BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOME BUILDERS ASSOCIATION OF
LANE COUNTY and EUGENE
CHAMBER OF COMMERCE,
Petitioners,

and

REST-HAVEN MEMORIAL PARK
and CHARLES WIPER III,
Intervenors-Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

KEVIN MATTHEWS, ROBERT ZAKO,
JOHN KLINE and DAVID G. HINKLEY,
Intervenors-Respondent.

LUBA Nos. 2001-059 and 2001-063

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner Home Builders Association of Lane County and intervenors-petitioner.

Allen L. Johnson, Portland, filed a petition for review and argued on behalf of petitioner Eugene Chamber of Commerce. With him on the brief was Johnson and Sherton, PC.

Emily N. Jerome, Eugene, filed the response brief and argued on behalf of respondent. With her on the brief was Harrang, Long, Gary, Rudnick, PC.

Donna M. Matthews, Eugene, represented intervenor-respondent Kevin Matthews. David Hinkley, John Kline, and Robert Zako, Eugene, represented themselves.

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

REMANDED 02/28/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the city's adoption of a comprehensive update to Eugene Code (EC) chapter 9, the city's zoning and land division ordinance.

FACTS

In 1982, the Land Conservation and Development Commission (LCDC) acknowledged EC chapter 9 and the Eugene-Springfield Metro Area Comprehensive Plan (Metro Plan). Although it has been amended a number of times since 1982, EC chapter 9 has never had a comprehensive review and update. In 1994, the city initiated such a comprehensive review. The city conducted its review for over seven years, by means of a number of different proceedings, generating a 17,180-page record. The city's review, and the revised 428-page EC chapter 9, are both known as the Land Use Code Update (LUCU).[1]

The LUCU recodifies, with minor or no editorial changes, some preexisting provisions of EC chapter 9. It also extensively reorganizes the existing code, deletes a number of existing provisions, and adopts a number of new or amended provisions. As codified, the LUCU contains 10 large sections. LUCU 9.0000 contains general provisions, code enforcement provisions, and definitions. LUCU 9.1000 contains general provisions regarding zoning and nonconforming uses. LUCU 9.2000, 9.3000 and 9.4000 contain regulations for the city's base zones, special area zones, and overlay zones, respectively. The

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[1]By agreement of the parties, petitioner Home Builders Association of Lane County included the codified version of the LUCU as an appendix (Volume II) to its petition for review. Petitioner represents that Volume II is identical to Record pages 3 to 428, containing the uncodified version of the LUCU, with the exception that certain scriveners' errors have been corrected, and a table of contents added. We follow the parties in citing to code provisions according to the codified version in Volume II, rather than to the uncodified version in the record.

Further, we follow the city in referring to the updated version of EC chapter 9 adopted in this decision as "LUCU," while referring to the unamended version of EC chapter 9 as "EC," in order to more easily distinguish the two versions. The city also points out that the current codification scheme contains five digits ("9.####") while the unamended version contained four digits ("9.###"). Thus, we will refer to the current and former code, respectively, in the following format: "LUCU 9.####" and "EC 9.###."

9.2000s contain a new base zone, the Park, Recreation and Open Space zone. The 9.4000s contain new overlay zones. In the 9.5000s, the LUCU sets out standards for specific types of development, such as bed-and-breakfast facilities and multi-family housing. In the 9.6000s, the LUCU sets out nondiscretionary general development standards, intended for applications for building permits for developments that do not require land use approval. LUCU 9.7000 describes the different procedures applicable to different types of applications and proceedings. LUCU 9.8000 sets out application requirements and development criteria for discretionary land use applications. Some of the criteria in LUCU 9.8000 require compliance with the criteria in LUCU 9.6000. Finally, LUCU 9.9000 contains selected policies from the city's adopted refinement plans, incorporated into the city's code to comply with ORS 197.195, which requires such incorporation if those policies are to be applied to limited land use decisions.

The city initially adopted the LUCU on February 26, 2001. Petitioners separately appealed that decision to LUBA. LUBA consolidated the appeals on March 27, 2001. The city then withdrew its decision for reconsideration pursuant to ORS 197.830(13). On May 29, 2001, the city readopted the decision, unchanged except for the effective date. Petitioners refiled their notices of intent to appeal, and LUBA resumed its proceedings on these consolidated appeals.

OFFICIAL NOTICE

Petitioner Home Builders Association of Lane County (Home Builders) requests that the Board take official notice of several documents related to LCDC's acknowledgment of the Metro Plan in 1982. The documents are provided in an appendix (Volume III) to Home Builders' petition for review. No party objects to this request, and it is allowed.

Petitioner Eugene Chamber of Commerce (Chamber) requests that the Board take official notice of the entire Metro Plan, including the refinement plans and other documents and maps that have been added to or made a part of the Metro Plan since 1982. However,

Chamber states that it has been unable to secure from the city an authoritative and complete list of all the documents that comprise the Metro Plan. Therefore, Chamber requests that LUBA decline to take notice of any part of the Metro Plan cited by the city unless it determines that "a complete set of such documents" is "made available for review by Petitioners at least three weeks prior to oral argument." Chamber Petition for Review 12.

The city objects to Chamber's qualifications to its request for official notice. We agree that Chamber has not identified any legal basis for such a qualified request. Accordingly, we will take official notice of any part of the Metro Plan that the parties bring to our attention.

STANDING

The city disputes the standing of intervenors-petitioner, apparently on the grounds that intervenors-petitioner have not demonstrated that they "appeared" before the city, as required by ORS 197.830(2). Intervenors-petitioner join in the petition filed by Home Builders. Footnote 1 of Home Builders' petition states that intervenors-petitioner appeared during the proceedings below and cites to the record to support that statement. Absent some challenge from the city to that demonstration of standing, we conclude it is sufficient to satisfy ORS 197.830(2), and therefore intervenors-petitioner have standing in these appeals.

FIRST AND THIRD ASSIGNMENTS OF ERROR (HOME BUILDERS)

Home Builders' first and third assignments of error allege that the LUCU violates the needed housing statutes at ORS 197.307.[2] We address these assignments together.[3]

[2]Chamber's petition for review presents four assignments of error, and adopts by reference the three assignments of error in Home Builders' petition for review. Accordingly, unless more specific reference is necessary, we use "petitioners" to refer to both petitioners.

[3]Some of petitioners' arguments under these assignments of error relate to Goal 10 (Housing) and the adequacy of the city's buildable lands inventory. We address those arguments below.

I. Introduction

ORS 197.303(1) defines "needed housing" for purposes of ORS 197.307 as "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels," and includes a broad nonexclusive list of housing types.[4] In turn, ORS 197.307(3)(a) requires that "needed housing" shall be permitted in one or more zoning districts or overlay zones "with sufficient buildable land to satisfy that need."[5] ORS 197.307(4) allows local governments to set approval standards and procedures

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[4]ORS 197.303(1) provides:

> "As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:
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> "(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
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> "(b) Government assisted housing;
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> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and
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> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions."

[5]ORS 197.307(3) provides, in relevant part:

> "(a) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing, including housing for seasonal and year-round farmworkers, 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.
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> "(b) A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development of needed housing or to a permit, as defined in ORS 215.402 or 227.160, for residential development. The standards or conditions shall not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone.
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> "* * * * *

governing, and impose special conditions on, needed housing.[6] However, ORS 197.307(6) specifies that any such approval standards, special conditions or procedures shall be "clear and objective."[7]

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998), *aff'd* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 594 (1999), we discussed at length the history and meaning of ORS 197.303 and 197.307, specifically the requirement in ORS 197.307(6) that approval standards, special conditions or procedures applied to needed housing be "clear and objective." We concluded that, under these statutes, needed housing

> "is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." 35 Or LUBA at 158.

> "(d) In addition to an approval process based on clear and objective standards as provided in paragraph (b) of this subsection, a local government may adopt an alternative approval process for residential applications and permits based on approval criteria that are not clear and objective provided the applicant retains the option of proceeding under the clear and objective standards or the alternative process and the approval criteria for the alternative process comply with all applicable land use planning goals and rules."

[6]ORS 197.307(4) provides:

> "Subsection (3) of this section shall not be construed as an infringement on a local government's prerogative to:
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> "(a) Set approval standards under which a particular housing type is permitted outright;
>
> "(b) Impose special conditions upon approval of a specific development proposal; or
>
> "(c) Establish approval procedures."

[7]ORS 197.307(6) provides:

> "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."

We then examined a number of code provisions adopted by the city's legislative decision, and determined that many of them did not qualify as "clear and objective" under our understanding of that statutory term. In doing so, we held that code provisions that simply impose informational requirements—for example, requirements that the applicant submit information regarding the natural features of the site, or a geologic study in certain hazard zones—are not "approval standards" within the meaning of ORS 197.307(6). 35 Or LUBA at 158-59. We assumed, for purposes of that opinion, that such informational requirements could constitute "procedures for approval" under ORS 197.307(6). However, we held that, to the extent such informational requirements are not "clear and objective," that failure is not fatal, given that ORS 227.178(2) requires that the city "notify the applicant of exactly what information is missing within 30 days of receipt of the application." Viewed in context with ORS 227.178(2), we held, the city's provisions for informational requirements were sufficiently clear and objective. 35 Or LUBA at 159.

We further addressed an argument that several code provisions we found in violation of ORS 197.307(6) also violated ORS 197.307(3)(b), a provision that was added to the statute in 1997. *See* n 5. We remanded the decision to allow the city to explain whether any code provisions found not to be clear and objective under ORS 197.307(6) also violate ORS 197.307(3)(b). In so doing, we interpreted ORS 197.307(3)(b) as applying to standards or conditions only if "the standards or special conditions regulate *only* for appearance or aesthetic purposes." 35 Or LUBA at 166 (emphasis in original).

The petitioner in *Rogue Valley* appealed our decision to the Court of Appeals, challenging our conclusions that (1) insofar as informational requirements are subject to and fall short of the requirement to be "clear and objective," the city may supply clarity through the notices that ORS 227.178(2) requires the city to provide to applicants; and (2) ORS 197.307(3)(b) applies only to standards or conditions that regulate exclusively for appearance or aesthetics. The court affirmed both those conclusions. In resolving the first

contention, the court noted that the petitioner's challenge was a facial one to a legislative enactment. To succeed in such a facial challenge, the court stated, the petitioner "must demonstrate that the provisions are *categorically incapable* of being clearly and objectively applied under any circumstances where they may be applicable." 158 Or App at 4 (emphasis original; citing *Benson v. City of Portland*, 119 Or App 406, 850 P2d 416, *rev den* 318 Or 24 (1993)).

In response to LUBA's and the court's *Rogue Valley* decisions, the 1999 legislature passed HB 3410, which amended ORS 197.307(3)(b) and added new provisions, codified at ORS 197.831, 215.416(8) and 227.173(2). Regarding ORS 197.307(3)(b), section 1 of HB 3410 added the terms "in whole or part" to the current version of the statute. That change is apparently directed at LUBA's and the court's holding that ORS 197.307(3)(b) is applicable only to standards or conditions that are *exclusively* concerned with appearance or aesthetics.

Sections 2 and 3 of HB 3410 amended ORS 215.416 and 227.173, which govern approval or denial of a "permit," to state that:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

That change is apparently directed at LUBA's and the court's holding that notice required by ORS 227.178(2) can remedy a lack of clarity in an informational requirement, to the extent required by ORS 197.307(6).

Finally, section 5 of HB 3410, codified at ORS 197.831, added the following provision to the statutes governing LUBA's review:

> "In a proceeding before [LUBA] or on judicial review from an order of the board that involves an ordinance required to contain clear and objective approval standards for a permit under ORS 197.307 and 227.175, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards are capable of being imposed only in a clear and objective manner."

ORS 197.831 is apparently directed at the court's statement that, under a facial challenge to a legislative land use decision, the petitioner's burden is to demonstrate that the challenged provisions are categorically incapable of being applied clearly and objectively under any circumstances where they may be applicable.

A threshold issue in the present case is the effect of the 1999 amendments on LUBA's review of petitioners' arguments, that certain LUCU provisions violate the ORS 197.307(6) requirement that standards, conditions and procedures for approval be "clear and objective."[8] We understand petitioners to contend that the intent and effect of ORS 197.831 is to restore the burden and standard of review that existed prior to the court's *dictum* in *Rogue Valley*.[9] That standard, according to petitioners, has always placed on the *local government* the *ultimate* burden of demonstrating in a challenge to legislative adoption of land use regulations that its "legislative planning and zoning ordinances comply with state land use goals, rules and statutes." Chamber's Petition for Review 10. Further, petitioners argue, that standard has never placed on the petitioner the burden of demonstrating that the challenged regulations are "categorically incapable" of being applied clearly and objectively "under any circumstances where they may be applicable." 158 Or App at 4. According to petitioners, that very different and difficult burden belongs and is properly confined to review of regulatory takings challenges to a legislative enactment, such as that in *Benson v. City of Portland*, the case cited in the court's *Rogue Valley* decision.

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[8]As far as we can tell, petitioners do not argue that any LUCU provision violates ORS 197.307(3)(b).

[9]Chamber argues that the court's statement of the burden and its standard of review was *dictum*, because the ordinance provisions challenged in *Rogue Valley* prescribed local requirements for the content of applications, and were thus not "standards or procedures required to be clear and objective under ORS 197.307." Chamber's Petition for Review 9 n 2. As noted above, both LUBA and the court assumed, without deciding, that such informational requirements could constitute "procedures for approval" for purposes of ORS 197.307(6).

The city's response brief agrees with petitioners that ORS 197.831 is directed at the court's statement of the petitioner's burden in its *Rogue Valley* decision. Further, the city argues that ORS 197.831 essentially restores the burden and standard under ORS 197.307(6) that LUBA applied in its *Rogue Valley* decision. We do not understand petitioners to disagree on the latter point. Petitioners quote extensively and with apparent approval from our discussion of what "clear and objective" means under ORS 197.307(6), and cite our *Rogue Valley* decision frequently in arguing that specific LUCU provisions are not "clear and objective." Neither petition for review argues that the burden and standard under ORS 197.831 is different than the burden and standard that LUBA applied in *Rogue Valley*, or attempts to articulate what the difference might be. Accordingly, our analysis will assume that ORS 197.831 does not alter the burden and standard that we applied in our *Rogue Valley* decision. Under that decision, the city has the ultimate burden of demonstrating that the LUCU provisions challenged in the petitions for review are "clear and objective" within the meaning of ORS 197.307(6). Such standards are "clear and objective" if the local government demonstrates that the terms of the standards do not subject needed housing to "subjective, value-laden analyses that are designed to balance or mitigate impacts" on the subject property, other property or the community. 35 Or LUBA at 158.[10]

With that understanding of the applicable law, we turn to petitioners' challenges.

II. Petitioners' Challenges

ORS 197.307(3)(d) allows a local government to adopt an alternative approval process for residential applications and permits based on criteria that are not clear and objective, as long as the applicant has the option of proceeding instead under clear and objective criteria. *See* n 5; *see also Callison v. LCDC*, 145 Or App 277, 284 n 8, 929 P2d

[10]However, as we cautioned in *Rogue Valley*, few tasks are *less* clear or *more* subjective than attempting to determine whether a particular land use approval criterion is clear and objective. 35 Or LUBA at 155.

1061 (1996) (clear and objective criteria are not rendered otherwise simply because local governments provide an optional, alternative set of approval standards that are not clear and objective). As the city explains, the city designed the LUCU to offer two separate sets of approval criteria applicable to land use applications involving needed housing. The first track (needed housing track) is intended to contain only clear and objective criteria. The second is an optional, alternative track (alternative track) that includes criteria that are not intended to be clear and objective.

Petitioners advance three general types of challenges. First, petitioners contend that some of the criteria under the needed housing track contain terms or standards that are not in fact clear and objective. These criteria are identified in Table 1.1 of Home Builders' petition for review, which challenges over 100 LUCU provisions, organized in 31 categories.

Second, petitioners argue that some of the city's needed housing standards, even assuming they are clear and objective, are written in a manner that effectively prohibits and renders impossible the development of needed housing under clear and objective standards. Petitioners offer three examples or types of such standards, and argue that these types of standards violate the needed housing statutes because they essentially force the needed housing developer into seeking approval under the alternative track. Petitioners submit that forcing a needed housing applicant to pursue approval under the alternative track is inconsistent with the intent of the needed housing statutes.

Third, petitioners argue that a number of LUCU provisions, even if clear and objective, nonetheless violate ORS 197.307(6) because they "discourage needed housing through unreasonable cost or delay." These LUCU provisions do so by either (1) reducing the area of development sites that can be developed; (2) requiring additional amenities in connection with development; or (3) adding additional requirements for filing complete applications for development.

