BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BARNARD PERKINS CORP., Petitioner, vs. CITY OF RIVERGROVE, Respondent.	LUBA No. 97-215 FINAL OPINION AND ORDER

Appeal from City of Rivergrove.

Steve W. Abel, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Peter D. Mostow and Stoel Rives LLP.

Tracey Pool Reeve, Portland, and Michael K. Collmeyer, Lake Oswego, filed the response brief and argued on behalf of respondent.

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

REMANDED 07/28/98

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 appeals the city's adoption of Ordinance No. 60-97, and the city's readoption of Ordinance No. 59-97, both amending the city's zoning code and comprehensive plan.

FACTS

The city of Rivergrove is a small residential community where all lots within the city are zoned residential and developed predominantly as single family dwellings. Only 10.2 acres of buildable land remain in the city. The Tualatin river and its associated floodplain form the southern border of the city.

Petitioner is a developer with a pending application for a 60-unit condominium project within the city. On September 29, 1997, the city adopted Ordinance No. 59-97, which, inter alia, amends the city's zoning code and comprehensive plan to impose a minimum lot size of 10,000 square feet and prohibit multi-family development other than duplexes or triplexes. Petitioner appealed that decision to LUBA on October 20, 1997. The city thereafter withdrew for reconsideration the decision on Ordinance No. 59-97, pursuant to OAR 661-10-021.

On December 8, 1997, the city council conducted a hearing and decided to (1) readopt Ordinance No. 59-97; (2) adopt Ordinance No. 60-97, which makes a minor amendment to the city's comprehensive plan in response to one of petitioner's objections to Ordinance 59-97; and (3) adopt joint findings

supporting both ordinances. Both ordinances contain an emergency clause, making them effective on adoption. The city then submitted its decision on reconsideration to LUBA, pursuant to OAR 661-10-021. The city's submission is entitled "Respondent's Decision on Reconsideration," and states that it includes the adoption of both ordinances and the joint findings, which are attached as appendices.[1]

Pursuant to OAR 661-10-021, petitioner then filed an amended notice of intent to appeal (NITA) the decision on reconsideration. The amended NITA states:

> "Notice is hereby given that Petitioner intends to appeal the final land use decision of respondent City of Rivergrove entitled Ordinance No. 60-97 * * *. The Ordinance adopts a decision on reconsideration adopting Ordinance No. 60-97 which amends the Rivergrove Zoning Code and Comprehensive Plan, reaffirms the City's adoption of Ordinance No. 59-97 and adopts findings in support of Ordinances 59-97 and 60-97." Record 4.

MOTION TO DISMISS

The city moves to dismiss petitioner's appeal for lack of jurisdiction insofar as it challenges Ordinance No. 59-97. The city argues that, by its terms, petitioner's amended NITA

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[1]The "Decision on Reconsideration" states:

> "Respondent, City of Rivergrove, hereby submits its decision on reconsideration in accordance with OAR 661-10-021(3). The decision on reconsideration includes: (1) the adoption by the [city] of Ordinance No. 60-97 (a copy of Ordinance No. 60-97 is attached as Appendix 1); (2) the reaffirmation by the [city] of its adoption of Ordinance No. 59-97 (a copy of Ordinance 59-97 is attached as Appendix 2; and (3) the adoption by the [city] of Findings in Support of Ordinances Nos. 59-97 and 60-97 (a copy of the Findings is attached as Appendix 3)." Record 8.

appeals only Ordinance No. 60-97. According to the city, petitioner's NITA erroneously states that Ordinance No. 60-97 reaffirms Ordinance No. 59-97, when in fact the record demonstrates that the two ordinances were separate decisions adopted pursuant to separate votes.

Petitioner concedes that the amended NITA is inaccurate and that Ordinance No. 60-97 does not reaffirm Ordinance No. 59-97. Nonetheless, petitioner argues that the terms and context of the NITA clearly identify the subject of the appeal, the city's single decision on reconsideration, which includes the adoption of both ordinances. Alternatively, petitioner contends that the amended NITA adequately identifies both ordinances as the subject of the appeal, and thus, at worst, petitioner has committed a technical violation of LUBA's rules by identifying more than one land use decision in a single NITA. According to petitioner, the remedy for such violation is not to dismiss one of the decisions appealed, but rather to require petitioner to submit an additional filing fee and deposit, an act petitioner declares itself ready and able to perform.

Both parties cite to Dyke v. Clatsop County, 17 Or LUBA 493, aff'd in part, rev'd in part, 97 Or App 70, rev den 308 Or 592 (1989), or its subsequent history, to support their positions. In Dyke, the notice of intent to appeal appealed Resolution 88-11-9, which, according to the petitioner, granted conditional use approval and adopted an exception to

Goal 4. We determined that the exception to Goal 4 was the subject of a separate decision, adopted by ordinance, and was not part of Resolution 88-11-9. The petitioner in Dyke did not contend that the notice appealed both decisions, but only that Resolution 88-11-9 incorporated the ordinance. We disagreed, and held under those circumstances that petitioner could not challenge the ordinance. Id. at 498.

The Court of Appeals reversed that part of our decision, concluding that because the two decisions are memorialized separately does not mean they are not really one decision for purposes of appeal to LUBA, at least where the subject of one enactment is a required component of another. 90 Or App at 73. Because the exception to Goal 4 was a necessary part of the decision to allow the conditional use, the court concluded, the petitioner's notice was sufficient to give LUBA jurisdiction over the exception. Id.

The city contends, and petitioner appears to acknowledge, that the two ordinances at issue in the present case stand alone and one is not a required component of the other in the sense in the same manner as the two decisions at issue in Dyke. The parties' viewpoints diverge thereafter. Petitioner stresses that the city characterized both ordinances as constituting a single "decision on reconsideration," while the city argues that the present case falls squarely within the general rule articulated in our opinion in Dyke, rather than within the narrow exception described the Court of Appeals.

