applicable rule is set out at OAR 660-007-0005(3).

Planning Goal[] 5" and therefore not "suitable [and] available * * * for residential uses."

In its response brief, intervenor responds that the property is included in Metro's 2014 Buildable Lands Inventory (2014 BLI). Accordingly, intervenor argues, as a matter of law the property has been previously determined to be "buildable land" and petitioners may not now challenge that legislative determination in this subsequent quasi-judicial proceeding. Intervenor moves that LUBA take official notice of Metro Ordinance 15-1361 (Metro Ordinance) that adopted the 2014 BLI for the Metro region, and portions of Exhibit A to the Metro Ordinance.[8] Those portions of Exhibit A include portions of the Urban Growth Report (UGR) that is adopted and incorporated into the Ordinance. Appendix 3 to the UGR includes a BLI map, and intervenor argues that the BLI map identifies the tax lot that is the subject property as "vacant buildable land."

Petitioners do not object to LUBA taking official notice of the Metro Ordinance, as long as LUBA also takes official notice of the sections of the UGR at Appendix 2 of the 2014 BLI that, as petitioners describe them, "detail[] the methodologies used in creating the BLI and the limitations of its evaluation of 'environmental constraints' in determining to what extent a certain property

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[8] At oral argument, the Board requested that intervenor provide a complete copy of the Metro Ordinance that adopted the 2014 BLI and all exhibits incorporated therein to the Board and petitioners, and intervenor did so.

is considered 'buildable.'" Response to Motion to Take Official Notice 2-3. According to petitioners, Metro "used a formula to provide uniform adjustments for estimated residential capacity on all lots with identified environmental constraints. * * * Specifically, Metro removed a fixed percentage of the total acreage of lands constrained by environmental protections from its BLI." *Id.* We understand petitioners to argue that while the property may be included on the BLI, such inclusion on the BLI does not demonstrate that the entire property is "buildable land."

Intervenor's motion to take official notice of the Metro Ordinance is granted and we take official notice of the Metro Ordinance and the BLI. The enlarged BLI map from the UGR, Appendix 3, page 8 that is attached to intervenor's motion to take official notice identifies the tax lot comprising the subject property as "vacant buildable land," with a green dot - the dot signifying a dwelling unit capacity of between 1 and 15 units. The chart included in the UGR, Appendix 3, page 3 identifies "13,445" single family residential units on vacant buildable land in unincorporated Washington County. What is not clear from the map or the chart is whether the entire 2.54-acre subject property was included in the BLI.[9]

[9] For tax lots greater than one acre, the BLI assumed an 18.5% set aside for future streets and sidewalks. UGR, Appendix 2, page 7.

The methodology for addressing environmentally constrained land is described in the UGR, Appendix 2, pages 1-7.[10] As explained in the UGR,

[10] The UGR, Appendix 2 explains:

> "Local governments vary in how they implement environmental regulations found in Urban Growth Management Functional Plan Title 3 (Water Quality and Flood Management) and Title 13 (Nature in Neighborhoods). Moreover, estimation of residential housing capacity of tax lots (TL) with environmental impact may vary substantially on a case by case basis. Typically, *density transfers* from the environmentally impacted portion of a tax lot to the unconstrained part of the tax lot may vary significantly depending on the environmental impact and city regulations.
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> "The capacity calculations for environmentally constrained tax lots recognize residential density transfers and Title 13's more flexible protections, which are applied on a site-by-site basis during the development review process. Generally, under Title 13, development is to avoid, minimize, or mitigate (in that order) designated habitat areas. Typically, precise delineations of habitat conservation areas are identified during the site development process. Therefore, the data and BLI calculation methods are more appropriate at a higher geographic scale than individual tax lots. The residential capacity computation (though accurate at a regional or subregional scale) may NOT accurately portray the precision needed to calculate the environmental deduction for each tax lot. This may also affect the calculation for the transfer of density from the environmentally constrained area to the unconstrained part for individual tax lots, but we believe that on balance, the variance in the calculation of net density and net residential capacity offset each other over the entire region.
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> "The BLI technical working group was asked to provide advice on how to handle capacity assumptions in Title 13 areas. The group agreed that counting full residential capacity was not appropriate, but that discounting all capacity was not appropriate either. Metro

staff then sent an e-mail inquiry out to all local jurisdictions in the region to determine their jurisdictions' historic development experience in Title 13 areas. Metro staff received varied responses with many caveats that preclude meaningful summarization. In the end, this inquiry did not produce a clear answer. Aside from the fact that Title 13 gets interpreted on a site-by-site basis, another challenge is that local implementation of Title 13 is fairly recent, which means that there is not a lot of development experience from which to draw (particularly in light of the Great Recession). Given this ambiguity and the fact that Title 13 areas comprise a relatively small portion of the region's single-family zoned vacant land (approximately 5.5%) and even less of its multi-family zoned vacant land (approximately 0.5%), Metro staff determined that the most reasonable approach was to rely on percentages found in the Title 13 Model Ordinance. This is the best available information and is being used on the advice of the BLI technical working group.