A. Clear and Objective

As noted, Table 1.1 in Home Builders' petition for review identifies 31 categories of standards that apply under one or more of six types of criteria for land use approvals under the needed housing track. Petitioners contend, in 31 footnotes attached to the table, that these standards are either not clear and objective, or require compliance with standards that are not clear and objective.[11]

The city offers a number of general and specific responses. The city's general defenses include several theories for why a number of the challenged provisions are not, in fact, subject to the ORS 197.307(6) requirement that they be "clear and objective." Finally, the city addresses each of the provisions identified in Table 1.1 and argues that, to the extent such provisions are required to be clear and objective, they satisfy that requirement. We first address the city's general defenses.

1. General Defenses

a. Purpose and Applicability Provisions

The city responds to certain challenges by arguing that the disputed code provisions merely state the purpose or define the applicability of other code provisions, and that such purpose or applicability provisions are not "standards" within the meaning of ORS 197.307(6).[12]

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[11]Correlating Table 1.1, its footnotes, and the parties' arguments about specific LUCU provisions is a frustrating exercise. In hindsight, we should not have accepted Home Builders' petition for review, because the bulk of its needed housing arguments are contained in a three-page table and accompanying pages of footnotes. Further, as discussed below, the bulk of its Goal 5 arguments are contained in a table accompanied by thirteen pages of footnotes. Aside from the difficulty that format presents in understanding Home Builders' arguments, the resulting compression allowed Home Builders to effectively circumvent the 50-page limit at OAR 661-010-0030(2)(b), without seeking the Board's permission.

[12]For example, petitioners argue that the purpose and applicability provisions of LUCU 9.5500(1) and (2) are not clear and objective. We quote representative portions of LUCU 9.5500(1) and (2):

> "**(1) Purpose of Multiple-Family Standards**. The purpose of these development standards is to:

We agree with the city that purpose or applicability provisions that by their terms *or the terms of other related code provisions* do not apply as approval criteria for needed housing are not "standards" within the meaning of ORS 197.307(6). ORS 197.307(6) does not require that such purpose or applicability provisions must be clear and objective. We agree with the city that the purpose and applicability provisions that it cites are not, by their terms or the terms of other related provisions, approval standards.[13]

b. Existing Code Provisions

The city contends that a number of petitioners' challenges to specific code language are challenges to existing code provisions that were carried forward from the EC with little or no substantive change.[14] The city concedes that the *application* of any such existing code

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> "(a) Ensure that new multiple-family development enhances the character and livability of Eugene's neighborhoods[.]
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> "* * * * *
>
> "**(2) Applicability of Multiple-Family Standards**
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> "(a) Except for building alterations and building additions that increase the square footage of livable floor area by less than 50%, multiple-family standards shall apply to all multiple family developments in all zones except commercial. In cases where the standards apply, they shall be considered applicable for the portion of the development site impacted by the proposed development.
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> "(b) Multiple family standards shall also apply to multiple family developments in commercial zones unless the entire ground floor, with the exception of areas for lobbies, stairs, elevators and bicycle storage for residents, is in non-residential use. * * * "

[13]The code provisions and challenges to which this defense applies are LUCU 9.5500(1) and (2) (Table 1.1, footnote 1); LUCU 9.6880 and 9.6882 (Table 1.1, footnote 3); LUCU 9.6730(1) and (2) (Table 1.1, footnote 7); LUCU 9.6750(1) (Table 1.1, footnote 8); and LUCU 9.6815(1) (Table 1.1, footnote 14).

[14]For example, petitioners argue that LUCU 9.6820(5) is not clear and objective. LUCU 9.6820(5) provides:

> "Where needed, the planning director shall require public accessways from a cul-de-sac longer than 150 [feet], measured from the centerline of the intersecting street to the radius point of the cul-de-sac[,] to provide safe, convenient, and direct circulation for pedestrians, bicyclists, and emergency vehicles."

provisions might be challenged in the context of a quasi-judicial decision on a specific needed housing application under ORS 197.307(6), but the city argues that whether such existing provisions are clear and objective cannot be challenged in the present appeal of the city's legislative decision.

Presumably, the city believes that our review of carried-forward standards in the present appeal would constitute an impermissible collateral attack on those standards. Although the city does not cite it, the most apt authority we find for that proposition is *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986). In *Urquhart*, LUBA remanded a plan amendment that applied a new land use designation to certain undeveloped lands that were not included in the plan's acknowledged Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) inventory, without first considering whether to add the lands to the plan's Goal 5 inventory. The Court of Appeals held that, if there was a defect in the regional plan, it was in the acknowledged Goal 5 inventory, and LUBA lacked authority to remand on the basis of a defect in the inventory that was not directly or indirectly attributable to the challenged plan amendment. However, we believe the present case is closer to *Dept. of Transportation v. Douglas County*, 157 Or App 18, 967 P2d 901 (1998). In that case, the county adopted a decision that was intended to comply with all requirements of the transportation planning rule. The petitioner argued that the rule required the county to amend certain plan and code provisions, and requested remand on the grounds that the county had failed to amend those provisions. LUBA concluded, based on the reasoning in *Urquhart*, that it had no authority to review the unamended

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The city argues that LUCU 9.6820(5) was carried forward from EC 9.045(7), which provided:

> "There shall be no cul-de-sac more than 400 feet long from the centerline of the intersecting street to the radius point of the cul-de-sac bulb. The planning director shall require public accessways from cul-de-sacs where necessary to provide safe, convenient, and direct circulation for pedestrians and bicyclists."

provisions for compliance with the rule. The court reversed, distinguishing *Urquhart* on several grounds, and holding that LUBA had authority to review the unamended provisions for compliance with the rule. Central to the court's analysis was its conclusion that, unlike *Urquhart*, the rule applied directly to the challenged decision, the county intended its decision to comply comprehensively with the rule, and the rule itself required compliance prior to the county's periodic review.

Here, the city concedes that ORS 197.307(6) applies directly to its decision, and that the LUCU represents a comprehensive effort to conform its land use regulations with the needed housing statutes.[15] What is particularly determinative in the present case is that the city intended its legislative enactment to implement and comply with the needed housing statutes. *Compare Volny v. City of Bend*, 37 Or LUBA 493, 502, *aff'd* 168 Or App 516, 4 P3d 768 (2000) (legislative amendment to city's transportation element of its comprehensive plan was not deficient for failure to adopt a transportation system plan required by administrative rule, where the challenged amendment was not intended to and did not have the effect of implementing the rule). The city does not dispute that its decision significantly amends its land use regulations governing housing in an effort to bring those regulations into compliance with the needed housing statutes, and that such amendments are subject to scrutiny under ORS 197.307(6). In such circumstances, the city cannot carry forward unamended or slightly amended portions of those regulations and expect they will be immune from challenge under ORS 197.307(6). In addition, the city does not dispute that application of any such carried-forward provisions in a future quasi-judicial decision may be subject to challenge under ORS 197.307(6). Given that concession, we see no reason to

[15]While ORS 197.307 does not itself require compliance at any particular time, ORS 197.646 requires that local governments amend their plan and land use regulations to implement new or amended statutes when those new or amended statutes become applicable to the local government.

defer the question of whether those unamended provisions are consistent with ORS 197.307(6).

c. Authority to Impose Conditions

The city responds to a number of petitioners' challenges by arguing that the disputed provision merely authorizes the city to impose certain conditions, and does not itself constitute either a "standard" or "condition" that can be challenged in the present legislative proceeding.[16] The city submits that if the city in fact imposes conditions that are not clear and objective, such conditions may be challenged in an appeal of the quasi-judicial decision imposing those conditions. However, the city argues, code provisions that merely authorize the imposition of conditions are not subject to scrutiny under ORS 197.307(6) in the present appeal of the city's legislative enactment.

We addressed a similar issue in our *Rogue Valley* decision, concluding that a provision allowing the city to impose certain conditions "if it is deemed necessary to mitigate any potential negative impact caused by the development," violated ORS 197.307(6). 35 Or LUBA at 159. We recognized that the conditions that might actually be imposed under that provision might be clear and objective. Nonetheless, we concluded that the city's authority to impose conditions under that provision was "highly discretionary and subjective," and therefore was not a clear and objective procedure. *Id.* at 160. In the present case, we similarly reject the city's categorical argument that a provision authorizing the city to impose conditions is immune from scrutiny under ORS 197.307(6). Depending on their terms, such

[16]For example, petitioners challenge LUCU 9.6845, as not constituting a clear and objective standard, special condition or procedure for approval:

> "Where necessary to insure safety, reduce traffic hazards and promote the welfare of the general public, pedestrians, bicyclists and residents of the subject area, the planning director or public works director may require that local streets and alleys be designed to discourage their use by non-local motor vehicle traffic and encourage their use by local motor vehicle traffic, pedestrians, bicyclists, and residents of the area."

provisions may constitute or contain "standards" or "procedures for approval." If so, such provisions must be clear and objective.

We now turn to the parties' arguments that specific LUCU provisions are not "clear and objective."

2. Specific Challenges

a. LUCU 9.5500

LUCU 9.8100 and 9.8445 require that, if applicable, the proposal comply with the multiple-family standards at LUCU 9.5500. Petitioners argue in Table 1.1, footnote 1 that LUCU 9.6420(3), cross-referenced in LUCU 9.5500(12)(b)(3), is not clear and objective. LUCU 9.6420(3) pertains to interior parking area landscaping, and requires that parking lots with more than a specified number of spaces include a specified square footage of landscaping per space.[17] In our *Rogue Valley* decision, we commented that "numerical or absolute" standards are almost paradigmatically "clear and objective." 35 Or LUBA at 154 n 20. We cited an example from the legislative history of ORS 197.307 referencing a similar

[17]LUCU 9.6420(3)(e)(1) provides:

> "In addition to the landscaping standards required in subsections (c) and (d), landscaping shall be provided within the interior of surface parking areas for 50 or more motor vehicles so as to:
>
> "a. Improve the visual qualities of these areas.
>
> "b. Delineate and define circulation movements of motorists and pedestrians.
>
> "c. Improve air quality.
>
> "d. Encourage energy conservation by moderating parking area microclimates.
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> "Parking area landscaping shall be provided according to Table 9.6420(3)(e)(3). Interior Parking Area Landscaping."

Table 9.6420(3)(e)(3) follows, prescribing 15 square feet of landscaping per parking space for lots with 50 to 99 spaces, and 22 square feet of landscaping per parking space for lots with 100 or more spaces.

numerical landscaping standard. 35 Or LUBA at 157 n 25. The city argues, and we agree, that the landscaping standards in LUCU 9.6420(3)(e)(1) are clear and objective.

Although petitioners do not assist us on this point, the target of their criticism may be language in LUCU 9.6420(3)(e)(1) that, the city contends, merely describes the purpose of the landscaping standards in LUCU 9.6420(3)(e)(1), (2) and (3), *e.g.*, to improve the visual qualities of the area, delineate circulation, improve air quality, and moderate parking lot microclimates. The city's position on this point would be stronger if it had separated this language from the undisputed standards in LUCU 9.6420(3)(e)(1), (2) and (3) and denominated the language as a purpose statement, as the city did with at least some other LUCU provisions. *See, e.g.*, LUCU 9.5500(1) at n 12. Notwithstanding that omission, we agree with the city that, read in context, the disputed language describes the goals furthered by complying with the clear and objective standards at LUCU 9.6420(3)(e)(1), (2) and (3), and does not itself function as an approval standard. This subassignment is denied.

b. Metro Plan Diagram

LUCU 9.8325(2) and 9.8520(2) both require that proposed land uses and densities within proposed development be "consistent with the land use designation(s) shown on the Metro Plan Land Use Diagram, as refined in any applicable refinement plan." The Metro Plan diagram is a large color-coded map that depicts plan designations in the Eugene-Springfield Metropolitan Area. *See* Response Brief App 5. The Metro Plan diagram does not depict individual lot or parcel lines, and it contains text noting that "[o]ne cannot determine the exact designation of a particular parcel of land without consulting the appropriate local jurisdiction." The text goes on to state that the "home jurisdiction will use the diagram to determine a site's plan designation" by relying on refinement plans, identifiable features on the diagram, the plan text, or other information that can support such a determination. *Id.*

We understand petitioners to argue, in Table 1.1, footnote 2, that the LUCU 9.8325(2) and 9.8520(2) requirements of consistency with the Metro Plan diagram designations are not clear and objective, because one cannot determine from the diagram itself the designation of any particular site and thus whether proposed uses and densities are consistent with that designation. Further, petitioners note that while some refinement plans contain plan designations for specific parcels, some do not.

The LUCU 9.8325(2) and 9.8520(2) consistency requirements are themselves clear and objective. The city argues, and we agree, that the absence of lot or parcel depictions from the Metro Plan diagram and from some refinement plans does not render LUCU 9.8325(2) and 9.8520(2) unclear or subjective. The diagram text requires the "home jurisdiction" to identify a site's designation, using the diagram, any applicable refinement plan, or other pertinent information. The needed housing applicant's obligation under LUCU 9.8325(2) and 9.8520(2) is to demonstrate that the proposed development is consistent with that designation. That the home jurisdiction may have to consult documents other than the diagram and applicable refinement plans in particular cases, in order to determine a site's designation, does not mean that the LUCU 9.8325(2) and 9.8520(2) consistency requirements are not clear and objective.[18] This subassignment is denied.

c. Preservation of Existing Natural Resources

LUCU 9.8100(3), 9.8325(4), 9.8445(3) and 9.8520(8) require preservation of existing natural resources, demonstrated by compliance with five criteria (a) through (e).[19] Petitioners argue in Table 1.1, footnote 3 that these five criteria are not clear and objective.

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[18]Petitioners advance an identical argument respecting LUCU 9.8220(5)(a) in Table 1.1, footnote 21. For the same reasons as expressed in the text, we conclude that LUCU 9.8220(5)(a) is clear and objective.

[19]LUCU 9.8100(3) is representative, and provides as follows:

> "The proposal will preserve existing natural resources by compliance with all of the following:

(i) Criteria (a)-(c)

Petitioners first argue that the requirements in criteria (a)-(c) for a 100-foot "perimeter" around the "area occupied" by rare plant populations and rare animal populations, and a 50-foot buffer protecting "waterways" measured from the "top of the bank," are not clear and objective, because the quoted terms are imprecise and not defined.

The city responds that the terms "perimeter," "area occupied," and "top of the bank" have plain and commonly understood meanings, and the lack of a precisely defined starting point for the required buffer zones does not mean that the disputed standards are not clear and objective. The city also argues that the term "waterways" has a plain and commonly understood meaning.[20]

> "a. All rare plant populations (those that are proposed for listing or are listed under State or Federal law) are preserved. The protected area shall include the area occupied by the plant population(s), plus a minimum 100 foot buffer around the perimeter of the plant population(s).
>
> "b. All documented habitat for all rare animal species (those that are proposed for listing or are listed under State or Federal law) is preserved. The protected area shall include the area occupied by the animal population(s), plus a minimum 100 foot buffer around the perimeter of the animal population(s).
>
> "c. All waterways are protected. Protected areas shall include the area between the banks and a minimum 50 foot buffer on each side of the top of the bank.
>
> "d. The proposal complies with EC 9.6880 to EC 9.6885 Tree Preservation and Removal Standards.
>
> "e. Natural resource areas designated on the Metro Plan diagram as 'Natural Resource' and areas identified in any city-adopted natural resource inventory are protected. Protection shall include the area of the resource and a minimum 50 foot buffer around the perimeter of the natural resource area."

[20]As framed, the parties' arguments tend to focus on whether particular *terms* in the challenged standards are clear and objective. We caution that the ultimate question under ORS 197.307(6) is whether the *standard* is clear and objective, viewed in context. That the standard may contain imprecise or ambiguous terms is a relevant and, depending on the terms and their function in the standard, perhaps sufficient, consideration in answering that ultimate question. However, the existence of imprecise or ambiguous terms in a standard does not *necessarily* resolve whether that standard violates ORS 197.307(6).

We noted in our *Rogue Valley* decision that even numerical standards such as setbacks and height limitations may "not always be entirely clear," because one must determine where the measurement begins. 35 Or LUBA at 154 n 20. We also noted that with respect to height limitations, many zoning ordinances include complicated formulas for determining the reference point from which height is measured. *Id.* The present issue is similar: whether a numerical standard is not "clear and objective" because the critical reference point from which the required measurement must begin is stated in undefined descriptive terms. We generally agree with the city that use of such terms does not necessarily offend ORS 197.307(6), at least where the terms have plain and commonly understood meanings, and the described referents can be located by a reasonable person with reasonable effort. However, we cannot say that the standards containing the disputed terms are clear and objective. It may be possible in many cases to determine the "area occupied" and hence the perimeter of a rare plant population, but the city does not explain how one can reasonably determine the "area occupied" by a rare animal population, which presumably is mobile to some degree. Absent delineation of habitat in an inventory or map, or some similar reasonable means of locating the described referents, we do not believe criteria (a) and (b) are clear and objective.

