BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICK STALLKAMP and
KATHY STALLKAMP,
Petitioners,

vs.

CITY OF KING CITY,
Respondent,

and

MATRIX DEVELOPMENT CORPORATION,
Intervenor-Respondent.

LUBA No. 2002-082

FINAL OPINION
AND ORDER

Appeal from City of King City.

Rick Stallkamp and Kathy Stallkamp, Tigard, filed the petition for review. John A. Rankin, Sherwood, argued on behalf of petitioners. Kathy Stallkamp argued on her own behalf.

Christopher Alan Gilmore, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Beery and Elsner LLP.

John M. Junkin, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Bullivant Houser Bailey PC.

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

REMANDED 11/27/2002

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 a city decision that adopts the West King City Comprehensive Plan (WKCCP).

FACTS

In 1998, Metro amended its Urban Growth Boundary (UGB) to include a 90-acre unincorporated portion of Washington County, called Urban Reserve No. 47 (UR 47), for future residential development on the west side of the City of King City. On January 3, 2001, the city adopted a concept plan to address future development for UR 47. Subsequently, on May 15, 2001, city voters approved annexation of UR 47.

The southern boundary of UR 47 and the new UGB are coterminous, and follow the contours of the Tualatin River floodplain. These two boundaries bisect tax lot 191. The northern portion of tax lot 191 is within UR 47 and the UGB, and outside the floodplain. The southern portion of tax lot 191 is outside UR 47 and the UGB, and within the floodplain. To ease development of the northern portion of tax lot 191, the city council asked voters to approve annexation of the southern portion. On November 6, 2001, city voters approved the annexation of the southern portion of tax lot 191.

On February 6, 2002, the city adopted an ordinance annexing both UR 47 and the southern portion of tax lot 191. Thereafter, the city initiated a legislative proceeding to plan and zone the annexed area, which was identified as the West King City Planning Area (WKCPA). After a series of public meetings, the city council adopted Ordinance No. 0-02-04 (the Ordinance). The Ordinance includes the WKCPA Comprehensive Plan and Community Development Code Amendments, a new zoning map, and findings to support the amendments. The challenged decision rezones the southern portion of tax lot 191 from a county Rural Residential (RR-5) zone to a city Recreational Open Space (ROS) zone. The ROS zone allows only parks and open spaces as permitted uses outside the UGB, and further

prohibits habitable buildings in such parks. The ROS zone allows as conditional uses outside the UGB only "[u]tility facilities necessary for public service," and "[c]omponents of sanitary sewer systems or stormwater systems," if necessary to serve lands inside the UGB.[1] The WKCCP contemplates that the southern portion of tax lot 191 will be used as a park and for components of a stormwater system.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that the challenged ordinance fails to comply with Goal 14 (Urbanization), because it allows a park serving urban residents to be located on rural lands.[2] Petitioners emphasize that Goal 14 Guideline (A)(1) states that comprehensive plans should designate sufficient urbanizable land to accommodate, among other things, "open space and recreational needs." Petitioners contend that the city's UGB already contains sufficient land to accommodate the city's perceived needs for parks and open spaces. By choosing to use rural lands for an urban service and not providing a separation of urban and rural lands, petitioners argue, the WKCCP violates Goal 14.

We do not understand the argument. That the city's UGB already contains sufficient land to meet the city's needs for parks and open spaces might mitigate against a

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[1] The challenged decision amends King City Community Development Code (CDC) 16.112.030 to provide for the following conditional uses in the ROS zone:

> "C. Utility facilities necessary for public service (located outside the UGB). Sanitary sewer facilities may be established or extended only as permitted by OAR 660-011-0060; and
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> "D. Components of sanitary sewer systems or stormwater systems, including water quality facilities for stormwater, which may be placed outside the [UGB] if such placement is necessary to serve lands inside a nearby UGB. Such systems must satisfy ORS 215.296(1) or (2) to protect farm and forest practices, and shall not serve lands outside a UGB."

