

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 HOMEBUILDERS ASSOCIATION OF  
5 METROPOLITAN PORTLAND,

6 *Petitioner,*

7  
8 vs.

9  
10 METRO,  
11 *Respondent,*

12 and

13  
14 1000 FRIENDS OF OREGON,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2001-197

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Metro.

23  
24 Wendie Kellington, Lake Oswego, filed the petition for review and argued on behalf  
25 of petitioner.

26  
27 Richard P. Benner, Portland, filed the response brief and argued on behalf of  
28 respondent. With him on the brief was Daniel B. Cooper.

29  
30 Mary Kyle McCurdy, Portland, represented intervenor-respondent.

31  
32 BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member,  
33 participated in the decision.

34  
35 AFFIRMED

36 05/21/2002

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

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**NATURE OF THE DECISION**

Petitioner appeals a legislative text amendment to the Metro Regional Framework Plan (RFP) and Metro Code (MC) that permits only Metro to initiate an amendment to the Metro urban growth boundary (UGB) to accommodate housing need.

**MOTION TO FILE REPLY BRIEF**

Petitioner requests permission to file a reply brief, pursuant to OAR 661-010-0039. The proposed reply brief addresses arguments in the response brief that petitioner waived certain issues by not raising those issues below. There is no objection to the motion, and it is allowed.

**MOTION TO STRIKE**

Metro moves to strike appendix 4 to the petition for review, which contains a copy of portions of a Metro document called the Regional Urban Growth Goals and Objectives (RUGGOs). Metro argues that the RUGGOs are not in the record and are not applicable in that form to the challenged decision. According to Metro, the RUGGOs have been incorporated into the RFP, adopted in 1997, and no longer exist independently of the RFP. Consequently, Metro also moves to strike portions of the fourth and eighth assignments of error, which argue in part that the challenged decision is inconsistent with the RUGGO provisions in appendix 4.

Petitioner responds that LUBA’s rules require that the petition for review either quote or contain a copy of any provision of local law cited in the petition. OAR 661-010-0030(4)(f). To the extent other authority is required, petitioner argues that LUBA routinely takes official notice of local laws and ordinances. We agree with petitioner that the motion to strike is without merit. Whether the RUGGOs apply to the challenged decision, or provide a basis for reversal or remand, goes to the merits of the fourth and eighth assignments of error. However, even if they do not apply to the challenged decision, we may

1 take official notice of the RUGGOs. Similarly, that the cited RUGGO provisions are not in  
2 the local record is not a basis to strike those provisions, or arguments based on them. The  
3 motion to strike is denied.

4 **FACTS**

5 Metro is a regional government responsible for, among other things, the Metro UGB,  
6 which includes the city of Portland and a number of other cities and unincorporated urban  
7 areas.

8 In 1995, the legislature adopted ORS 197.296, which in relevant part requires that at  
9 periodic review or any other legislative review concerning an urban growth boundary and  
10 related to housing, local governments shall ensure that comprehensive or regional plans shall  
11 provide sufficient building lands within the UGB to accommodate estimated housing needs  
12 for 20 years.<sup>1</sup> In 1997, the legislature adopted ORS 197.299, a statute that applies only to  
13 Metro and that requires Metro to conduct the analysis required by ORS 197.296 not later  
14 than January 1, 1998, and re-conduct that analysis at least every five years thereafter.<sup>2</sup>

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<sup>1</sup>ORS 197.296 provides in relevant part:

“(2) At periodic review pursuant to ORS 197.628 to 197.650 or at any other legislative review of the comprehensive plan or regional plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, comprehensive plans or regional plans shall provide sufficient buildable lands within urban growth boundaries established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years. The 20-year period shall commence on the date initially scheduled for completion of the periodic or legislative review.

“(3) In performing the duties under subsection (2) of this section, a local government shall:

“(a) Inventory the supply of buildable lands within the urban growth boundary and determine the housing capacity of the buildable lands; and

“(b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years.”

<sup>2</sup>ORS 197.299 provides:

1 Prior to the challenged decision, Metro’s code authorized five ways in which the  
2 Metro UGB might be amended: a legislative process initiated by Metro and four distinct  
3 types of quasi-judicial procedures, initiated by cities, counties, special districts or property  
4 owners. Quasi-judicial amendments included, in relevant part, major amendments and  
5 locational adjustments.<sup>3</sup> Under *former* MC 3.01.033, applications for quasi-judicial major or  
6 locational amendments could only be filed between February 1 and March 15 each year.  
7 Under *former* MC 3.01.030, nothing prohibited a local government, special district or  
8 property owner from filing an application for a quasi-judicial UGB amendment in order to  
9 address housing needs.

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- “(1) A metropolitan service district organized under ORS chapter 268 shall complete the initial inventory, determination and analysis required under ORS 197.296 (3) not later than January 1, 1998, and conduct the inventory and analysis at least every five years thereafter.
- “(2)(a) The metropolitan service district shall take such action as necessary under ORS 197.296 (6)(a) to accommodate one-half of a 20-year buildable land supply determined under ORS 197.296 (3) within one year of completing the analysis.
- “(b) The metropolitan service district shall take all final action under ORS 197.296 (6)(a) necessary to accommodate a 20-year buildable land supply determined under ORS 197.296 (3) within two years of completing the analysis.
- “(c) The metropolitan service district shall take action under ORS 197.296 (6)(b), within one year after the analysis required under ORS 197.296 (3)(b) is completed, to provide sufficient buildable land within the urban growth boundary to accommodate the estimated housing needs for 20 years from the time the actions are completed. The metropolitan service district shall consider and adopt new measures that the governing body deems appropriate under ORS 197.296 (6)(b).
- “(3) The Land Conservation and Development Commission may grant an extension to the time limits of subsection (2) of this section if the Director of the Department of Land Conservation and Development determines that the metropolitan service district has provided good cause for failing to meet the time limits.”