Similarly, determining whether a feature is a "waterway," and what is the "bank" or "top of the bank," requires considerably more assistance than the city's ordinance provides. The LUCU does not define "waterway," "bank" or "top of the bank," or provide any means of identifying and locating those referents, which have a multiplicity of meanings, with different geographic consequences. *See Willhoft v. City of Gold Beach*, ___ Or LUBA ___ (LUBA Nos. 2001-088/89, December 3, 2001) (describing the multiple meanings of "bank" and "top of bank" and the difficulty locating them). For that reason, criterion (c) is not clear and objective.

(ii) Criterion (d)

With respect to criterion (d), petitioners argue that the LUCU 9.6880-9.6883 standards referenced in criterion (d) contain unspecified procedures that are not clear and objective. Further, petitioners argue, LUCU 9.6885(2)(b) is ambiguous, because it does not clearly or objectively state what constitutes acceptable "consideration" of specified preservation priorities.[21]

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[21]LUCU 9.6885(2) sets forth standards for tree preservation and removal, and provides in relevant part:

> "No permit for a development activity subject to this section shall be approved until the applicant submits plans or information, including a written report by a certified arborist, that demonstrates compliance with the following standards:
>
> "(a) The following minimum percentages of the existing number of significant trees on the development site whose condition rating is 60 or higher (on a scale of 0 to 100) will be preserved:
>
> "1. 60% for projects on property zoned R-1.
>
> "2. 40% for projects on property zoned R-1.5 and R-2.
>
> "3. 40% for projects on property zoned R-3 and R-4. This percentage may be reduced to 20% providing the proposed project achieves at least 50% of the maximum density required for that zone.
>
> "4. 20% for projects on property zoned commercial, industrial, and public land.
>
> "5. 40% for projects on property in all other zones. * * *
>
> "(b) *The materials submitted shall reflect that consideration has been given to preservation in accordance with the following priority*:
>
> "1. Significant trees located adjacent to or within waterways or wetlands designated by the city for protection, and areas having slopes greater than 25%;
>
> "2. Significant trees within a stand of trees; and
>
> "3. Individual significant trees.
>
> "(c) That development will occur in a manner that protects at least 70% of the critical root zone of each tree retained under subsection (2)(a) above.

Petitioners do not identify what procedures in LUCU 9.6880-9.6883 they believe offend ORS 197.307(6), and we do not see that any procedure does so.

With respect to LUCU 9.6885(2)(b), the city responds that it simply requires that the application show "consideration" of certain priorities, and that such an informational requirement, to the extent it is subject to ORS 197.307(6), is clear and objective. We agree that LUCU 9.6885(2)(b) merely requires that the application reflect "consideration" of specified priorities and does not require that that consideration be adequate or acceptable. Petitioners' argument essentially reads a discretionary requirement into the code, that the consideration be "acceptable" in some manner. That requirement is not stated in LUCU 9.6885(2)(b) or necessarily implied. This subassignment of error is denied.

(iii) Criterion (e)

With respect to criterion (e), petitioners contend that references to the Metro Plan diagram's natural resource designations and any "city-adopted natural resource inventory" are unclear. Petitioners repeat their argument, discussed above, that the diagram does not depict property boundaries and thus cannot delineate the boundaries of natural resource areas. Finally, petitioners question whether the reference to "city-adopted natural resource inventory" includes only acknowledged Goal 5 inventories, or whether it includes other inventories, such as a 1991 Metro Natural Resources Study that the city apparently adopted but did not incorporate into its acknowledged Goal 5 inventory.

The city responds first that natural resource areas cannot be developed with housing and therefore criterion (e) simply does not implicate ORS 197.307(6). However, criterion (e) requires a buffer zone between development and a natural resource area, and presumably

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> "(d) If the proposal includes removal of any street tree(s), removal of those street trees has been approved, or approved with conditions according to the process at EC 6.320 Tree Removal and Replacement - Permit Decision." (Emphasis added.)

applies in circumstances where development, including needed housing, is proposed adjacent to a natural resource area. Therefore, criterion (e) implicates ORS 197.307(6).

The city next argues that natural resource areas are clearly delineated on the Metro Plan diagram, for the reasons described above. We agree that there seems no reason that the boundaries of designated natural resource areas cannot be located with precision using the diagram, refinement plans and other documents referenced by the diagram, for purposes of the 50-foot buffer required by criterion (e).

The city does not respond to petitioners' argument that the reference to "areas identified in any city-adopted natural resource inventory" is unclear, because it may include adopted inventories other than the city's acknowledged Goal 5 inventory. Petitioners identify one such adopted inventory, a 1991 natural resources study. We agree with petitioners that criterion (e) is ambiguous in that respect. The ambiguity may be significant, because if criterion (e) references inventories that do not follow the Metro Plan diagram's delineations, or do not provide their own delineations, then there may be no objective way to determine their boundaries and thus the reference point for the required 50-foot buffer. This subassignment of error is sustained, in part.

d. Complies with All Applicable Standards

LUCU 9.8100(4) requires that a conditional use proposal comply "with all applicable standards," and then sets forth a nonexclusive list of standards that might apply.[22] Petitioners

[22]As amended by Ordinance 20235, LUCU 9.8100(4) provides:

"The proposal complies with all applicable standards, including, but not limited to:

"(a) [LUCU] 9.6706 Development in Flood Plains through [LUCU] 9.6709 Special Flood Hazard Areas - Standards.

"(b) [LUCU] 9.6710 Geological and Geotechnical Analysis.

"(c) [LUCU] 9.6730 Pedestrian Circulation On-Site.

argue in Table 1.1, footnote 4 that the phrase "all applicable standards" invites argument over what standards are applicable, and thus is not clear and objective.

The city responds that the phrase "all applicable standards" does not render LUCU 9.8100(4) unclear or subjective, because it is the nature of the development proposal, rather than LUCU 9.8100(4), that dictates whether a standard applies. For example, the city argues, a needed housing proposal for multi-family housing must provide bicycle parking, while a proposal for a single-family-dwelling need not. We agree that, viewed in context, the phrase "all applicable standards" does not render LUCU 9.8100(4) unclear or subjective. Depending on the nature of the proposal, certain standards, for example floodplain or geological hazard standards, might or might not apply. The phrase "all applicable standards" simply recognizes that the nature or location of certain proposals may trigger different sets of standards. LUCU 9.8100(4) supplies a nonexhaustive list of possible standards. That it does not list every possible standard that might apply to every possible type of proposed development does not mean LUCU 9.8100(4) violates ORS 197.307(6). This subassignment of error is denied.

e. Compliance with LUCU 9.6705

LUCU 9.8100(4)(a), 9.8220(2)(d), 9.8325(7)(c), 9.8445(4)(c) and 9.8520(3)(d) each require compliance with LUCU 9.6705, which sets out the purpose of the city's floodplain development provisions. In footnote 5 to Table 1.1, petitioners argue that LUCU 9.6705 is

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"(d) [LUCU] 9.6735 Public Access Required.

"(e) [LUCU] 9.6750 Special Setback Standards.

"(f) [LUCU] 9.6775 Underground Utilities.

"(g) [LUCU] 9.6780 Vision Clearance Area.

"(h) An approved adjustment to a standard pursuant to the provisions beginning at [LUCU] 9.8015 of this land use code constitutes compliance with the standard."

not clear and objective. The city attaches to its brief Ordinance 20235, adopted October 10, 2001, which amends the predicate code provisions to remove the requirement that development comply with the purpose statement at LUCU 9.6705. Response Brief Appendix 27-29, 31-32.

For the reasons expressed above, a purpose provision that is not an approval criterion is not a "standard" that must comply with ORS 197.307(6). In addition, the city argues, and petitioners do not dispute, that Ordinance 20235 amended the LUCU to remove any requirement that needed housing comply with the purpose statement at LUCU 9.6705. Accordingly, we agree with the city that petitioners' challenge to LUCU 9.6705 is without merit.

f. Compliance with LUCU 9.6730

LUCU 9.8100(4)(c), 9.8325(7)(e), 9.8445(4)(e) and 9.8520(3)(f) each require that certain needed housing must comply with standards in LUCU 9.6730, which governs pedestrian circulation. *See* n 22 (*quoting* LUCU 9.8100(4)). In Table 1.1, footnotes 7 and 31, petitioners argue that LUCU 9.6730(3)(d) and (e) contain terms that are not clear and objective.[23]

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[23]LUCU 9.6730(3) provides in relevant part:

> "All on-site pedestrian paths provided for the purposes of complying with this land use code shall conform with the following standards:
>
> "* * * * *
>
> "(d) *Where necessary for traffic circulation*, on-site pedestrian paths may be intersected by driving aisles as long as the crossing is marked with striping or constructed with a contrasting paving material to indicate a pedestrian crossing area.
>
> "(e) On-site vehicular and pedestrian circulation shall be designed to *minimize* vehicular/pedestrian conflicts at driveway crossings within parking lots and at vehicle ingress/egress points." (Emphasis added.)

Petitioners argue that use of the terms "where necessary" and "minimize" in LUCU 9.6730(3)(d) and (e) render those provisions unclear and subjective. The city responds that Ordinance 20235 deletes the term "minimize" from LUCU 9.6730(3)(e) and thus moots petitioners' challenge to that provision. However, the city does not direct us to the pertinent section of Ordinance 20235. The only section of the ordinance we find affecting LUCU 9.6730 is section 27, at Response Brief App 21, but that section amends LUCU 9.6730(3)(*b*), not (*e*), and the amendment has nothing to do with the term "minimize." Accordingly, the city has not demonstrated that petitioners' challenge to LUCU 9.6730(3)(e) is moot.

With respect to subsection (d), the city argues that the terms "where necessary for traffic circulation" merely recognize that some applications will not propose development in which driving aisles intersect pedestrian paths, and thus subsection (d) will not apply. Read in isolation, the terms "where necessary for traffic circulation" might be understood as surplusage, as the city asserts. However, read together, LUCU 9.6730(3)(d) and (e) require that the proposed parking lots and driveways present the fewest possible conflicts between pedestrians and vehicles, and that any proposed intersections between driving aisles and pedestrian paths be "necessary for traffic circulation." These are substantive, vague requirements that grant the city considerable discretion in approving or denying needed housing. Consequently, LUCU 9.6730(3)(d) and (e) are not clear and objective.

g. Adjustments under LUCU 9.8015

LUCU 9.8100(4)(h), 9.8220(2), 9.8325(7), 9.8445(4) and 9.8520(3) each provide that "[a]n approved adjustment to a standard pursuant to the provisions beginning at [LUCU] 9.8015 of this land use code constitutes compliance with the standard." The adjustment process at LUCU 9.8015 to 9.8030 is similar to the variance process that allows deviation from certain standards contained elsewhere in the code. For example, LUCU 9.5500(6)(a) prescribes numerical maximum building massing standards for multi-family housing. LUCU 9.8030(8)(a) allows relief from the limits at LUCU 9.5500(6)(a) if the applicant

demonstrates, among other things, that the adjustment "[c]reate[s] a vibrant street façade with visual detail."

Petitioners argue that the adjustment process at LUCU 9.8015 contains standards that are not clear and objective, and therefore LUCU 9.8100(4)(h), 9.8220(2), 9.8325(7), 9.8445(4) and 9.8520(3) are not clear and objective. The city responds, and we agree, that LUCU 9.8100(4)(h), 9.8220(2), 9.8325(7), 9.8445(4) and 9.8520(3) merely state that an adjustment to a standard constitutes compliance with that standard. The city may provide a needed housing applicant with a choice between meeting a clear and objective standard by complying with its terms *or* by obtaining a discretionary variance or adjustment to that standard without offending ORS 197.307(6). *See* ORS 197.307(3)(d) and *Callison*, 145 Or App at 284 n 8. This subassignment of error is denied.

h. Features Included in the Application

LUCU 9.8220(2)(k), 9.8325(12), 9.8445(4)(j) and 9.8520(10) each require that the applicant show compliance with "applicable development standards explicitly addressed in the application," or words of similar effect. Petitioners argue, in Table 1.1, footnote 10, that this language invites argument over what standards are "explicitly addressed" in the application and what the applicable standards might be.

The city explains that, under the old code, certain standards such as landscaping standards would be addressed only at the building permit stage. According to the city, the intent of the disputed language is to allow an applicant to choose to address such standards at the initial development permit stage. If an applicant chooses to explicitly address such standards in their initial development application, the city argues, the city will review and approve those standards along with the initial development permit. The city argues, and we agree, that the disputed standards are clear and objective. This subassignment of error is denied.

i. Lot Dimension and Density Requirements

LUCU 9.8220(2)(a), 9.8325(7)(a), 9.8445(4)(a) and 9.8520(3)(a) each require that the applicant show compliance with standards at LUCU 9.2000 through 9.3915 regarding lot or parcel dimensions and density requirements. Petitioners argue that "[t]he majority of the provisions contained in [LUCU] 9.2000-9.3915 do not constitute clear and objective standards and, furthermore, are not relevant to needed housing." Table 1.1, footnote 11.[24]

LUCU 9.2000 through 9.3915 occupy more than 100 pages of the city's code, and set forth a large number of requirements, including lot or parcel dimensions and density requirements applicable in each of the city's many zones and subzones. The city argues that it cannot respond, because petitioners have made no effort to identify which of these many requirements petitioners believe are not clear and objective, much less why. We agree that, absent some assistance from petitioners, we cannot perform our review function. We therefore do not consider petitioners' arguments concerning these provisions. This subassignment of error is denied.

j. Emergency Response Time

LUCU 9.8325(7)(j) and 9.8520(7) require for approval of a planned unit development or subdivision that "[n]ew dwellings shall be within a 4-minute response time for emergency medical services." LUCU 9.8220(6) imposes a similar five-minute requirement for approval of a partition. Petitioners argue in Table 1.1, footnotes 12 and 13, that these response time requirements are not clear and objective, because it is not clear how the response time is measured, and what assumptions are made about the time of day, traffic, etc. Petitioners note that during the proceedings below city staff produced maps showing the current four-minute and five-minute response times in the city, and concede that such maps, if adopted into the

[24]Home Builders does not identify, and we are not aware of, any requirement that standards applied to needed housing be "relevant to needed housing." Any standards applied to needed housing must, of course, be clear and objective.

LUCU, would be clear and objective. Record 1878-80. However, petitioners argue, the city did not adopt such maps, and without them it is uncertain how a needed housing applicant can determine whether or not proposed development is permitted under LUCU 9.8325(7)(j) and 9.8520(7).[25]

The city responds that the response time requirements are numeric and quantifiable, as evidenced by the maps city staff produced during the proceedings below. If the standard is written so clearly that a map can be produced showing the permitted and prescribed areas, the city argues, it is clear and objective.

The city's response does not explain how response time is calculated or how, absent adoption of maps or a clear method of delineation, a needed housing applicant can reasonably determine whether proposed development is permitted under LUCU 9.8325(7)(j) and 9.8520(7). Presumably a number of variables could have been applied in producing the maps, including the current location or service area of emergency response providers and assumptions about speed, traffic, etc. Those variables, particularly the current location or service area of providers, will likely change over time. It is not clear whether the city envisions that city staff will calculate whether an applicant's proposal falls within the current response time area, or that the applicant must perform the calculations. Under either scenario, it is unclear how that calculation is made. ORS 227.173 requires that ordinance provisions that apply to needed housing "must be clear and objective on the face of the ordinance." The response time requirement does not meet that standard. This subassignment of error is sustained.

[25]As discussed below, the LUCU provides that if property lies outside the response time limits, it may still be developed, but only under discretionary standards. We address, below, petitioners' challenges to those LUCU provisions.

k. Street Standards

LUCU 9.8220(2)(b), 9.8325(6)(a) and 9.8520(3)(b) require that partitions, PUDs and subdivisions comply with the street, alley and public ways standards at LUCU 9.6800 through 9.6870. Petitioners argue in Table 1.1, footnote 14 that a number of provisions at LUCU 9.6800 through 9.6870 are not clear and objective.