[2] Goal 14 is to "provide for an orderly and efficient transition from rural to urban land use." Goal 14 further provides that "[u]rban growth boundaries shall be established to identify and separate urbanizable land from rural land."

demonstration of "need" for purposes of factors 1 and 2 of Goal 14, if the city (or Metro, more precisely) were amending the UGB. However, the challenged decision does not amend the UGB; in relevant part it simply applies city zoning to land within the city but outside the UGB. Under such circumstances, we do not see that application of zoning that would allow a park on rural lands can offend Goal 14, unless it would allow an urban use on rural lands. *See generally 1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 498-511, 724 P2d 268 (1986) (*Curry County*) (Goal 14 implicitly prohibits urban uses on rural lands). We understand petitioners to contend that a city park on the southern portion of tax lot 191 is necessarily an urban use, because it is intended to serve urban residents. Therefore, we understand petitioners to argue, either the UGB must be amended to include the entirety of tax lot 191, or the city must take an exception to Goal 14.

Absent rulemaking by the Land Conservation and Development Commission (LCDC), whether a particular use of land is "urban" or "rural" in nature is generally a matter of case-by-case inquiry. *Curry County*, 301 Or at 521. A contemplated park that is within city limits and that presumably would primarily serve urban residents would seem to be, on its face, an urban use. However, even assuming that to be the case, we do not agree with petitioners that a park as contemplated under the decision in this case violates Goal 14 or requires an exception to Goal 14.

The city and intervenor-respondent (together, respondents) point out that in *Washington Co. Farm Bureau v. Washington Co.*, 17 Or LUBA 861, 877-78 (1989), we concluded that an inter-urban transportation facility on rural EFU land was an urban use, but that it did not violate Goal 14 or require an exception to Goal 14, because the facility was one of the uses that are specifically allowed in the EFU zone under ORS 215.213(1) and (2). We reasoned that "the legislature intended to allow counties to permit the uses it specified in ORS 215.213(1) and (2) without the additional requirement, unexpressed in the language of the statute, that the use be rural or an exception to Goal 14 be taken." 17 Or LUBA at 878.

More recently, we affirmed that conclusion, in the context of a proposed expansion of a golf course from within an urban growth boundary onto rural lands, both EFU and non-EFU, outside the boundary. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37, *aff'd* 171 Or App 149, 15 P3d 42 (2000). In our decision in that case, we relied on *Washington Co. Farm Bureau* to conclude that the proposed expansion was not subject to county urbanization policies implementing Goal 14, because a golf course is a specifically authorized use under ORS 215.213 and 215.283. The Court of Appeals agreed, and stated further that "[w]here the urban use in question is specifically permitted by statute on EFU land, it is also implicitly permitted by statute on rural land—of which EFU land is virtually always a subspecies in theory and fact." 171 Or App at 159. The court stated that:

> "* * * An exception to Goal 14 to allow precisely the same urban use on precisely the same rural land that the statutes explicitly authorize would come within the principle recognized in *Curry County*, that a totally redundant exception to or showing of compliance with Goal 14 is unnecessary." *Id.* at 159.

Turning to the present case, there is no dispute that a public park is a permitted use on EFU land. ORS 215.213(2)(e). Under the court's reasoning in *Jackson County Citizens League*, a "park" within the meaning of ORS 215.213(2)(e) need not be "rural" and does not require an exception to Goal 14, even if it is accurately characterized as an "urban" use.[3] Further, the court recognized that the logic of a statute that allows certain uses, including urban uses, in EFU zones without requiring compliance with Goal 14 or an exception to that goal implicitly extends to such uses on rural land zoned other than EFU. We see no reason not to apply that logic here. We have difficulty imagining why a park on rural EFU-zoned

[3] A question could arise whether a park allowed under the local government's land use regulations is in fact a "park" within the meaning of ORS 215.213 or 215.283. *See Utsey v. Coos County*, 176 Or App 524, 573, 32 P3d 933 (2001) (Deits, J., dissenting) (opining that a proposed motocross racetrack is not a permissible component of a "private park" allowed under ORS 215.283(2)); *Warburton v. Harney County*, 174 Or App 322, 25 P3d 978 (2001) (private guide-training school is not a "school" allowed as a permitted use under ORS 215.283(1)). However, there is no contention here that a park and open space allowed in the ROS zone under the WKCCP would be something different than the parks that are allowed under ORS 215.213(2) or 215.283(2).