<sup>3</sup>As relevant here, the principle difference between major amendments and locational adjustments under former MC 3.01 was that locational adjustments were limited to no more than 20 acres, while major amendments were quasi-judicial amendments of more than 20 acres.

1           On December 13, 2001, Metro adopted the decision challenged in this appeal,  
2 Ordinance 01-929A. The preamble to Ordinance 01-929A recites that under  
3 ORS 197.299(1), Metro must inventory and analyze its supply of land every five years, that  
4 Metro will conduct a legislative review of land supply every five years, but that Metro also  
5 wants to ensure the availability of a procedure to amend the UGB between five-year reviews  
6 in order to address unanticipated needs that cannot wait until the next legislative review.  
7 Record 35. Further, Ordinance 01-929A takes effect immediately, “because processing and  
8 reviewing major amendments and locational adjustments under the current code is drawing  
9 staff and Council resources away from Metro’s legislative review of the UGB, which Metro  
10 must complete to meet the requirements of ORS 197.299 and periodic review before LCDC.”  
11 Record 37.

12           The challenged decision amends section 1.9.3 of the RFP to provide that a local  
13 government, special district or property owner may initiate a quasi-judicial UGB amendment  
14 process only for specified nonhousing needs.<sup>4</sup> The challenged decision does not alter the

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<sup>4</sup>As amended, section 1.9.3 of the RFP provides, in relevant part:

“Urban Growth Boundary Amendment Process — Criteria for amending the UGB shall be adopted based on statewide planning goals 2 and 14, other applicable state planning goals and relevant portions of the RUGGOs and this Plan:

- “1. Major Amendments. Amendments of the UGB may be made through a quasi-judicial or a legislative process. Metro will initiate the legislative amendment process when it determines there is need to add land to the UGB following the analysis of buildable land supply required every five years by ORS 197.299(1). The process shall involve local governments, special districts, citizens and other interests. A local government, a special district or a property owner may initiate a quasi-judicial amendment process to add land to the UGB for public facilities, public schools, natural areas and those nonhousing needs that (a) were not accommodated in the most recent five-year analysis of land supply pursuant to ORS 197.299(1) and (b) must be addressed prior to the next five-year analysis.
- “2. Minor Adjustments. Minor adjustments of the UGB may be brought to Metro by a local government, a special district or a property owner for siting public facility lines and roads, for land trades and to make the UGB coterminous with nearby property lines or natural or built features in order to make the UGB function more efficiently and effectively.”

1 legislative process for amending the Metro UGB at MC 3.01.015, but significantly amends  
2 the provisions governing quasi-judicial UGB amendments. In relevant part it reduces the  
3 number of quasi-judicial methods to two: major amendments and minor adjustments.

4 Under MC 3.01.035 as amended, minor adjustments to the UGB are permitted only to  
5 site roads and lines, for small land trades, and for minor locational adjustments.  
6 MC 3.01.035(a) states that it is not the purpose of that section “to add land to the UGB to  
7 satisfy a need for housing or employment.”<sup>5</sup>

8 Major amendments are processed under MC 3.01.025.<sup>6</sup> The criteria for a major  
9 amendment are found at MC 3.01.030. Under MC 3.01.030 as amended, major adjustments  
10 are intended “to provide a mechanism to address needs for land that were not anticipated in  
11 the last five-year analysis of buildable land supply and cannot wait until the next five-year  
12 analysis.”<sup>7</sup> However, MC 3.01.030(a) specifies that land may be added under that provision

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<sup>5</sup>MC 3.01.035 provides in relevant part:

- “(a) The purpose of this section is to provide a mechanism to make small changes to the UGB in order to make it function more efficiently and effectively. It is not the purpose of this section to add land to the UGB to satisfy a need for housing or employment. This section establishes criteria that embody state law and Regional Framework Plan policies applicable to boundary adjustments.
- “(b) Metro may adjust the UGB under this section only for the following reasons: (1) to site roads and lines for public facilities and services; (2) to trade land outside the UGB for land inside the UGB; or (3) to make the UGB coterminous with nearby property lines or natural or built features.”

<sup>6</sup>As amended, MC 3.01.025(a) provides:

“A city, a county, a special district or a property owner may file an application for a major amendment to the UGB on a form provided for that purpose. The Executive Officer will accept applications for major amendments between February 1 and March 15 of each calendar year except that calendar year in which the Metro Council is completing its five-year analysis of buildable land supply under ORS 197.299(1). After receipt of a complete application, the Executive Officer will set the matter for a public hearing and provide notice to the public in the manner set forth in sections 3.01.050 and 3.01.055.”

<sup>7</sup>MC 3.01.030 provides in relevant part:

- “(a) The purpose of the major amendment process is to provide a mechanism to address needs for land that were not anticipated in the last five-year analysis of buildable

1 only for “public facilities, public schools, natural areas, land trades and other nonhousing

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land supply and cannot wait until the next five-year analysis. This section establishes criteria for major amendments to the UGB and sets forth how state law applies to these amendments. Metro intends compliance with the criteria of this section to constitute compliance with ORS 197.298, statewide planning Goals 2 and 14 and the Regional Urban Growth Goals and Objectives. Land may be added to the UGB under this section only for the following purposes: public facilities, public schools, natural areas, land trades and other nonhousing needs.

“(b) The applicant shall demonstrate that the amendment will provide for an orderly and efficient transition from rural to urban use, considering the following factors:

“(1) Demonstrated need to accommodate long-range urban population growth. The Metro Council will consider, based upon evidence in the record, whether the need for the subject land was accommodated at the time of the last legislative analysis of the UGB required by ORS 197.299. If the need was not accommodated in that analysis, the Metro Council will consider whether the need must be met now, rather than at the time of the next legislative amendment, in order to ensure an orderly and efficient transition from rural to urban use.

“(2) Need for employment opportunities and livability. The Metro Council will consider, based upon evidence in the record, whether the need must be met at a particular location, or in a particular part of the region, in order to secure an employment or livability opportunity that cannot await the next legislative review of the UGB required by ORS 197.299(1), or to ensure the livability of that part of the region.