(i) Dedication of Public Ways

LUCU 9.6805 allows the city to require dedication of public ways as a condition of approval, subject to constitutional limitations, and to require that the applicant design and locate any such public ways according to the LUCU 9.0020 purpose statement.[26] The city argues that LUCU 9.6805 is not a standard, but simply authority to impose conditions, and thus need not be clear and objective. We rejected that general defense, above. We agree with petitioners that the second sentence of LUCU 9.6805, requiring that the applicant design and locate dedicated public ways to facilitate community needs according to the LUCU 9.0020 purpose statement, is not clear and objective. This subassignment of error is sustained.

(ii) Options to Dedication

LUCU 9.6815(2)(a) requires that all streets and alleys shall be public unless the developer demonstrates that dedication "is not necessary" to comply with the code or the

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[26]LUCU 9.6805 provides:

> "As a condition of any development, the city may require dedication of public ways for bicycle and/or pedestrian use as well as for streets and alleys, provided the city makes findings to demonstrate consistency with constitutional requirements. The public ways to be dedicated to the public by the applicant shall be of such design and location as necessary to facilitate provision for the transportation and access needs of the community and subject property according to [LUCU] 9.0020 Purpose."

LUCU 9.0020 describes the purpose of the zoning ordinance, including "to protect and promote the health, safety, and general welfare of the public and to preserve and enhance the economic, social, and environmental qualities of the community."

street connectivity requirements at LUCU 9.6815(2)(b) to (f).[27] The city argues, and we agree, that the dedication requirement is clear and objective. That the city provides an

[27]LUCU 9.6815(2) provides in relevant part:

"(a) All streets and alleys shall be public unless the developer demonstrates that a public street or alley is not necessary for compliance with this land use code or the street connectivity standards of subparagraphs (b) to (f) of this subsection.

"(b) The proposed development shall include street connections in the direction of all existing or planned streets within 1/4 mile of the development site. The proposed development shall also include street connections to any streets that abut, are adjacent to, or terminate at the development site. * * *

"(c) The proposed development shall include streets that extend to undeveloped or partially developed land that is adjacent to the development site or that is separated from the development site by a drainage channel, transmission easement, survey gap, or similar property condition. The streets shall be in locations that will not prevent the adjoining property from developing consistent with applicable standards.

"(d) The proposed street alignment shall minimize excavation and embankment and avoid impacts to natural resources, including water-related features.

"(e) The requirements of subparagraphs (b) and (c) of this subsection do not apply if it is demonstrated that a connection cannot be made because of the existence of one or more of the following conditions:

"1. Physical conditions preclude development of the connecting street. Such conditions may include, but are not limited to, topography or likely impact to natural resource areas such as wetlands, ponds, streams, channels, rivers, lakes or upland wildlife habitat area, or a resource on the National Wetland Inventory or under protection by state or federal law.

"2. Buildings or other existing development on adjacent lands, including previously subdivided but vacant lots or parcels, physically preclude a connection now or in the future, considering the potential for redevelopment.

"(f) In cases where a required street connection would result in the extension of an existing street that is not improved to city standards and the street has an inadequate driving surface, the developer shall construct a temporary barrier at the entrance to the unimproved street section with provision for bicycle, pedestrian, and emergency vehicle access. The barrier shall be removed by the city at the time the existing street is improved to city standards or to an acceptable standard adopted by the public works director. In making a determination of an inadequate driving surface, the public works director shall consider the street rating according to Eugene's Paving Management System and the anticipated traffic volume."

alternative to dedication that is not clear and objective does not offend the statute. This subassignment of error is denied.

(iii) Street Connectivity Standards

Petitioners argue that certain terms in LUCU 9.6815(2)(b) to (f) are not clear and objective. *See* n 27.

LUCU 9.6815(2)(c) requires street extension to adjacent undeveloped land, even if that land is separated by listed property conditions, including any property condition "similar" to those listed. Because the listed property conditions are specifically described, it is sufficiently clear what property conditions may be "similar."

LUCU 9.6815(2)(f) requires that the developer take certain actions when an existing street to which a connection is required has "an inadequate driving surface." While that phrase, considered in isolation, may be unclear or allow the city impermissible discretion, LUCU 9.6815(2)(f) goes on to specify that the city's determination of "inadequate driving surface" shall be based on the street rating in the city's rating system and the anticipated traffic volume. Considered as a whole, LUCU 9.6815(2)(f) is clear and objective.

However, we agree with petitioners that, without further specification, the following provisions are impermissibly vague and discretionary: the LUCU 9.6815(2)(c) requirements that proposed street alignment "will not prevent the adjoining property from developing consistent with applicable standards," the LUCU 9.6815(2)(d) requirement that the proposed street alignment "shall minimize excavation and embankment" and shall "avoid impacts to natural resources," and the LUCU 9.6815(2)(e) provisions that exempt development from the street extension requirement where physical conditions "preclude" the connection. This subassignment of error is sustained, in part.

(iv) Cul-de-Sac Standards

Petitioners challenge several provisions in LUCU 9.6820, governing cul-de-sacs.[28] LUCU 9.6820(1)(b) specifies that an exception to the cul-de-sac requirement is warranted when "topographic constraints, existing development, or natural features prevent" construction of a cul-de-sac. Petitioners argue that it is not clear when, or in whose judgment, circumstances will "prevent" construction of a required cul-de-sac. We agree

Petitioners also argue that LUCU 9.6820(2) and (5) grant the city impermissible discretion in approving temporary turnarounds and requiring public accessways off a cul-de-sac. The city responds that LUCU 9.6820(2) simply provides authority to impose conditions but is not itself a standard, and that LUCU 9.6820(5) was carried over from a preexisting code provision and is thus not subject to ORS 197.307(6). However, LUCU 9.6820(2) does more than provide authority to impose conditions; the first sentence imposes an approval

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[28]LUCU 9.6820 provides in relevant part:

> "(1) All streets that terminate shall be designed as a cul-de-sac bulb, except when any of the following conditions exist:
>
> > "(a) The street will be extended in the future.
> >
> > "(b) Topographic constraints, existing development, or natural features prevent the construction of a bulb.
> >
> > "(c) The street is less than 150 feet long.
>
> "(2) If a street qualifies for exception under subsection (1)(a), a temporary easement shall be provided and a turnaround of suitable strength constructed in an alternative location approved by the planning director. Conditions such as signage, restrictive covenants, or maintenance agreements may be required by the planning director to ensure that the turnaround area remains in good repair and available for use as intended.
>
> "* * * * *
>
> "(5) Where needed, the planning director shall require public accessways from a cul-de-sac longer than 150', measured from the centerline of the intersecting street to the radius point of the cul-de-sac[,] to provide safe, convenient, and direct circulation for pedestrians, bicyclists, and emergency vehicles."

standard. For reasons explained above, that LUCU 9.6820(5) is carried forward from a preexisting provision does not obviate compliance with ORS 197.307(6). We agree with petitioners that LUCU 9.6820(2) and (5) are not clear and objective standards. This subassignment of error is sustained.

(v) Street Intersections

LUCU 9.6830(1)(a) requires that "[s]treets and alleys shall intersect one another at an angle as near to a right angle as is *practicable* considering [the] topography of the area and previous adjacent layout." (Emphasis added.) Petitioners argue that the term "practicable" renders the provision unclear and subjective.

The city responds that LUCU 9.6830(1)(a) imposes an absolute, clear and objective requirement: streets must intersect at right angles. According to the city, that LUCU 9.6830(1)(a) also provides, under specified circumstances, for an alternative that achieves the maximum possible adherence to that absolute does not render it unclear or subjective. We agree. This subassignment of error is denied.

(vi) Public Accessways

Petitioners argue that portions of LUCU 9.6835 are vague and discretionary.[29] The city makes no attempt to demonstrate that LUCU 9.6835 is clear and objective, and we conclude that it is neither clear nor objective. This subassignment of error is sustained.

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[29]LUCU 9.6835 provides in relevant part:

> "(1) When necessary to provide safe, convenient and direct access for pedestrians and bicyclists to and from nearby residential areas, transit stops, neighborhood activity centers, and other commercial and industrial areas, or where required by adopted plans, the city shall require within the development the dedication to the public and improvement of accessways to connect to cul-de-sacs, or to pass through blocks, provided the city makes findings to demonstrate consistency with constitutional requirements. 'Nearby' means uses within 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists. * * *
>
> "(2) When necessary to provide connectivity, the city shall require improvements to existing unimproved public accessways on properties adjacent to the development,

(vii) Special Safety Requirements

LUCU 9.6845 states that the city may require that local streets be designed to discourage their use by non-local traffic.[30] Petitioners contend that the city's discretion in imposing such requirements, *i.e.*, "where necessary to insure safety" etc., renders LUCU 9.6845 unclear and subjective.

The city responds that LUCU 9.6845 is not a standard or procedure subject to ORS 197.307(6), but simply a potential basis for attachment of a condition of approval. We disagree. LUCU 9.6845 is a "standard" subject to ORS 197.307(6) because, as applied in multi-stage partitions, PUDs and subdivisions, it functions as an approval criterion. If the city approves a tentative subdivision plat with a condition that the final plat must show changes to conform to LUCU 9.6845, and the city denies the final plat if those changes are not made, then LUCU 9.6845 is an approval criterion. Therefore, it must be clear and objective. The city makes no effort to demonstrate that it is so. This subassignment of error is sustained.

(viii) Transit Facilities

LUCU 9.6865(1) and (2) allow the city to require additional right-of-way or other improvements to develop transit facilities "where a need" for such facilities "has been identified." Petitioners argue that these provisions are not clear and objective. The city

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> provided the city makes findings to demonstrate consistency with constitutional requirements. Said improvements to unimproved public accessways shall connect to the closest public street or developed accessway. Where possible, accessways may also be employed to accommodate the uses included in [LUCU] 9.6500 Easements."

[30]LUCU 9.6845 provides:

> "Where necessary to insure safety, reduce traffic hazards and promote the welfare of the general public, pedestrians, bicyclists and residents of the subject area, the planning director or public works director may require that local streets and alleys be designed to discourage their use by non-local motor vehicle traffic and encourage their use by local motor vehicle traffic, pedestrians, bicyclists, and residents of the area."

makes no attempt to demonstrate that they are clear and objective and we conclude that they are neither clear nor objective.

l. Public Improvement Standards

LUCU 9.8220(2)(c), 9.8325(7)(b), 9.8445(4)(b) and 9.8520(3)(c) respectively require that applications for partitions, PUDs, site design and subdivision involving needed housing comply with standards for public improvements at LUCU 9.6500 through 9.6510. In Table 1.1, footnote 15, petitioners contend that several provisions in LUCU 9.6500 through 9.6510 are not clear and objective.

LUCU 9.6500(2) provides that "[e]asements may be required along lot or parcel rear lines or side lines, or elsewhere as necessary to provide needed facilities for present or future development of the area." Petitioners argue that LUCU 9.6500 fails to define what "needed facilities" are. However, LUCU 9.6500(1) discusses easements for "wastewater sewers and other public utilities." Viewed in context, it is clear that the "needed facilities" referenced in LUCU 9.6500(2) are the facilities discussed in other provisions of LUCU 9.6500.

LUCU 9.6505(3) states that a developer shall pave all streets and alleys on the development site and that "the city manager may require the developer to pave streets and alleys that are impacted by the development." Petitioners contend that the quoted language is not clear and objective, because it is unclear which streets and alleys are "impacted" by development. The city does not attempt to demonstrate otherwise. We agree that the quoted language is neither clear nor objective.

LUCU 9.6505(4) states that sidewalks shall be located, designed and constructed "according to the provisions of this land use code * * * and other adopted plans and policies." LUCU 9.6505(5) includes identical language regarding bicycle paths. Petitioners contend that the quoted language invites argument in identifying what are the applicable standards, and thus is not clear and objective. We disagree. The quoted language simply

refers to other standards, and is sufficiently clear and objective to comply with ORS 197.307(6).

Finally, LUCU 9.6510 states that the city may require the applicant to provide "adequate" drainage by constructing facilities "adequate for the drainage needs of the area." Petitioners argue that LUCU 9.6510 is vague and discretionary. The city does not attempt to demonstrate otherwise. We agree with petitioners that LUCU 9.6510 is neither clear nor objective. This subassignment of error is sustained, in part.

m. Grading on Steep Sites

LUCU 9.8325(5) and 9.8520(5) provide that for PUD or subdivision applications involving needed housing, "[t]here shall be no proposed grading on portions of the development site that meet or exceed 20% slope." Petitioners contend that this requirement is not clear and objective, because the code does not explain what method should be used to determine slope. The city responds, and we agree, that the slope of a property is an objectively determinable fact, and the absence of instructions on how to determine slope does not offend ORS 197.307(6).[31] This subassignment of error is denied.

n. Pedestrian, Bicycle and Transit Circulation

LUCU 9.8220(5)(b), 9.8325(6)(b) and 9.8520(6)(a) provide that partitions, PUDs and subdivisions shall provide for pedestrian, bicycle and transit circulation.[32] In Table 1.1,

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[31]For the same reason, we reject petitioners' challenge in Table 1.1, footnote 27, to LUCU 9.8520(11), which regulates development within the South Hills Study Area on slopes that exceed 20 percent.

[32]LUCU 9.8220(5)(b), 9.8325(6)(b) and 9.8520(6)(a) provide:

> "[The applicant shall provide] pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. 'Nearby' means uses within 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists."

footnote 17, petitioners contend that these provisions are not clear and objective, because they do not specify when pedestrian, bicycle and transit circulation is "needed," and because they require discretionary determinations such as whether uses exist within two miles that can "reasonably be expected to be used" by bicyclists.

The city responds that pedestrian, bicycle and transit circulation are "needed" depending on whether such circulation is required in the code for the type of development proposed. However, LUCU 9.8220(5)(b), 9.8325(6)(b) and 9.8520(6)(a) do not say that, and the city identifies no other provisions that specify when pedestrian, bicycle and transit circulation are "needed" for partition, PUD and subdivision approval. We agree with petitioners that these provisions are not clear and objective. This subassignment of error is sustained.

o. Required Public Improvements

LUCU 9.8100(5) and 9.8445(5) require for conditional use or site review approval that the applicant show that required public improvements are in place. If such improvements are not in place, the applicant must either (1) post a performance bond, or (2) file a petition for public improvements, and the petition must be accepted by the city engineer.[33] Petitioners argue in Table 1.1, footnote 18, that the requirement to show that public improvements are in place is not clear and objective. Further, petitioners argue that

[33]LUCU 9.8100(5) and 9.8445(5) require for conditional use permit or site review approval that:

> "Public improvements as required by this land use code or as a condition of tentative plan approval have been completed, or:
>
> "(a) A performance bond or suitable substitute as agreed upon by the city has been filed with the city finance officer in an amount sufficient to assure the completion of all required public improvements; or
>
> "(b) A petition for public improvements and for the assessment of the real property for the improvements has been signed by the property owner seeking the [approval], and the petition has been accepted by the city engineer."

the second option is not clear and objective, because it fails to state standards under which the city engineer is required to accept a petition for public improvements, and standards for the assessment of the real property for the improvements.

Petitioners do not explain why the public improvement requirement is unclear or subjective, and we do not see that it is. It simply refers to public improvements required by other LUCU provisions or in a tentative plan approval. Although no party points them out to us, the second option presumably is governed by standards governing city approval of petitions for local improvement districts, in EC chapter 7. Petitioners do not explain why such standards violate ORS 197.307(6), or argue that the first option is not clear and objective. This subassignment of error is denied.

p. Existing Improvements

LUCU 9.8220(3) and 9.8520(4) require that applications for partitions and subdivisions show that the proposal will not cause "existing improvements on proposed lots" to be inconsistent with applicable LUCU standards. Petitioners contend, in Table 1.1, footnote 19, that these standards invite argument over what standards are "applicable" and when the proposal would cause existing improvements to be "inconsistent" with such standards.

The evident intent of LUCU 9.8220(3) and 9.8520(4) is to prevent development from rendering existing improvements nonconforming with respect to other LUCU standards. As explained above, that code provisions refer generally to other applicable standards, without listing those standards, does not in and of itself offend ORS 197.307(6). Whether existing improvements are rendered nonconforming with other applicable standards depends on the terms of those other standards, not on LUCU 9.8220(3) and 9.8520(4), which are themselves clear and objective. We reject petitioners' challenge to LUCU 9.8220(3) and 9.8520(4).

q. Access Management Guidelines

LUCU 9.8220(4) requires that partitions abutting collector and arterial streets comply with "access management guidelines of the agency having jurisdiction over the street." Petitioners argue, in Table 1.1, footnote 20, that ORS 197.307(6) requires s*tandards*, not *guidelines*. However, LUCU 9.8220(4) is itself a standard, one that requires compliance with certain guidelines, which thereby function as mandatory approval standards, despite their label. Petitioners make no argument that LUCU 9.8220(4) or the applicable guidelines are not clear and objective. For that reason we reject petitioners' challenges to LUCU 9.8220(4).

r. Availability of Public Facilities and Services

LUCU 9.8325(8) requires for PUD approval a showing that "[p]ublic facilities and services are available to the site[.]" Petitioners argue, in Table 1.1, footnote 22, that this standard is unclear because it does not define "public facilities and services," or specify the level of facilities and services sufficient to constitute being "available."