lands should not be subject to evaluation under Goal 14, but a park on rural lands zoned other than EFU must be. Consequently, we agree with respondents that even if a park allowed under the WKCCP would constitute an urban use, the city is not required to take an exception to Goal 14.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the challenged decision fails to comply with Statewide Planning Goal 11 (Public Facilities and Services), because it allows urban public facilities outside the UGB.[4] According to petitioners, Goal 11 provides that a public facility in a rural area may serve only a rural area, and may not serve urban areas. Petitioners argue that, under the WKCCP, the portion of tax lot 191 on rural land outside the UGB will partially satisfy the city's urban needs for parks and open space and stormwater systems, in violation of Goal 11.

Respondents reply that Goal 11 generally addresses not where public facilities are *located*, but what uses they serve. According to respondents, nothing in Goal 11 prohibits locating an urban public facility outside a UGB on rural land, as long as it serves an urban area and not a rural area. Where Goal 11 and the Goal 11 rule at OAR chapter 660, division

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[4] Goal 11 is to "plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." In relevant part, Goal 11 provides that:

> "Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served. * * *
>
> "* * * * *
>
> "Local governments shall not allow the establishment or extension of sewer systems outside urban growth boundaries or unincorporated community boundaries, or allow extensions of sewer lines from within urban growth boundaries or unincorporated community boundaries to serve land outside those boundaries."

Goal 11 defines "rural facilities and services" to mean "facilities and services suitable and appropriate solely for the needs of rural lands." Goal 11 defines "urban facilities and services" in relevant part to refer to "key facilities" and "appropriate types and levels" of sanitary facilities, storm drainage facilities and recreation facilities and services, among others. *See* n 7.

11 are concerned with the location of public facilities, respondents argue, the goal and rule set forth specific limitations and exceptions governing location of such facilities. For example, respondents note that OAR 660-011-0060(2) prohibits (with certain exceptions) the establishment of new sewer systems outside a UGB, or the extension of sewer lines from within a UGB to serve land outside the UGB.[5] One exception to that prohibition allows components of sanitary sewer systems that serve urban areas to be located in rural areas. OAR 660-011-0060(3).[6] Respondents argue that the challenged WKCCP amendments are

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[5] OAR 660-011-0060(2) provides:

> "Except as provided in sections (3) and (4) of this rule, and consistent with Goal 11, a local government shall not allow:
>
> "(a) The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries;
>
> "(b) The extension of sewer lines from within urban growth boundaries or unincorporated community boundaries in order to serve uses on land outside those boundaries;
>
> "(c) The extension of sewer systems that currently serve land outside urban growth boundaries and unincorporated community boundaries in order to serve uses that are outside such boundaries and are not served by the system on the date of this rule.

[6] OAR 660-011-0060(3) provides:

> "Components of a sewer system that serve lands inside an urban growth boundary (UGB) may be placed on lands outside the boundary provided that the conditions in subsections (a) and (b) of this section are met, as follows:
>
> "(a) Such placement is necessary to:
>
> "(A) Serve lands inside the UGB more efficiently by traversing lands outside the boundary;
>
> "(B) Serve lands inside a nearby UGB or unincorporated community;
>
> "(C) Connect to components of the sewer system lawfully located on rural lands, such as outfall or treatment facilities; or
>
> "(D) Transport leachate from a landfill on rural land to a sewer system inside a UGB; and
>
> "(b) The local government:

consistent with Goal 11 and OAR 660-011-0060(3) in allowing components of urban sanitary sewer systems on rural lands. Given that the Goal 11 rule specifically authorizes locating components of urban sanitary sewer system components on rural land and contains no prohibitions on locating urban stormwater systems on rural lands, respondents argue, it is not inconsistent with Goal 11 to allow components of urban stormwater systems on rural land.

With respect to parks and open space, respondents dispute that "parks" are "public facilities" under Goal 11 at all. Respondents note that the definition of "public facility systems" at OAR 660-011-0005(7) includes water, sewer, stormwater and transportation systems, but does not include "parks."

