BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 49, LYNN-MARIE CRIDER,
and JULIE MARKIEWICZ,
Petitioners,

vs.

CITY OF HAPPY VALLEY,
Respondent,

and

PROVIDENCE HEALTH SYSTEM-OREGON,
Intervenor-Respondent.

LUBA No. 2008-123

FINAL OPINION
AND ORDER

Appeal from City of Happy Valley.

David C. Noren, Hillsboro, filed the petition for review and argued on behalf of petitioners.

Christopher D. Crean, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Beery, Elsner & Hammond, LLP.

Michael C. Robinson and Seth J. King, Portland, filed a response brief and argued on behalf of intervenor-respondent. With them on the brief were Roger A. Alfred and Perkins Coie LLP.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 01/30/2009

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision that amends the City of Happy Valley Comprehensive Plan and Land Development Ordinance.

FACTS

The subject property includes approximately 146 acres. Before the city adopted the decision that is the subject of this appeal, the subject property was planned and zoned by Clackamas County for exclusive farm use (EFU). The subject property was part of a larger 12,000+ acre area in the Happy Valley-Damascus-Boring area that Metro included within the urban growth boundary (UGB) in 2002. The Damascus-Boring Concept Plan identifies the subject property as suitable for research-development to support industrial development and provide employment.

The challenged decision adopts the Rock Creek Mixed Employment Comprehensive Plan, as part of the city's comprehensive plan. The challenged decision also amends the Happy Valley Land Development Ordinance (LDO) to add a new development district, the Rock Creek Mixed Employment (RC-ME) district.[1] The challenged decision applies the RC-ME zoning district to the subject property.[2] The RC-ME zoning district allows medical centers and retail sales as permitted uses.

FIRST ASSIGNMENT OF ERROR

Petitioners argue the challenged decision violates Statewide Planning Goal 11 (Public Facilities and Services). According to petitioners, Goal 11 imposes a planning obligation on the city to ensure that a new hospital is not constructed on the subject property unless it is

[1] Happy Valley Municipal Code Title 16 is the city's Development Code. According to LDO 16.04.010, the Development Code is to be "cited and referenced as the "City of Happy Valley, Oregon, Land Development Ordinance."

[2] Although the RC-ME is denominated a "Development District" in the LDO, the parties refer to it as a zoning district, and we do so as well in this opinion.

first shown that a new hospital is needed. Petitioners contend that the evidence in the record shows a new hospital is not needed in this location.

> "Petitioners presented * * * evidence and argument to show that the city's decision would allow a new hospital to be constructed without further review, and that allowing a new hospital without determining whether there is a need for that health service in the area, does not comply with Goal 11. Petitioners presented evidence * * * that there is not a need for another hospital in the area; that there are four existing hospitals within nine miles of the subject property, many of which have low occupancy rates; that there is already an over-supply of hospital beds in the Portland region for the present and for the projected needs over the next 20 years; and that allowing a new hospital where there is not sufficient need will drive up health care costs, disrupt existing health services, and result in over-utilization that causes worse rather than better health care." Petition for Review 4-5.

Because no need for a hospital on the subject property has been shown and because the RC-ME zoning district would allow a hospital to be constructed without requiring a demonstration that a hospital is needed, petitioners contend the challenged decision to apply the RC-ME zoning district to the subject property violates Goal 11. According to petitioners, the challenged "decision should be remanded for the city to develop an adequate factual base and supporting findings that demonstrate that allowing a new hospital without further review is consistent with the orderly and efficient delivery of health services." Petition for Review 11.

The city found that health care is not among the planning obligations that are imposed on the city under Goal 11 and that the city was not required under Goal 11 to ensure that a hospital could not be constructed on the subject property under RC-ME zoning unless it is first shown to be needed. We understand petitioners to derive a planning obligation to ensure that public facility capacity does not exceed the need for that public facility capacity from the first two sentences of Goal 11. Relevant text from Goal 11 is set out in the appendix to this opinion.

The first sentence of Goal 11 simply requires planning for "a timely, orderly and efficient arrangement of public facilities and services[.]" That language does not mandate

that public facility capacity must proceed in lockstep with public facility demand. That language may require that the city ensure that its land use regulations allow hospitals, and ensure that the other public facilities and services that are needed for hospitals to operate are available or obtainable, but that language does not require that the city ensure that no hospitals are constructed absent a demonstration that they are currently needed.