Nothing in the text or context of LUCU 9.8325(8) indicates the scope of "public facilities and services," nor clarifies whether inadequate facilities and services are nonetheless "available." We agree that LUCU 9.8325(8) is not clear and objective.

s. Future Land Division

LUCU 9.8220(7) and 9.8520(9) require that partition and subdivision applications proposing parcels or lots in excess of 13,500 square feet shall indicate that such parcels or lots can be further divided without violating the code or "interfering with the orderly extension of adjacent streets, bicycle paths and accessways." LUCU 9.8220(7) and 9.8520(9) also provide that "[i]f the planning director deems it necessary" for future land division, "any restriction of buildings" within future streets, paths or accessways "shall be made a matter of record" in the plat approval. Petitioners argue, in Table 1.1, footnote 23, that the above-quoted language is unclear and grants the city impermissible discretion.

The city responds that it will be sufficiently obvious in any given case whether or not future division of an oversize lot or parcel will interfere with future streets, paths or accessways. We agree. LUCU 9.8220(7) and 9.8520(9) require the application to show, by the location of property lines and other details, whether an oversize lot or parcel can be divided under the code. The application must also show that such future division will not interfere with extension of adjacent streets and paths. Whether such interference exists or not should be evident on the face of the partition or subdivision plat.

However, the second sentence of LUCU 9.8220(7) and 9.8520(9) grants the city discretion to restrict the location of buildings on the plat and make any such restrictions a "matter of record" in the plat approval. The city does not attempt to demonstrate that such grant of discretion is consistent with ORS 197.307(6). That aspect of LUCU 9.8220(7) and 9.8520(9) is not clear and objective. This subassignment of error is sustained, in part.

t. Dwellings within One-Quarter Mile of Park

LUCU 9.8325(9) requires that all proposed dwellings within a PUD be within one-quarter mile of a recreation area or open space. Petitioners argue, in Table 1.1, footnote 24, that the "method for measuring distance" in LUCU 9.8325(9) is not clear and objective. We understand petitioners to argue that it is fundamentally unclear whether the one-quarter mile distance is measured by how the crow flies, or by surface streets. The potential difference, we agree, is considerable. LUCU 9.8325(9) is not clear and objective.

u. Stormwater Runoff

LUCU 9.8325(10) requires that a PUD application demonstrate that:

> "Stormwater runoff from the PUD will not create negative impacts on natural drainage courses either on-site or downstream, including, but not limited to, erosion, scouring, turbidity, or transport of sediment due to increased peak flows or velocity."

Petitioners argue, in Table 1.1, footnote 25, that discretionary terms such as "negative impacts" in LUCU 9.8325(10) are unclear and subjective. The city responds that LUCU

9.8325(10) does not require discretion or the exercise of judgment; it simply requires *no* negative impacts from increased peak flows or velocity. While that standard may be difficult to meet, the city argues, it is clear and objective. We agree. *See 1000 Friends of Oregon v. LCDC (Hood River Co.)*, 91 Or App 138, 143, 754 P2d 22 (1988) (prohibition on any adverse impact on identified resources is clear and objective). LUCU 9.8325(10) is a prohibition on negative impacts of the type listed, caused by increased peak flows or velocity. Either the proposed PUD will meet that standard or it will not.[34] This subassignment of error is denied.

v. Solar Lot Standards

LUCU 9.8325(11) requires that lots proposed in a PUD for single-family detached dwellings shall comply with solar lot standards at LUCU 9.2790. Petitioners argue, in Table 1.1, footnote 26, that "whether the solar lot standards apply to the project as a whole or to a particular lot depends on a range of standards that are ambiguous or allow discretionary review."

The city responds, and we agree, that without more assistance from petitioners we cannot perform our review function. Petitioners do not identify the "range of standards" in LUCU 9.2790 they believe are ambiguous and discretionary, and none are apparent to us. Without some explanation, we do not see that there is any ambiguity or discretion involved in applying the solar lot standards pursuant to LUCU 9.8325(11). This subassignment of error is denied.

w. South Hills Development

LUCU 9.8325(13) prohibits development above an elevation of 900 feet within the boundaries of the South Hills Study, and further requires a 300-foot setback from the

[34]We address, below, petitioners' argument that LUCU 9.8325(10) is so difficult to meet that it impermissibly forces needed housing applicants to opt for the alternative discretionary track.

"ridgeline" unless the city manager determines that "the area is not needed as a connection to the city's ridgeline trail system." Petitioners argue, in Table 1.1, footnote 27, that LUCU 9.8325(13) is not clear and objective, because it is not clear how elevation is calculated, and the city manager's determination is discretionary. We disagree that either offends ORS 197.307(6). The elevation of land, like its slope, is an objectively determinable fact. As for "ridgeline," the city points out that LUCU 9.8325(13) itself describes the pertinent reference point as the "line indicated as being the urban growth boundary within the South Hills Study plan area." We agree with the city that because the 300-foot setback is clear and objective, offering a discretionary alternative to that requirement does not violate the statute. This subassignment of error is denied.

x. Blair Boulevard Special Area Zone

LUCU 9.3515 sets out a number of design standards for development within the Blair Boulevard Historic Commercial Special Area Zone. Petitioners argue, in Table 1.1, footnote 28, that some of the standards within one of the LUCU's special zones, at LUCU 9.3515, are not clear and objective. Petitioners do not identify which of the numerous standards at LUCU 9.3515 they believe violate ORS 197.307(6). In any case, as far as we can tell the special zone is a Goal 5-designated historic area, and residential development within Goal 5-designated historic areas is not subject to statutory restrictions on needed housing. ORS 197.307(3)(e). We reject petitioners' arguments under LUCU 9.3515.

y. Multi-Family Housing

LUCU 9.5500 sets out standards for multi-family housing. LUCU 9.5500(4)(b) requires that on development sites with less than 100 feet of street frontage, at least 40 percent of the "site width" shall be occupied by a building placed within 10 feet of the minimum front yard setback line. LUCU 9.5500(5)(a) requires that multi-family buildings located within 40 feet of the front lot line shall have their "primary orientation" toward the street. Petitioners argue, in Table 1.1, footnote 29, that the above-quoted terms render these

standards not clear and objective. However, both terms have plain, commonly understood meanings that are sufficiently clear and objective when read in context. This subassignment of error is denied.

z. Landscape Standards

LUCU 9.6220 requires that installed plant materials shall "meet current nursery industry standards," and shall be maintained "in a healthy and attractive manner." We agree with petitioners that these standards are not clear and objective. This subassignment of error is sustained.

B. Alternative Track

Petitioners' second general type of challenge is that certain standards, even if they are clear and objective, are so difficult or impossible to comply with that at least some needed housing applicants will be forced to apply for needed housing under the alternative, discretionary track. According to petitioners, the city has essentially legislated that some areas of the city or types of needed housing can be developed only under discretionary criteria. Petitioners contend that the city must ensure that the entirety of its inventory of buildable residential lands can be developed under clear and objective standards.

1. Emergency Response Times

In section II.A.2.j, above, we sustained petitioners' arguments that LUCU 9.8325(7)(j), 9.8520(7), and 9.8220(6) are not clear and objective. These provisions, part of the needed housing track, require for approval of a subdivision, planned unit development or partition in the South Hills area of the city that new dwellings shall be within a four or five-minute response time for emergency medical services. No similar requirement applies under the alternative, discretionary track. Petitioners argue that, even if these standards are made clear and objective, they suffer from the additional and unfixable flaw that they effectively rule out the possibility of developing needed housing in this area of town under nondiscretionary criteria.

The city responds that nothing in the needed housing statutes requires that all areas of the city must be immediately available for development of needed housing under clear and objective standards, or that clear and objective standards be immediately applicable to every development proposing needed housing. According to the city, it is consistent with ORS 197.307 to prohibit development in certain areas of the city that are not yet fully served by urban services, such as emergency services, as long as such prohibitions are clear and objective. Once emergency services are extended, the city argues, the developer may choose to use the needed housing track instead of the alternative track. The city contends that developers who do not choose to wait and who choose to develop notwithstanding arguably inadequate emergency services must comply with discretionary criteria requiring, among other things, minimization of fire risk. Providing developers that option, the city argues, does not offend ORS 197.307.

We generally agree with the city that nothing in the needed housing statutes requires that all of the city's buildable lands inventory must be developable at a given time. There may be other reasons why the city cannot impose temporary restrictions that affect the timing of development, to avoid overburdening public facilities and services.[35] However, ORS 197.307 is not concerned with the timing of development, and simply does not address that issue. If ORS 197.307 is not concerned with a temporary *total* prohibition on new housing, then we fail to see how the statute is offended by a temporary *partial* prohibition that allows development of needed housing under discretionary criteria that are designed to address the public safety concern that prompts the temporary restrictions. This subassignment of error is denied.

[35]Petitioners do not argue that the city's emergency response restrictions constitute a *de facto* moratorium, or that they endanger the city's ability to meet its Goal 10 (Housing) obligations within the relevant planning period.

2. Stormwater Runoff

In section II.A.2.u, we held that LUCU 9.8325(10) imposes a clear and objective requirement that stormwater runoff from a PUD will not "create negative impacts on natural drainage courses" such as erosion, turbidity or sediment transport, "due to increased peak flows or velocity." We agreed with the city that, while LUCU 9.8325(10) may be difficult to meet, its prohibition on negative impacts of the specified type is clear and objective. Petitioners argue that, even if LUCU 9.8325(10) is clear and objective, it nonetheless offends the needed housing statute, because it is so difficult to meet that it effectively forces needed housing applicants to opt for the alternative, discretionary track.[36] Petitioners submit that rain falls on all development, and all water moving across ground carries some sediment, creates some turbidity, and has some erosional component, no matter how minute, and therefore no PUD could possibly comply with LUCU 9.8325(10).

We agree with petitioners, at least in the abstract, that imposing a clear and objective standard that is impossible or virtually impossible to meet is a prohibition in the guise of a standard. ORS 197.307(3)(d) allows the city to offer a discretionary approval track, "provided the applicant retains the option of proceeding under the clear and objective standards[.]" That option is illusory if the clear and objective standards are impossible to satisfy. It may not be the case that LUCU 9.8325(10) is impossible to satisfy. However, the city provides no assistance on this point, or indeed respond to this subassignment of error at all. Accordingly, we sustain this subassignment of error.

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[36]The corresponding alternative track standard is LUCU 9.8325(9), which provides:

> "Stormwater runoff from the PUD will not create *significant* negative impacts on natural drainage courses either on-site or downstream, including, but not limited to, erosion, scouring, turbidity, or transport of sediment due to increased peak flows or velocity." (Emphasis added.)

3. Conflicting Standards

Finally, petitioners argue that the LUCU violates ORS 197.307(6) because it lacks a clear and objective mechanism for resolving conflicts among clear and objective standards. Petitioners contend that certain clear and objective standards potentially conflict with each other to the extent that, in approving or denying an individual application, the city might exercise some discretion in resolving that conflict. For example, petitioners note that PUD standards in the South Hills area of the city require that 40 percent of the development site be preserved in contiguous open space, which excludes improvements such as streets. However, petitioners argue, this potentially conflicts with other PUD standards that require streets to connect in the direction of all existing or planned streets within one-quarter mile of the site.

Petitioners concede that the city's code includes adjustment procedures that allow an applicant to seek relief from particular standards, and that an applicant might invoke such procedures if the application presented a conflict in the manner hypothesized above. However, petitioners contend that the adjustment procedures are not themselves clear and objective, and therefore cannot satisfy ORS 197.307(6). According to petitioners, only a clear and objective conflict mechanism can satisfy the statute. Petitioners offer no suggestion as to what a "clear and objective" conflict procedure might look like.

The city responds that, if any conflict between clear and objective standards such as that hypothesized ever arises, then one of two things will happen. To avoid denial for failure to meet all clear and objective standards, the applicant will either (1) modify the application so that it meets all clear and objective standards; or (2) invoke the city's discretionary adjustment procedure, to adjust one or more standards. If the applicant fails to do either, the city argues, it will deny the application for failure to meet all standards.

ORS 197.307 does not require a conflict mechanism for resolving potential conflicts between clear and objective criteria. If any two clear and objective standards conflicted on

their face, such that it was impossible to satisfy both, then we might well agree with petitioners that such standards offend the statute. However, petitioners have not identified any clear and objective standards that conflict on their face. At most, petitioners speculate that an application for development of a particular site might not be able to show compliance with two clear and objective standards, either because of a particular aspect of the proposal or because of some feature of the site or its surroundings that makes it difficult or impossible to satisfy both standards. In the former circumstance, the applicant can modify the proposal so that it complies with all standards. In the latter, the problem is not conflicting standards, but rather that some feature of the site makes it difficult or impossible to comply with all applicable standards. The city's adjustment processes are apparently designed for just such circumstances. In neither circumstance is it accurate to say that the *standards* conflict. In sum, we do not see that the absence of some mechanism for resolving potential conflicts between standards violates ORS 197.307. This subassignment of error is denied.

III. Discourage Needed Housing Through Unreasonable Cost or Delay

Finally, petitioners argue in Home Builders' third assignment of error that a number of LUCU provisions, even if clear and objective, nonetheless violate ORS 197.307(6) because they "discourage needed housing through unreasonable cost or delay." These LUCU provisions do so by either (1) reducing the area of development sites that can be developed; (2) requiring additional amenities in connection with development; or (3) imposing burdensome requirements for filing complete applications for development.

For example, petitioners argue that, as discussed below in regard to Goals 5, 9 and 10, the LUCU requires protection of "critical root zones" for trees. Petitioners argue that such regulations effectively reduce the supply of buildable land, and thus increase demand and price. Similarly, petitioners argue that certain LUCU provisions require new amenities, such as landscaping, and a new requirement that all on-site utilities be placed underground, that will increase the cost of needed housing. Petitioners also argue that new informational

requirements for geotechnical reports, new requirements for pre-application conferences, and requirements that tentative PUD approvals undergo public hearings will increase costs and cause delay in the development of needed housing.

ORS 197.307(6) prohibits standards, conditions or procedures for approval that, either in themselves or cumulatively, discourage needed housing "through unreasonable cost or delay." The statute does not prohibit *reasonable* cost or delay. In our view, the question of whether approval standards or procedures discourage needed housing through *unreasonable* cost or delay cannot, in most cases, be resolved in the abstract, in a challenge to a legislative decision that adopts such standards or procedures. In the absence of actual application of standards or procedures in a particular case, it is difficult to see how any party could demonstrate what the delay or additional cost might be, whether that delay or cost is reasonable or unreasonable, and whether that delay or cost discourages needed housing, either alone or in combination with other standards or procedures. Because different sets of standards and procedures will apply to different applications in different areas of the city, demonstrating in the abstract that standards or procedures *cumulatively* discourage needed housing is rendered even more difficult. These difficulties are apparent in the present case, because the petitions for review make no attempt to demonstrate why any standards or procedures, alone or cumulatively, result in *unreasonable* cost or delay, much less what those costs or delay might be. While petitioners argue that certain standards or procedures are likely to increase cost or delay, they make no effort to demonstrate that such increased cost or delay is unreasonable, alone or cumulatively. With the possible exception discussed below, we believe it is highly unlikely that such a demonstration can be made or, if made, reviewed in a meaningful manner, except in the context of an "as-applied" challenge.

One exception to the foregoing is a challenge against a standard or procedure on the grounds that the standard or procedure is unreasonable as a matter of law; in other words, the standard or procedure lacks a rational basis. Any cost or delay attributable to a standard or

procedure that lacks a rational basis is perforce "unreasonable," whatever the actual cost or delay that might be incurred in a particular case. Such a facial challenge can be meaningfully addressed and resolved in an appeal of a legislative decision.

In the present case, the only challenges we perceive that argue, in essence, that a standard or procedure lacks a rational basis are petitioners' challenges to two procedural requirements.

Petitioners first contend that LUCU 9.6710 requires a "geotechnical" analysis for any proposed PUD, site review, or subdivision application on land with slopes equal to or greater than five percent, and for any proposed development that includes construction of a public street, alley, drainage system or sewer. One of three levels of analysis is required, depending on the slope. The purpose of this informational requirement, according to LUCU 9.6710(1), is to ensure that facilities in "areas of known or potential unstable soil conditions are located, designed and constructed in a manner that provides for public health, safety, and welfare." However, petitioners argue that the results of the required geotechnical analysis are not tied to any approval standard. Because the required information is not related to any approval standard, we understand petitioners to argue, it is a purposeless requirement that functions only to increase costs and cause delay.