It is not clear to us whether Goal 11 addresses public park facilities. The Goal 11 definition of "Urban Facilities and Services" includes "recreation facilities and services," among other things.[7] That definition appears to be broader than the OAR 660-011-0005(7) definition of "public facility systems." However, even if Goal 11 is concerned with public park facilities, we agree with respondents that an exception to Goal 11 is not required in order to adopt zoning that would permit a park serving urban residents on rural land. We addressed a similar argument in *Washington Co. Farm Bureau*, regarding a transportation facility on rural land intended to serve urban commuters, and held that:

> "(A) Adopts land use regulations to ensure the sewer system shall not serve land outside urban growth boundaries or unincorporated community boundaries, except as authorized under section (4) of this rule; and
>
> "(B) Determines that the system satisfies ORS 214.296(1) or (2) to protect farm and forest practices, except for systems located in the subsurface of public roads and highways along the public right of way."

[7] Goal 11 defines "Urban Facilities and Services" to refer to

> "key facilities and to appropriate types and levels of at least the following: police protection; sanitary facilities; storm drainage facilities; planning, zoning and subdivision control; health services; recreation facilities and services; energy and communication services; and community governmental services."

> "[F]or the same reasons we conclude, *supra*, that Goal 14 does not apply to the part of the county's decision challenged in this proceeding, we conclude Goal 11 is not offended by the county's decision. We do not necessarily mean to say that uses allowed in the EFU zone *must* be provided levels of service that would otherwise violate Goal 11 or that provision of such services to EFU zone uses could not be appropriately limited, pursuant to Goal 11 or plan policies implementing Goal 11, to minimize impacts on surrounding rural areas. However, in this case, the use allowed by the EFU zone *is the public service or facility itself*. The legislature specifically provided for this use in the EFU zone with no express limitation on the level or intensity of use or the source of its intended users. We conclude the legislature did not intend in ORS 215.213(1) and (2) and 215.283(1) and (2) to authorize only those identified transportation facilities and improvements that are needed to provide service to adjoining EFU-zoned uses." 17 Or LUBA at 880 (emphasis in original).

As noted above, ORS 215.213(2)(e) specifically allows a public park in the EFU zone. For the same reasons described above in *Washington Co. Farm Bureau* and *Jackson County Citizens Leagu*e, the legislature presumably did not intend in providing for a particular public facility in the EFU zone to subject such facilities to an additional requirement under Goal 11 that the facility must serve only rural lands. Accordingly, we disagree with petitioners that the city park contemplated under the WKCCP requires an exception to Goal 11.

Turning to the issue of stormwater facilities, the definition of "sewer system" at OAR 660-011-0060(1)(f) specifically excludes a "system provided solely for the collection, transfer and/or disposal of storm water runoff." Nothing in the Goal 11 rule or Goal 11 purports to allow stormwater facilities serving urban areas outside a UGB, in the same manner in which OAR 660-011-0060(3) allows "components of a sewer system" to be placed outside a UGB. Nonetheless, public stormwater facilities are, or can be, considered "utility facilities" allowed in an EFU zone pursuant to ORS 215.213(1)(d) and 215.283(1)(d). *See Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998) (analyzing a proposed stormwater treatment facility on EFU-zoned land as a "utility facility necessary for public service" permitted under the EFU statutes). Under the reasoning in *Washington Co. Farm Bureau* and *Jackson County Citizens League*, such utility facilities may be allowed on

rural lands without regard to whether they serve urban or rural lands, and without requiring an exception to Goal 11.