“(3) Orderly and economic provision of public facilities and services. \* \* \*

“(4) Maximum efficiency of land uses within and on the fringe of the existing urban area. \* \* \*

“(5) Environmental, energy, economic and social consequences. \* \* \*

“(6) Retention of agricultural and forest land. \* \* \*

“\* \* \* \* \*

“(7) Compatibility of proposed urban development with nearby agricultural activities. \* \* \*

“\* \* \* \* \*

“(d) If the Metro Council adds land to the UGB in order to facilitate a trade and the land is available for housing, the Metro Council shall designate the land to allow an average density of at least 10 units per net developable acre or such lower density that is consistent with the 2040 Growth Concept plan designation for the area.

“(e) Compliance with the criteria in subsections (b) and (c) of this section shall constitute conformance with the Regional Urban Growth Goals and Objectives.”

1 needs.” The net effect of the foregoing amendments is that the only vehicle to amend the  
2 UGB to address housing needs under Metro’s code is by means of a legislative amendment  
3 initiated by Metro, pursuant to MC 3.01.015.

4 **WAIVER**

5 In response to several assignments of error, Metro argues that petitioner failed to raise  
6 the issues set forth therein during the proceedings before the Metro Council, and thus those  
7 issues are waived, pursuant to ORS 197.763(1). Petitioner responds, and we agree, that the  
8 challenged decision is a legislative decision and, as such, is not subject to the requirement, at  
9 ORS 197.763(1), that issues before LUBA must first be raised before the local government  
10 below. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 678-79 (1995).

11 **FIRST, SECOND, THIRD, FOURTH, SEVENTH, EIGHTH AND TENTH**  
12 **ASSIGNMENTS OF ERROR**

13 In these assignments of error, petitioner argues that the challenged amendments are  
14 inconsistent with statewide planning Goal 10 (Housing),<sup>8</sup> Metro’s Charter, the Metro  
15 Housing rule at OAR chapter 660, division 7, the statutes governing needed housing at  
16 ORS 197.303 to 197.313, and the statutes governing UGB amendments for housing at  
17 ORS 197.296 and 197.299. In addition, petitioner argues that the challenged amendments  
18 are inconsistent with Goal 14 (Urbanization) and Metro’s RUGGOs.<sup>9</sup>

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<sup>8</sup>Goal 10 is to “provide for the housing needs of citizens of the state.” In addition, Goal 10 provides, in relevant part:

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

“‘Buildable Lands’ refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.”

<sup>9</sup>Goal 14 is to “provide for an orderly and efficient transition from rural to urban land use.” Goal 14 provides, in relevant part:



1           The common theme in the arguments under these assignments of error is that Metro  
2 has an obligation under the cited provisions to maintain “a constant adequate supply of land  
3 for housing” in the Metro area, and that Metro’s prohibition on quasi-judicial UGB  
4 amendments to address housing needs that may exist in the future is inconsistent with that  
5 obligation. Petition for Review 14. Specifically, petitioner argues that a process under  
6 which the UGB can be amended to address housing needs *only* pursuant to a legislative  
7 process initiated by Metro is insufficient to ensure an adequate supply of buildable  
8 residential lands in the Metro UGB. Petitioner contends that a quasi-judicial UGB  
9 amendment process, initiated by parties other than Metro, is essential to prevent unexpected  
10 interim shortages in the supply of buildable residential lands. Petitioner speculates that,  
11 absent the opportunity for action presented by quasi-judicial UGB amendments for housing,  
12 Metro may not act in a timely manner to maintain an adequate supply of land for housing.

13           The issue presented in these assignments of error is largely a matter of first  
14 impression, and nothing in the cited provisions of law or other authority bears directly on the  
15 question of whether Metro must retain a quasi-judicial UGB amendment process for housing  
16 need. We understand petitioner to contend, however, that a requirement for such a process is

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“Urban growth boundaries shall be established to identify and separate urbanizable land from rural land. Establishment and change of the boundaries shall be based upon considerations of the following factors:

“(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;

“(2) Need for housing, employment opportunities, and livability[.]”

“\* \* \* \* \*

“Land within the boundaries separating urbanizable land from rural land shall be considered available over time for urban uses. Conversion of urbanizable land to urban uses shall be based on consideration of:

“\* \* \* \* \*

“(2) Availability of sufficient land for the various uses to insure choices in the market place[.]”

1 implicit in the cited goals, rules and other law or, stated differently, that such a process is  
2 essential to ensure that Metro fulfills its obligations under the cited goals, rules, etc., and  
3 therefore a requirement for a quasi-judicial process must be presumed. We first address that  
4 main theme in petitioner’s arguments, before turning to related arguments that require  
5 additional discussion.

6 **A. Residential Lands Supply**

7 It is not clear whether petitioner takes the position, in arguing that Metro must  
8 provide “a constant adequate supply of land,” that Metro must ensure that the UGB contains  
9 a 20-year supply of residential land at all times. Metro disputes any contention to that effect.  
10 If that is petitioner’s contention, we agree with Metro. Nothing cited to us in the goals, rules  
11 or statutes requires that Metro *maintain* a 20-year supply at all times. In ORS 197.299, the  
12 legislature has directed Metro to review its supply of residential lands at least every five  
13 years, and take appropriate steps within two years of completing its analysis to accommodate  
14 a 20-year supply. That timetable does not suggest that the legislature is concerned that  
15 Metro ensure a 20-year supply of residential land at all times.

16 We understand petitioner to argue, however, that the timetable at ORS 197.299 is  
17 sufficient only if there exists some additional process to *obligate* Metro to respond to  
18 unexpected shortages in between its five-year reviews. The challenged decision removes  
19 such a process from Metro’s code, petitioner contends, and replaces it with a scheme under  
20 which Metro can choose to ignore such shortages for as long as five years and perhaps much  
21 longer.<sup>10</sup> Allowing Metro to ignore housing needs for five years or longer, petitioner  
22 submits, is patently inconsistent with the above-cited provisions of law.

