

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 RENAISSANCE DEVELOPMENT,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF LAKE OSWEGO,

10 *Respondent,*

11
12 and

13
14 ROGER M. HANLON

15 and JACINTA KEYES-HANLON,

16 *Intervenors-Respondent.*

17
18 LUBA No. 2003-031

19
20 FINAL OPINION

21 AND ORDER

22
23 Appeal from City of Lake Oswego.

24
25 William C. Cox, Portland, filed the petition for review and argued on behalf of
26 petitioner. With him on the brief was Gary P. Shepherd.

27
28 Evan P. Boone, Deputy City Attorney, Lake Oswego, filed the response brief and
29 argued on behalf of respondent.

30
31 Roger M. Hanlon and Jacinta Keyes-Hanlon, Lake Oswego, represented themselves.

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

35
36 REMANDED

09/11/2003

37
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 city decision that approves petitioner’s delineation of a tree grove on its property, but denies its proposal for (1) lot line adjustments, (2) a tree cutting permit, and (3) designation of approximately one-half of the tree grove for protection.

MOTION TO INTERVENE

Roger M. Hanlon and Jacinta Keyes-Hanlon move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

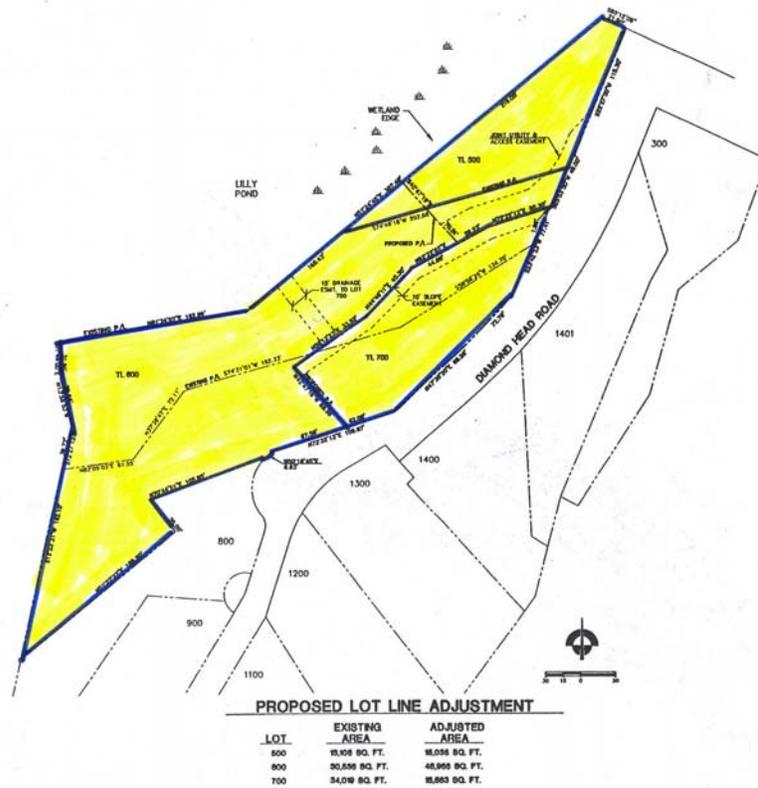
Petitioner owns 1.78 acres, consisting of three tax lots (tax lots 500, 600 and 700). The three tax lots are located above Lilly Pond in Lake Oswego and are zoned Residential Low Density (R-10).¹ R-10 zoning allows residential development with a 10,000 square foot minimum lot size. The subject property slopes steeply up from the bay to the top of a ridge where Diamond Head Road provides access to the subject property and a number of other properties. Unlike other properties in the area, there is also a relatively flat area midway up the slope on the subject property, between Diamond Head Road and Lilly Pond below, where an unimproved road provides access. This flat area and unimproved road were created in the 1960s as a staging area for construction of a sewer line for the area. Petitioner proposes to reconfigure the existing tax lots to allow development of new houses on reconfigured tax lots 500 and 600. Figure 1 on the following page shows the proposed lot configuration.

There is an existing dwelling on tax lot 700, next to Diamond Head Road at the top of the ridge. At present, with the exception of the area occupied by the existing house on tax lot 700, the subject property is forested along its frontage with Diamond Head Road and down the existing steep slope from Diamond Head Road to Lilly Pond below. The building

¹ Lilly Pond is also sometimes referred to in the documents and maps in the record as Lilly Bay.

1 envelope for the dwelling proposed for tax lot 500 would also be located next to Diamond
 2 Head Road near the top of the ridge. The central dispute in this case concerns the proposed
 3 building envelope for tax lot 600, and its associated driveway. The building envelope for tax
 4 lot 600 and the long driveway that would be needed to access that building envelope toward
 5 the western part of tax lot 600 is in the location of the old sewer staging area and roadway.
 6 As proposed, there would be an area of development that runs from where the driveway
 7 departs from Diamond Head Road between tax lots 500 and 700 to tax lot 600's westerly
 8 property line.