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the challenged decision replaces a section of the city's community development code (CDC) with a new chapter, Chapter 16.140, which regulates development in floodplain and drainage hazard areas. Record 46-60. According to petitioners, CDC 16.140 is inconsistent with certain provisions of Title 3 of the Metro Urban Growth Management Functional Plan, which is codified at Metro Code (MC) 3.07.310 to 3.07.370. According to petitioners, CDC 16.140.060(A) and (B) expressly allow development to result in an increase in flood levels, contrary to the requirements of MC 3.07.340(A)(2)(a).[8] Further, petitioners argue, CDC 16.140.060(F) allows cuts and fills in areas that will be filled with water in non-storm winter conditions, contrary to the requirements of MC 3.07.340(A)(2)(c). Finally, petitioners contend that CDC 16.140 fails to require that the city evaluate other practicable alternatives to development in flood hazard areas, as required by MC 3.07.340(B)(2)(f) and 3.07.340(D)(3)(d)(i).[9]

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[8] MC 3.07.340(A)(2) provides, in relevant part:

> "All development, excavation and fill in the Flood Management Areas shall conform to the following performance standards:
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> "a. Development, excavation and fill shall be performed in a manner to maintain or increase flood storage and conveyance capacity and not increase design flood elevations.
>
> "b. All fill placed at or below the design flood elevation in Flood Management Areas shall be balanced with at least an equal amount of soil material removal.
>
> "c. Excavation shall not be counted as compensating for fill if such areas will be filled with water in non-storm winter conditions.
>
> "d. Minimum finished floor elevations for new habitable structures in the Flood Management Areas shall be at least one foot above the design flood elevation.

[9] MC 3.07.340(B)(2)(f) provides, in relevant part:

MC 3.07.330 in relevant part requires cities and counties to adopt code language that "substantially complies with the performance standards in section 3.07.340," or demonstrate that existing ordinances do so.[10] Cities and counties must amend their comprehensive plans and land use regulations to comply with MC 3.07.340 by January 31, 2000. MC 3.07.810(C). Until the local government does so, Title 3 standards apply directly to the local government's land use decisions. MC 3.07.810(E). A post-acknowledgment plan amendment to the city's comprehensive plan or land use regulation shall be deemed to comply with the MC if no timely appeal to LUBA is filed or if the amendment is affirmed on

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> "Cities and counties may allow development in Water Quality Resource Areas provided that the governing body, or its designate, implement procedures which:
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> "i. Demonstrate that no practicable alternatives to the requested development exist which will not disturb the Water Quality Resource Area; and
>
> "ii. If there is no practicable alternative, limit the development to reduce the impact associated with the proposed use[.]"

MC 3.07.340(D)(3) provides, in relevant part:

> "Additions, alterations, rehabilitation or replacement of existing structures, roadways, driveways, accessory uses and development in the Water Quality and Flood Management Area may be allowed provided that:
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> "* * * * *
>
> "d. In determining appropriate conditions of approval, the affected city or county shall require the applicant to:
>
> "i. Demonstrate that no reasonably practicable alternative design or method of development exists that would have a lesser impact on the Water Quality Resource Area than the one proposed; and
>
> "ii. If no such reasonably practicable alternative design or method of development exists, the project should be conditioned to limit its disturbance and impact on the Water Quality Resource to the minimum extent necessary to achieve the proposed addition, alteration, restoration, replacement or rehabilitation[.]"

[10] MC 3.07.1010(rrr) defines "substantial compliance" to mean:

> "[C]ity and county comprehensive plans and implementing ordinances, on the whole, conform with the purposes of the performance standards in the functional plan and any failure to meet individual performance standard requirements is technical or minor in nature."

appeal. MC 3.07.810(F). MC 3.07.820 through .840 set out procedures whereby, upon notification by the local government, the Metro executive officer makes a determination whether proposed plan or land use regulation amendments comply with functional plan requirements. The present record does not contain any indication that the Metro executive officer has made such a determination with respect to CDC 16.140, or any other portion of the challenged decision.

Respondents do not dispute petitioners' allegation that the text of CDC 16.140 omits the standards that MC 3.07.340(A)(2), 3.07.340(B)(2)(f) and 3.07.340(D)(3)(d)(i) appear to require.[11] The city argues in responding to the fourth assignment of error that CDC 16.140 is not intended to implement MC 3.07.340, and therefore the city need not comply with those standards.[12] *See Volny v. City of Bend*, 37 Or LUBA 493, 502, *aff'd* 168 Or App 516, 4 P3d 768 (2000) (amendments to the transportation element of the city's comprehensive plan need not comply with the Transportation Planning Rule's requirements for a transportation system plan, where it is clear the amendments were not intended to implement the rule or constitute a transportation system plan). However, the city does not support that assertion, and we note that the city adopted a finding stating that "Chapter 16.140 and 16.141 provisions maintain the Plan and Code's compliance with state Goal 5 and Title 3." Record 99. That finding suggests that the city adopted CDC 16.140, in part, to implement and comply with MC 3.07.340.