The second sentence of Goal 11 comes a little closer to providing some support for petitioners' position: "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." (Emphasis added.) But again, that language need not be interpreted to require the kind of rigid match between the current or short term *need* for public facilities and the *capacity* for public facility capacity that petitioners suggest is mandated under Goal 11. Based on that language, LUBA has interpreted Goal 11 to require that public facilities in rural areas be appropriate for and limited to the needs of rural areas, as opposed to urban areas. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 84-85 (1987); *Friends of Benton County*, 12 Or LUBA 160, 164 (1984); *Conarow v. Coos County*, 2 Or LUBA 190, 193 ("Goal 11 prohibits provision of an urban level of services to rural areas"). But no decision we are aware of has ever held that a city must ensure that its planning for public facilities and services in urban areas bars construction of such public facilities or services if they will have more capacity than is presently needed or needed in the planning period. The reality is that market and budget forces almost always place cities in the opposite situation, with the demand for public facilities and services outstripping current or planned capacity. But, in fact, it is not unusual for public facilities to be constructed with excess capacity. For example, water and sewer mains are often sized much larger than required to serve current development needs, so that they will be able to serve anticipated future development as it occurs. Under petitioners' interpretation of Goal 11, building in such excess public facility capacity would not be

permitted. Absent a clearer indication in the language of Goal 11 to support petitioners' interpretation of Goal 11, we reject that interpretation.

It is not clear to us whether the city has *any* specific planning obligations under Goal 11 that extend to health services generally or private hospitals in particular. The answer to that question is complicated because although parts of Goal 11 have remained unchanged since Goal 11 first took effect in 1975, Goal 11 has been amended to reflect subsequent statutory and administrative rule changes that clearly and expressly impose local government planning obligations for water, sewer and transportation facilities. ORS 197.712(2)(e); OAR chapter 660, division 11. Goal 11 appears to assign different planning responsibilities for "public facilities and services" and "key facilities."[3] Since Goal 11 uses different words to describe the planning obligations for "public facilities and services" and "key facilities," those planning obligations are presumably not the same.[4] Goal 11 also expressly requires that local governments prepare a "public facilities plan," but that public facility plan is only required to address "water, sewer and transportation facilities." Finally, to round out the several seemingly disconnected planning directives in Goal 11, Goal 11 defines "urban facilities and services" as including "key facilities," and a number of other things, including

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[3] Goal 11 itself defines neither term. The Statewide Planning Goals general definitions include the following definitions for those terms:

> **"PUBLIC FACILITIES AND SERVICES**. Projects, activities and facilities which the planning agency determines to be necessary for the public health, safety and welfare.
>
> **"KEY FACILITIES**. Basic facilities that are primarily planned for by local government but which also may be provided by private enterprise and are essential to the support of more intensive development, including public schools, transportation, water supply, sewage and solid waste disposal."

Based on the above definition, there is a great deal of potential for overlap between "public facilities and services "and "key facilities."

[4] Local governments are directed "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services." Goal 11 also directs that public facilities and services [must be] appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served. The planning obligation for "key facilities" is more sparsely stated: "[a] provision for key facilities shall be included in each plan."

"health services."[5] But Goal 11 does not expressly assign any planning responsibilities to "urban facilities and services," as such, leaving it exceedingly unclear whether some or all "urban facilities and services" come within the planning obligations that Goal 11 assigns for "public facilities and services." Goal 11 Planning Guideline 5 suggests that within urban areas *public* facilities and services and *urban* facilities and services are not the same thing. *See* Appendix.

Because we have already determined Goal 11 does not impose a planning obligation on cities to prevent development of excess public facility and service capacity in urban areas, it is not necessary for us to resolve the parties' dispute about whether the city has *any* planning obligations under Goal 11 that extend to health services generally or private hospitals in particular. Even if the city has some obligation to plan for hospitals as "health services," it does not have an obligation under Goal 11 to ensure that a hospital is not constructed until there is substantial evidence that the hospital is currently needed or needed within the planning period. As far as Goal 11 is concerned, while the city likely has some obligation to ensure that its comprehensive planning and land use regulations make it possible to develop hospitals, the city may leave it to market forces and any other regulatory bodies that may be required to approve construction of hospitals to determine whether and when hospitals are actually constructed.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Amendments to the city's comprehensive plan and land use regulations are subject to the review criteria set out at LDO 16.40.041. Two of those criteria are set out below:

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[5] The relevant language from Goal 11 is set out below:

> "**Urban Facilities and Services** – Refers 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." (Italics added.)

"B. There is a demonstrated public need for a change of the specific type proposed.

"C. That need will be best served by the amendment as proposed as compared with other alternatives."