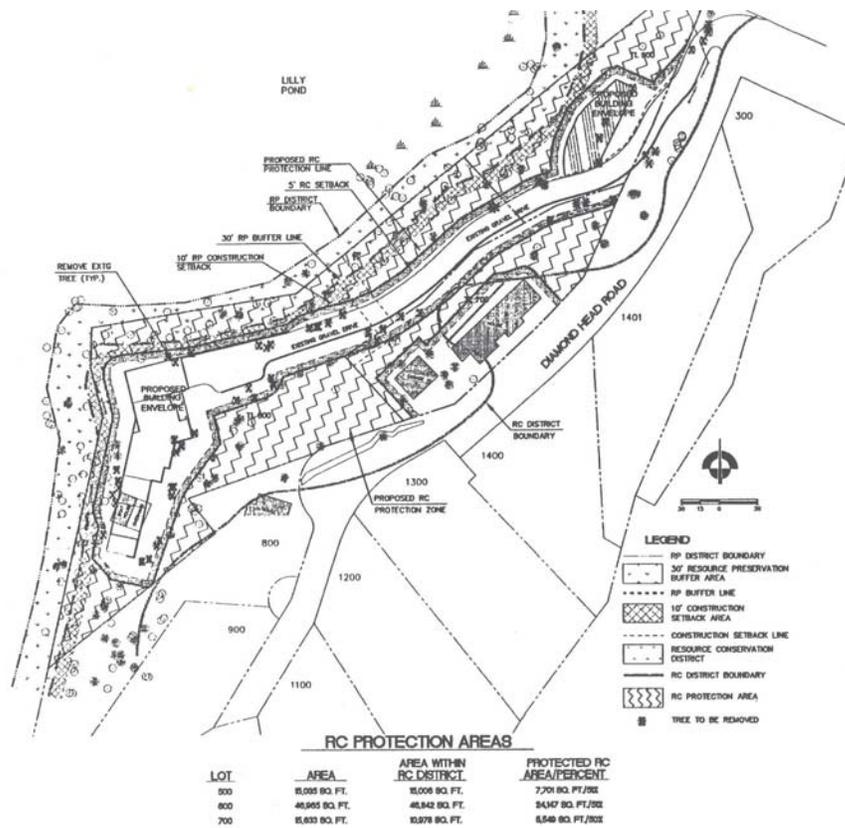
9 **Figure 1**



11 The subject property is affected by the city's Sensitive Lands Overlay Districts.
 12 There are two such overlay districts. The first, the Resource Protection Overlay District

1 (RPOD), applies to stream corridors and wetlands. Lake Oswego Code (LOC) 50.16.020(4).
 2 The second, the Resource Conservation Overlay District (RCOD), applies to significant tree
 3 groves. LOC 50.16.020(5). Lilly Pond and its associated wetlands, which adjoin the subject
 4 property, are included within an RPOD. Under LOC 50.16.070(2) and 50.16.075(5), the
 5 Lilly Bay RPOD imposes a 30-foot Resource Preservation Buffer onto the subject property's
 6 frontage with Lilly Bay and an additional 10-foot construction setback area beyond that
 7 buffer. This 30-foot Resource Preservation Buffer Area and Construction Setback Area are
 8 shown on Figure 2 below.

9 **Figure 2**



1 The subject property is almost entirely covered with trees and for that reason the
2 city’s sensitive lands map identifies a majority of the subject property as being subject to an
3 RCOD to protect the existing tree canopy. Applicants who wish to develop property that is
4 subject to an RCOD must “first delineate the resource.” LOC 50.16.035(1).² Once a
5 significant tree grove subject to the RCOD is delineated, LOC 50.16.055(1) requires that the
6 applicant designate “a minimum of 50%” of that delineated RCOD as “RC Protection Area.”
7 Petitioner’s proposed RC Protection Area is shown on Figure 2.

8 As proposed by petitioner, approximately one-half of the existing tree canopy would
9 be protected by two RC Protection Areas that are roughly equal in size. The lower RC
10 Protection Area extends up from Lilly Pond to the proposed building pad on tax lot 500 and
11 the proposed driveway and building pad for tax lot 600. The second RC Protection Area is
12 located above the driveway and building pad for tax lot 600, below Diamond Head Road and
13 the existing house on tax lot 700. *See* Figure 2.

14 Although planning staff recommended denial of petitioner’s proposed RC Protection
15 Area, the city’s Development Review Commission approved petitioner’s application.³
16 Opponents appealed that decision to the city council. The city council affirmed petitioner’s
17 delineation of the RCOD on the subject property and also approved petitioner’s proposed 30-
18 foot Resource Preservation Buffer Area along the property’s frontage along Lilly Pond and
19 the 10-foot construction setback from that buffer area. However, the city council denied
20 petitioner’s proposal for the RC Protection Area, as well as the proposed lot line adjustments
21 and tree-cutting permit. This appeal followed.

² LOC 50.16.035(1) explains that “[a] delineation is a more precise, site specific determination of the location of the resource prepared by a qualified professional.”

³ As previously noted, that application included requests for lot line adjustments and tree cutting permits that would be necessary to build houses on tax lots 500 and 600 in the locations shown on Figure 2.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 **A. Petitioner’s Proposed RC Protection Area**

3 As we have already noted, the city accepted petitioner’s delineation of the RCOD for
4 the property, as well as the 30-foot Resource Preservation Buffer and 10-foot Construction
5 Setback Area, as shown on Figure 2. It is petitioner’s proposed split RC Protection Area,
6 which accommodates petitioner’s desired building site and driveway for tax lot 600, that is at
7 the center of this appeal.