Respondents next argue that, to the extent CDC 16.140 falls short of Title 3 requirements, it is saved by the fact that CDC 16.140 defers to and requires compliance with the standards of a local sewerage agency, Clean Water Services (CWS). Respondents point

[11] Neither the city nor intervenor-respondent argues that CDC 16.140 "substantially complies" with Title 3, notwithstanding its omission of the Title 3 standards. *See* n 10 and related text.

[12] Intervenor-respondent does not appear to dispute that CDC 16.140 is intended to implement Title 3 requirements regarding water quality and flood management areas. Intervenor-respondent's response brief 18.

out, for example, that CDC 16.140.060(F) requires proposed excavations and fill to comply with CWS requirements. Record 54. Respondents argue that the city is entitled to rely on CWS standards to satisfy Title 3, because the Metro executive officer has deemed CWS standards to comply with Title 3, including MC 3.07.340. The city's findings state, in relevant part:

> "By intergovernmental agreement between King City and [CWS] dated June 21, 1990, King City is bound to follow the rules and regulations of [CWS] governing the use of storm and surface water systems. In the CWS compliance report to Metro, CWS's standards substantially comply with Sections 3.07.330 and 3.07.340 of Title 3, and in many instances the [CWS] standards exceed Metro's Title 3 requirements related to water quality, flood management and erosion control." Record 99.[13]

Therefore, respondents argue, the city may simply rely on CWS standards to satisfy Title 3.

There are two difficulties with respondents' argument. First, the city has not simply relied on CWS standards to satisfy Title 3. Rather, the city has adopted CDC 16.140, which appears not to comply with MC 3.07.340(A)(2)(a) and (c), 3.07.340(B)(2)(f) and 3.07.340(D)(3)(d)(i) in the three particulars that petitioners identify.[14] Second, we cannot agree with respondents that these apparent inconsistencies with Title 3 may be overlooked by virtue of the CDC 16.140 requirements that refer to unspecified CWS standards. It may be that CWS standards regarding development, excavation or fill in flood hazards areas comply with the requirements of MC 3.07.340(A)(2), and that CWS standards require evaluation of practicable alternatives to development in flood hazard areas, as required by MC

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[13] Intervenor attaches to its brief a December 7, 1999 letter from the Metro executive officer to CWS, stating that CWS amendments to its design and construction standards meet or exceed Title 3 requirements for floodplain and water quality protection. The letter also states that when cities and counties conform their plans and codes to the CWS standards, those counties and cities will be in substantial compliance with Title 3. Intervenor asks the Board to take official notice of the December 7, 1999 letter, but does not explain why that letter constitutes judicially cognizable law under Oregon Evidence Code 202, and we do not see that it does.

[14] We do not intend to foreclose the possibility that, despite the apparent difference between CDC 16.140 and the cited Title 3 requirements, CDC 16.140 nonetheless satisfies the ultimate standard of "substantial compliance" under MC 3.07.330, as MC 3.07.1010(rrr) defines that term. However, as noted earlier, respondents make no attempt to demonstrate that such is the case, and the challenged decision does not attempt to do so either.

3.07.340(B)(2)(f) and 3.07.340(D)(3)(d)(i). However, no one has provided us with the CWS standards so that we can confirm that they do. Even if CWS standards do include those Title 3 requirements, we question whether that would permit LUBA to overlook the failure of CDC 16.140 to comply with Title 3, simply because portions of CDC 16.140 refer to CWS standards and might have the ultimate legal effect of requiring that an applicant comply with CWS standards that *do* comply with Title 3. *See Sommer v. Douglas County*, 70 Or App 465, 471, 689 P2d 1000 (1984) (finding that it was error for LCDC to acknowledge a county land use regulation that violated Goal 3 even though the county comprehensive plan had been amended to comply with Goal 3 and would control in the event of a conflict with the deficient land use regulation).