"Solution:

"Most areas that are considered environmentally sensitive fall into multiple categories of overlap including Titles 3 and 13, or are in a floodway or flood prone soils, or include steep slopes or some other ecosystem feature. Metro employs an environmental hierarchy to classify the environmental features to avoid double counting the capacity deduction for the BLI. BLI reductions will reflect the higher assumed protections when environmental features are overlapping.

"Methods differ for single-family, multi-family, and employment lands. Generally, using the best available GIS data:

"• Remove 100% of the area of floodways

"• Recognize environmental constraints such as slopes over 25% and as defined by cities and counties under Title 3 and Title 13. In many instances, the delineation of the environmental buffers are

Appendix 2, the BLI defined the following land area calculations for purposes of addressing land with environmental constraints:

> "Vacant buildable = Calculated area of TL [tax lot] – utility easements – parks – railroads – tax exempt sites [;]
>
> "Net unconstrained = vacant buildable – environmental constraints[.]" *Id.* at 6.

Then, for land zoned single family residential, Metro applied the following methodology:

> "Single-family residential
>
> "1. Floodways: 100% removed[.]
>
> "2. Slopes > 25% and Title 3 treated the same way: 100% removed [.]
>
> > "a. If tax lot > (or equal to) 50% constrained, follow the 'maximum capacity rule' (defined below) to add back units[.]
> >
> > "b. *If tax lot is <50% constrained, assume 90% of unconstrained area is in BLI* (i.e., apply 10% discount to vacant buildable acres)[.]
>
> "3. Title 13: 50% of Title 13 constrained acres removed from BLI (consistent with Title 13 model Ordinance).

> GIS modeled data; where available we utilize environmental buffers from local government GIS data
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> "• By assumption, permit 1 dwelling unit (DU) per residentially-zoned (SFR, MFR, MUR) tax lot if environmental encumbrances would limit development such that by internal calculations no (zero) dwelling units would otherwise be permitted ('essentially avoid takings')." UGR, Appendix 2, 5-6 (italics in original).

> "4. Assume at least one unit per tax lot, even if fully constrained." UGR Appendix 2, 6-7 (underlining and italics added, footnotes omitted).

When the dust settles on the parties' arguments regarding the BLI, it is clear that at least some portion of the subject property is included in the Metro BLI and therefore at least some portion has previously been determined by Metro to be "buildable land" as defined in ORS 197.295(1). Accordingly, petitioners may not, in an appeal of the county's decision approving a subdivision of that land, argue that no part of the subject property is "buildable land," because that would amount to an impermissible collateral attack on Metro's decision to include at least portions of the subject property in the BLI.

What is not clear is whether Metro applied its methodology for addressing environmentally constrained land to the subject property and based on that methodology deducted a percentage (either 50% or 10%) of the subject property, in calculating the estimated number of dwelling units that could supply housing on the property. That seems to us to be an important question that nothing in the record or the BLI, or anything else presented to us, answers. Stated differently, we do not know whether the methodology and assumptions for addressing environmentally constrained land that are outlined in UGR, Appendix 2 were applied *to the subject property* at all.

We address here two possibilities. First, it is possible that the BLI included all of the subject property without deduction for environmental constraints, in which case Metro has (perhaps mistakenly) determined that the

entire property is "buildable land," and subject to the protection of the needed housing statutes, notwithstanding any Goal 5-protected resources that may be present on the property. Second, it is possible that the BLI deducted an assumed percentage due to environmental constraints, but in an extremely imprecise way. If that is the case, then the quoted text from the UGR set out at n 10 supports an inference that in preparing the BLI, Metro assumed that at the time of development, the local government would prepare a site-specific delineation of the actual extent of the environmental constraints and thus the extent of buildable lands, and that only unconstrained lands would be "buildable lands."[11] The delineated environmentally-constrained lands on a particular parcel identified in the BLI as environmentally constrained would not qualify as "buildable lands" for purposes of ORS 197.307(4), and accordingly the CDC's significant natural resource standards would apply to development of such constrained lands.