The city urges us to adhere to the "basically sound legal analysis" in our opinion.

We do not believe the "exception" articulated by the court in Dyke is limited to the facts of that case, as the city urges. The lesson inherent in Dyke is that whether multiple enactments constitute a single decision for purposes of appeal to LUBA depends on the relationship between the enactments. That the two ordinances at issue in the present case "stand alone" is not determinative. What is determinative, in our view, is that the two ordinances were adopted in the context of an enactment withdrawn for reconsideration under OAR 661-10-021, and the resulting "decision on reconsideration," as characterized by the city, expressly includes the original enactment and a supplementary enactment. Indeed, the city found that Ordinance 60-97 is an "integral part" of its reconsideration of Ordinance 59-97. Record 12.

It is important to recognize that withdrawing a decision for reconsideration under OAR 661-10-021 merely suspends the original appeal, and that, if the local government affirms the original decision or modifies it with only minor changes, the petitioner is not obligated to file an amended NITA specifically appealing the decision on reconsideration in order for the original appeal to continue. ORS 197.830(12)(b); OAR 661-10-021(5)(a)(B). In this context, the statute and our administrative rule relax the pleading

requirement in recognition that, at least where the decision on reconsideration affirms or makes only minor revisions to the original decision, the proceedings thereafter are both in form and substance a continuation of the original appeal. The jurisdictional trap that is a consequence of the city's position is inconsistent with the terms and tenor of that statutory scheme.

The city's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the decision must be remanded because the city failed to send notice of the proposal to adopt Ordinance No. 59-97 and 60-97 to DLCD at least 45 days prior to the hearings held, as required by ORS 197.610(1).[2]

The record shows that the city mailed notice of its proposal to adopt Ordinance 59-97 approximately 30 days before the hearing at which the city first adopted it, September 29, 1997, and notice of the proposal to adopt Ordinance 60-97 and reconsider Ordinance 59-97 approximately 17 days before the hearing at which it adopted and reaffirmed those ordinances. Both notices advised that the city was not affording DCLD 45 days notice because, pursuant to ORS 197.610(2), the city had determined that "emergency circumstances requiring expedited

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[2]ORS 197.610(1), in relevant part, requires that:

> "A proposal to amend a local government acknowledged comprehensive plan or land use regulation * * * shall be forwarded to the director at least 45 days before the final hearing on adoption."

review" existed.[3]

Petitioner argues that the city had been considering the amendments contained in the proposed ordinances for over a year before it suddenly decided that "emergency circumstances" existed requiring expedited review. Petitioner submits that the justifications asserted by the city do not establish that an actual "emergency" exists within the meaning of ORS 197.610(2). The emergency clause for Ordinance 59-97 states that the ordinance is necessary to preserve the city's character, guide future development in the city's Flood Hazard District, and avoid continuation of the current lack of regulatory controls.[4] The emergency clause for Ordinance 60-

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[3]ORS 197.610(2) states that:

> "[A] local government may submit an amendment or new regulation with less than 45 days' notice if the local government determines that there are emergency circumstances requiring expedited review. * * * In [that case]:
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> "(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615(1) and (2); and
>
> "(b) Notwithstanding the requirements of ORS 197.830(2), [DLCD] or any other person may appeal the decision to [LUBA] under ORS 197.830 to 197.845."

[4]The emergency clause for Ordinance 59-97 states in full:

> "Because this ordinance is necessary to allow the City to guide and control its future development in a manner which will preserve the City's character; and because this ordinance is necessary to guide and control its future development within the Flood Hazard District in a manner which protects the public health, safety and welfare of the citizens of Rivergrove; and in order to provide for a prompt transition in a reasonable time to the regulatory controls contained herein and to avoid a continuation of the current lack of regulatory controls in an area of such critical concern to the citizens of Rivergrove, an emergency is hereby declared to exist and this ordinance shall

97 recites the same reasons, but elaborates that expedited review of the decision on reconsideration is necessary to meet the deadline imposed by OAR 661-10-021.[5]

The city responds that it properly exercised the discretion granted it by ORS 197.610(2) to determine what constitutes an "emergency" within the meaning of that statute. While "emergency circumstances" is not defined in the statute, both parties cite to ORS 221.310(1), which permits cities to adopt ordinances effective immediately where the city finds that immediate implementation is "necessary for the immediate preservation of the peace, health and safety of the city."[6]

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be in full force and effect from the time of passage by the City Council." Record 17-18.

[5]The emergency clause for Ordinance 60-97 states:

"Because this ordinance is an integral part of the City's reconsideration under the provisions of OAR 661-10-021 of Ordinance No. 59.07; and because this ordinance is necessary to allow the review of Ordinance No. 59.97 by [LUBA] to proceed; * * * and because this ordinance is necessary to allow the City to guide and control its future development in a manner which will preserve the City's character; and because this ordinance is necessary as noted above to resolve litigation concerning Ordinance No. 59-97 which, in turn, is necessary to guide and control future development within the Flood Hazard District in a manner which protects the public health, safety and welfare of the citizens of Rivergrove; and in order to provide for a prompt transition in a reasonable time to the regulatory controls in an area of such critical concern to the citizens of Rivergrove, an emergency is hereby declared to exist and this ordinance shall be in full force and effect from the time of passage by the City Council" Record 12.

[6]ORS 221.310(1) provides:

"These emergency measures shall become effective immediately if they state in a separate section the reasons why it is necessary that they should become immediately effective and if they are approved by the affirmative vote of three-fourths of all the members elected to the city council, taken by ayes and nos, and also by the mayor."

Petitioner argues that the city did not cite any immediate threats to peace, health and safety, and that the stated justifications for expedited review do not support a declaration that "emergency circumstances" exist. The city contends that it made a sufficient declaration pursuant to the procedures required by ORS 221.310(1), and thus, to the extent ORS 221.310(1) illuminates the meaning of ORS 197.610, the city's declaration of an emergency under ORS 197.610 satisfies that provision.