Because respondents make no effort to demonstrate that the challenged portions of CDC 16.140, or the CWS standards referred to in CDC 16.140, substantially comply with the cited Title 3 provisions, we have no basis to reject petitioners' argument that CDC 16.140 does not comply with Title 3 requirements.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

MC 3.07.330(B) requires that local governments hold at least one public hearing prior to adopting plan amendments or regulations implementing MC 3.07.340, and further that such amendments and regulations "shall be available for public review at least 45 days prior to the public hearing."[15] Petitioners contend that a Goal 5 study was completed on May 6,

[15] MC 3.07.330(B) provides:

> "Cities and counties shall hold at least one public hearing prior to adopting comprehensive plan amendments, ordinances and maps implementing the performance standards in section 3.07.340 of this title or demonstrating that existing city or county comprehensive plans and implementing ordinances substantially comply with section 3.07.340, to add Protected Water Features**,** and wetlands which meet the criteria in section 3.07.340(E)(3), to their Water Quality and Flood Management Area map. The proposed comprehensive plan amendments, implementing ordinances and maps shall be available for public review at least 45 days prior to the public hearing."

2002, and made available to the public only at the May 15, 2002 city council hearing. The city subsequently adopted a map of Goal 5 resources from that study, as well as portions of the study. According to petitioners, the city violated MC 3.07.330(B) in failing to provide at least 45 days prior to the public hearing for the public to review the Goal 5 study.

Respondents argue that, assuming MC 3.07.330(B) applies at all, it was satisfied in the present case, because a draft version of the text and map amendments, including a draft of CDC 16.140, was made available on December 14, 2001, 47 days prior to the first public hearing before the planning commission on February 4, 2002. According to respondents, the fact that subsequent information was provided to assure compliance with Goal 5, and the city amended the draft amendments to include portions of that information, does not violate MC 3.07.330(B). We agree.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend that the city failed to provide adequate notice of the proposed amendments to the Department of Land Conservation and Development (DLCD), as required by ORS 197.610.[16] According to petitioners, the city filed the notice of proposed

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[16] ORS 197.610 provides, in relevant part:

> "(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of [DLCD] at least 45 days before the first evidentiary hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending.
>
> (2) When a local government determines that the goals do not apply to a particular proposed amendment or new regulation, notice under subsection (1) of this section is not required. In addition, a local government may submit an amendment or new regulation with less than 45 days' notice if the local government determines that there are emergency circumstances requiring expedited review. In both cases:
>
> "(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615 (1) and (2); and

amendments more than 45 days prior to the initial evidentiary hearing, as required by ORS 197.610(1). However, petitioners argue, that notice failed to describe the proposal to apply the ROS zone to portions of UR 47.

Respondents argue that its notice to DLCD satisfied the statute and LCDC's rules implementing the statute, at OAR 660-018-0020.[17] The form DLCD has required under OAR 660-018-0020 requires the local government to specify plan map and zoning changes. *See, e.g.*, Record 547. The notice provided by the city states that the city proposes to amend plan map designations and zoning within UR 47 from county RR-5 to city R-9 and R-12. *Id.* The notice does not mention any amendments to ROS. However, the city points out, the city's submittal to DLCD included a map of proposed map and zoning changes, as required by OAR 660-018-0020, which depicts portions of UR 47 as subject to the ROS zone. Record 492. The city argues that its notice to DLCD substantially conforms to the statute and rule, and that any failure to list the ROS zone on the notice itself is, at most, a procedural error that does not warrant remand, as petitioners have not demonstrated any prejudice to their substantial rights.

In *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993), the Court of Appeals held that a total failure to provide notice to DLCD as required

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> "(b) Notwithstanding the requirements of ORS 197.830(2), the director or any other person may appeal the decision to [LUBA] under ORS 197.830 to 197.845."