A. LDO 16.40.041(B)

To address LDO 16.40.041(B), the city adopted the following findings:

"The need for a Metro Title 4-compliant 'Employment' zoning district was established during the Damascus-Boring Concept Plan process, in which population and employment projections were applied to the greater approximately 2,500-acre planning area to determine the amount, type and location of various zoning districts to meet the projected needs analysis. The proposed Rock Creek Mixed Employment Comprehensive Plan provides a legislative land use means to implement the Damascus-Boring Concept Plan designation of 'Mixed Employment.' Therefore, this criterion is satisfied by the proposed amendments." Record 120.

Petitioner argues that "[b]y focusing on the general nature of the amendment, rather than the specific type of change proposed, the city fails to comply with its own ordinance by not requiring proof of 'a demonstrated public need' for a new hospital without further review." Petition for Review 12.

As intervenor points out, the challenged decision does not approve a hospital; the challenged decision amends the city's comprehensive plan and zoning ordinance to make them consistent with the Damascus-Boring Concept Plan. Under the county's reading of 16.40.041(B), the "demonstrated public need" is to replace the county EFU planning and zoning, which is not consistent with the Damascus-Boring Concept Plan, with the amended city comprehensive planning and zoning for the property, which the city finds is consistent with the Damascus-Boring Concept Plan. We understand intervenor to argue that because the "demonstrated public need" is for the comprehensive planning and zoning that is required by the Damascus-Boring Concept Plan, not a current public need for each and every use that is potentially approvable under that new comprehensive planning and zoning, petitioners'

arguments regarding LDO 16.40.041(B) provide no basis for reversal or remand. We agree with intervenor.

B. LDO 16.40.041(B)

The city adopted the following findings to address the LDO 16.40.041(B) requirement to consider alternatives to the proposal:

> "Staff interprets the language 'other alternatives' in this criterion to mean that the alternatives would be to analyze other zones besides one that might implement the 'Mixed Employment' designation explored in the Damascus-Boring Concept Plan. The potential for future development within the subject area requires replacing the existing County zoning (EFU) with an 'Employment' zone. The proposed RC-ME zoning district will result in a range of commercial and employment uses that will facilitate employment opportunity in this geographic region, conducive with the Damascus-Boring Concept Plan and per the Title 4 requirements of the Functional Plan." Record 120.

Petitioners argue "[t]he city did not demonstrate that the need for a hospital was better served by allowing it outright at this time, without any evidence of need, rather than the alternative proposed by petitioners, to make hospitals a conditional use subject to review for public need." Petition for Review 12.

Petitioners contend the city failed to adopt any findings to respond to their suggested conditional use alternative. However, the city did adopt findings that specifically address and reject petitioner's conditional use alternative:

> "Evidence in the record demonstrates there is no need to classify medical centers and their ancillary facilities, including hospitals, as conditional uses. The RC-ME District is intentionally designed to provide for a hospital, associated medical uses and collaborative businesses that will provide important employment opportunities to the City. There is nothing inappropriate about the hospital use at this location, and a conditional use permit process would be both superfluous and unnecessary." Record 23.

The city's findings go on to explain that uses are generally subjected to conditional use review because they have features or characteristics that make them unsuitable as uses that are allowed by right. The findings point out that the Damascus-Boring Concept Plan specifically anticipates a hospital in this area and any hospital developed in the RC-ME

district would be subject to discretionary review through the city's Master Plan and Design Review processes to ensure appropriate site development.

Petitioners neither acknowledge nor challenge the adequacy of the above findings. We conclude they are adequate to explain why the city found the proposal complies with LDO 16.40.041(B).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

A. Metro Code (MC) 3.07.440

The subject property is in an area that has been designated as "Employment" by Metro. MC 3.07.440 requires that commercial retail uses in designated Employment areas be limited to those that will "serve the needs of businesses, employees and residents of the Employment Areas."

"3.07.440 Protection of Employment Areas

> "A. Except as provided in subsections C, D and E, in Employment Areas mapped pursuant to Metro Code Section 3.07.130, cities and counties shall limit new and expanded commercial retail uses to those appropriate in *type and size* to serve the needs of businesses, employees and residents of the Employment Areas.
>
> "B. Except as provided in subsections C, D and E, a city or county shall not approve a commercial retail use in an Employment Area with more than 60,000 square feet of gross leasable area in a single building, or commercial retail uses with a total of more than 60,000 square feet of retail sales area on a single lot or parcel, or on contiguous lots or parcels, including those separated only by transportation right-of-way."[6] (Emphasis added.)