We agree with petitioner that a pro forma declaration of "emergency circumstances," unaccompanied by stated reasons directed at the necessity for expedited review, is insufficient to satisfy ORS 197.610. That provision safeguards the ability of DLCD and other interested parties to participate in proceedings to amend acknowledged comprehensive plans and land use regulations, and thus ensure that those plans and regulations continue to comply with the statewide planning goals. See Oregon City Leasing, Inc. v. Columbia County, 121 Or App 173, 177, 854 P2d 495 (1993). Nonetheless, we believe the city's declarations with respect to both ordinances are sufficient to satisfy ORS 197.610.[7] Both declarations cite a current lack of regulatory controls over development in the Flood Hazard regulatory controls to protect

[7]We need not and do not decide whether the parties are correct that an "emergency" has the same meaning under both ORS 221.310(1) and 197.610 or whether compliance with one statute necessarily assures compliance with the other.

public health, safety and welfare. The possibility of unregulated development in a floodplain is a sufficient hazard to public health, safety and welfare to warrant expedited proceedings and hence inadequate notice to DLCD, pursuant to ORS 197.610.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city erred in making a legislative decision on reconsideration without following the procedures required by the city's Land Development Ordinance (LDO) 6.226 and 4.120. Under those provisions, the city must conduct legislative actions pursuant to a "Type IV" proceeding, which requires that plan and ordinance amendments be considered at a public hearing before the city planning commission before being forwarded to the city council for final action. In the present case, the city council held a public hearing and rendered the decision on reconsideration without remanding the amendments at issue to the planning commission for initial review. Petitioner contends that the city's procedural error violated its substantial rights to participate fully in the hearing before the city council, because petitioner was deprived of the findings and report that the planning commission would have submitted to the city council.

The city responds that it followed the required Type IV procedure with respect to its initial adoption of Ordinance

No. 59-97, and thus the city's readoption of that ordinance, without changes, does not violate the applicable procedural requirements. We agree. Davenport v. City of Tigard, 23 Or LUBA 565, 581-82 (1992) (Absent local provisions to the contrary, the local government is not required to follow on remand from LUBA all of the procedures required for the initial decision). Petitioner does not argue that any local provisions require remand to the planning commission when the city withdraws for reconsideration a decision appealed to us. We perceive no reason why the rule stated in Davenport should not apply in the context of a decision on reconsideration as well as a decision on remand.

With respect to Ordinance No. 60-97, the city contends that it is only a minor amendment that effectuates the amendments made by Ordinance No. 59-97, and should be considered merely a continuation of the proceedings that resulted in Ordinance No. 59-97. Accordingly, the city concludes that Ordinance No. 60-97 should enjoy the same procedural regularity as Ordinance No. 59-97. In the alternative, the city argues, petitioner has not demonstrated any prejudice to its substantial rights from the city's alleged procedural error. ORS 197.835(9)(a)(B)[8]

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[8]ORS 197.835(9) states:

"* * * the board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

We agree with the city's alternative argument. Petitioner has not shown that the city's alleged procedural error precluded it from meaningful participation or otherwise prejudiced petitioner's substantial rights. Petitioner participated fully in the proceedings before the city council. Indeed, it appears that Ordinance No. 60-97 was the city's response to one of the objections petitioner raised to Ordinance No. 59-97.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city's decision on reconsideration violates LDO 6.226, because it constitutes consideration of a legislative action more than once in a 12-month period.

LDO 6.226 provides that "unless an emergency is declared by the City Council, legislative actions under [the LDO] shall be considered only once in a 12-month period." Petitioner contends that the city's initial adoption of Ordinance 59-97 on September 29, 1997, and its readoption of that ordinance on December 8, 1997, violate the plain terms of LDO 6.226. Petitioner alleges prejudice to its substantial rights, in that the city's failure to wait a full year to readopt

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"* * * * *

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

Ordinance No. 59-97 deprived petitioner of the opportunity to adequately consider its options, whether to submit its development application under the old regulations or to attempt to convince the city to embrace the type of high density development petitioner favors.

The city responds, and we agree, that petitioner has not demonstrated that the city's alleged procedural error caused prejudice to its substantial rights. The city points out that petitioner's representatives attended and participated in every planning commission meeting and city council meeting leading up to adoption of the challenged ordinances. Further, according to the city, petitioner has exercised both of the options it identifies, by submitting its application under the old regulations and advocating vigorously against provisions in the challenged ordinances that petitioner perceives as unfavorable.

Because petitioner has not shown a basis to reverse or remand the decision pursuant to ORS 197.835(9)(a)(B), we need not consider the city's alternative argument that it complied with the exception clause in LDO 6.226 when it declared an emergency in adopting both challenged ordinances.[9]

The third assignment of error is denied.

[9]In any case, we question whether LDO 6.226 even applies in this context, as petitioner argues it must, when doing so would prevent the city from making a timely decision on reconsideration, as required by OAR 661-10-021.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that elements of Ordinance No. 59-97 and 60-97 are not supported by findings and are inconsistent with portions of the Housing Element in the city's comprehensive plan, in violation of LDO 6.229. LDO 6.229 requires that, in making a recommendation regarding "legislative actions" including plan amendments, the planning commission shall "[i]dentify the provisions of the plan that are relevant to the decision and prepare adequate findings on how the proposal does or does not comply with each provision."

The Housing Element contains two sections stating that, "when urban conditions develop," the city shall encourage and allow "small lot sizes" with a minimum lot size of 6,000 square feet.[10] Petitioner explains that "when urban conditions develop" means when the city obtains sewer service from the county, an event that both parties agree has transpired. As relevant here, Ordinance 59-97 amends those two sections of the Housing Element to change the minimum lot size from 6,000 square feet to 10,000 square feet. Petitioner argues that a 10,000 square foot minimum lot size cannot be a "small lot"

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[10]The Regional Housing Objectives section of the Housing Element states:

> "When urban conditions develop, Rivergrove shall encourage small lot size (minimum of 6,000 sq. Ft.), the 'filling-in' of vacant land, planned unit developments and multi-family dwelling units."