23 The possibility that the Metro UGB as a whole might have a 10 or 15-year supply of  
24 residential land for a limited period of time appears to trouble petitioner less than the

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<sup>10</sup>Petitioner points out that the statute does not impose a timetable to complete Metro’s analysis, only that Metro take any required actions within two years of completing the analysis.

1 possibility that, viewed on a *subregional* scale, an unexpected shortage might substantially  
2 reduce or even eliminate the supply of buildable land in that subregion of the urban area  
3 within the UGB. For example, petitioner posits that unexpected employment growth in one  
4 subregion of the Metro UGB might create unexpected local housing demand that exhausts  
5 that subregion's share of the regional land supply in less than five years. In that event,  
6 petitioner argues, the challenged decision would effectively prohibit the city or others from  
7 applying to Metro for a quasi-judicial UGB amendment to address these unexpected housing  
8 needs. According to petitioner, under the challenged decision Metro would have no  
9 obligation to address that unexpected need until its five-year legislative review, and even  
10 then Metro could take up to two years after it completes its review before it actually amends  
11 the UGB. Petitioner argues that such a potentially long delay in addressing housing needs  
12 would be inconsistent with the above-cited goals, rules and statutes. To prevent the  
13 possibility of such long delays, petitioner contends, Metro *must* provide a quasi-judicial UGB  
14 amendment process that includes consideration of housing needs.

15 Metro's decision relies on the five-year review mandated by ORS 197.299 to obviate  
16 any necessity for quasi-judicial UGB amendments directed at housing needs. Metro's brief  
17 points out that the Metro Council can initiate a legislative amendment to amend the UGB at  
18 any time it determines there is need to do so, in addition to the five-year reviews mandated  
19 by ORS 197.299. MC 3.01.015(c). Metro also argues, and petitioner does not dispute, that  
20 local governments, special districts and citizens can petition the Metro Council to initiate a  
21 UGB amendment for any reason at any time. Aside from petitioner's speculation, Metro  
22 argues, there is no reason to presume that the Metro Council would fail to act, if it  
23 determined that a housing need exists that should be addressed prior to the next five-year  
24 review. Given the five-year review timetable at ORS 197.299, Metro's ability to initiate a  
25 UGB amendment at any time, and the ability of interested parties to petition Metro to amend  
26 the UGB, Metro argues that it is highly unlikely that the supply of residential land within the

1 regional UGB as a whole could be diminished to the point where Metro can be said to have  
2 failed its obligations under the cited goals, rules and statutes. Therefore, Metro argues, a  
3 quasi-judicial UGB amendment procedure for housing is not essential to ensure compliance  
4 with any of the cited goals, rules or other applicable law.

5 We agree that petitioner has not established that the availability of a quasi-judicial  
6 UGB amendment procedure for housing is essential to ensure that the regional UGB as a  
7 whole continues to comply with applicable law. ORS 197.299 contemplates some delay  
8 between Metro’s initial determination that the regional UGB contains a 20-year supply of  
9 residential land and subsequent reviews and actions based on those reviews. We do not see  
10 why, given the timetable imposed by ORS 197.299, a quasi-judicial UGB amendment  
11 process is necessary to ensure that the UGB as a whole contains a sufficient amount of  
12 residential land.<sup>11</sup>

13 Petitioner’s argument based on the possibility of a subregional shortage of residential  
14 lands presents a closer question. In *Residents of Rosemont v. Metro*, 173 Or App 321, 329-  
15 30, 21 P3d 1108 (2001), the Court of Appeals explained that a subregional housing need  
16 may, in some circumstances, constitute need for purposes of satisfying factors 1 and 2 of  
17 Goal 14. The court cautioned, however, that any such subregional need “must be identified  
18 and evaluated in the context of regional needs.” *Id.* at 330.<sup>12</sup>

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<sup>11</sup>Although the parties do not discuss it, we note that ORS 197.301 and 197.302 require any metropolitan service district organized under ORS chapter 268 (*i.e.*, Metro) to compile information and report every two years to the Department of Land Conservation and Development (DLCD) on various housing matters, including the rate of conversion of vacant land to improved land. ORS 197.301(2). After gathering the information but before submitting it to DLCD, Metro must make a determination that actions taken in its legislative UGB review under ORS 197.296 have “established the buildable land supply and housing densities necessary to accommodate estimated housing needs determined under ORS 197.296(3).” ORS 197.302(1). If not, Metro must undertake corrective action, which may include amendment of the UGB. *Id.* Failure to “demonstrate the buildable land supply \* \* \* necessary to accommodate housing needs” under ORS 197.302 and 197.296 may be the basis for an enforcement action under ORS 197.319 to 197.335. ORS 197.302(3). In other words, in addition to conducting the ORS 197.296 UGB review every five years, it appears that Metro must take steps every two years to verify that the actions it has taken under ORS 197.296 are working.

<sup>12</sup>As far as we are informed, Metro’s legislation does not define subregions, or contain any designation or criteria for designating particular areas within the regional UGB as subregions. Metro apparently defines

1           While LUBA and the Court of Appeals have held that Metro *can* consider housing  
2 need on a subregional basis, at least in some circumstances, it is not clear to us that anything  
3 compels Metro to do so. Petitioner cites to RUGGO Objective 17, codified as part of RFP  
4 Policy 1.3, which states that Metro shall adopt a “fair share” strategy for meeting housing  
5 need “based on a subregional analysis that provides for,” among other things, “a balance of  
6 jobs and housing within the region and subregions.”<sup>13</sup> However, nothing in RFP 1.3 or  
7 anything else directed to our attention expressly compels Metro to achieve and maintain a  
8 constant subregional “balance of jobs and housing.”