The city's statewide Goal 7 (Areas Subject to Natural Disasters and Hazards) findings discuss the geotechnical analysis requirement at LUCU 9.6710, and suggest that "development must occur in accordance with the analysis' recommendations." Record 496. However, the city does not identify any standard that imposes that requirement, or that relies on the required geotechnical analysis in any way. As far as we can tell, the geotechnical analysis requirement functions only to supply the city with potentially expensive information that has no bearing on any approval standard. Consequently, we agree with petitioners that the requirement violates ORS 197.307(6).

The second procedure is at LUCU 9.7055, which makes tentative PUD approvals subject to the city's "Type III" procedures, which require a public hearing. Petitioners argue that approval under clear and objective standards should not require a hearing at all, and at most should be subject to administrative approval under a "Type I" procedure, which does not provide for notice, opportunity for comment, hearing or local appeal. We understand petitioners to contend that the only apparent purpose for requiring a hearing for tentative PUD approval is to impose additional costs and delay on needed housing. The city responds that subdivisions and site review approvals are "limited land use decisions" as defined at ORS 197.015(12), which by statute must provide notice and opportunity for comment and thus must be processed under at least "Type II" procedures, which provide for notice, opportunity for comment and local appeal. Similarly, the city argues, tentative PUD approval is a "permit" decision as defined at ORS 227.160(2), which must be processed under procedures that provide the opportunity for a public hearing. We agree that petitioners have not demonstrated that the hearing requirement for tentative PUD approval lacks a rational basis.

The first and third assignments of error (Home Builders) are sustained, in part.

SECOND ASSIGNMENT OF ERROR (HOME BUILDERS)
FOURTH ASSIGNMENT OF ERROR (CHAMBER)

Petitioners contend that the city erred in adopting a number of LUCU provisions regulating natural resources, including inventoried Goal 5 resources, without complying with the requirements of Goal 5 and the Goal 5 administrative rule at OAR chapter 660, division 23.

The city's adoption of the LUCU is a "post-acknowledgment plan amendment," or PAPA.[37] In adopting a PAPA, local governments are required to apply Goal 5 only if the PAPA "affects a Goal 5 resource." OAR 660-023-0250(3).[38] As defined in that rule, and as relevant here, the LUCU "affects a Goal 5 resource" only if it (1) "creates or amends a resource list"; (2) amends a "land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5"; or (3) "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list."

Petitioners argue that the LUCU "creates or amends a resource list" within the meaning of OAR 660-023-0250(3)(a), because the city essentially adopted a program of protecting *unacknowledged* and *uninventoried* Goal 5 resources, without completing the Goal 5 process. Further, petitioners contend that the LUCU amends regulations protecting

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[37]OAR 660-023-0010(5) defines a PAPA to include "amendments to an acknowledged comprehensive plan or land use regulation and the adoption of any new plan or land use regulation."

[38]OAR 660-023-0250(3) and (4) provide, in relevant part:

> "(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]
>
> "* * * * *
>
> "(4) Consideration of a PAPA regarding a specific resource site, or regarding a specific provision of a Goal 5 implementing measure, does not require a local government to revise acknowledged inventories or other implementing measures, for the resource site or for other Goal 5 sites, that are not affected by the PAPA, regardless of whether such inventories or provisions were acknowledged under this rule or under OAR 660, Division 16."

inventoried Goal 5 resources, without addressing the requirements of Goal 5 and the Goal 5 rule.

The challenged decision takes the position that the LUCU does not "affect" any Goal 5 resource, and therefore the LUCU is consistent with Goal 5.[39] The city's response brief argues that, to the extent any LUCU amendment "affects a Goal 5 resource," the amendment is consistent with the Goal 5 inventory and the original program to protect the resource, and therefore the amendment is consistent with Goal 5. The city also argues that the city can regulate or protect environmental resources that are not inventoried Goal 5 resources, without doing so under Goal 5, and that such regulations do not constitute creation or amendment of a "resource list," or otherwise trigger application of the Goal 5 rule.

I. Creates or Amends a Resource List

To address the last argument first, we agree with the city that no authority brought to our attention requires that the city in all cases apply Goal 5 and the Goal 5 rule before it amends its acknowledged land use regulations to protect resources that are indisputably *not* part of the city's acknowledged inventory of Goal 5 resources. *See Ramsey v. City of Portland*, 30 Or LUBA 212, 217 (1995) (adoption of an ordinance regulating the cutting of individual trees does not affect any Goal 5 site nor implicate Goal 5, even though it arguably furthers the objectives of Goal 5). The city explains that it is currently in periodic review

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[39]The decision's Goal 5 findings state, in relevant part:

> "The Metro Plan has an acknowledged Goal 5 inventory. The changes to the [LUCU] do not [a]ffect the existing measures that ensure that Goal 5 resources are maintained. * * *" Record 495.
>
> "* * * None of the changes to the [LUCU] are intended specifically to protect a Goal 5 resource and none of the changes would allow a use inconsistent with a Goal 5 resource identified for protection. Therefore, the changes to the [LUCU] are consistent with Goal 5." Record 496.

and, as part of periodic review, it is updating its Goal 5 inventory.[40] The city argues that adoption of the LUCU is not part of that periodic review task and is not intended to create or add to the city's list or inventory of Goal 5 resources. We agree that the city is required to comply with and complete the Goal 5 process only if and to the extent its decision "affects a Goal 5 resource" or otherwise triggers application of the Goal 5 rule. *See Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282, 299, *aff'd* 175 Or App 419, 28 P3d 1229 (2001) (ordinance adopting new protections for both inventoried Goal 5 drainageways and noninventoried waterways, as an "interim protection" pending completion of the city's Goal 5 process, must be consistent with the Goal 5 rule). Petitioners have not established that the LUCU was intended to create a Goal 5 resource list or has the effect of amending the city's acknowledged Goal 5 resource list. Accordingly, we focus our analysis on petitioners' arguments under OAR 660-023-0250(3) that the LUCU amends the city's acknowledged programs for protecting inventoried Goal 5 resources, without complying with the rule.

II. Amendment of Regulations Protecting Goal 5 Resources

The parties agree that the starting point for analysis under OAR 660-023-0250(3) is to identify the city's acknowledged Goal 5 inventory and the program that was adopted to protect significant Goal 5 resources. The next step is to determine whether any LUCU provision amends a "land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5" or "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list."[41] If so, then the city must address and comply with the Goal 5 rule, in adopting such provisions.

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[40]We understand the "resource list" referenced in OAR 660-023-0250(3) to be the same thing as the city's Goal 5 inventory.

[41]Petitioners assert at one point that the LUCU allows new uses that could be conflicting uses, but they do not identify what provisions do so or explain why. Accordingly, we do not address that assertion.

A. Goal 5 Inventory

Identifying the city's Goal 5 inventory is not an easy task, in part because it was adopted as part of a regional planning process, and in part because the inventory consists, as far as we can tell, of a large collection of various "working papers" and maps. In Table 2.1, accompanied by 60 footnotes, Home Builders attempts to correlate acknowledged, inventoried Goal 5 resources with LUCU provisions that allegedly affect those resources. Column A of Table 2.1 organizes the inventoried resources in six pertinent categories: areas of significant vegetation, wildlife and wildlife habitat (VWWH); scenic areas; water areas; Willamette River Greenway; sand and gravel areas, and energy sources.

The city argues, and petitioners do not dispute, that most of the 35 identified VWWH and all of the sand and gravel sites are not within the City of Eugene or were excluded from the city's inventory of significant Goal 5 sites during the acknowledgment process. The city states that only eight of the listed VWWH areas and none of the sand/gravel areas are included on the city's acknowledged Goal 5 inventory. The eight VWWH sites are Bertlesen Slough, Willow Creek Wetlands, Willamette Wetlands, Delta Ponds, Skinner's Butte Park, Alton Baker Park, Hendricks Park and Amazon Park.

Significant scenic areas are not listed in any resource list, but instead are mapped at Figure H-2, which appears in the Home Builders Appendix III, 117. Buttes, ridgelines, viewpoints with public access, parklands, golf courses and cemeteries are identified as scenic areas on Figure H-2. Apparently some of the VWWH sites are also scenic areas. Significant water areas are mapped on a different map, found in the city's Appendix, at 125.[42] Water areas include bodies of water, wetlands, stream corridors, floodways and aquifer recharge areas. Some VWWH sites are also water sites. The Willamette River Greenway is identified by maps J-1, J-2 and J-3, found in the Home Builders Appendix III, 133, 137, 139.

[42]The significant water areas map is also labeled Figure H-2.

With respect to energy sources, petitioners claim that although the city addressed energy sources such as solar energy under different goals than Goal 5, such resources are in fact Goal 5 resources, and therefore part of the city's Goal 5 inventory. Accordingly, petitioners argue, several LUCU amendments affecting the city's solar standards must comply with the Goal 5 rule. The city does not respond specifically to this claim, although as discussed below it argues generally that petitioners have in many cases failed to demonstrate that challenged LUCU provisions are part of the city's Goal 5 program. We agree that petitioners have not demonstrated that "energy sources" are an inventoried Goal 5 resource, and that the city's solar standards are part of the city's Goal 5 program.

B. Program to Achieve the Goal

For each of the above-described categories of inventoried sites, Column C of Table 2.1 lists categories of LUCU provisions that allegedly apply to those inventoried resources. Petitioners contend that these provisions either increase or decrease the level of protection provided by the city's acknowledged Goal 5 program. For example, petitioners argue that for many kinds of development approvals, including site review, subdivisions, PUDs and conditional use permits, the LUCU requires the "preservation of significant natural features," and provides a list of such features.[43] According to petitioners, these increased protections

[43]For example, LUCU 9.8090(5) requires for conditional use permit approval that:

> "The proposal is designed and sited to minimize impacts to the natural environment by addressing the following:
>
> "(a) Protection of Natural Features. The preservation of significant natural features to the greatest degree attainable or feasible, including:
>
> "1. Significant on-site vegetation, including rare plants (those that are proposed for listing or are listed under state or federal law), and native plant communities.
>
> "2. All documented habitat for all rare animal species (those that are proposed for listing or are listed under state or federal law).

apply to lands that include inventoried Goal 5 resources such as wildlife habitat, wetlands, riparian corridors and natural areas. Therefore, petitioners argue, the city cannot adopt such amendments unless it first addresses and complies with Goal 5 and the Goal 5 rule.

Identifying the city's program to achieve Goal 5 is even more problematic than identifying its Goal 5 inventory. The city takes the position, and we do not understand petitioners to dispute, that the scope of the program, *i.e.*, the portion of the comprehensive plan and land use regulations that were adopted in order to protect a significant Goal 5 resource, are those identified in various LCDC acknowledgment orders attached to the parties' briefs. These orders discuss a number of measures to protect Goal 5 resources that include, as far as we can tell, the following: certain Metro Plan policies, certain plan designations, certain zoning classifications, the South Hills Study, the land division code, and certain specific zoning ordinance provisions addressing PUDs, cluster subdivisions, site

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"3. Prominent topographic features, such as ridgelines and rock outcrops.

"4. Wetlands, intermittent and perennial stream corridors, and riparian areas.

"5. Natural resource areas designated in the Metro Plan diagram as 'Natural Resource' and areas identified in any city-adopted natural resource inventory.

"(b) Tree Preservation. The proposed project shall be designed and sited to preserve significant trees to the greatest degree attainable or feasible * * *:

"* * * * *

"(c) Restoration or Replacement. The proposal mitigates, to the greatest degree attainable or feasible, the loss of significant natural features described in criteria (a) and (b) above, through the restoration or replacement of natural features such as:

"1. Planting of replacement trees within common areas; or

"2. Re-vegetation of slopes, ridgelines, and stream corridors; or

"3. Restoration of fish and wildlife habitat, native plant habitat, wetland areas, and riparian vegetation.

"* * * * *"

review, tree preservation, and building height limitations. We discuss, below, the parties' disputes over whether specific challenged LUCU provisions are part of the city's program to achieve Goal 5.

The city offers a number of general and specific defenses to petitioners' arguments. We address the city's general defenses first and then the parties' specific arguments regarding particular resources and code provisions. For the reasons explained below, we agree with petitioners that some LUCU amendments amend regulations that apply to and protect some inventoried Goal 5 resources. Petitioners are correct that the city cannot adopt such amendments unless it addresses and complies with Goal 5 and the Goal 5 rule.

C. The City's General Defenses

1. Increased Protection to Goal 5 Resources

The first general defense is the city's repeated argument that, to the extent a LUCU provision applies to an inventoried Goal 5 resource and merely *increases* the level of protection afforded that resource, such an amendment is necessarily consistent with Goal 5, without further inquiry, as long as the city's Goal 5 inventory designates that resource for "protection" against conflicting uses. In other words, the city argues, once the city chooses as part of its original Goal 5 process to fully protect a resource from conflicting uses, and adopts measures to protect that resource, the city may subsequently increase the level of protection provided, and that increased protection either does not trigger Goal 5 review or is axiomatically consistent with Goal 5.

We disagree. The city adopted its Goal 5 inventory and program to achieve the goal under OAR chapter 660, division 16, which requires that the city make a policy choice, based on its Goal 5 analysis, with respect to each resource site to (1) fully protect the site against conflicting uses, (2) limit conflicting uses, or (3) fully allow conflicting uses. OAR 660-016-

0010.[44] The city explains that for most resource sites the identified conflicting uses were "(1) aggregate extraction versus other Goal 5 values; (2) timber harvest versus other Goal 5 values; and (3) low density residential development as it encroaches upon natural resources at the urban fringe." Response Brief 57, *quoting* Appendix 134. In choosing to protect a site, the city adopted various measures designed to protect the site from conflicting uses, and those measures were acknowledged by LCDC to comply with Goal 5. Certainly the city could not *decrease* the level of protection provided by those measures, without demonstrating that such decreased protection is consistent with Goal 5. The rationale for requiring that demonstration where the city *increases* the level of protection is less obvious, but we believe that OAR 660-023-0250(3) nonetheless requires such a demonstration. In relevant part, the text of the rule provides that any PAPA that amends a land use regulation adopted in order to protect a significant Goal 5 resource must comply with Goal 5. The rule is not limited to amendments that decrease levels of protection. If LCDC intended the rule to exclude amendments that increase levels of protection to protected sites, it could have easily said so.

Further, in originally choosing a level of protection consistent with Goal 5, the city necessarily made a choice under Goal 5 to balance a variety of conflicting considerations, including the relative value of the conflicting uses that the site is protected against, how stringent protections should be, and the economic and social costs and benefits of those protections. That choice was presumably based in part on the rule-required environmental, social, economic and energy (ESEE) analysis that was developed by the city to decide to protect, partially protect, or not protect the resource. OAR 660-016-0010. That choice may

[44]The city's original Goal 5 analysis and inventory was developed under the old Goal 5 rule at OAR chapter 660, division 16. A similar requirement to determine whether a significant resource should be protected, partially protected, or not protected against conflicting uses, based on an economic, social, environmental and energy (ESEE) analysis, is found at OAR 660-023-0040.

have involved balancing, for example, the city's Goal 5 obligations with its obligations under other statewide planning goals, such as Goals 9 (Economic Development) and 10. *See* ORS 197.340 (local governments must give statewide planning goals equal weight). The city must justify post-acknowledgment decisions to increase the level of protection given to inventoried Goal 5 resources, which will presumably disturb the balance of conflicting considerations arrived at 20 years earlier in its original Goal 5 analysis.

2. Nonsubstantive Changes

The second general defense is the city's frequent argument that amendments to certain challenged LUCU provisions are carried forward from the EC with only minor editorial or nonsubstantive changes. The city argues that such nonsubstantive changes do not require review under Goal 5.