8 Once the RCOD is delineated, the next task is set out at LOC 50.16.055(1), which
9 requires that a development applicant “designate a minimum of 50% of the [delineated]
10 RC[OD] * * * as the “RC Protection Area.’” Development is generally *prohibited* in a RC
11 Protection Area, but residential development is generally *allowed* in the RCOD outside a
12 designated RC Protection Area.⁴ LOC 50.16.055 sets out the criteria that govern designation
13 of an RC Protection Area.⁵

⁴ LOC 50.16.055(2) provides that with only the limited exceptions provided in LOC 50.16.060, “no development shall be permitted within the [RC] Protection Area.” The LOC 50.16.060 development restrictions are not at issue in this appeal. However, there does not seem to be any dispute that under LOC 50.16.060 residential development would be allowed within the portion of the subject property outside the RC Protection Area and that under LOC 50.16.055(2) no residential development would be allowed in the RC Protection Area.

⁵ LOC 50.16.055(3) and (4) provide as follows:

- “3. Except as provided in subsection 4 of this section, the location of the Protection Area shall be based upon the following criteria:
 - “a. The Protection Area shall link to other RP or RC lands on the development site and on abutting properties, if such lands are present;
 - “b. The largest trees within an RC District shall be included in the Protection Area;
 - “c. The location of the Protection Area shall be designed to protect development from blow-down hazards;
 - “d. The Protection Area shall protect steep slopes and resources close to water areas from potential erosion and water quality impacts;
 - “e. The Protection Area shall protect wildlife habitat and travel corridors;

1 We note one additional provision of the Sensitive Lands Overlay Districts before
2 turning to the provision that is at the center of the parties' dispute under the first two
3 assignments of error. LOC 50.16.040(1) provides that in some circumstances certain lot
4 dimension standards may be waived "without a formal variance." LOC 50.16.040(2)
5 provides that where waiver of lot dimension requirements is not possible under LOC
6 50.16.040(1), or other LOC standards would preclude development, an applicant "may
7 qualify for a variance under LOC 50.68."⁶

"f. The Protection Area shall include the area with the highest HAS ranking, if more than one resource is located on the property;

"g. The Protection Area shall be designed to protect a contiguous canopy and a clustered configuration that does not fragment lands within an RC District;

"h. The Protection Area shall maintain an ecologically viable plant and wildlife community;

"i. The Protection Area shall maintain the scenic qualities of the site.

"4. It is recognized that all of the criteria listed in subsection (3) of this section may not be applicable to every site. In some cases, the criteria may conflict on a given site. In such cases, the reviewing authority shall balance the applicable criteria in order to protect the most environmentally significant portion of the RC District."

⁶ LOC 50.16.040 provides, as relevant:

"1. Except as provided in subsections (2) and (3) of this section, an applicant for development subject to environmental review may vary from the lot dimensional standards (building setbacks, lot dimensions, size, width, and depth) otherwise applicable without a formal variance pursuant to LOC Article 50.68, if the applicant demonstrates that:

"a. Compliance with the applicable dimensional standard or standards would cause the proposed development to disrupt lands within an RP or RC District or within a required buffer, or would preclude or reduce the transfer of allowable density from RP or RC zoned areas of the property to non RP or RC zoned areas;

"b. The proposed development will result in greater protection of the resources identified on the site than would occur without the dimensional modification, and

"c. In the case of a Planned Development, the criteria of LOC 50.17.015 have been met.

1 **B. The City’s Decision**

2 The city applied the LOC 50.16.055(3) criteria for locating the RC Protection Area
3 on the subject property and found that petitioner’s proposal violated eight of the nine criteria.
4 *See* n 5.⁷ In the case of seven of those eight LOC 50.16.055(3) criteria, the city expressly or
5 implicitly relies on petitioner’s failure to include the area planned for the driveway and
6 building envelope on tax lot 600 as part of the RC Protection Area to conclude that the
7 criteria are not satisfied by petitioner’s proposal.⁸ Record 16-22. From these bases of
8 denial, petitioner argues the city council either erroneously failed to consider LOC 50.16.050
9 or misconstrued LOC 50.16.050. We turn to LOC 50.16.050, which is at the heart of the
10 parties’ disagreement in this appeal.

11 **C. LOC 50.16.050**

12 Petitioner contends that the city’s decision regarding the seven LOC 50.16.055(3)
13 criteria effectively means the house it wishes to build on tax lot 600 must be built next to
14 Diamond Head Road on an extremely steep and possibly unstable slope. Petitioner further
15 contends that even if it is technically feasible to build a house next to Diamond Head Road
16 on tax lot 600, variances from other LOC requirements will be necessary. Petitioner reasons
17 that in view of these constraints, the area of tax lot 600 along Diamond Head Road does not
18 include a reasonable building site. Petitioner contends the city’s failure to recognize and
19 address this issue requires remand. The challenged decision does not expressly address this

“2. An application to vary from standards other than the dimensional standards above or
that does not comply with the criteria contained in subsection (1) of this section may
be processed pursuant to the formal variance process contained in [LOC] 50.68.”