[17] OAR 660-018-0020(1) provides, in relevant part:

> "A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be submitted to the Director at least 45 days before the first evidentiary hearing on adoption. The proposal submitted shall be accompanied by appropriate forms provided by the Department and shall contain three copies of the text and any supplemental information the local government believes is necessary to inform the Director as to the effect of the proposal. The submittal shall indicate the date of the final hearing on adoption. In the case of a map change, the proposal must include a map showing the area to be changed as well as the existing and proposed designations. Wherever possible, this map should be on 8-1/2 by 11-inch paper, where a goal exception is being proposed, the submittal must include the proposed language of the exception. * * *"

by ORS 197.610(1) is a substantive error rather than a procedural error. The court's opinion left unanswered the question of whether partial or substantial compliance with ORS 197.610(1) would necessarily require the same result, *i.e.*, whether *any* deviation from the requirements of ORS 197.610(1) is a substantive error that will result in remand, without regard to whether the deviation results in prejudice to a party's substantial rights. In *Donnell v. Union County*, 40 Or LUBA 455, 459-60 n 2 (2001), where the county provided DLCD with 19 days' notice rather than the required 45 days, we questioned the correctness of several LUBA decisions that seemed to answer that question in the affirmative.[18]

We now hold that not every deviation from the requirements of ORS 197.610(1) or its implementing rule is a "substantive" error that must result in remand. We see no reason to analyze the error alleged in the present case, if it is error, as other than a procedural error. Accordingly, we have no basis to remand the decision under this assignment of error, unless petitioners demonstrate that the error caused prejudice to their substantial rights. Petitioners make no effort to demonstrate that the city's specification of map changes on the DLCD form, assuming it constitutes error, prejudiced their substantial rights, and we do not see that such a demonstration could be made in this case.

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[18] In *Donnell*, we commented:

> "We also note that the county correctly points out in its brief that the error that led to remand in *Oregon City Leasing, Inc*. was a complete failure to provide DLCD a copy of the proposed action. Here the error was providing the proposal to DLCD less than 45 days before the first evidentiary hearing. Our prior decision in this case and other decisions of this Board can be read to say that *Oregon City Leasing, Inc*. holds that *any* deviation whatsoever from the requirements of ORS 197.610(1) is a substantive error that will result in remand, without regard to whether the deviation results in any prejudice to a party's substantial rights. *See Concerned Citizens v. Jackson County*, 33 Or LUBA 70, 91 (1997) ('failure * * * to comply with ORS 197.610(1) is substantive error'); *DLCD v. City of St. Helens*, 29 Or LUBA 485, 495 (1995) ('[t]he requirements of ORS 197.610 *et seq*. are substantive, not merely procedural'); *Dorgan v. City of Albany*, 27 Or LUBA 64, 68 (1994) (same). We do not believe the holding in *Oregon City Leasing, Inc.* is so broad. We also now question whether our prior decision correctly concluded that remand was required based on the county's delay in providing the proposal to DLCD until 19 days before the initial evidentiary hearing. However, in view of our conclusion that the county's actions on remand were sufficient to correct any error it may have initially committed under ORS 197.610(1), we need not consider and resolve those questions here." *Id.*

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that the challenged decision effects a number of zone changes, and is thus subject to the requirements of ORS 227.175. According to petitioners, the city failed to provide written notice of the proposed rezoning to nearby property owners, as required by ORS 227.175.

Respondents dispute that the city's legislative decision is subject to any requirement of ORS 227.175. Even if it is, respondents argue, any failure to provide written notice is a procedural error, and petitioners are entitled to remand of the decision based on procedural error only if the error prejudiced petitioners' substantial rights. ORS 197.835(9)(a)(B). Respondents point out that petitioners, who own property adjacent to tax lot 191, participated in the proceedings before the city council.

Petitioners do not explain why they believe that ORS 227.175 applies to the challenged legislative decision, and we do not see that it does. Even if the city failed to satisfy an applicable notice requirement, petitioners may advance a claim of procedural error only on their own behalf. ORS 197.835(9)(a)(B). Petitioners make no effort to show that any alleged procedural error prejudiced their substantial rights.

The sixth assignment of error is denied.

The city's decision is remanded.