In addition, the Methods and Zoning Tools section of the Housing Element lists four policies that go into effect when urban conditions develop, among them that the city shall allow "small lot sizes for single family homes (minimum of 6,000 sq. ft)."

and hence the amendments are inconsistent with the terms of the Housing Element as well as its general theme of encouraging higher density. According to petitioner, Ordinance 59-97 makes it virtually impossible for higher density housing to be built in the city.

The city council expressly interpreted the phrase "small lot" to include a lot size of 10,000 square feet, and rejected petitioner's contention before the council that the amendments to the Housing Element were inconsistent with the Housing Element. The city argues that determination of minimum lot sizes is a quintessentially legislative action, well within the city's legislative discretion, and that its interpretation of its plan is entitled to deference under ORS 197.829(1). We agree. Petitioner offers no authority other than its own opinion that a "small lot" cannot extend to a 10,000 square foot minimum. We defer to the city's interpretation of the Housing Element, and affirm that interpretation.

Petitioner makes a similar argument with respect to Ordinance 60-97, which amends policy 2 of the Methods and Zoning Tools section of the Housing Element. That section provides that, until urban conditions develop, the city shall:

> "Encourage [higher densities by allowing clustering of housing units into townhouses, zero lot line houses, and small lot sizes] <u>development at appropriate densities by allowing multi-family units</u> if common drainfields or other sewage disposal methods can meet environmental quality standards." (Bracketed material deleted, underlined material added by Ordinance 60-97).

Petitioner contends that the deletion of the "higher density" provisions of policy 2 is inconsistent with the general theme in the Housing Element to encourage higher densities. The city responds that, by its terms, policy 2 applies only until urban conditions develop, i.e. until urban sewer service is available. Because urban conditions have developed, the city argues, policy 2 no longer applies. We agree.

Finally, petitioner argues that the city council failed to make findings of compliance with pertinent portions of the Housing Element, as required by LDO 6.229. The only specific portion of the Housing Element that petitioner identifies as requiring and lacking supporting findings is a statement that the city could meet projected housing demands for the year 2000 if it allows six dwelling units per buildable acre, half single family dwelling units and half multi-family.[11]

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[11]The Housing Element projection petitioner cites to states that:

> "By the year 2000, Metro estimates that Rivergrove's population will be 450. Assuming that Rivergrove is fully served by sewers, it could accommodate the following population increase:
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> "10.2 acres buildable land x 6 units/acre = 60 new units (50% single family and 50% multi-family)
>
> "30 single family x 3 (average household size) 90
>
> "30 multi-family x 2 (average household size) 60
>
> "1978 population 300
>
> "Year 2000 Population 500
>
> "Thus, Rivergrove could surpass Metro's population projection for the year 2000. * * *"

Petitioner contends that, under the 10,000 square foot minimum, only four "units" could be built per acre, making it impossible to achieve the goal of six dwelling units per acre. Petitioner argues that the city failed to address or make findings whether Ordinance 59-97 complies with the "six-unit-per-acre" provision, as required by LDO 6.229.

Petitioner cites a line of cases requiring that local governments support quasi-judicial decisions with findings of fact and findings of compliance with applicable criteria. The city responds that such cases are inapposite, because adoption of both ordinances in this case were legislative decisions, not quasi-judicial, and that lack of findings is not a basis to reverse or remand legislative decisions, at least where the local government can defend the decision through argument in its brief and citation to plan and code provisions and the record. Churchill v. Tillamook County, 29 Or LUBA 68, 77 (1995). The city contends that, notwithstanding specific findings directed at the "six-unit-per-acre" goal in the Housing Element, the argument and citation to the record in the city's brief is sufficient to establish that Ordinance 59-97 is consistent with that goal.

However, Churchill addresses whether provisions of state law require findings to support legislative decisions, and answers that question in the negative. The rule stated in Churchill has no application when local provisions require that legislative decisions be supported by findings of

compliance with relevant portions of the comprehensive plan. Andrews v. City of Brookings, 27 Or LUBA 39, 43 (1994). The absence of such findings, or the adoption of purely conclusory findings, can provide a basis for reversal or remand. Foster v. Coos County, 28 Or LUBA 609, 612 (1995). Because LDO 6.229 requires the city to support legislative decisions with findings of compliance with relevant provisions of the city's comprehensive plan, and the "six-unit-per-acre" goal in the Housing Element appears to be a relevant provision, we agree with petitioner that LDO 6.229 requires the city to make findings on how Ordinance 59-97 does or does not comply with that provision.

The city next argues that, even if the city has an obligation to make findings that Ordinance 59-97 complies with relevant provisions of the Housing Element, it made general findings of compliance with the comprehensive plan, and thus implicitly with the "six-units-per-acre" language in the Housing Element. In addition, the city contends that there is evidence in the record clearly demonstrating that Ordinance 59-97 complies with the "six-units-per-acre" provisions in the Housing Element. We understand the city to argue that, notwithstanding the lack of adequate findings required by LDO 6.229, we may affirm the city's decision because the city has

identified evidence in the record that clearly supports the decision. ORS 197.835(11)(b).[12]

The city argues that the Housing Element does not, as petitioner seems to assume, call for a minimum density of six single family dwelling units. Rather, the Housing Element projects an equal mix of single family and multi-family dwellings in order to achieve the target population. Moreover, the Housing Element's projection treats each multi-family apartment rather than building as a "unit" for purposes of the six-unit-per-acre goal. The city notes that Ordinance 59-97 expressly permits duplexes and triplexes on all residential lots in the city. The city argues that the Housing Element assumes a 50/50 mix of single and multi-family dwellings units on buildable land, and that, depending on how many multi-family units are triplexes, it is possible for a 50/50 mix of single and multi-family units to meet the goal of six dwelling units per acre, even under the 10,000 square foot minimum lot size.[13] Accordingly, the city argues that the

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[12]ORS 197.835(11)(b) provides:

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

[13]The city attaches a sheet of calculations to its brief, showing the average density per acre under various combinations of single and multi-

record clearly supports a finding that Ordinance 59-97 complies with the Housing Element.