⁷ The city determined that LOC 50.16.055(3)(f) is ambiguous, but concluded that it need not resolve the ambiguity in that criterion in this case, because its application of other LOC 50.16.055(3) criteria required revision of the RC Protection Area in any event. Record 20.

⁸ Those seven LOC 50.16.055(3) criteria are as follows: (a) (linkage with other RPOD and RCOD lands), (c) (protect from blowdown hazards), (d) (protection of steep slopes and resources close to water areas), (e) (protection of wildlife habitat and travel corridors), (g) (avoid fragmenting lands within the RCOD), (h) (maintain ecologically viable plant and wildlife community), (i) (maintain scenic qualities).

1 issue and the parties disagree about (1) whether the city is obligated to address this issue, and
2 (2) whether there is a reasonable building site for tax lot 600 at the top of the ridge along
3 Diamond Head Road.⁹

4 Petitioner’s argument under these assignments of error is based on LOC 50.16.050,
5 which provides:

6 “In addition to compliance with LOC 50.16.040 to 50.16.045, applicants for
7 development which are subject to environmental review pursuant to LOC
8 50.16.015 on property containing [a Resource Conservation Overlay] District
9 *shall comply with the standards contained in LOC 50.16.050 to 50.16.060, in*
10 **order to:**

11 “1. Ensure that new development and alterations are compatible with and
12 maintain the functions and values of resources within the RC District;
13 and

14 “2. Limit the amount of disturbance allowed within RC[ODs], *while*
15 *permitting reasonable development of property.*” (Italics and bold
16 emphasis added.)

17 Petitioner interprets the italicized language to establish that (1) LOC 50.15.050
18 imposes mandatory approval standards that the city is obligated to address, and (2) one of
19 those mandatory approval criteria requires that the development limitations that are imposed
20 in RCODs must not preclude “reasonable development of [the] property.” If we understand
21 petitioner correctly, it contends that the subjective criteria at LOC 50.16.055(3) for
22 designating the RP Protection Area must not be applied in a manner that does not permit an
23 opportunity for “reasonable development of [the] property.” Because the challenged
24 decision does not interpret or expressly apply LOC 50.15.050 at all, and because the city
25 clearly did not apply LOC 50.15.050 in the manner that petitioner contends is required by the

⁹ We note here that petitioner’s and the city’s dispute is both legal and factual. The factual dispute is whether there is a reasonable development site on tax lot 600 next to Diamond Head Road, where the house must be located if petitioner’s proposed RC Protection Area is rejected in favor of the more contiguous RC Protection Area on the lower part of the property that the city favors. The legal dispute is whether the city is obligated under the LOC to ensure that residentially zoned properties that are subject to RC Protection Areas retain an area outside the delineated RC Protection Area that will allow an opportunity for reasonable development of the property. For the moment, we put aside the factual dispute and focus on the legal dispute.

1 words of that section of the code, petitioner argues the city’s decision must be remanded.
2 Petition for Review 9.

3 In its brief, the city argues that LOC 50.16.050(1) and (2) are not mandatory approval
4 standards and that the city therefore did not err in failing to address those sections of the code
5 in its decision expressly. The city focuses on the bold lettered language, “in order to,” which
6 the city argues makes it reasonably clear that the clauses that follow under LOC 50.16.050
7 are expressions of policy or ultimate goals rather than mandatory approval standards. The
8 city also argues in its brief that the internal reference in LOC 50.16.050 to “standards
9 contained in LOC 50.16.050 to 50.16.060” does not necessarily mean that there *are* any
10 standards in LOC 50.16.050. The city argues that despite the internal reference to LOC
11 50.16.050, the only “standards” are those set forth in LOC 50.16.055 (for designating and
12 protecting the RC Protection Area) and LOC 50.16.060 (establishing development standards
13 for the RCOD).¹⁰ The city argues that despite the internal reference, LOC 50.16.050
14 imposes no mandatory approval criteria and that the city was not obligated to find that
15 delineating the RC Protection Area in the location that it believes is required by the criteria at
16 LOC 50.16.055(3) will leave petitioner with an opportunity for “reasonable development of
17 [the] property.”

18 Purpose statements in land use regulations are often generally worded expressions of
19 the motivation for adopting the regulation, or the goals or objectives that the local
20 government hopes to achieve by adopting the regulation. Where a purpose statement is
21 worded in that manner, we have stated that it does not play a direct role in reviewing
22 applications for permits under the land use regulations. *Beck v. City of Tillamook*, 20 Or
23 LUBA 178, 185-86 (1990), *aff’d* 105 Or App 276, 812 P2d 16 (1991), *rev’d on other*

¹⁰ The city notes in its brief, that LOC 50.16.050 has been amended to delete the internal reference so that LOC 50.16.050 now provides “applicants * * * shall comply with the standards contained in LOC 50.16.055 to 50.16.060 * * *.”

1 grounds 313 Or 148, 831 P2d 674 (1992). In other cases, however, purpose statements can
2 impose additional affirmative duties upon the local government that must be fulfilled.
3 *Freeland v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2003-059, August 5, 2003), slip op
4 6-7.