9           Petitioner’s scenario presumes that whenever a subregional shortage of residential  
10 land is identified, that identification triggers an obligation by Metro to eliminate that  
11 shortage immediately, notwithstanding that the region as a whole has an adequate supply of  
12 residential land. That presumption is questionable. Metro’s choices as to the distribution of  
13 future residential growth in the region are constrained, to some extent, by state law, and the  
14 result may be that some areas of the Metro UGB are allotted more land for residential growth  
15 than other areas. If one area experiences unexpected employment growth, bringing the local

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subregions only on an ad hoc basis. *See Residents of Rosemont*, 173 Or App at 331 (remanding in part because Metro failed to explain why an area within a six-mile radius of property proposed for inclusion in the UGB is an identifiable subregion).

<sup>13</sup>RFP 1.3 provides in relevant part:

“The Metro Council shall adopt a ‘fair share’ strategy for meeting the housing needs of the urban population in cities and counties based on a subregional analysis that provides for:

“[A] diverse range of housing types available within cities and counties inside the UGB;

“[S]pecific goals for low- and moderate-income and market rate housing to ensure that sufficient and affordable housing is available to households of all income levels that live or have a member working in each jurisdiction;

“[H]ousing densities and costs supportive of adopted public policy for the development of the regional transportation system and designated centers and corridors;

“[A] balance of jobs and housing within the region and subregions.”

1 jobs and housing ratio out of balance, it is not clear to us that Metro must allot more land to  
2 that area for additional housing. It may be that Metro could, consistent with RFP 1.3 and  
3 other applicable law, rely on the supply of buildable land in nearby subregions to address that  
4 imbalance, or take other steps that do not require expansion of the UGB.

5 Be that as it may, the dispositive issue is the question of timing. Petitioner has not  
6 identified any legal requirement, other than ORS 197.299, that Metro consider UGB  
7 amendments for housing on any particular timetable. The speculative possibility that a  
8 subregional housing shortage will arise in the interim between five-year reviews, and that  
9 Metro will decline to initiate a legislative proceeding to redress that interim shortage, is an  
10 insufficient basis to establish that a quasi-judicial UGB amendment process is essential to  
11 ensure that Metro satisfies its obligations under Goals 10 and 14, and the other cited  
12 authority. We hold that, given the five-year reviews mandated by ORS 197.299, Metro is not  
13 obligated to provide a quasi-judicial UGB amendment process to address housing need  
14 generally or subregional housing need in particular.

15 **B. Definition of Legislative Amendment**

16 Petitioner also argues that, as a product of the challenged decision and Metro’s  
17 preexisting definition of “legislative amendment,” Metro has effectively created a class of  
18 housing need that Metro *cannot* address in its legislative review and thus cannot address at  
19 all. Petitioner points out that MC 3.01.010(h) defines “legislative amendment” to mean “an  
20 amendment to the UGB initiated by [Metro], which is not directed at a particular site-specific  
21 situation or relatively small number of persons.” Petitioner posits that a housing need might  
22 be limited to a “particular site-specific situation or relatively small number of persons.” If  
23 so, petitioner argues, Metro is precluded from addressing such small-scale housing need as  
24 part of its legislative review, because a UGB amendment based on that housing need could  
25 not constitute a “legislative amendment.”

1           It seems improbable that a need for housing within the meaning of Goals 10 and 14,  
2 in the context of Metro’s obligations to maintain the regional UGB, could be limited to a  
3 “particular site-specific situation or relatively small number of persons.” However, even if  
4 such a site-specific need could exist, petitioner is incorrect that the challenged decision in  
5 combination with the MC 3.01.010(h) definition of “legislative amendment” prevents Metro  
6 from ever considering such site-specific housing needs. We have often recognized that  
7 legislative decisions may consist of a collection of discrete decisions, some of which, viewed  
8 individually, could be described as quasi-judicial. In such cases, whether the decision is  
9 properly viewed as legislative or quasi-judicial depends on its character as a whole, not the  
10 character of the constituent parts. *DeBell v. Douglas County*, 39 Or LUBA 695, 699 (2001);  
11 *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 655 (1999), *aff’d as modified*  
12 165 Or App 1, 994 P2d 1205 (2000); *Leonard v. Union County*, 24 Or LUBA 362, 368  
13 (1992). In other words, we know of no reason why Metro could not, in the course of its  
14 periodic legislative reviews of the UGB, address specific housing needs that, if viewed  
15 individually, might not meet the MC 3.01.010(h) definition of “legislative amendment.”

16           **C.     Needed Housing**

17           ORS 197.303 defines “needed housing” to include a broad range of housing types.<sup>14</sup>  
18 Under ORS 197.307(3)(a), when a housing need has been shown within a UGB at particular

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<sup>14</sup>ORS 197.303(1) provides in relevant part:

“As used in ORS 197.307, until the beginning of the first periodic review of a local government’s acknowledged comprehensive plan, ‘needed housing’ means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government’s acknowledged comprehensive plan, ‘needed housing’ also means:

- “(a)     Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
- “(b)     Government assisted housing;

1 price ranges and rent levels, needed housing shall be permitted in one or more zones with  
2 sufficient buildable lands to satisfy that need. In addition, ORS 197.307(6) requires that:

3 “Any approval standards, special conditions and the procedures for approval  
4 adopted by a local government shall be clear and objective and may not have  
5 the effect, either in themselves or cumulatively, of discouraging needed  
6 housing through unreasonable cost or delay.”

7 According to petitioner, the challenged decision creates procedures for amending the  
8 UGB that are not “clear and objective,” and that will have the effect of “discouraging needed  
9 housing through unreasonable cost or delay.” Petitioner argues that under the definition of  
10 “legislative amendment,” discussed above, it is not clear when and under what circumstances  
11 Metro will apply its procedures to amend the UGB to address housing need. Further,  
12 petitioner argues that the elimination of quasi-judicial UGB amendment procedures for  
13 housing and Metro’s sole reliance on its legislative UGB reviews to address housing need  
14 will necessarily discourage needed housing through “unreasonable delay.”