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[6] MC 3.07.440(C), (D) and (E) set out specific exceptions to the 60,000 square foot limitation in 3.07.440(B). Those exceptions are set out below:

> "C. A city or county whose zoning ordinance applies to an Employment Area and is listed on Table 3.07-4 may continue to authorize commercial retail uses with more than 60,000 square feet of gross leasable area in that zone if the ordinance authorized those uses on January 1, 2003.

MC 3.07.440(A) appears to require that cities and counties impose two limits on commercial retail uses. They must be both of a "type" and a "size" that is appropriate to serve "the needs of businesses, employees and residents of the Employment Areas." MC 3.07.440(B) then sets an absolute size limit of 60,000 square feet for commercial retail uses, with the three exceptions set out at MC 3.07.440(C), (D) and (E) that would allow commercial retail uses to exceed the 60,000-square foot limit in certain circumstances.

B. Commercial Uses in the RC-ME Zoning District

The RC-ME zoning district includes the following purpose statement:

> "Purpose. The Rock Creek mixed employment (RC-ME) district permits land uses with high job densities that provide stable, family-wage employment within the city. This zone provides a mix of uses that are compatible with nearby residential uses and provide a buffer between residential and industrial areas. Permitted uses in the Rock Creek mixed employment zone include office, creative arts, small-scale manufacturing, research and development, and medical centers. *Commercial uses are limited to those serving the primary uses of the district.* A limited number of residential uses, including pre-existing dwelling units, are permitted by right." LDO 16.12.150(A) (Emphasis added.)

"D. A city or county whose zoning ordinance applies to an Employment Area and is not listed on Table 3.07-4 may continue to authorize commercial retail uses with more than 60,000 square feet of gross leasable area in that zone if:

"1. The ordinance authorized those uses on January 1, 2003;

"2. Transportation facilities adequate to serve the commercial retail uses will be in place at the time the uses begin operation; and

"3. The comprehensive plan provides for transportation facilities adequate to serve other uses planned for the Employment Area over the planning period.

"E. A city or county may authorize new commercial retail uses with more than 60,000 square feet of gross leasable area in Employment Areas if the uses:

"1. Generate no more than a 25 percent increase in site generated vehicle trips above permitted non-industrial uses; and

"2. Meet the Maximum Permitted Parking – Zone A requirements set forth in Table 3.07-2 of Title 2 of the Urban Growth Management Functional Plan."

The above purpose statement is followed by a list of the uses that are allowed in the RC-ME zoning district. A number of general categories of uses are followed by specific examples of uses in those general categories of uses. One of the general categories of uses that are allowed in the RC-ME zoning district is "Commercial Retail." Under that general category of uses are "Commercial Day Care," "Indoor health and recreation facilities," "Parking Lots," "Restaurant – Full Service," "Retail Sales," "Retail – Personal Services." There follows a number of other general categories of uses, including "Commercial Office," "Industrial," Energy recovery systems," "Institutional," and "Other."

C. Petitioners' Argument

Petitioners contend that the RC-ME zone violates the MC 3.07.440(A) requirement to "limit new and expanded commercial retail uses to those appropriate in type and size to serve the needs of businesses, employees and residents of the Employment Areas." However, with one exception, petitioners fail to explain which "commercial retail uses" allowed in the RC-ME zone they believe are inconsistent with the MC 3.07.440(A) requirement that "commercial retail uses" be limited "to those appropriate in type and size to serve the needs of businesses, employees and residents of the Employment Areas." The only use petitioners identify as violating the MC 3.07.440(A) limit on "commercial retail uses" is Retail Sales. Petitioners recognize that the RC-ME zone specifically limits Retail Sales uses in the RC-ME zone to no more than 60,000 square feet.[7] However, we understand petitioners to argue the RC-ME zone does not require that Retail Sales uses must be of a "type" of "retail commercial" use that serves "the needs of businesses, employees and residents of the Employment Areas," as MC 3.07.440(A) requires. Petitioners argue that the city cannot rely on language in the purpose statement that "[c]ommercial uses are limited to those serving the

[7] Although there are minor wording differences, the 60,000 square foot limitation the RC-ME zone imposes on Retail Sales uses parrots the language in MC 3.07.440(B) and appears to impose the limit required by MC 3.07.440(B).

primary uses of the district." We understand petitioners to argue that purpose statement language will not be applied on a case by case basis to ensure that each Retail Sales use that is developed in the RC-ME zone in the future is of a type that serves "the needs of businesses, employees and residents of the Employment Areas."