5 LOC 50.16.050 is ambiguous. The ambiguity begins with its title—“Resource
6 Conservation [Overlay] District Environmental Review Standards; Applicability and
7 Purpose.” If the question must be resolved by the title alone, LOC 50.16.050 could be a
8 statement of “[r]eview [s]tandards,” “applicability,” “purpose” or any combination of the
9 three. Viewing the language of LOC 50.16.050 itself in isolation, it could also be an
10 expression of approval standards (as petitioner argues) or it could be an expression of
11 purpose (as the city argues). However, neither interpretation is particularly compelling,
12 because both interpretations require that some language be given preclusive effect over
13 language that seems to support the opposite interpretation.

14 Viewing the language of LOC 50.16.050 in context with the parallel RPOD
15 provisions lends some support to the city’s argument, but not a great deal. LOC 50.16.065 to
16 50.16.085 are the RPOD provisions that parallel the RCOD provisions at LOC 50.16.050 to
17 50.16.060. LOC 50.16.065 is worded similarly to LOC 50.16.050.”¹¹ LOC 50.16.065

¹¹ LOC 50.16.065 provides as follows:

“In addition to compliance with LOC 50.16.030 to 50.16.045, applicants for development that is subject to environmental review on property containing an RP District *shall comply with the standards contained in LOC 50.16.065 to 50.16.085, in order to:*

- “1. Prohibit new development within an RP District following delineation of the resource or resources, except as provided in this section. In the event that development is allowed within an RP District, the applicant shall mitigate for the loss of or damage to the RP resource pursuant to LOC 50.16.100 to 50.16.115;
- “2. Ensure that new development and alterations are compatible with and maintain the total land area and the functions and values of resources designated as RP;
- “3. *Allow for development opportunities for at least one single family home in residential zones where an RP District occupies most or all of an individual*

1 includes the same ambiguous internal reference to itself and includes the same “in order to”
2 language that the city relies heavily on to argue that these sections are merely statements of
3 purpose. LOC 50.16.065(c) sets out an even more explicit statement that the RPOD is not
4 intended to preclude residential development. LOC 50.16.065(c) provides that “at least one
5 single family home” is to be allowed in any event, with mitigation. Like LOC 50.16.050,
6 LOC 50.16.065 is followed by two sections that are undeniably “standards”. LOC 50.16.070
7 (RPOD Buffer Requirements); 50.16.075 (RPOD Development Standards). However, unlike
8 the RCOD provisions, which include no specific standards in the two sections that follow
9 LOC 50.16.050 that can be said to implement the “while permitting reasonable development
10 of [the] property” language in LOC 50.16.050(2), the RPOD provisions do include such a
11 specific implementing provision at LOC 50.16.085.¹² LOC 50.16.085 is notable in that it
12 guarantees a “reasonable development opportunity” to develop “at least one single family
13 home” subject to the cited mitigation criteria. It also requires that “[a]ll other applicable City
14 Codes and Development Standards shall be complied with,” which suggests that the
15 referenced “reasonable development opportunity” in LOC 50.16.085 is one that complies
16 with “Development Standards” and does not require variances from those standards.

17 With the above discussion of related LOC provisions in mind we return to the critical
18 legal issue. Is the city obligated under LOC 50.16.050(2) to apply the RC Protection Area
19 criteria at LOC 50.16.055(3) in a way that leaves petitioner with an opportunity for
20 reasonable development of the property, on the part of the property outside the delineated RC

property, pursuant to applicable mitigation criteria of LOC 50.16.100 to 50.16.115.” (Italics and bold emphasis added.)

¹² LOC 50.16.085(1) provides as follows:

“When a delineated RP[OD] resource occupies most or all of an individual property in any residential district and *thereby prevents reasonable development opportunity* on such a parcel, the property owner shall be permitted development of at least one single family home. All other applicable City Codes and Development Standards shall be complied with, and the mitigation criteria of LOC 50.16.100 to 50.16.115 shall also be applicable.” (Emphasis added.)

1 Protection Area? For properties subject to the RPOD, it is clear that an opportunity for
2 reasonable residential development, without the necessity of securing variances, must be
3 provided. The city's failure to adopt an RCOD provision that parallels the LOC 50.16.085
4 provision for properties subject to the RPOD could be explained in a number of ways. We
5 note two possible explanations below.

6 First, it could be that the city's failure to adopt a provision similar to LOC 50.16.085
7 for the RCOD was an oversight and that, given the ambiguous status of LOC 50.16.050,
8 LOC 50.16.050(2) should be viewed as an approval criterion or, even if it is not technically
9 an approval criterion, that the RC Protection Area criteria should be applied in a manner that
10 leaves a property owner with an opportunity for reasonable development of the property.
11 Such an interpretation of LOC 50.16.050 would give effect to the clear expression of purpose
12 that the RC Protection Area is not to be applied in a way that will leave a property owner
13 without an opportunity for reasonable development of the property.¹³

14 Second, it could be that the city (1) purposely did not adopt a provision like LOC
15 50.16.085 for the RCOD and (2) does not intend LOC 50.16.050(2) to operate as an approval
16 criterion or to have any effect on the manner in which an RC Protection Area is delineated
17 under LOC 50.16.055(3). As the city points out in its brief, up to 50% of a property may
18 remain outside the RC Protection Area. In most cases, the exclusion of a substantial portion
19 of the property from the RC Protection Area may be sufficient, in and of itself, to leave the
20 property owner with a reasonable building site.¹⁴ The city notes in its brief that a property
21 owner may be able to deviate from "lot dimensional standards" under LOC 50.16.040 and is

¹³ We note that unless LOC 50.16.050(2) is viewed as an approval criterion or unless the RC Protection Area delineation criteria at LOC 50.16.050(3) must be applied in a manner that leaves a reasonable development site, the RC Protection Area delineation criteria appear to focus exclusively on the forest resource to be protected and not at all on whether a reasonable opportunity for residential development will remain on the area that is not included in the RC Protection Area.