We disagree with the city. The record appears to support the city's contention that, assuming certain levels of multi-family development, Ordinance 59-97 is consistent with the Housing Element goal of six units per acre. However, nothing in Ordinance 59-97 or elsewhere directed to our attention provides any support for the crucial assumption that certain levels of multi-family development are likely or will be achieved. As petitioner points out, and the city appears to concede, if the buildable land in the city is developed as single family dwellings under the new 10,000 square foot minimum, the city will not meet the six-unit-per-acre goal. Given that past residential development in the city consists entirely of single family dwellings, we see no basis for the city, or us, to assume that future development will reach a certain level of multi-family development. Accordingly, we cannot affirm the decision on the basis that the record "clearly supports" a finding that Ordinance 59-97 complies with the six-unit-per-acre Housing Element goal.

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision is inconsistent with the Energy Conservation Element of the

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family dwellings. The sheet of calculations is not in the record and thus not evidence we can consider for purposes of ORS 197.830(11)(b).

city's plan and not supported by adequate findings related to energy conservation. The Energy Conservation Element states that

> "the City's existing patterns of land use are not particularly energy-efficient. Single Family dwelling units on large individual lots are the primary land use."

Accordingly, the Energy Conservation Element requires that the city

> "Modify the [LDO] when necessary to enforce land use patterns, building forms, or siting practices which in common practice will reduce energy consumption or improve energy efficiency."

Petitioner argues that the city failed to make findings of compliance with the Energy Conservation Element, as required by LDO 6.229. Petitioner argues that Ordinance 59-97 and 60-97 implicate the Energy Conservation Element because those ordinances eliminate support in the city's plan for smaller lot, higher density development other than duplexes and triplexes, thus encouraging the larger lot, single family pattern of development that the plan describes as energy inefficient.

The city repeats its argument that it is not required to make findings of compliance with plan provisions implicated by the challenged ordinances. For the reasons discussed in the fourth assignment of error, we agree with petitioner that, to the extent the Energy Conservation Element is relevant to the challenged ordinances, LDO 6.229 requires the city make findings of compliance with that provision.

The city does not appear to dispute that the Energy Conservation Element is relevant to the challenged ordinances, but does dispute that either ordinance is inconsistent with the Energy Conservation Element. The city argues that the LDO permitted multi-family development before Ordinance 59-97, and that the LDO continues to permit at least some multi-family development after Ordinance 59-97, and thus the challenged decision essentially maintains the status quo, resulting in little or no energy conservation consequences that might conflict with the Energy Conservation Element. We understand the city to suggest that we may affirm the city's decision, notwithstanding the lack of findings regarding the Energy Conservation Element, because the record clearly supports a finding that the challenged ordinances comply with that provision. ORS 197.835(11)(b).

Again, we disagree. It is not at all clear from this record that the challenged decisions "maintain the status quo." The city appears to concede that smaller lot, higher density multi-family development was possible under the preexisting LDO, and that the challenged decisions, while continuing to permit some multi-family development, preclude certain forms of higher density development. We cannot say, on this record, that the city's choices will have little or no energy conservation consequences or otherwise that it complies with the Energy Conservation Element. Accordingly, we cannot affirm the city's decision on the basis that the record

"clearly supports" a finding of compliance with that provision.

The fifth assignment of error is sustained.

SIXTH, SEVENTH, EIGHTH, NINTH AND TENTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision implicates and is inconsistent with several statewide planning goals, respectively Goal 2 (Coordination), Goal 10 (Housing), Goal 13 (Energy), Goal 5 (Natural Resources) and Goal 6 (Air and Water Quality), and is not supported by adequate findings related to those goals.

We review amendments to the city's comprehensive plan for compliance with applicable statewide planning goals. ORS 197.835(6). Amendments to the city's land use ordinance are reviewed for compliance with the city comprehensive plan, or, if the plan does not provide specific policies or provisions providing a basis for the amendment, with the statewide planning goals. ORS 197.835(7)(a), (b).[14]

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[14]Ordinance 59-97 contains both amendments to the city's plan and amendments to the LDO. The city argues generally that the amendments to the LDO are not reviewable for compliance with the statewide planning goals, because the amendments to the city's plan in Ordinance 59-97 are "specific policies or provisions" that provide a basis for the LDO amendments. ORS 197.835(7)(b). Accordingly, the city concludes, the LDO amendments are reviewable only for compliance with the city's plan, as amended by the plan amendments in Ordinance 59-97.

We reject the city's suggestion that the "specific policies or provisions" in the city's plan necessary to provide a basis for amendments to land use regulations under ORS 197.835(7)(b) can be unacknowledged, contemporaneously adopted plan provisions. The limited scope of review under ORS 197.835(7)(b) is predicated on the fact that acknowledged plan provisions are, perforce, in compliance with the goals, and the presumption that land use regulations authorized by plan provisions in compliance with the goals must also be in compliance with the goals, rendering independent review unnecessary. That presumption of derivative compliance is absent

Absent local provisions to the contrary, a lack of findings in support of a legislative decision is not itself a basis for reversal or remand. However, in order for LUBA to review the challenged decision for compliance with applicable goals, the city must support its decision either with adequate findings directed at applicable goals or with argument in its brief and citation to plan provisions, code provisions and evidence in the record. Churchill, 29 Or LUBA at 77.

A. Goal 2 (Coordination)

Goal 2 requires that "[o]pportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances." In the sixth assignment of error, petitioner contends that the city failed to extend opportunities for comment to Clackamas County, Washington County and the city of Lake Oswego, each of which, according to petitioner, is an "affected governmental unit" because it abuts the city and thus must suffer from the city's effort to shift population growth onto other jurisdictions.