Whether a local government intends for its zoning ordinance purpose statements to operate as approval criteria for individual land use decisions "depends on the wording of the specific provisions and their context." *Tylka v. Clackamas County*, 22 Or LUBA 166, 173 (1991). We agree with petitioners that the RC-ME purpose statement is not worded as an approval standard, and the city would not be required to apply it on a case by case basis in allowing Retail Sales uses in the RC-ME zone in the future. We do not understand the city or intervenor to argue otherwise.

We understand intervenor to advance two arguments in response to this assignment of error. Intervenor first appears to contend that it can be assumed that Retail Sales uses that do not exceed the 60,000 square foot limit are of a "type" of "commercial retail" use that serves "the needs of businesses, employees and residents of the Employment Areas," as MC 3.07.440(A) requires. That seems like a questionable assumption to us, although intervenor points out that a Metro representative appeared below and expressed no opposition to the proposed RC-ME zone. Record 273. Notwithstanding the Metro representative's general support for the proposal, we believe remand is required for the city to better explain why such an assumption is warranted, if it in fact believes such an assumption is warranted. Neither Metro nor the city specifically addresses the question presented under this assignment of error, and without a better explanation we cannot agree that assumption is warranted.

Intervenor also suggests petitioners' objection under this assignment of error is premature and should be raised later when approval of a Master Plan is requested. The difficulty with that argument is that intervenor offers no reason to believe the city would be

required under the LDO to determine whether a particular proposed Retail Sales use complies with the MC 3.07.440(A) requirement that it be of a "type" that is "appropriate" "to serve the needs of businesses, employees and residents of the Employment Area," at the time of Master Plan or Site Plan approval. Adding such a requirement might well be sufficient to ensure compliance with MC 3.07.440(A), but unless and until such a requirement is imposed, it cannot be assumed that Master Plan review will ensure that Retail Sales uses in the RC-ME zone will comply with MC 3.07.440(A).

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioners contend that because RC-ME zoning would allow construction of a hospital without ensuring that any hospital that is built in the RC-ME zone is a regional hospital that will generate "traded sector jobs," the city's decision violates MC 3.07.410 and the Statewide Planning Goal 2 (Land Use Planning) coordination requirement, as well as Statewide Planning Goal 9 (Economic Development).[8]

A. MC 3.07.410 and Goal 2

Metro's Urban Growth Management Functional Plan is codified at MC Chapter 3.07. Title 4 of MC Chapter 3.07 is entitled "Industrial and Other Employment Areas." MC

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[8] During the proceedings before the city, petitioners' economist offered the following description of the "traded sector:"

> "* * * Economists generally divide regional economic activity into two broad categories, the traded sector of the economy and the local sector of the economy. The traded sector consists of firms selling their goods and services outside the region, in competition against businesses in other states and increasingly in other nations. The traded sector includes most manufacturing businesses, and some professional service businesses—like engineers or research and development facilities. The local sector of the economy consists of businesses that primarily serve the needs of the local population, providing the kinds of services (food, clothing, furnishings, building materials, financial services and health and personal care) that people everywhere consume.
>
> "These traded sector firms are particularly important because they bring new income into the community that is paid out in wages to employees and respent throughout the local economy." Record 312.

3.07.410 – 3.07.450. Under Title 4, certain areas of the Metro region have been designated Regionally Significant Industrial Areas (RSIA), Industrial Areas or Employment Areas. The subject property is in an area that is currently designated as a RSIA by Metro. However, the Boring-Damascus Concept Plan designates the subject property as a mixed-employment area, and it is anticipated that Metro will be asked at some point in the future to redesignate the area as a Title 4 Employment Area.

According to petitioners the Title 4 Purpose and Intent section, MC 3.07.410, requires the city to "protect industrial and employment land by limiting non-industrial users."[9] Petition for Review 14. Petitioners contend the city violated its planning obligations under MC 3.07.410 by allowing "a medical center as a permitted use without requiring that it support industrial research and development or otherwise generate traded-sector jobs."[10] *Id.*

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[9] MC 3.07.410 is set out below:

> "Purpose and Intent.
>
> The Regional Framework Plan calls for a strong economic climate. To improve the region's economic climate, Title 4 seeks to provide and protect a supply of sites for employment by limiting the types and scale of non-industrial uses in Regionally Significant Industrial Areas (RSIAs), Industrial and Employment Areas. Title 4 also seeks to provide the benefits of 'clustering' to those industries that operate more productively and efficiently in proximity to one another than in dispersed locations. Title 4 further seeks to protect the capacity and efficiency of the region's transportation system for the movement of goods and services and to encourage the location of other types of employment in Centers, Employment Areas, Corridors, Main Streets and Station Communities. The Metro Council will evaluate the effectiveness of Title 4 in achieving these purposes as part of its periodic analysis of the capacity of the urban growth boundary."