¹⁴ As we noted earlier, the city takes the position in its brief that petitioner in this case may well have such a reasonable building site, notwithstanding the steep slopes along Diamond Head Drive.

1 expressly permitted to seek variances to other LOC requirements and that such deviations or
2 variances from LOC requirements could produce a reasonable building site.

3 Under ORS 197.829(1), *Clark v. Jackson County*, 313 Or 506, 836 P2d 710 (1993),
4 and *Church v. Grant County*, 187 Or App 518, 524, ___ P3d ___ (2003), LUBA must sustain
5 a local government’s interpretation of its own legislation unless that interpretation is
6 inconsistent with the express language of the plan or regulation, is inconsistent with the
7 purpose of the plan or regulation, is inconsistent with the underlying policy providing the
8 basis for the plan or regulation, or is contrary to a state statute, land use goal or rule that the
9 comprehensive plan provision or land use regulation implements.¹⁵ The relevant interpretive
10 question was raised below, but as we earlier noted the city council does not address the
11 question in its decision.¹⁶ The city council therefore has not adopted a reviewable
12 interpretation.

13 Although LUBA is authorized by ORS 197.829(2) to interpret the LOC in the first
14 instance, where the city fails to do so, we find that this is not an appropriate case for LUBA
15 to exercise that authority. That is because we (1) find both petitioner’s and the city’s
16 interpretive arguments to be plausible, and (2) also find that both petitioner’s and the city’s
17 arguments have problems. Those problems are sufficiently significant that the city council

¹⁵ Under ORS 197.829(1):

“[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

¹⁶ Petitioner argues at page 8 of the petition for review that the relevant interpretive question was raised below. The city does not dispute that the relevant interpretive question was raised below.

1 might assign different significance to the respective problems in deciding how it wishes to
2 interpret and apply LOC 50.16.050.¹⁷ In such a circumstance, we believe it is appropriate to
3 remand the city’s decision so that the city council can answer the interpretive question in the
4 first instance.

5 We repeat that the interpretive question for the city to answer on remand is whether
6 LOC 50.16.050(2) imposes a mandatory approval criterion or a mandate of some other sort
7 that must be considered when applying the RC Protection Area criteria at LOC 50.16.055(3)
8 to delineate the portion of the property that must be protected from development, such that
9 those criteria must be applied in a manner that will leave the property owner with
10 “reasonable development of [the] property.”¹⁸

11 If the answer to that question is yes, then a second interpretive issue will need to be
12 addressed. What does “while permitting reasonable development of [the] property mean?”
13 Petitioner’s engineering geologist prepared a letter to assess the potential for developing a
14 house on tax lot 600 along Diamond Head Road.¹⁹ Petitioner reads that letter to establish

¹⁷ For example, the city council might be sufficiently troubled with the express allowance of a right to develop at least one residence on property subject to the RPOD that it would be persuaded to adopt petitioner’s view that LOC 50.16.050(2) should be viewed to provide a similar guarantee for properties subject to the RCOD. Another decision maker might view the differences between the RCOD (which only applies to approximately one-half of the property or less) and the RPOD (which could apply to the entire property) as sufficient to make an express provision like LOC 50.16.085 unnecessary in all but the most unusual circumstances and, therefore, decline to read LOC 50.16.050(2) as imposing a mandatory approval criterion or a mandatory consideration of any type.

¹⁸ We note that a possible consequence of a negative answer to this question could be that the property that remains outside the delineated RC Protection Area cannot reasonably be developed. If the property owner is able to establish that the property that remains outside the RC Protection Area cannot be put to any reasonable economic use, it may be that the property owner would be able to assert a successful inverse condemnation or takings claim against the city.

¹⁹ That letter identifies the following physical challenges that would have to be overcome in building a house along Diamond Head Road:

“[W]e have performed a preliminary assessment of an alternative development plan proposed by the [city] staff. The alternative plan is to construct a house 10 to 20 feet from the right-of-way for Diamond Head Road * * *. The proposed alternative development area is a steep, native slope inclining at about 100% grade (45 degrees). House construction is most likely feasible on this slope; however, such construction would require more substantial excavation