The city responds that, to the extent Goal 2 is implicated by the challenged decision, the city complied by sending notice to DLCD and to Metro, the regional government responsible for coordinating all planning activities affecting

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when the authorizing plan provisions have not yet been acknowledged or determined to be in compliance with the goals. It follows that any LDO amendments in Ordinance 59-97 not authorized or provided for by acknowledged plan provisions are subject to independent review for compliance with relevant goals.

land uses within the metro region, including the counties and city petitioner argues are affected. The city also sought and received information from both DLCD and Metro, and made findings with respect to their participation. Finally, the city published several notices in newspapers of general circulation. The city submits that its actions and findings fully comply with any obligation it had under Goal 2.

We agree with the city. Petitioner argues that the city's decision tends to shift growth to other jurisdictions, but provides no particularized basis to believe that governmental units bordering the city are more affected by the city's decision than other governmental bodies within the metro region. Under these circumstances, we conclude that the city's Goal 2 obligation to coordinate with affected governmental units was satisfied by coordinating with Metro, the regional government responsible for regional planning.

The sixth assignment of error is denied.

B. Goal 10 (Housing)

Petitioner argues in the seventh assignment of error that the challenged decision is inconsistent with the requirements of Goal 10 and its implementing rules at OAR chapter 660, Divisions 7 (Metropolitan Housing) and 8 (Interpretation of Goal 10, Housing).[15] Petitioner contends that the challenged

[15]Goal 10 is:

"To provide for the housing needs of citizens of the state.

decision reduces the city's capacity for higher density development, and is thus inconsistent with one of the "guidelines" for Goal 10, which suggests that local ordinances "should be used to increase population densities in urban areas * * *." Goal 10, Guideline B.4. In addition, petitioner argues that the city violated the requirement at OAR 660-08-0030(1) to "consider the needs of the relevant region in arriving at a fair allocation of housing types and densities." OAR 660-08-0030(1).

The challenged decision finds that the city plan, as amended by the challenged ordinances, satisfies the requirements of Goal 10 with respect to "providing an appropriate level of residential development in terms of both quantity (availability) and type (flexibility)." Record 20.

The city responds, first, that the guidelines for statewide planning goals are simply suggested approaches and are not requirements with which local governments must comply, and therefore, even assuming the challenged decision decreases density, Guideline B.4. provides no basis to reverse or remand the decision. Churchill, 29 Or LUBA at 73-74. We agree that Guideline B.4. does not, in itself, state what Goal 10 requires.

"Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

With respect to Goal 10 itself and its implementing rule, the city argues that the challenged decision does not decrease potential density, or at least does not affect the city's ability to meet the housing targets in its plan, and thus does not violate the city's obligation to allow for "flexibility of housing location, type and density," Goal 10, or for "fair allocation of housing types and densities." OAR 660-08-0030(1).

The city is exempt from the specific regional housing density and mix standards to which most other jurisdictions in the Metro region are subject. See OAR 660-007-0035(4). While OAR 660-007-0035 does not exempt the city from the other requirements of Goal 10 or Division 8, neither Goal 10 nor Division 8 mandate any particular housing mix or level of density. Rather, Division 8 contemplates that the city will determine an appropriate level of housing types and density by means of a housing needs projection. OAR 660-008-0010.

The parties appear to agree that compliance with Goal 10 is linked to compliance with the housing needs projections and requirements in the city's plan and in the Metro Urban Growth Management Functional Plan (Metro Plan). The challenged decision cites to table 1 of the Metro Plan, and relies on that table as evidence that Ordinance 59-97 complies with Goal 10. Table 1 lists a year 2017 "target capacity" for housing for each jurisdiction within the Metro region. The city's "target capacity" for dwelling units is negative 15, which, we

are informed, means that the city is projected to have more than sufficient buildable land to meet population projections, based apparently on the housing mix and density figures in the Housing Element in the city's plan. Those figures, discussed in the fourth assignment of error, assume a six-unit-per acre density, a 6000 square foot minimum lot size, and a 50/50 mix of single and multi-family dwellings. We understand petitioner to argue that reliance on those figures as evidence that the challenged decision is consistent with either Goal 10 or the Metro Plan is misplaced, because the challenged decision significantly reduces the mix and density of housing possible in the city, and thus casts into doubt whether the city can still meet its assigned "target capacity" under the lower densities imposed by Ordinance 59-97.

The city responds that its finding of compliance with Goal 10 and the Metro Plan, combined with argument in its brief and citation to the sheet of supporting calculations attached to its brief, is sufficient to demonstrate that Ordinance 59-97 is consistent with Goal 10's requirements.[16] The city argues that its plan and LDO, as amended by Ordinance 59-97, continue to allow development that, under certain scenarios, can exceed a density of six-units-per-acre, and

[16]Although the sheet of calculations attached to the city's brief is not evidence in the record for purposes of ORS 197.835(11)(b), we perceive no reason why we cannot consider those calculations as part of the city's argument and explanation why the challenged decision is consistent with applicable statewide planning goals.

thus still provide for the housing mix and density level necessary to meet the city's "target capacity."

In Opus Development Corp. v. City of Eugene, 30 Or LUBA 360, 374, aff'd 141 Or App 249 (1996) (Opus II), we considered plan amendments that changed medium density residential designations to low density designations. The petitioners in Opus II argued that the amendments were inconsistent with Goal 10 because they effectively reduced the inventory of buildable lands required by Goal 10 without any basis to find that the remaining inventory was still adequate to meet the city's projected housing needs. The city's inventory was built on an assumption that large numbers of multi-family units would be developed downtown, an assumption undermined by the challenged amendments. We remanded for the city to consider the impact of the challenged amendments on the number of dwelling units that could be built downtown, and hence whether the amendments still allowed the city to meet the inventory and availability requirements of Goal 10. Id. at 374.