[10] Petitioners' economist explained that while some health care uses could be part of the traded sector, a run-of-the-mill hospital or medical center is not part of the traded sector:

> "Health care research, related patenting of medicines and devices, and manufacturing of such medicines or devices may be part of the traded sector if they export the fruits of the research and manufacturing beyond the region. In such circumstances, it may be appropriate to allow a cluster of health care activity in an employment area, if there is proof that the core activity or primary purpose of the health care cluster is research and development or related manufacturing. However, the [RC-ME zone allows] medical centers, doctors' offices and other local sector health services as an outright permitted use without any requirement that they be tied to a health care or biotechnology cluster that *creates* jobs instead of simply moving jobs around within the local area. * * * Allowing health care facilities as an outright permitted use in your employment district, without requiring that the be tied to a cluster of

According to petitioners, that error on the city's part also results in a failure to coordinate its planning with Metro's Title 4, as required by Goal 2.[11]

Respondents point out that MC 3.07.410 is the purpose and intent section of Title 4 and MC 3.07.410 is simply not worded as a planning directive to local governments to ensure that lands that are subject to Metro's Title 4 are limited to development by traded sector employers. Moreover, respondents argue, MC 3.07.410 does not even mention the "traded sector." According to respondents, the RC-ME zoning district was adopted to implement the Rock Creek Employment Study. That study specifically envisions a regional hospital as part of a research and industrial campus that is expected to create 5,328 jobs. Respondents contend that petitioners' arguments that the challenged decision violates MC 3.07.410 and the city's coordination obligations under Goal 2 are without merit.

We agree with respondents. Neither the wording of MC 3.07.410 nor its context suggest that MC 3.07.410 itself is a mandatory planning directive to local governments. *Tylka v. Clackamas County*, 22 Or LUBA 166, 173 (1991). *See also Watts v. Clackamas County*, 51 Or LUBA 166, 172 (2006) (purpose statement of the section of zoning ordinance provisions for home occupations is not an approval standard where the purpose statement simply describes why the home occupation provisions were adopted); *Freeland v. City of Bend*, 45 Or LUBA 125, 130 (2003) (same). MC 3.07.410 describes what Metro's Regional Framework Plan "calls for" and what Title 4 "seeks." Subsequent sections of Title 4 set out what local governments must do to protect RSIAs, Industrial Areas and Employment Areas. MC 3.07.420 through 3.07.440. Moreover, as respondents correctly point out, even if MC

> health care research and development does not effectively limit non-industrial jobs in the employment area, as contemplated by the regional planning embodied in Metro's Title 4." Record 314 (emphasis in original).

[11] Among other things, Goal 2 requires that local governments ensure that "[e]ach plan and related implementation measure shall be coordinated with the plans of affected governmental units."

3.07.410 could be read to impose some sort of planning obligation on local governments, it does not distinguish between the local sector and traded sector of the local economy.

B. Goal 9

OAR chapter 660, division 9 is the Land Conservation and Development Commission's (LCDC's) administrative rule that refines and implements Goal 9. Petitioners contend the city erred by concluding that it was not subject to the planning obligations imposed by OAR 660-009-0010(4), which provides;

> "For a post-acknowledgment plan amendment under OAR chapter 660, division 18, that changes the plan designation of land in excess of two acres within an existing urban growth boundary *from an industrial use designation to a non-industrial use designation, or an other employment use designation to any other use designation*, a city or county must address all applicable planning requirements, and:
>
> "(a) Demonstrate that the proposed amendment is consistent with its most recent economic opportunities analysis and the parts of its acknowledged comprehensive plan which address the requirements of this division; or
>
> "(b) Amend its comprehensive plan to incorporate the proposed amendment, consistent with the requirements of this division; or
>
> "(c) Adopt a combination of the above, consistent with the requirements of this division." (Emphasis added.)

Intervenor contends that by its terms OAR 660-009-0010(4) does not apply in this case and that petitioners' arguments to the contrary are without merit:

> "On its face * * * this rule applies only to comprehensive plan map amendments changing the map designation from industrial or employment to other designations. Prior to adoption of the Amendments, the comprehensive plan map designation for the Property was 'EFU,' which is not an industrial or employment designation. Petitioners do not dispute this point but argue that OAR 660-009-0010(4) is nevertheless applicable because the Property has been subject to the 'Regionally Significant Industrial Area' designation on Metro's Title 4 map, and according to Petitioners, the City's decision will change that designation. In fact, the City's decision does not purport to and will not change the Title 4 map designation for the Property. Instead, as set forth in the staff report, the City will forward the Amendments, once adopted, to the Metro Council for that agency's consideration of a Title 4 map

> amendment. Petitioners offer no authority in support of the argument that OAR 660-009-0010(4) applies to the City's action under these circumstances. * * *" Intervenor-Respondent's Brief 17 (record citations omitted).