15 Metro responds that ORS 197.303 through 197.307 are directed at local governments  
16 that have a comprehensive plan, that adopt zoning districts, and that approve applications for  
17 development of needed housing, *e.g.*, cities or counties within the Metro UGB. Metro argues  
18 that it does not have a comprehensive plan, does not adopt zoning districts, and does not  
19 approve applications for development of needed housing. Metro disputes that “procedures  
20 for approval” of needed housing referenced in ORS 197.307(6) include the challenged Metro  
21 Code provisions governing UGB amendments.

22 Metro’s role in implementing ORS 197.303 through 197.307 is not clear to us. The  
23 Metropolitan Housing Rule at OAR chapter 660, division 7 implements the needed housing

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“(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to  
197.490; and

“(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.”



1 statutes, and applies exclusively to the Metro region. Metro has at least a regional  
2 coordination role under the rule. OAR 660-007-0050. Importantly, OAR 660-007-0015  
3 appears to specifically implement ORS 197.307(6) in requiring that:

4 “Local approval standards, special conditions and procedures regulating the  
5 development of needed housing must be clear and objective, and must not  
6 have the effect, either in themselves or cumulatively, of discouraging needed  
7 housing through unreasonable cost or delay.”

8 Rather than the general phrase “procedures for approval” used in ORS 197.307(6), the rule  
9 refers to “procedures regulating the development of needed housing[.]” That supports  
10 Metro’s position that ORS 197.307(6) is directed in relevant part at procedures for approving  
11 an application for *development* of needed housing, not procedures that more remotely touch  
12 on housing, such as UGB amendment procedures. *See Citizens Against Irresponsible*  
13 *Growth v. Metro*, 39 Or LUBA 539, 555 (2001), *aff’d* 179 Or App 12, 38 P3d 956 (2002) (a  
14 UGB amendment merely converts rural land to urbanizable land, and does not itself allow  
15 uses that would trigger application of the Transportation Planning Rule).

16 We need not decide whether ORS 197.307(6) applies to the challenged decision,  
17 because even it does, petitioner has not established that the decision violates the statute.  
18 Petitioner’s only allegation that Metro’s legislation is not “clear and objective” is directed at  
19 the Metro Code definition of “legislative amendment,” which the challenged decision does  
20 not amend. We do not see that the challenged amendments, to the extent they affect the  
21 meaning of the code definition of “legislative amendment,” render that definition unclear or  
22 subjective. Regarding whether the challenged decision “discourages needed housing”  
23 through unreasonable delay, we have held that:

24 “[T]he question of whether approval standards or procedures discourage  
25 needed housing through *unreasonable* cost or delay cannot, in most cases, be  
26 resolved in the abstract, in a challenge to a legislative decision that adopts  
27 such standards or procedures. In the absence of actual application of  
28 standards or procedures in a particular case, it is difficult to see how any party  
29 could demonstrate what the delay or additional cost might be, whether that  
30 delay or cost is reasonable or unreasonable, and whether that delay or cost

1 discourages needed housing, either alone or in combination with other  
2 standards or procedures. \* \* \* While petitioners argue that certain standards  
3 or procedures are likely to increase cost or delay, they make no effort to  
4 demonstrate that such increased cost or delay is unreasonable, alone or  
5 cumulatively. \* \* \* [W]e believe it is highly unlikely that such a  
6 demonstration can be made or, if made, reviewed in a meaningful manner,  
7 except in the context of an ‘as-applied’ challenge.” *Home Builders Assoc. v.*  
8 *City of Eugene*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2001-059/063, February 28,  
9 2002) slip op 51 (emphasis in original).

10 Here, petitioner speculates that Metro will delay initiating a legislative UGB amendment for  
11 housing for some period of time pursuant to the challenged amendments, and that that delay  
12 will be unreasonable. That speculation has no basis in the record and petitioner’s  
13 hypotheticals do not offer a sufficient basis for concluding that any delay that might result  
14 under the challenged decision will be unreasonable.<sup>15</sup>

15 **D. Conclusion**

16 For the foregoing reasons, we conclude that petitioner has not established that the  
17 availability of a quasi-judicial UGB amendment procedure is essential to ensure compliance  
18 with any applicable law. Petitioner’s other arguments under these assignments of error do  
19 not provide a basis for reversal or remand. Accordingly, the first, second, third, fourth,  
20 seventh, eighth and tenth assignments of error are denied.

21 **FIFTH ASSIGNMENT OF ERROR**

22 Goal 1 (Citizen Involvement) is to “develop a citizen involvement program that  
23 insures the opportunity for citizens to be involved in all phases of the planning process.”  
24 Petitioner argues that the challenged decision violates Goal 1, because it prohibits citizen  
25 access to the Metro Council to establish, in a setting subject to quasi-judicial protections, a  
26 need for land to satisfy housing needs and to obtain a determination that a UGB amendment  
27 is the appropriate means to respond to that need.

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<sup>15</sup>We note that under ORS 197.319 and 197.320, a person may request an enforcement order and LCDC shall issue such an order if the commission has good cause to believe that the local government “is applying \* \* \* procedures for approval that do not comply with ORS 197.307(6).” ORS 197.320(10).

1 Metro responds that where amendments to a local government’s comprehensive plan  
2 or land use regulations do not amend or affect the local government’s acknowledged citizen  
3 involvement program, the only way petitioner can demonstrate a violation of Goal 1 is to  
4 demonstrate that the decision fails to comply with the acknowledged citizen involvement  
5 program. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 284 (1998);  
6 *Churchill v. Tillamook County*, 29 Or LUBA 68, 73 (1995). Metro argues that the same  
7 reasoning should apply to amendments to Metro’s RFP and code. Because the challenged  
8 amendments do not amend or affect Metro’s citizen involvement program, Metro argues, and  
9 petitioner has not attempted to demonstrate that the challenged amendments are inconsistent  
10 with that program, this assignment of error provides no basis for reversal or remand. We  
11 agree.