Opus II instructs us that, where challenged plan amendments undermine assumptions and calculations that support acknowledged plan provisions directed at Goal 10 requirements, the local government must demonstrate that its plan, as amended, still complies with Goal 10. In the present case, it appears that the city's housing needs projection and "target capability" to meet housing demand are built on assumptions and calculations that are undermined to some degree by the

challenged decision. For example, it appears that under the previous 6,000 square foot minimum lot size, the six-unit-per-acre goal and the population target in the Housing Element could be met by any mix of housing types, including all single family homes. Under the challenged ordinances, by contrast, it appears that only scenarios involving a high ratio of triplexes are likely to meet the Housing Element's six-unit-per-acre goal and associated population targets. In other words, the assumptions built into the calculations relied upon to demonstrate compliance with Goal 10 are undercut to such a degree that we cannot find support, on this record, for the city's finding that the challenged decision complies with Goal 10.

Accordingly, we conclude that the city has not made adequate findings or demonstrated by argument in its brief and citation to the record and local provisions that the challenged ordinances are consistent with Goal 10.

The seventh assignment of error is sustained.

C. Goal 13 (Energy Conservation)

Petitioner contends in the eighth assignment of error that the challenged decision is inconsistent with Goal 13, which states, in toto:

"To conserve energy.

> "Land and uses developed on the land shall be managed and controlled so as to maximize the conservation of all forms of energy, based upon sound economic principles."

Petitioner notes that the Guidelines for Goal 13 specifically link energy conservation with higher housing densities. Petitioner repeats its theme that the challenged decision significantly reduces potential residential density in the city by increasing the minimum lot size and limiting multi-family development to duplexes and triplexes, and argues that the city has failed to explain how that reduced density is consistent with Goal 13.

The city responds that the challenged decision permits relatively dense multi-family development and thus, to the extent decisions affecting density implicate Goal 13, the challenged decision complies with Goal 13, as demonstrated by citation to the record and argument in the city's brief.

We perceive nothing in the brief terms of Goal 13 that requires a local government to maximize residential density, or even consider the energy consequences of different levels of residential density in amending its land use provisions. Unlike Goal 10, there is no implementing rules that expounds the requirements of Goal 13. In our view, Goal 13 is directed at the development of local energy policies and implementing provisions, and does not state requirements with respect to other land use provisions, even if those provisions have incidental impacts on energy use and conservation. See Brandt v. Marion County, 22 Or LUBA 473, 484 (1991), aff'd in part, rev'd in part on other grounds 112 Or App 30 (1992) (Goal 13 does not require the county to consider whether proposed

industrial expansion is more or less energy efficient than existing industry). We conclude that Goal 13 is not implicated by the challenged decision in this case.

The eighth assignment of error is denied.

D. Goal 5 (Natural Resources)

In the ninth assignment of error, petitioner challenges the city's amendment of the LDO to provide for a half-acre minimum lot size in the flood hazard zone bordering the Tualatin River. Petitioner contends that the Tualatin River is a "natural resource" protected by Goal 5, and thus that the city was required to conduct an analysis under Goal 5 before approving amendments that affect the river.

The city responds that amendments to the city's land use regulations are reviewable for goal compliance only if the plan does not contain specific policies or provisions providing a basis for the regulation. ORS 197.835(7)(b). The city notes that an existing acknowledged provision of its comprehensive plan calls for a half-acre minimum in the flood hazard zone, and argues that this plan provision provides a specific basis for the LDO amendment. Accordingly, the city argues, even if the challenged amendment to the LDO affects the Tualatin River in a manner implicating Goal 5, it is not reviewable for compliance with Goal 5. We agree.

The ninth assignment of error is denied.

E. Goal 6 (Air, Water and Land Resource Quality)

Petitioner contends in the tenth assignment of error that the challenged decision implicates Goal 6 because the reduced density that is a result of the challenged decision will result in greater pollution from automobile use and energy-inefficient single family homes over higher density development. Accordingly, petitioner assigns error to the city's lack of findings regarding Goal 6.

For the reasons discussed in the eleventh assignment of error below, we agree with the city that petitioner has not established that the challenged decision implicates Goal 6.

The tenth assignment of error is denied.

ELEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision is not supported by adequate findings related to the Transportation Planning Rule at OAR Chapter 660, Division 12. OAR 660-12-060(1) provides:

> "Amendments to functional plans, acknowledged comprehensive plans and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility."

Petitioner contends that the challenged decisions are intended to and will result in reduced potential for residential density in the city. Petitioner posits that reduced potential density will have consequences on automobile

trips, vehicle miles traveled, local transit use, and the service levels of streets in the city.

However, petitioner has made not any argument or pointed to any evidence in the record that the challenged amendments "significantly affect a transportation facility." Petitioner has not identified a single "transportation facility" that could be affected by the city's decision. Nor has petitioner explained how a decrease in potential density could "affect" the city's transportation facilities within the meaning of OAR 660-12-060(1), which is directed at ensuring that local governments do not permit types and densities of development inconsistent with designated road and highway capacities.[17]

The eleventh assignment of error is denied.

TWELFTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision is inconsistent with the Metro Urban Growth Management Functional Plan (Metro Plan) and not supported by adequate findings related to the Metro Plan.

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[17]We do not mean to suggest that plan and ordinance amendments resulting in low density residential development cannot, in particular circumstances, "significantly affect a transportation facility" within the meaning of OAR 660-12-060(1). However, petitioner has not attempted to demonstrate that any particular level or type of development threatens the function, capacity or level of service of any particular transportation facilities. Instead, petitioner relies on the unexplained premise that low-density residential development inevitably results in more vehicle miles traveled and hence more pressure on local roads compared to higher density development. That premise may have some validity in particular contexts, for example, where a city is expanding into rural, undeveloped lands. However, we understand from the present record that all of the projected residential development in the city is infill in nature. In that context, one could expect that low density residential development would create less pressure on local roads than higher density development.