We agree with intervenor-respondent that OAR 660-009-0010(4) simply does not apply in the circumstances presented in this case.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

When a local government proposes to adopt post-acknowledgment comprehensive plan and land use regulation amendments, such as those adopted by the challenged amendment, the local government must send the proposal to the Director of the Department of Land Conservation and Development (DLCD) at least 45 days before the first evidentiary hearing on the proposal. ORS 197.610(1).[12] Under ORS 197.610(1), the copy of the proposal that is sent to DLCD must include the "text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal." ORS 197.610(1) directs DLCD to "notify persons who have requested notice that the proposal is pending."

In this case, the city completed the standard DLCD form that the agency requires for post-acknowledgment amendments under ORS 197.610(1). That form was sent to DLCD on March 3, 2008, more than 60 days before the first evidentiary hearing on May 13, 2008. In completing that form the city was required to provide a summary of the proposal and the city provided the following summary:

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[12] ORS 197.610(1) provides:

> "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 the Department of Land Conservation and Development 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."

> "LEGISLATIVE APPLICATION PROPOSING CHANGES TO THE CITY'S COMPREHENSIVE PLAN AND DEVELOPMENT CO[D]E TO ESTABLISH A ROCK CREEK MIXED EMPLOYMENT (RC-ME) ZONING DISTRICT, AND APPLY SAID COMPREHENSIVE PLAN DESIGNATION/ZONING DISTRICT TO AN APPROXIMATELY 145-ACRE GEOGRAPHIC AREA." Record 616.

In other spaces on the DLCD form, the city identified applicable statewide planning goals. The city also identified the location of the property and identified the phone number, fax number and e-mail address for the city planning staff contact regarding this proposal. *Id*. Although ORS 197.610(1) expressly requires that the text of the proposal must be sent to DLCD 45 days before the first evidentiary hearing on the proposal, the DLCD form does not state that the text of the proposal must accompany the 45-day notice.[13] In this case, the city failed to provide the text of the proposal with the 45-day notice.[14] Petitioners argue that this failure on the city's part requires remand.

It is clear that a complete failure to comply with ORS 197.610(1) requires remand, without regard to whether such a complete failure to comply with ORS 197.610(1) results in

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[13] However, LCDC's administrative rules do make it clear that 45-day notice must include "two 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." OAR 660-018-0020(1)(c). OAR 660-018-0020(2) further clarifies:

> "The text submitted to comply with subsection (1)(c) of this rule must include the specific language being proposed as an addition to or deletion from the acknowledged plan or land use regulations. A general description of the proposal or its purpose is not sufficient. In the case of map changes, the text must include a graphic depiction of the change, and not just a legal description, tax account number, address or other similar general description. OAR 660-018-0020(2).

[14] In support of its position that the city failed to provide the text of the proposal to DLCD with its 45-day notice, petitioners attached extra-record evidence to their petition for review. That led to: (1) motions by the city and intervenor-respondent to strike the extra-record evidence, (2) a motion by petitioners that challenged the timeliness of the motions to strike, (3) petitioners' motion to take evidence not in the record and (4) objections by the city and intervenor-respondent to petitioners' motion to take evidence not in the record.

Based on a supplemental affidavit that the city filed on December 1, 2008, we understand the city to concede that the text of the proposal did not accompany the 45-day notice that appears at Record 616-17. Even if the city does not concede the point, we conclude that the record does not establish that the text of the proposal was sent to DLCD and that it is the city's burden to establish that it did so. We therefore conclude it is unnecessary to resolve any of the pending motions.

prejudice to a petitioner at LUBA. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993). However, where a local government attempts to comply with ORS 197.610(1), but falls short in some particular, remand may or may not be required, depending on the nature of the failure and the likely consequences of that failure. The test that LUBA applies to determine whether an incomplete performance of the obligations set out in ORS 197.610(1) necessitates a remand was explained in some detail in *OCAPA v. City of Mosier*, 44 Or LUBA 452, 471-72 (2003):