12 The fifth assignment of error is denied.

13 **SIXTH ASSIGNMENT OF ERROR**

14 ORS 197.620(1) provides:

15 “Notwithstanding the requirements of ORS 197.830(2), persons who  
16 participated either orally or in writing in the local government proceedings  
17 leading to the adoption of an amendment to an acknowledged comprehensive  
18 plan or land use regulation or a new land use regulation may appeal the  
19 decision to the Land Use Board of Appeals under ORS 197.830 to 197.845. *A*  
20 *decision to not adopt a legislative amendment or a new land use regulation is*  
21 *not appealable* except where the amendment is necessary to address the  
22 requirements of a new or amended goal, rule or statute.” (Emphasis added.)

23 Petitioner contends that ORS 197.620(1), in providing that a decision to not adopt a  
24 *legislative* comprehensive plan amendment is not appealable to LUBA, implicitly prohibits  
25 Metro from declining to entertain an application for a *quasi-judicial* amendment to the Metro  
26 UGB.

27 Petitioner reads too much into ORS 197.620(1). The statute deals with circumstances  
28 in which post-acknowledgment plan and land use regulation amendments may be appealed to

1 LUBA. It does not explicitly or implicitly address a local government’s authority to define  
2 what matters it will consider on a quasi-judicial or legislative basis.

3 The sixth assignment of error is denied.

4 **NINTH ASSIGNMENT OF ERROR**

5 Petitioner argues that the challenged decision violates the Goal 2 (Land Use  
6 Planning) consistency requirement.<sup>16</sup> Specifically, petitioner argues that:

7 “\* \* \* Notwithstanding that Metro may take or adopt planning actions or  
8 documents excusing constituent cities and counties from compliance with  
9 Table 1 housing accommodation targets or other requirements for housing,  
10 Metro enacted no corresponding obligation to respond to reductions in the  
11 existing UGB assumed land supply for needed housing with a timely UGB  
12 amendment. This is contrary to Goal 2. \* \* \*” Petition for Review 26.

13 We do not understand the argument. Petitioner seems to contend that because Metro  
14 can excuse cities and counties from complying with certain housing accommodation targets,  
15 Metro must adopt some provision that obligates it to accommodate any resulting shortfall in  
16 the residential land supply with a timely UGB amendment. If that is petitioner’s argument,  
17 petitioner fails to explain why Goal 2 imposes such an obligation. Absent a more developed  
18 argument, we cannot agree that it imposes such an obligation.

19 The ninth assignment of error is denied.

20 **ELEVENTH ASSIGNMENT OF ERROR**

21 Petitioner argues that Metro’s prohibition of quasi-judicial UGB amendments for  
22 housing needs is inconsistent with several provisions of the state and federal constitutions.  
23 Specifically, petitioner contends that Metro’s decision (1) denies property owners due  
24 process of law guaranteed by the Fifth and Fourteenth Amendments to the United States

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<sup>16</sup>Goal 2 is to “establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.” In relevant part, Goal 2 requires that “[c]ity, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268.”

1 Constitution; (2) favors one group of persons over another in violation of the Equal  
2 Protection Clause of the United States Constitution and the Privileges and Immunities clause  
3 of Article I, section 20 of the Oregon Constitution; and (3) retaliates against petitioner’s  
4 members for exercising their rights to political speech and to petition the government, in  
5 violation of the First Amendment to the United States Constitution, and section 1 of the  
6 Oregon Constitution Bill of Rights.

7 **A. Due Process of Law**

8 Petitioner argues that property owners have a due process right to timely access to the  
9 procedures and standards the legislature has created for post-acknowledgment plan  
10 amendments, including exceptions and expansions of UGBs. Therefore, petitioner contends,  
11 property owners are entitled to have these legislatively adopted standards applied in a quasi-  
12 judicial setting.

13 Metro responds that petitioner has no fundamental property interest in the availability  
14 of a quasi-judicial process to amend the Metro UGB to address housing need. We agree. As  
15 noted above, to the extent the pertinent goals, rules and statutes address the issue, nothing  
16 cited to us requires that local governments provide a quasi-judicial UGB amendment  
17 procedure. Further, we concluded above that, at least where ORS 197.299 or a similar  
18 review timetable applies, a quasi-judicial UGB amendment procedure is not essential to  
19 ensure that the supply of land within a UGB complies with the relevant goals, rules and  
20 statutes. Petitioner has not established that it has a constitutionally protected “property”  
21 interest in invoking state and local UGB amendment standards in a quasi-judicial proceeding.

22 This subassignment of error is denied.

23 **B. Privileges and Immunities**

24 Petitioner contends that Metro’s decision denies property owners the right to apply  
25 for and obtain a decision on a UGB amendment to satisfy housing needs, while continuing to  
26 grant that right for those who wish to add land to satisfy non-housing needs. According to

1 petitioner, the decision denies the class of housing developers the same privileges granted to  
2 non-housing developers, without any rational basis, and thus offends Article I, section 20 of  
3 the Oregon Constitution, and the Equal Protection Clause of the United States Constitution.<sup>17</sup>

4 Petitioner argues that persons wishing to develop land for housing outside the UGB are a  
5 “true class” entitled to protection under the foregoing constitutional provisions, and that there  
6 exists no rational basis for the distinction between housing and non-housing developers.

7 Metro responds that the challenged decision treats land uses differently, not persons  
8 or classes of persons. To the extent those who wish to develop land for housing outside the  
9 UGB constitute a “true class,” and to the extent the challenged decision treats that class  
10 differently than other classes, Metro argues that there is a rational basis for doing so.  
11 According to Metro, ORS 197.299 requires that Metro ensure a 20-year supply of land for  
12 housing on a five-year cycle, while no similar statutory timetable applies for non-housing  
13 needs. Based on this, Metro argues that it reasonably concluded that it did not need to  
14 provide a quasi-judicial UGB amendment procedure for housing, but would continue to  
15 provide that opportunity for other purposes.