As noted, the hearings officer did not determine whether the property is "buildable land," and the BLI is not in the record of the proceeding before the county. We have taken official notice of the Metro Ordinance and the BLI but neither provides an answer to the precise question presented in the first assignment of error. Intervenor argues that "[a]t a minimum, greater precision

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[11] As the UGR explains, constrained lands can still be developed, and in addition, with density transfers, the actual development density would not vary much from the estimate produced under the UGR's assumptions.

is needed in defining whether at least a portion of the Property is 'buildable land.'" Response Brief 9. Intervenor requests that if the hearings officer erred, the decision be remanded to the county for further findings on the buildable land issue. Response Brief 10. In the unusual circumstances presented here, we determine that the best remedy is to remand the decision to the hearings officer to determine what property is included in the BLI and thus subject to the protections at ORS 197.307(4).

The first assignment of error is sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR

CDC 422-3.3 prohibits alteration of a significant water or wetland area, except that if it can be demonstrated, with the concurrence of the Oregon Department of Fish and Wildlife (ODFW), that the area has been "degraded," an enhancement of these areas conforming to the requirements listed in CDC 422-3.4 can be permitted.[12] Intervenor's original application proposed to locate

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[12] CDC 422-3.3(A) provides in relevant part:

> "No new or expanded alteration of the vegetation or terrain of the Riparian Corridor (as defined in Section 106) or a significant water area or wetland (as identified in the applicable Community Plan or the Rural/Natural Resource Plan Element) shall be allowed except for the following:
>
> " * * * * *
>
> "(7) Where it can be demonstrated, with concurrence of the Clackamas District biologist or other applicable district biologist of the [ODFW], that a riparian corridor, Water

a portion of the storm water facilities in the area that is identified as "Water Areas and Wetlands and Fish and Wildlife Habitat." As part of its original proposal, intervenor proposed enhancement of the areas. During the proceedings below, intervenor modified its proposal to relocate the public facilities out of the water and wetland areas and therefore no enhancement plan was being proposed for those areas.[13] Accordingly, the hearings officer found, CDC 422-3.3 and 422-3.4 do not apply. The hearings officer found, in the alternative, that even if the application triggered application of CDC 422-3.3 and 422-3.4, the needed housing statute prohibits their application because they are not clear and objective standards.

> Areas and Wetlands, or Water Areas and Wetlands and Fish and Wildlife Habitat has been degraded, an enhancement of these areas which conforms to the definition and criteria listed in Section 422-3.4 may be permitted through a Type II procedure.
>
> "Enhancement or alteration of a non-degraded portion of these areas is permitted when it is in conjunction with and it is needed to support the enhancement of the degraded area. Where development is proposed that would have negative impacts on these areas it is the county's policy to follow state and federal regulatory guidelines for mitigation proposals."

CDC 422-3.4 contains the detailed submittal requirements for a proposed enhancement plan.

[13] Clean Water Services recommended a condition of approval requiring enhancement of the "Vegetated Corridor" area in order to improve water quality. Record 12, Supplemental Record 1139-40.

In their second assignment of error, petitioners argue that Condition C1 at Record 12 requires an enhancement plan, and that the hearings officer therefore erred in determining that no enhancement activity was proposed pursuant to CDC 422-3.3(A)(7) that would trigger submittal of an enhancement plan under CDC 422-3.4. Petitioners also argue that the needed housing statute does not apply because at least the environmentally constrained portions of the subject property are not buildable land. Additionally, petitioners argue that CDC 422-3.4 is not a "standard" within the meaning of ORS 197.307(4), and that any provisions that are standards are "clear and objective." In their third assignment of error, petitioners argue that CDC 422-3.3(A) does not allow enhancement of areas that are only "marginal" as opposed to "degraded."

Intervenor responds that the hearings officer correctly concluded that he could not apply CDC 422-3.3 and 422-3.4 because the application is for needed housing on buildable land. Intervenor argues that the provisions of CDC 422-3.3 and 3.4 are "standards" because they are "substantive provisions that must be applied" to the application, citing *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993). Such standards are not "clear and objective," according to intervenor.

We do not reach the question of whether the hearings officer erred in deciding that he could not apply CDC 422-3.3 and 3.4 to the application because of the needed housing statute, for the same reasons that we declined to reach the question of whether the hearings officer erred in not applying CDC

422-3.6 because of the needed housing statute. Resolution of those issues depends on whether the entire property or some percentage of the property is included on the BLI and therefore is entitled to the protection of the needed housing statutes.

We do not reach the second and third assignments of error.

The county's decision is remanded.