1 that even if residential development in that location is possible, it will require heroic
2 measures that render development in that location unreasonable.²⁰ The city staff, on the
3 other hand, pointed to the existence of other houses along Diamond Head Road. Record 47
4 (“existing development on Diamond Head Road was typically comprised of buildings closer
5 to the road on the steep slopes”); 247 (“[I]ocating these future dwellings along Diamond
6 Head road allows for a development that is balanced and compatible with other
7 developments in the immediate neighborhood”). The staff also pointed to language in the
8 applicant’s geologist’s letter stating that “[h]ouse construction is most likely feasible” as
9 evidence that there is a reasonable construction site. If the city concludes that petitioner is
10 entitled to retain a reasonable development site on the portion of the property that is outside
11 the RC Protection Area, it will need to decide whether it believes staff or petitioner. In doing
12 so, the city will need to resolve a related question. The city takes the position in its brief,
13 that even if development of a house on tax lot 600 at the top of the ridge along Diamond
14 Head Road would require one or more variances, petitioner must first seek the waivers of
15 “lot dimensional standards” and variances that LOC 50.16.040 authorizes, if those waivers or
16 variances would allow construction of a residence, before petitioner could establish that a
17 delineation of the RC Protection Area in a way that requires development in that location

and impacts to the site and neighboring properties in order to provide adequate foundation support structures. Due [to] the steep slope within and immediately below the house footprint, collu[vi]al soils would need to be entirely removed from the foundation footprint and footing areas excavated at least several feet into competent basalt bedrock. Most likely, access roads and a staging area bench (or benches) would need to be cut into the hillside for excavating equipment to access the foundation area. To accomplish the level and depth of excavation described above would require significant use of a hydraulic rock chipper. Due to the close proximity of neighboring houses, the potential for vibration damage to neighboring structures would be moderate to high. Given that the house height would exceed three stories, larger and deeper foundation elements and a more substantial structural support system would be necessary to design the house to meet seismic resistance codes. Additional measures may also be necessary (such as removal, grouting, bolting and/or other structural improvements) to secure free-face, basalt blocks (disturbed during excavation).” Record 460.

²⁰ Petitioner also contends that construction along Diamond Head Road will require a number of “variances to the front yard setback, the building height, and hillside protection standards[.]” Petition for Review 13.

1 denies it an opportunity for “reasonable development of [the] property.”²¹ The city will need
2 to determine whether in considering whether petitioner is left with an opportunity for
3 “reasonable development of [its] property,” the possibility that petitioner could seek and
4 obtain variances is a relevant consideration and how the possibility that such variances might
5 be granted, if they are necessary, should be analyzed in the context of the present application.

6 The first and second assignments of error are sustained.

7 **THIRD ASSIGNMENT OF ERROR**

8 Petitioner argues that the city’s standards for approval in LOC 50.16.055 and .060 are
9 so vague that they violate ORS 227.173(1), which provides:

10 “Approval or denial of a discretionary permit application shall be based on
11 standards and criteria, which shall be set forth in the development ordinance
12 and which shall relate approval or denial of a discretionary permit application
13 to the development ordinance and to the comprehensive plan for the area in
14 which the development would occur and to the development ordinance and
15 comprehensive plan for the city as a whole.”

16 There is no question that the present case involves “[a]pproval or denial of a
17 discretionary permit application” that is “based on standards and criteria” that are “set forth
18 in the development ordinance.” The issue is whether those “standards and criteria” are so
19 vague as to violate the statute. Under ORS 227.173, standards and criteria are impermissibly
20 vague when an applicant is unable to determine whether, or how, approval may be granted.
21 *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982); *McKenney v. Deschutes*
22 *County*, 37 Or LUBA 685, 690 (2000). As petitioner acknowledges, many land use permit
23 approval criteria are extremely subjective and grant broad discretion to the local government
24 in determining whether to approve or deny applications. Furthermore, the courts have
25 generally upheld highly subjective approval standards that would appear even more
26 subjective than the LOC 50.16.055(3) RC Protection Area delineation criteria. *See Lee*, 57

²¹ As we noted earlier, that view seems to be somewhat at odds with LOC 50.16.085, which seems to guarantee an opportunity to build at least one residence on properties subject to the RPOD without variances.

1 Or App at 802 (upholding standards protecting public health, need, convenience, and
2 welfare); *Oregon Entertainment Corporation v. City of Beaverton*, 38 Or LUBA 440, 458-59
3 (2000), *aff'd* 172 Or App 361, 19 P3d 918, *rev den* 332 Or 250, 27 P3d 1044 (2001)
4 (upholding standards protecting compatibility and livability). We do not see that the
5 standards at issue are any more vague than those that have survived challenges under ORS
6 227.173 in the past.

7 Petitioner cites three of the city’s standards as examples of approval criteria that are
8 impermissibly vague. The first example is LOC 50.16.055(3)(a), which requires the RC
9 Protection Area to “link” other RC and RP lands. *See* n 5. The city interpreted “link” to
10 require that the RC Protection Area should remain adjacent to the other resource areas, rather
11 than allowing for a hole in the middle of the RCPA, as petitioner had suggested. Record 16-
12 17. Although petitioner disagrees with this interpretation and policy, it is not so vague and
13 uncertain that petitioner cannot identify what the city believes petitioner must do to comply
14 with the criterion. To the contrary, it is clear that the city interprets and applies LOC
15 50.16.055(3)(a) to require that petitioner revise the RC Protection Area so that it does not
16 have a hole in the middle of it.