16 As relevant here, to establish that the challenged decision violates Article I, section  
17 20, of the Oregon Constitution, petitioner must show that (1) another group has been granted  
18 a “privilege” or “immunity” that petitioner’s group has not been granted; (2) petitioner’s  
19 group constitutes a “true class”; and (3) the distinction between the classes does not have a  
20 rational relationship to a legitimate end. *Withers v. State of Oregon*, 163 Or App 298, 306,  
21 987 P2d 1247 (1999). A true class is one that is defined in terms of characteristics that are  
22 shared apart from the challenged law or action. *Id.* If the true class is one with immutable  
23 characteristics, or a distinct, socially recognized group of citizens that has been the subject of

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<sup>17</sup>Article I, section 20, of the Oregon Constitution provides that “[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”

1 adverse social and political stereotyping, then it is a suspect class, subject to a more exacting  
2 review standard. *Tanner v. OHSU*, 157 Or App 502, 520, 971 P2d 435 (1998). A true class  
3 that is defined by other characteristics, such as geographical residency or employment status,  
4 is subject to a less exacting rational relationship test. *Gunn v. Lane County*, 173 Or App 97,  
5 103, 20 P3d 247 (2001); *Sherwood School Dist. 88J v. Washington Cty. Ed.*, 167 Or App  
6 372, 6 P3d 518 (2000).

7         Petitioner does not contend that it or its members are a suspect class, but argues that it  
8 or its members are nonetheless a true class. We need not decide whether the first two  
9 elements are met in this case, because we agree with Metro that the different statutory  
10 treatment of housing and non-housing needs at ORS 197.299 provides a rational basis for  
11 Metro to provide different UGB amendment procedures for housing and non-housing needs.  
12 We concluded, above, that the timetable for review at ORS 197.299 is sufficient to obviate  
13 the legal necessity, if any, for a quasi-judicial UGB amendment for housing. Metro's  
14 findings state, and petitioner does not dispute, that processing and reviewing quasi-judicial  
15 UGB adjustments for housing draws staff and Council resources away from Metro's  
16 mandated legislative review of the UGB under ORS 197.299 and under periodic review. No  
17 such statutory timetable or resource conservation considerations apply to non-housing needs.  
18 It is a rational choice under these circumstances to preserve a quasi-judicial UGB process for  
19 non-housing needs, while eliminating an unnecessary quasi-judicial process for housing  
20 needs.

21         Petitioner make a similar, unavailing argument under the Equal Protection Clause of  
22 the United States Constitution, which we reject for the same reasons above.

23         This subassignment of error is denied.

24         **C.         Retaliation Against Political Expression**

25         Petitioner argues that the Metro Council was motivated to adopt the challenged  
26 decision by vindictiveness or animus against petitioner, and the decision represents an

1 attempt to retaliate against petitioner for petitioning the Oregon legislature to adopt  
2 ORS 197.296 to 197.299. For that reason, petitioner argues, the decision violates the Equal  
3 Protection Clause, the First Amendment Free Speech Clause, the federal constitutional right  
4 to petition the government for redress of grievances, and the state constitutional right for  
5 citizens to alter, reform or abolish the government.

6 As evidence of impermissible motivation, petitioner quotes a statement by the Metro  
7 Councilor who sponsored the challenged legislation:

8 “Secondly, I would point out that at least in the eleven years that I’ve been  
9 here that we are constantly in review of the [UGB], that we’re constantly in a  
10 legislative mode, and that’s because of the Home Builders Association as well  
11 as others that went down to the state [legislature] to make the formula so  
12 detailed and complicated that it takes us close to five years sometimes to make  
13 sure that we go through the review process [to determine that] the numbers  
14 [are] right. And so, if we have a case where they have gone into a [quasi-]  
15 judicial [procedure] for residential, they’ve put themselves both in the  
16 legislative arena and in the quasi-judicial arena saying ‘Oh, I’ll get through  
17 one of them,’ that it takes our staff time, it takes up our staff resources, and it  
18 usually doesn’t work for them. And so again, we’re trying to make sure that if  
19 we put them someplace to go through a process, the process is doable.

20 “So it is simpler, it is cleaner, it is clearer, and I wouldn’t be supporting it  
21 today if it took away any constitutional rights of anybody.” Metro Councilor  
22 Susan McLain, Transcript of Metro Council, December 13, 2001, Petition for  
23 Review App 3, 17-18.

24 Metro responds that the above-quoted comments do not demonstrate impermissible  
25 animus toward petitioner, or an attempt to retaliate against petitioner for promoting  
26 legislation before the Oregon legislature. We agree. It is not clear to us, and petitioner does  
27 little to establish, what kind or degree of animus or impermissible motivation might warrant  
28 reversal or remand of the challenged decision under the cited constitutional provisions.  
29 Whatever the case, the above-quoted comments do not establish that Councilor McLain’s  
30 support for the challenged amendments was based on animus against petitioner or an  
31 impermissible motivation. The above-quoted comment suggests some frustration with  
32 perceived burdens and problems created by legislation sponsored by petitioner and others. In



1 other comments not cited by petitioner, the councilor explains that her support is motivated  
2 in part by desire to save applicants for quasi-judicial UGB amendments for housing from  
3 wasting money, time and resources pursuing an application that, due to the frequent reviews  
4 of the UGB required by ORS 197.299, are unlikely to succeed.<sup>18</sup> Read in context, the quoted  
5 comments do not demonstrate any particular animus against petitioner, much less one that  
6 gives rise to a constitutional violation.

7 This subassignment of error is denied.

8 The eleventh assignment of error is denied.

9 Metro's decision is affirmed.

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<sup>18</sup>*See, e.g.*, Petition for Review App 3, 21 (“when I said that [processing quasi-judicial applications] cost people money, I didn’t say it just cost Metro money, I said it cost applicants money. And it’s real money and real time and real energy and real resources. And I don’t want to put them through a process where they can’t pass the test”).