According to petitioner, the Metro plan applies to all cities, such as the city of Rivergrove, within the Metro urban growth boundary. The Metro Plan requires that any amendment to a comprehensive plan or land use ordinance shall be consistent with the requirements of the Metro Plan. The Metro Plan's general purpose is to increase residential capacity within the urban growth boundary. To effect this purpose, the Metro Plan requires that local governments adopt by November 21, 1998, provisions that comply with the Metro Plan's standards. Those standards require local governments to include a "minimum density standard" within their comprehensive plans and land use ordinance. Further, if recent residential development has been at a "low density," defined as 80 percent or less of the maximum zoned density, the Metro Plan imposes additional requirements. The Metro Plan also requires cities to project the capacity of dwelling units and jobs by the year 2017, to determine if those capacities meet Metro targets, and to take additional steps if not.

Petitioner argues that the city has failed to adopt a "minimum density standard," and failed to consider whether recent development in the city has been at a "low density," and hence whether measures are necessary to increase density. Further, petitioner contends that the city has not projected the capacity of dwelling units and jobs to the year 2017 under

the new zoning and minimum lot size, or determined if those capacities meet Metro targets.

The city responds, dispositively, that the Metro Plan does not require compliance with the requirements petitioner relies upon until November 21, 1998. The city states that it informed Metro that the challenged ordinances were not intended to satisfy any requirements in the Metro Plan, and that the city intended a broader revision at a later date. Record 84. We agree with the city that the Metro Plan does not require the city to adopt "minimum density standards," address density issues, or project residential and job capacity until November 21, 1998, and that the challenged ordinances are not intended to satisfy those requirements. We conclude that the failure of the challenged ordinances to comply with the Metro Plan's requirements cited to us are not a basis to reverse or remand the city's decision.

The twelfth assignment of error is denied.

THIRTEENTH ASSIGNMENT OF ERROR

Petitioner argues that Ordinance 59-97 violates OAR 660-08-015, which requires that

> "[l]ocal approval standards, special conditions and procedures regulating the development of needed housing must be clear and objective, and must not have the effect, either of themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Section 5.050(a) as amended by Ordinance 59-97 requires that all residential structures must have at least two of five

listed design elements. Petitioner argues that two of the five design elements are not "clear and objective" and hence violate OAR 660-08-015. Petitioner objects to the following two design standards, at section 5.050(a)(3) and (5), respectively:

> "The dwelling shall have exterior siding and roofing which in color, material and appearance is similar to the exterior siding and roofing material commonly used on dwelling units within Rivergrove."

> "The dwelling shall have a garage or carport built of materials like the main dwelling."

Petitioner argues that both provisions require a subjective determination of whether siding and roofing are "similar" to other units and whether building materials on a garage or carport are "like" the main dwelling. According to petitioner, such subjective evaluation cannot be "clear and objective."

The city responds that both provisions are modeled after nearly identical language at ORS 197.307(5)(d) and (e), governing local regulation of manufactured dwellings.[18] The

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[18]ORS 197.307(5) provides:

> "A jurisdiction may adopt any or all of the following placement standards, or any less restrictive standard, for the approval of manufactured homes located outside mobile home parks:
>
> "* * * * *
>
> "(d) The manufactured home shall have exterior siding and roofing which in color, material and appearance is similar to the exterior siding and roofing material commonly used on residential dwellings within the community or which is comparable to the predominant materials used on surrounding dwellings as determined by the local permit approval authority.

city notes that OAR 660-08-015 is apparently based on and nearly identical to ORS 197.307(6), which is part of the same section as the standards at ORS 197.307(5)(d) and (e).[19] The city reasons that the consanguinity between ORS 197.307(5) and 197.307(6) shows that the legislature considered the standards at ORS 197.307(5) to be "clear and objective" standards. If so, the city argues, the city's identical standards should also be considered clear and objective as a matter of law. Further, even without reference to OAR 660-08-015's pedigree, the city disputes that either provision requires a subjective decision. The city argues that both provisions are directed at the perceivable attributes of objects (color, material, appearance) and hence are objective. The city cites to dictionary definitions of "objective" as relating to perceivable objects and "subjective" as relating to something that exists only in the mind, and concludes that, because section 5.050(a) refers to perceivable objects rather than phantasms of the mind, those standards are necessarily

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"* * * * *

"(f) The manufactured home shall have a garage or carport constructed of like materials. A jurisdiction may require an attached or detached garage in lieu of a carport where such is consistent with the predominant construction of immediately surrounding dwellings."

[19]ORS 197.307(6) states:

"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."

objective. The city suggests that merely because different persons might disagree about whether certain colors or materials are "similar" to others does not make the standards subjective.

We disagree with the city that the resemblance between its standards and the provisions of ORS 197.307(5), governing approval of manufactured homes, demonstrates that the city's standards are "clear and objective" as a matter of law. It is equally possible to read ORS 197.307(5) and (6) as allowing a local government to require manufactured homes to have exteriors similar to other residential dwellings, as long as those requirements are "clear and objective." We do not read ORS 197.307(5) and (6) to state or imply that such requirements are necessarily "clear and objective" as a matter of law.

Further, we disagree with the city that because the standards at section 5.050(a) invoke perceivable attributes of objects (color, material, appearance) that the standards are objective. The antonym of "objective" in this context is not "subjective," i.e. something existing only in the mind, but rather "discretionary." OAR 660-08-015 is directed at ensuring that local governments apply objective, nondiscretionary standards that do not have the effect of discouraging needed housing. It is apparent, as the city acknowledges, that different decision makers may disagree whether certain colors, materials, or appearances are "similar" or "like" others. We

cannot imagine how such standards could be applied without considerable discretion. Cf. 1000 Friends of Oregon v. LCDC (Hood River Co.), 91 Or App 138, 144, 754 P2d 22 (1988)(a standard disallowing conflicting uses if they have any adverse impact is nondiscretionary and hence clear and objective).

The thirteenth assignment of error is sustained.

The city's decision is remanded.