17 Petitioner’s second example is LOC 50.16.055(3)(h), which requires that
18 development “maintain an ecologically viable plant and wildlife community.” Once again,
19 petitioner’s challenge to the standard is more of a disagreement with the city’s conclusions
20 rather than not being able to understand what is required by the standard. Petitioner
21 presented evidence that the plant and wildlife community was already degraded and that the
22 proposed development would have no detrimental effect upon the existing flora and fauna.
23 The city instead relied on its own consultants, who found a thriving plant and wildlife
24 community that would be very adversely affected by allowing development in the middle of
25 the RC Protection Area as petitioner proposes. The decision is adequate to inform petitioner

1 that it can satisfy this criterion by eliminating its proposal to develop tax lot 600 in a way
2 that substantially divides the RC Protection Area.

3 Petitioner’s final example is LOC 50.16.055(3)(b), which requires that “[t]he largest
4 trees within the RC District shall be included in the [RC] Protection Area[.]” Petitioner
5 listed eight species of trees, conducted an inventory and placed the inventoried trees by
6 species into one of four size categories.²² For most size categories, petitioner proposed to
7 keep a majority of the trees in each species. Record 375. For the largest two size categories,
8 petitioner proposed to keep a majority of the trees in all species. *Id.* The city rejected
9 petitioner’s approach.

10 “[LOC 50.16.055(3)(b)] requires that *the largest trees* be included in the
11 Protection Area – not that a *majority* of trees within certain size *ranges* be
12 included.” (Emphases in original).

13 Although we do not agree with petitioner that LOC 50.16.055(3)(b) violates ORS
14 227.173, the arguments that petitioner presents under this assignment of error can be read to
15 assert a related argument that we do agree with. LOC 50.16.055(3)(b) is ambiguous because
16 it does not expressly limit the “largest trees” that must be included in the RC Protection Area
17 in any way. The above-quoted finding can be read to embrace a literal interpretation of LOC
18 50.16.055(3) that petitioner must include every tree on the property within the RC Protection
19 Area, with the exception of the smallest tree. In that way *all* of the largest trees would be
20 included. However, the city’s suggestion that petitioner instead place houses along Diamond
21 Head Road makes it clear that the city does not adopt such a literal interpretation. Petitioner
22 argues, and the city does not dispute, that a number of large trees would have to be removed
23 to develop houses along Diamond Head Road.

24 Although petitioner now knows that its proposed categorical approach to delineating
25 an RC Protection Area that complies with LOC 50.16.055(3)(b) is not acceptable to the city,

²² The tree diameter size categories were as follows: (1) 5 inches to 10 inches, (2) 11 inches to 19 inches, (3) 20 inches to 30 inches, and (4) 31 inches or larger. Record 375.

1 petitioner cannot tell from the decision how many of the largest trees must be included in the
2 RC Protection Area or even how it should go about identifying the largest trees that must be
3 included in the RC Protection Area. Now that the city has rejected petitioner’s approach to
4 complying with LOC 50.16.055(3)(b), the city must provide petitioner some idea of how it
5 might go about successfully revising the RC Protection Area so that it will comply with LOC
6 50.16.055(3)(b). *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582
7 P2d 1384 (1978); *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371
8 (1994). The challenged decision does not do so.

9 The third assignment of error is sustained in part.

10 **FOURTH ASSIGNMENT OF ERROR**

11 We have some difficulty following petitioner’s fourth assignment of error. The
12 assignment of error states that the city misconstrued LOC 50.16.055(4). LOC 50.16.055(4)
13 provides:

14 “It is recognized that all of the criteria listed in [LOC 50.16.055(3)] may not
15 be applicable to every site. In some cases, the criteria may conflict on a given
16 site. In such cases, the reviewing authority shall balance the applicable
17 criteria in order to protect the most environmentally significant portion of the
18 RC District.”²³

19 After stating that this provision trumps the RC Protection Area criteria at LOC 50.16.055(3),
20 petitioner proceeds with what appears to be a substantial evidence challenge to the city’s
21 conclusions that the criteria in LOC 50.16.055(3) are not satisfied.

22 Turning first to petitioner’s interpretation of LOC 50.16.055(4), we agree with the
23 city that the “balance” that must be struck under LOC 50.16.055(4) only comes into play
24 when an action that is required to comply with one of the LOC 50.16.055(3) criteria is
25 inconsistent with the actions that are required to comply with another LOC 50.16.055(3)
26 criterion. We also agree with the city that no balancing was required in the present case

²³ LOC 50.16.055(3) and (4) were set out earlier at n 5.

1 under LOC 50.16.055(4), because the city found that the eight LOC 50.16.055(3) criteria that
2 it applied all require that petitioner include the proposed driveway and building area for tax
3 lot 600 within the RC Protection Area. We fail to see any conflict that would necessitate the
4 balancing that LOC 50.16.055(4) requires.

5 Turning to petitioner's disagreement with the city's conclusions regarding the
6 evidence it relied on, petitioner argues that its evidence is better, not that no reasonable
7 person could have relied on the evidence the city relied on. We find that there is substantial
8 evidence in the record for the conclusions the city reached regarding the areas that should be
9 included in the RC Protection Area.²⁴

10 The fourth assignment of error is denied.

11 The city's decision is remanded.

²⁴ Our conclusion here does not necessarily mean that a different RC Protection Area might not also satisfy the subjective criteria of LOC 50.16.055(3), in the event the city council adopts an interpretation of LOC 50.16.050 that requires a different delineation of the RC Protection Area.