We generally agree that provisions acknowledged to comply with Goal 5 that are carried forward without substantive change into newly codified regulations do not constitute an "amendment" of a Goal 5 regulation for purposes of OAR 660-023-0250(3). The difficulty, of course, is determining whether any changes are truly nonsubstantive. For example, LUCU 9.6715(3), which the city holds up as an example of nonsubstantive change, carries forward the same height limitation in EC 9.536(c), in almost identical terms.[45] We

[45]For example, petitioners allege that height limitation provisions at LUCU 9.6715(3) affect the inventoried Skinner's Butte area, among others. The city argues that LUCU 9.6715(3) is substantively the same as EC 9.536(c). We quote the relevant LUCU and EC provisions below:

EC 9.536(c):

> "Height limitations to be established to protect the view from and to the Skinner Butte area. This area is further described as follows: All property lying east of Washington Street and lying north of the Southern Pacific Railroad tracks, and lying west of Coburg Road, and lying south of the Willamette River.
>
> "The maximum height of any building where the existing ground elevation is below 460 feet shall be to an elevation of 500 feet. The maximum height of any building where the existing ground elevation is above 460 feet shall be 40 feet above the existing ground elevation at all points. In neither case shall the maximum height in the zoning district within which the building or structure is located be exceeded."

have little trouble agreeing with the city that any changes to the height limitation itself are nonsubstantive. However, we note that LUCU 9.6715(3) also appears to change the southern boundary of the Goal 5-protected Skinner's Butte scenic area. *See* n 45. If *that* amendment is challenged, a simple response that the change is "nonsubstantive" may not be sufficient to demonstrate that the amendment does not require review under Goal 5. A change in the area to which a regulation applies is a substantive change.

D. Specific Challenges

Column C of Table 2.1 lists more than a dozen categories of LUCU provisions that petitioners argue apply to one or more of the Goal 5 resources listed in Column A.

1. Height Limitation Areas

In Table 2.2, footnotes 6 and 20, petitioners challenge height limitations at LUCU 9.6715(3) and (4). As noted above, LUCU 9.6715(3) includes height limitations for Skinner's Butte. LUCU 9.6715(4) includes height limitations for Gillespie Butte. We agree with the city that the LUCU 9.6715(3) height limitations for Skinner's Butte are the same as in EC 9.536(c), which are acknowledged to comply with Goal 5. Petitioners offer no other challenge to LUCU 9.6715(3). With respect to LUCU 9.6715(4), the city does not dispute that the LUCU imposes new height limitations regarding Gillespie Butte, which under the previous code was not subject to any Goal 5-related height limitations. The city's only

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LUCU 9.6715(3):

> "Skinner Butte Height Limitation Area. The boundaries of the Skinner Butte Height Limitation Area are as follows:
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> "All property lying east of Washington Street, lying north of, and including, the north side of 6th Avenue, lying west of Coburg Road, and lying south of the Willamette River. (See Map 9.6715(3) Skinner Butte Height Limitation Area.) Within the Skinner Butte Height Limitation Area, the maximum height of any structure where the existing ground elevation is at, or below, 460 feet above mean sea level shall be to an elevation of 500 feet above mean sea level. The maximum height of any building where the existing ground elevation is above 460 feet mean sea level shall be 40 feet above the existing ground elevation at all points. In neither case shall the maximum height of any building or structure exceed the maximum allowed in the zone."

response is that such new limitations are consistent with the "protected" status of Gillespie Butte, and therefore necessarily consistent with Goal 5 and the Goal 5 rule, without further inquiry. We rejected that general defense, above. OAR 660-023-0250(3) requires that the city apply the Goal 5 rule to determine whether the additional protection imposed by LUCU 9.6715(4) is consistent with the goal and rule. There is no dispute that the city did not do so. This subassignment of error is sustained.

2. Subdivision, Site Review, PUD, and Conditional Uses

Petitioners argue that a number of LUCU provisions governing subdivision, site review, PUD, and conditional use permits change the level of protection afforded the inventoried VWWH areas, the inventoried scenic areas, the inventoried water areas and portions of the Willamette River Greenway, and therefore the city must demonstrate that they comply with Goal 5 and the Goal 5 rule. The provisions applicable to conditional use permits requiring preservation of significant natural features were set out earlier at n 43. The LUCU contains similar or identical provisions for subdivisions, site review and PUD applications.[46]

The city responds that petitioners have not related any of the identified LUCU provisions to any specific VWWH resource site, or explained why those provisions apply or potentially apply to development of those sites. The city also argues that at least the challenged subdivision provisions cannot apply to any of the eight identified significant VWWH areas, because each is subject to a combination of zoning, minimum lot size or comprehensive plan provisions that effectively prohibit any subdivision.[47]

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[46]The challenged LUCU provisions include subdivision criteria at LUCU 9.8515(7) and 9.8520(8), site review criteria at LUCU 9.8440(2) and 9.8445(3), PUD criteria at LUCU 9.8320(4) and 9.8325(4), and conditional use criteria at LUCU 9.8090(5) and 9.8100(3). These criteria are challenged in Table 2.1, footnotes 7, 13, 14, 15, 21, 27, 28, 29, 36, 42, 44, 45, 49, 50, 53, and 56.

[47]The city argues that the zoning, lot size and plan designation of the following sites listed as significant vegetation, wildlife and wildlife habitat areas effectively prohibit subdivision: (1) Bertlesen Slough, privately

We agree with the city that petitioners have not demonstrated that *all* of the identified LUCU provisions apply to specific resource sites. The city may well be correct that the eight listed VWWH sites cannot be subdivided, and therefore the challenged subdivision provisions will never apply to those sites. On the other hand, it seems apparent that some challenged provisions apply to at least some Goal 5 sites. For example, Bertelsen Slough, an inventoried site, is zoned I-2, which permits a wide range of conditional uses. *See* LUCU 9.2450. The city does not argue that Bertelsen Slough cannot be developed with, for example, conditional uses, nor dispute that such uses would be subject to the requirement at LUCU 9.8090(5) that approved conditional uses preserve significant natural features to the maximum extent feasible. *See* n 43. Similarly, Delta Ponds is zoned PL, which allows a wide range of conditional uses. Further, Delta Ponds is subject to both PD and SR overlay zones, which require that any proposed development, including permitted uses, comply with the PUD and site review provisions that, again, require protection of significant natural resources. In short, it appears that in one form or another the challenged requirements to protect significant natural resources are potentially applicable to most if not all of the identified VWWH areas. The city makes no argument that the inventoried scenic and water areas and the Willamette River Greenway can never be subject to the identified criteria.

In sum, petitioners are correct that the city must apply the Goal 5 rule to these criteria, and determine whether they are consistent with the goal and rule. If the city can better explain why certain criteria, such as the challenged subdivision criteria, cannot apply to

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owned, designated Natural Resources (NR) and zoned Light-Medium Industrial (I-2), with Wetland Buffer (WB) and Site Review (SR) overlays; (2) Willow Creek Wetlands, privately owned, designated NR and zoned Agriculture (AG) with WB and Waterside Protection (WP) overlays; (3) Willamette Wetlands, privately owned, designated Parks and Open Space and zoned AG; (4) Delta Ponds, publicly owned, designated Parks and Open Space and zoned Public Land (PL) with Planned Unit Development (PD) and SR overlays; (5) Skinner's Butte, publicly owned, designated Parks and Open Space and zoned PL; (6) Alton Baker Park, publicly owned, designated Parks and Open Space and zoned PL; (7) Hendricks Park, publicly owned, designated Parks and Open Space and zoned PL; and (8) Amazon Park, publicly owned, designated Parks and Open Space and zoned PL. The AG zone has a 20-acre minimum lot size; the PL zone has a minimum 6,000 square foot lot size. Response Brief 56-57 n 43.

identified Goal 5 resource sites, then the city need not evaluate those criteria under the rule. Where challenged criteria potentially apply to development of Goal 5 resource sites, the city must explain why those criteria are consistent with the goal and rule. This subassignment of error is sustained.

3. Public Land Zone

Petitioners argue, in Table 2.1, footnotes 8 and 22, that specified amendments to the provisions governing the Public Land (PL) zone, at LUCU 9.2680 to 9.2687, alter protections afforded to inventoried VWWH areas and, to the extent any inventoried scenic areas fall within the zone, to scenic areas.

The city disputes that the PL zone provisions constitute regulations that were adopted "in order to protect a significant Goal 5 resource." OAR 660-023-0250(3). We understand the city to argue that the PL zone plays no role in the city's program to achieve Goal 5 that was acknowledged by LCDC, and therefore any amendments to the PL zone need not be evaluated under the Goal 5 rule. As noted above, several inventoried VWWH areas are zoned PL. Petitioners argue that the purpose of the PL zone is to implement the Metro Plan by providing areas for government services including "parks and open space." LUCU 9.2680. Petitioners contend that the PL zone implements Metro Plan Goal 5 policies to protect inventoried VWWH and scenic areas.

As far as we can tell, none of the LCDC acknowledgment orders specifically discuss the PL zone as a Goal 5 implementing measure. However, one order discusses the "parks and open space" plan designation as a Goal 5 designation, and also plan policies that require protection of open space through various means, including zoning. Response Brief App 136, 138. A zoning classification that implements a Goal 5 plan designation and is applied to an inventoried Goal 5 resource would seem to be among the regulations that "protect a significant Goal 5 resource" within the meaning of OAR 660-023-0250(3). Given the purpose of the PL zone, and that each of the VWWH sites zoned PL is designated "parks and

open space," it appears that the PL zone implements the "parks and open space" plan designation. Although there is ambiguity on this point, we agree with petitioners that the PL zoning classification implements a Goal 5 plan designation and, therefore, amendments to that zone must comply with the Goal 5 rule. There is no dispute that the city did not evaluate these amendments under the rule. This subassignment of error is sustained.

4. Park, Recreation, and Open Space Zone

The LUCU adopts a new zoning classification at LUCU 9.2600 *et seq*., the Parks, Recreation, and Open Space (PRO) zone, but that zone has not yet been applied to any properties. The purpose of the PRO zone is to implement the Metro Plan by providing areas that preserve parks, recreation areas and open spaces. LUCU 9.2600. The city explains that the PRO zone is designed to be applied to sites that, under the EC, would be zoned PL. The city's Goal 5 findings explain that the zone is intended to protect the city's Goal 5 open space resources. Petitioners argue that many PRO provisions increase the level of protection provided to parks and open spaces under the EC.

The city responds that because the PRO zone has not yet been applied to any property, the adoption of the zone cannot possibly trigger Goal 5. For the reasons expressed above in our discussion of the PL zone, we agree with petitioners that the PRO zone is among the regulations that "protect a significant Goal 5 resource." That the city has not yet applied the zone to any property does not mean that adoption of the zone escapes scrutiny under Goal 5 or the Goal 5 rule. This subassignment of error is sustained.

5. Natural Resource Zone

Petitioners contend in Table 2.1, footnotes 10 and 24, that six LUCU amendments to the NR zone provisions at LUCU 9.2500 *et seq*. increase or decrease the protection afforded Goal 5 resources. The city responds that three of the six amendments are merely nonsubstantive clarifications of EC provisions. We do not agree that the three disputed

amendments are accurately characterized as nonsubstantive.[48] The city does not respond to petitioners' arguments regarding the other three amendments. This subassignment of error is sustained.

6. Wetland Buffer Overlay

Two of the VWWH sites are subject to the Wetland Buffer (WB) overlay zone, and the zone is intended to protect wetlands, which are inventoried significant water areas. Petitioners assert, and the city does not dispute, that the WB zone applies to portions of the Willamette River Greenway. In Table 2.1, footnotes 11 and 40, petitioners argue that five amendments to the WB zone provisions at LUCU 9.4800 *et seq*. increase or reduce protections afforded these Goal 5 resources.[49]

The city responds that each of the five amendments is merely a nonsubstantive clarification or change to previous EC provisions. The only disputed amendment that is clearly nonsubstantive is the deletion of EC 9.264(8), which is replicated in substantially

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[48]LUCU 9.2520(3)(c)(3) adds language to a section listing the uses permitted subject to site review, to state that "[s]tructures for the control of water are not considered impervious surfaces for the purpose of this section." LUCU 9.2520(4)(h) changes EC 9.306, which prohibited application of chemicals unless necessary to address an imminent threat to public health and safety, to specify that the planning director must make the determination that application of chemicals is necessary. LUCU 9.2530(2)(a) deletes language at EC 9.305(b)(1)(e) that provided that vegetation removal is limited to the removal of "[t]he minimum area of native vegetation necessary for approved uses or conditional uses or uses allowed by exception as specified in [EC] 9.262 and 9.264." That language was replaced by language at LUCU 9.2530(2)(b), which states that vegetation removal shall be "the minimum necessary for the proposed use and shall avoid removal of native vegetation to the extent practicable."

[49]EC 9.264(2) states that the Wetland Buffer overlay zone applies to land adjacent to wetlands identified in the West Eugene Wetlands Plan. LUCU 9.4815 states that the zone "may" be applied to such lands. Petitioners argue that this change renders application of the zone discretionary. LUCU 9.4820 removes "gravel parking areas" from the EC 9.264(3) definition of development exempt from the overlay zone, but adds a similar exemption for gravel areas constructed prior to May 24, 1995, as an essential component of the development. LUCU 9.4820 also specifies that "unauthorized fill" does not constitute exempt development. LUCU 9.4830(2)(a)(5) allows "[m]aintenance of existing utility *facilities* and easements" as a permitted use in the overlay zone. (Emphasis added.) EC 9.264(4)(b)(1)(e) formerly provided for "[m]aintenance of existing utility easements" as a permitted use in the zone. EC 9.264(6) specified that all development proposals shall be reviewed under the site plan review procedures. The LUCU deletes EC 9.264(6) but does not replace it with any specified procedure. EC 9.264(8) required a performance contract for any site or conditional use approval in the zone. The LUCU deletes EC 9.264(8), but imposes substantively identical requirements at LUCU 9.7025(1).

similar terms at LUCU 9.7025(1). We cannot say that the remaining amendments are nonsubstantive. The city offers no other basis to conclude that these amendments are consistent with Goal 5 or that they comply with the Goal 5 rule. This subassignment of error is sustained, in part.

7. Waterside Protection Overlay

One of the VWWH sites is subject to the Waterside Protection (WP) overlay zone, and the zone is intended to protect designated waterways, riparian areas and adjacent wetlands. Petitioners assert, and the city does not dispute, that portions of the Willamette River Greenway are subject to the WP zone. Petitioners argue, in Table 2.1, footnotes 12 and 41, that 11 LUCU amendments to the WP zone provisions at LUCU 9.4700 *et seq.* increase or reduce protection to Goal 5 VWWH and water area resources.

The city responds that each of the 11 challenged amendments is not subject to review under the Goal 5 rule because it either increases levels of protection to already protected Goal 5 resources, or consists only of nonsubstantive changes. We rejected the first defense, above. We cannot say that the remaining amendments are nonsubstantive, with the exception of an amendment to LUCU 9.4760(2). Petitioners argue that LUCU 9.4760(2) deletes a requirement at EC 9.262(7)(c) that four factors be considered "in the order listed." We agree with the city that, notwithstanding the deletion of the above-quoted language, the requirement continues to exist in LUCU 9.4760(2) that the four factors be considered in the order listed.[50] The city offers no other basis to avoid addressing the other amendments under the Goal 5 rule. This subassignment of error is sustained, in part.

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[50]LUCU 9.4760(2) provides in relevant part:

> "To determine the extent to which an exception is allowed under [LUCU] 9.4760(1)(a), the planning director shall consider the following provisions:
>
> "(a) Where practical, relax other setbacks in order to accommodate buffer setbacks as defined in [LUCU] 9.4720 Waterside Protection Areas.

8. Landscaping

LUCU 9.6240(2) provides that developers "who choose to preserve significant vegetation on the site" shall do so in the manner further described in the code. Petitioners argue, in footnotes 16 and 30, that this "requirement" increases protection of inventoried significant vegetation areas and scenic areas.

The city responds that petitioners have not established that the city's landscaping requirements, including LUCU 9.6240(2), apply to any inventoried Goal 5 resource. We agree that petitioners' argument is insufficiently developed. Petitioners have not established that the city's landscaping requirements are part of the city's program to achieve the goal, or that the landscaping requirement potentially applies to any inventoried resource. Nor have petitioners explained why LUCU 9.6240(2) is a "requirement" that increases protection of VWWH or scenic areas. This subassignment of error is denied.

9. Drainageways

Petitioners contend, in footnotes 31 and 35, that provisions at LUCU 9.6510(1) change the level of protection afforded to drainageways, which petitioners argue are inventoried significant scenic and water resources.[51] Specifically, petitioners argue that

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> "(b) If no economically viable use is feasible under (2)(a), relax WP overlay zone requirements applicable to riparian areas as defined in [LUCU] 9.4720 Waterside Protection Areas, outside buffer setback areas. * * *
>
> "(c) If no economically viable use is feasible under (2)(a) or (2)(b), reduce the buffer setback area to the minimum extent necessary to accommodate the development. * * *
>
> "(d) If no economically viable use is feasible under (2)(a), (2)(b), or (2)(c), allow alteration of the water feature(s) to the minimum extent necessary to accommodate the development. * * *"

[51]LUCU 9.6510 deals with stormwater drainage, and requires in relevant part that conveyance of ownership or dedication of easements may be required where:

> "* * * the subject property in the proposed development is or will be periodically subject to accumulations of surface water or is traversed by any open drainageway, headwater stream, creek, wetland, spring, or pond * * *."

LUCU 9.6510(1) replaces EC 9.065, which required easement dedications if land is "subject to accumulations of surface water or is traversed by any water course, channel, stream or creek." According to petitioners, LUCU 9.6510(1) adds drainageways, headwater streams, wetlands, springs and ponds to the list of scenic and water resources that may require dedication.

The city does not respond to this subassignment of error. It is sustained.

10. Geotechnical Analysis

LUCU 9.6710 requires that applicants submit a geotechnical analysis to ensure that facilities in areas of known or potentially unstable soil conditions are located, designed and constructed safely. Petitioners argue that erosion hazards along steep slopes adjacent to stream channels or along the floodway fringe are inventoried significant water areas. *See* Response Brief App 121 and 125. According to petitioners, the requirements for a geotechnical analysis increase the level of protection afforded these Goal 5 resources.

The city does not respond to this subassignment of error. It is sustained.

11. Cluster Subdivisions

LUCU 9.8040 to 9.8055 provide for "cluster subdivisions," which apparently allow for greater density in return for providing for open space or protection to natural resources. LUCU 9.8055(2) and (3) require that 25 percent of a cluster subdivision be devoted to open space or protection of natural resources, including natural waterways or wetlands. Petitioners argue that that requirement increases Goal 5 protection for inventoried water areas.

The city does not respond to this subassignment of error. It is sustained.

III. Conclusion

We conclude, above, that a number of challenged LUCU provisions are substantive amendments that either decrease or increase the level of protection the city previously afforded inventoried Goal 5 resources, and therefore affect a Goal 5 resource. A remaining question is what must the city do to demonstrate that such amendments are consistent with

Goal 5. The city's Goal 5 findings are conclusory, and its responses in its brief rely mainly on general defenses that we reject in whole or part. The short answer is that the city must demonstrate that, to the extent the LUCU amends programs that were previously adopted to protect significant Goal 5 resources, the challenged amendments comply with the Goal 5 rule. OAR 660-023-0250(3); *Pekarek v. Wallowa County*, 36 Or LUBA 494, 498 (1999) (where a plan or zoning ordinance amendment affects inventoried Goal 5 resources, the local government must apply the requirements of the Goal 5 rule and determine that the rule is satisfied). That does not necessarily mean that the city must repeat the entire Goal 5 process, or adopt new or amended ESEE analyses. Where the justification the city adopted to support its original Goal 5 programs also supports the amended Goal 5 programs, the city may simply explain why that is the case. However, where the original justification does not justify the amended Goal 5 program, part or all of the original justification will need to be amended to support the amended Goal 5 program.

For the foregoing reasons, we agree with petitioners that a number of LUCU provisions amend land use regulations protecting inventoried Goal 5 sites, and therefore the city must apply and find compliance with Goal 5 and the Goal 5 rule in adopting those amendments.

The second assignment of error (Home Builders) and the fourth assignment of error (Chamber) are sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR (CHAMBER)

Chamber argues in these assignments of error that the city adopted a number of resource preservation requirements that have the effect of reducing the city's inventories of commercial, industrial and residential lands, without addressing whether those inventories continue to comply with Goals 9 and 10. Chamber also challenges LUCU 9.9500, which incorporates into the city's zoning ordinance specified refinement plan policies.

I. Goals 9 and 10

According to Chamber, Goal 9 and its interpretative rule requires that the city "[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations and service levels for a variety of industrial and commercial uses[.]" Chamber argues that where the city adopts plan or zoning amendments that further restrict development of industrial and commercial lands so that the supply of such lands is effectively reduced, the city must determine that the land designated for industrial and commercial use remains consistent with Goal 9 requirements. *See Volny*, 37 Or LUBA at 510-11 (amendment that increases required right-of-way on city streets could reduce the amount of commercial or residential lands in a manner that implicates Goals 9 and 10); *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 691 (1995) (legislative zone changes from industrial and commercial to mixed use requires that the city demonstrate compliance with Goal 9 requirement for an adequate inventory of commercial and industrial sites).

Chamber makes a similar argument under Goal 10, which requires that "[b]uildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units." Chamber argues that where the city adopts plan or zoning amendments that reduce the supply of buildable residential lands, the city must determine that the remaining supply is consistent with Goal 10. *Volny*, 37 Or LUBA at 510-11; *Mulford v. Town of Lakeview*, 36 Or LUBA 715, 731 (1999) (rezoning residential land for industrial uses); *Gresham v. Fairview*, 3 Or LUBA 219 (same).

According to Chamber, the city's decision adopts several new requirements that individually and cumulatively function to reduce the amount of land that is available for industrial, commercial and residential uses. The chief focus of Chamber's argument is a set of new tree protection measures that require that any development activity preserve a minimum of 20 to 60 percent of "significant trees" on the site, which the LUCU defines as trees with a minimum diameter at breast height of eight inches. LUCU 9.6885(2); 9.0500.

Moreover, development must protect at least 70 percent of the "critical root zone" of each significant tree retained. The critical root zone (CRZ) is defined to include an area with a radius of 18 times the diameter at breast height of the tree. According to Chamber, each minimum eight-inch tree thus has a CRZ with a radius of 12 feet, and an unbuildable area of 452 square feet, while the CRZ for a 20-inch tree has a radius of 30 feet and an unbuildable area of 2,826 feet. Chamber notes that according to the city's urban forest plan, the city has about 200,000 trees that meet or exceed the LUCU definition of "significant tree." Chamber argues that the number of acres potentially rendered unbuildable by these provisions could be several thousand acres.

Chamber makes similar arguments with respect to new Open Waterway Protection zones, which mandate a minimum 50-foot buffer between open waterways and development for all conditional use permits, subdivisions, PUD and site review approvals. *See e.g.* LUCU 9.8100(3)(c). Other provisions require a minimum 100-foot buffer between rare plant populations or rare animal populations. *See e.g.* LUCU 9.8100(3)(a) and (b). Chamber argues that the city has made no effort to quantify how much buildable land has been effectively rendered unbuildable under these provisions, or whether the remaining supply is sufficient to satisfy Goals 9 and 10.

The city offers a number of responses. With respect to Goal 9, the city argues first that the city need not comply with the Goal 9 rule, OAR chapter 660, division 9, until periodic review. OAR 660-009-0010(2). Therefore, the city reasons, it need not undertake any review of the adequacy of its Goal 9 inventory outside periodic review. Second, the city argues that the EC previously contained a number of preservation requirements and that the disputed tree retention, CRZ requirements and other buffers cited by petitioners do not "increase" the limitations on buildable lands compared to the EC and thus trigger evaluation of the city's land inventories. The city next argues that petitioners have not established that the tree retention, CRZ requirements and other buffers in fact reduce the city's inventories of

industrial, commercial or residential land, much less that those reductions threaten the city's ability to comply with Goals 9 and 10.[52] The city argues also that other LUCU provisions actually *increase* the number of industrial, commercial or residential uses that might be developed.[53] Finally, with respect to Goal 10, the city cites to a 1992 residential land supply study that found a surplus of 1,415 acres of residential land above that needed during the period 1992 to 2015. The city concludes that, given increased opportunity for industrial, commercial and residential uses under the LUCU, and the excess supply of residential land, the record supports a finding that the city's inventories of such lands continue to satisfy Goals 9 and 10, even assuming that the cited LUCU provisions reduce the supply of buildable industrial, commercial or residential lands, as petitioners allege.

We agree with petitioners that the cited LUCU provisions trigger an obligation on the part of the city to evaluate whether its Goal 9 and 10 inventories continue to comply with those goals. The city's responses do not alter that conclusion. That the Goal 9 rule does not apply to the city's decision does not mean that that decision need not comply with Goal 9 itself. *DLCD v. City of Warrenton*, 37 Or LUBA 933, 960 (2000). Petitioners advance arguments under the goal, not the rule. The city may be correct that the EC contained some kind of tree and natural resource preservation requirements, and that the disputed LUCU provisions do not "increase" the restrictions previously imposed under the EC. However, the city does not cite us to any such EC provisions, nor dispute that the tree retention, CRZ, and buffer requirements have no counterparts in the EC.

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[52]The city also points out that the buffers cited by petitioners, using LUCU 9.8100(3)(a), (b) and (c) as examples, relate to applications for residential uses, and thus those restrictions do not impact the city's inventory of Goal 9 lands. The city is correct that LUCU 9.8100(3) relates to conditional use permits for residential development, specifically needed housing. However, we note that conditional use permits for non-residential development are subject to similar restrictions. *See e.g.* LUCU 9.8090(5).

[53]For example, the city notes that various LUCU provisions allow for additional home occupations, or create residential zones that allow for higher densities.

Further, we disagree with the city that petitioners have failed to demonstrate that the disputed LUCU provisions might impact the supply of industrial, commercial and residential lands. Petitioners have made a facially plausible showing that the disputed provisions are likely to reduce the supply of buildable lands. Under such circumstances, the city has an obligation to demonstrate that despite any such reductions in development potential for industrial, commercial and residential lands the city's inventories continue to comply with Goals 9 and 10. *Volny*, 37 Or LUBA at 510-11; *Opus Development Corp.*, 28 Or LUBA at 691. The city's effort in its brief to do so fails because it makes no effort to quantify how much land, if any, may be rendered unbuildable under the disputed provisions. Neither does the city's brief make any reviewable attempt to compare the disputed LUCU provisions' effect on development potential with the effect on development potential by replaced EC provisions. Until the city makes some attempt to make that comparison, the city is in no position to conclude that its inventories continue to comply with Goals 9 and 10.[54] This subassignment of error is sustained.

II. ORS 197.195

ORS 197.195 requires that a "limited land use decision" shall be consistent with applicable provisions of a city or county comprehensive plan.[55] However, the statute goes on to provide:

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[54]The city protests that any such evaluation would require inventorying each of the 200,000 significant trees in the city to determine how much buildable land if any is consumed in protecting them. However, we see no reason why any quantification that may be necessary to compare the impacts of the old and new regulations should present any difficulty that could not be overcome. In originally adopting the city's inventories of industrial, commercial and residential land, the city presumably applied assumptions, expressly or implicitly, regarding how much land is available or buildable for particular uses, given restraints such as steep slopes, floodplains, setbacks, and public improvements such as streets. Similarly, the city could develop assumptions regarding how much the disputed tree retention, CRZ and buffers are likely to reduce development potential on inventoried industrial, commercial and residential lands. In so doing, we see no reason why the city could not, if it chose, also develop assumptions regarding how much other LUCU provisions are likely to *increase* density or opportunity for industrial, commercial or residential uses, and determine if such increases offset any reductions caused by the tree retention, CRZ and buffers.

[55]ORS 197.015(12) defines a "limited land use decision" as:

> "* * * Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision." ORS 197.195(1)

At LUCU 9.9500 to 9.9710, the city's zoning ordinance sets forth a large number of selected refinement plan policies that, according to LUCU 9.9500, "shall be used when applicable for purposes of evaluating applicable adopted plan policies pertaining to subdivisions, partitions, and site review." Chamber argues that the city erred in doing so, for several reasons. First, Chamber argues that it is not clear if the adopted plan policies are intended to apply as *approval criteria*, where relevant, to subdivision, partition and site review applications under ORS 197.195. Chamber suggests that the city's purpose may instead be to provide context for interpretation or application of other, undisputable approval criteria. That uncertainty is compounded, Chamber argues, by the fact that some of the adopted plan policies contain terms that "recommend" or "encourage" various actions. Chamber argues that such precatory comprehensive plan language is an indication that the city did not intend the plan policies to constitute mandatory approval criteria applicable to individual limited land use decisions. Finally, Chamber argues, if these plan policies are intended as approval criteria, the imposition of a large body of new approval standards

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> "[A] final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
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> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

constitutes a substantial new burden on Goal 9 and 10 inventoried lands. Chamber contends that such new burdens must be evaluated against Goals 9 and 10.

The city responds that its adoption of the disputed refinement plan policies is intended to satisfy ORS 197.195, and to allow the city to apply such policies as approval criteria for subdivisions, partition or site review applications. While the above-quoted sentence from LUCU 9.9500 is awkwardly written, we agree with the city that the apparent intent and purpose of adopting the disputed policies is to make it possible to apply them as approval criteria, pursuant to ORS 197.195.

With respect to Goals 9 and 10, Chamber does not argue that application of these refinement policies to subdivision, partition or site review applications reduces the development potential of industrial, commercial or residential lands in a manner that effectively reduces the *supply* of such lands. Instead, we understand Chamber to argue that adoption of new, additional approval standards applicable to development of industrial, commercial and residential lands is an additional regulatory *burden* on development of those lands and therefore must be evaluated for consistency with Goals 9 and 10. However, Chamber cites no authority for that proposition. Chamber does not identify in this subassignment of error any requirement under Goals 9 or 10 that local governments not increase regulatory burdens or that local governments refrain from imposing any particular level of regulatory burden. Even assuming such a requirement exists or can be implied, Chamber makes no effort to explain why adoption of the challenged refinement plan policies as approval criteria to certain development in certain areas of the city threatens to violate that requirement. Absent a more developed argument from Chamber, we cannot say that the city's adoption of refinement policies pursuant to ORS 197.195 requires greater or different evaluation under the goals than the city performed here. This subassignment of error is denied.

The second and third assignments of error (Chamber) are sustained, in part.

FIRST ASSIGNMENT OF ERROR (CHAMBER)

Chamber argues that the city's decision violates Statewide Goal 2 (Land Use Planning), because (1) the decision is not supported by adequate explanations of compliance with applicable goals; (2) the decision is not supported by an adequate basis in fact; (3) the city failed to adopt ultimate policy choices; and (4) the city failed to adequately coordinate its decision with affected agencies and local governments, as required by Goals 2 and 10.

With the exception of the coordination argument, Chamber's arguments under the first assignment of error appear to be entirely derivative of other arguments in other assignments of error, and do not provide an independent basis for reversal or remand. Accordingly, we address only the coordination argument.

Goal 2 requires that "[e]ach plan and related implementation measure shall be coordinated with the plans of affected governmental units." The Goal 10 rule at OAR 660-008-0030 requires that "[e]ach local government shall consider the needs of the relevant region in arriving at a fair allocation of housing types and densities."[56] Petitioners argue that the city's decision effectively restricts the city's ability to meet its "fair share" of regional residential, commercial and industrial growth, with the result that nearby cities, such as Springfield, Junction City, Cottage Grove, Harrisburg, Monroe and Creswell, may have to accommodate more than their fair share. *See Creswell Court LLC v. City of Creswell*, 35 Or LUBA 234 (1998) (limits on new manufactured home parks violate the Goal 10 coordination requirements, where the city failed to coordinate with nearby jurisdictions that might have to

[56]OAR 660-008-0030 provides:

> "(1) Each local government shall consider the needs of the relevant region in arriving at a fair allocation of housing types and densities.
>
> "(2) The local coordination body shall be responsible for ensuring that the regional housing impacts of restrictive or expansive local government programs are considered. The local coordination body shall ensure that needed housing is provided for on a regional basis through coordinated comprehensive plans."

accommodate Creswell's share of demand for such housing). According to petitioners, there is little evidence in the record that the city coordinated with other cities, or attempted to balance the needs of these governmental units as well as the needs of its citizens.

The city points out that the Goal 2 coordination requirement is limited to "affected governmental units," which Goal 2 defines to include only governments with "programs, land ownerships or responsibilities within the area included in the Plan." Goal 2 does not require, as Goal 10 arguably does, that the city coordinate with governments outside the plan area. The city cites to evidence that it notified and coordinated with every government within the plan area, and argues that the Goal 2 coordination requirement was satisfied. We agree.

With respect to Goal 10, the city argues that the Goal 10 coordination requirement applies only if the city amends its plan or implementing regulations in a manner that affects the city's "allocation of housing types and densities." The city submits that the LUCU does not affect the allocation of housing types or housing density, and thus adoption of the LUCU does not trigger an obligation to coordinate with nearby cities under Goal 10.

We agree that no identified LUCU provision affects the "fair allocation of housing types or density" within the meaning of OAR 660-008-0030(1). Not all local government programs with arguable impacts on housing or Goal 10 compliance trigger the coordination requirement at OAR 660-008-0030(1), only those that affect the allocation of housing types or density, as was the case in *Creswell*. OAR 660-008-0030(2) may impose a coordination obligation with respect to such broader impacts, but it imposes that obligation on the local coordination body. Chamber does not argue that the city is the local coordination body.

The first assignment of error (Chamber) is denied.

The city's decision is remanded.