> The Court of Appeals concern in *Oregon City Leasing, Inc.* was with a potential failure of the larger statutory scheme at ORS 197.610 to 197.625, which is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice and instead rely on notice from DLCD of proposed post-acknowledgment plan and land use regulation amendments. The ORS 197.610(1) requirement for secondary notice by DLCD and the broader participation that such secondary notice may stimulate in any given post-acknowledgment proceeding is to ensure that proposed post-acknowledgment amendment proposals receive appropriate scrutiny to ensure that the acknowledged comprehensive plan and land use regulations are not amended in ways that violate the statewide planning goals. The legislature apparently made this broader notice and potential for participation by DLCD and others the *quid pro quo* for ORS 197.625. ORS 197.625 deems post-acknowledgment amendments to be consistent with the statewide planning goals as a matter of law, if the amendment is not appealed or is affirmed on appeal. Viewed in that context, possible prejudice to DLCD and to the persons who are entitled to notice from DLCD under ORS 197.610(1), who may not be parties in an appeal to LUBA, is also relevant in determining whether a city's errors in its ORS 197.610(1) notice to DLCD warrant remand. In our view, whether such errors warrant remand depends upon *whether the errors are of the kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function.* If so, whether the particular petitioners before LUBA can demonstrate prejudice to their substantial rights is not dispositive." (Emphasis added.)

Respondents point out that the proposal is an outgrowth of the Boring-Damascus Concept Planning process that had an extensive public outreach component. Written notice of the proposal, with the proposed text, was sent to all property owners within 300 feet of the subject property. Record 552-614. In addition, petitioners in opposing the proposal engaged in significant community outreach to gain support for their position. Respondents contend

that in view of all this notice and public participation, the city's failure to provide the proposed text in its 45-day notice to DLCD should not result in remand.

In presenting their arguments concerning the motions we mention in footnote 14 above, all parties called our attention to the notice that DLCD provided on April 17, 2008 to the Land Conservation and Development Commission (LCDC) concerning all post-acknowledgment amendment requests that DLCD received between March 1, 2008 and March 31, 2008. For purposes of this opinion, we will assume that the notices that DLCD provided to LCDC are the same notices that were sent by DLCD to comply with ORS 197.610(1) and OAR 660-018-0025. [15] Those notices provide a brief description of the proposal, identify the first evidentiary hearing date, identify the local contact and provide a phone number for that local contact. Petition for Review Appendix 10. Those notices do not provide the text of the proposal or a link for accessing that text electronically. Neither do the notices offer to provide the text of the proposal. Neither ORS 197.610(1) nor OAR 660-018-0025 requires that DLCD provide the proposed text to persons who have requested notice of post-acknowledgment actions. A person receiving those notices who wishes to review the proposed text would most logically place a phone call to the local contact to request a copy of the text.

[15] The text of ORS 197.610(1) was set out in n 12. Under OAR 660-018-0025, DLCD must send notice of post-acknowledgment actions to persons who have requested such notice within 15 days after DLCD receives a proposed post-acknowledgment action from a local government:

> "Persons requesting written notice of proposed amendments to acknowledged comprehensive plans or land use regulations or proposed adoptions of new land use regulations who have paid the fee established under the provisions of OAR 660-018-0140 shall be mailed a notice by the department of the proposed action within 15 days of the receipt of notice from local government required by OAR 660-018-0020. The department may provide such notice by electronic mail, in which case no fee is required. The department may provide the notice via the World Wide Web."

As we have already noted, the city sent its 45-day notice to DLCD on March 3, 2008, over 60 days before the first evidentiary hearing on May 13, 2008.[16] Therefore it is at least possible that DLCD could have placed a telephone call to the city and asked the city to provide the proposed text, before DLCD actually sent notice to persons who have requested notice of post-acknowledgment actions. But there also is no evidence that DLCD did so in this case.

We are unable to conclude that, notwithstanding the city's failure, DLCD was able to perform its review and notice obligations under ORS 197.610(1). In *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647, 658 (2003) we concluded that the city's failure to provide the proposed text with the 45-day notice of a proposed post-acknowledgment action that the city sent to DLCD was ineffective to comply with ORS 197.610(1).[17] It is true that the statutory and administrative rule schemes are not designed to ensure that persons who request notice of post-acknowledgment actions also receive a copy of the text of the proposed post-acknowledgment action from DLCD along with the notice that is required by ORS 197.610(1) and OAR 660-018-0025. It is also true that where the 45-day notice does not include the proposed text, DLCD could potentially notice the omission and call the city and require that the city provide the proposed text. That may have happened in this case. However, given the number of post-acknowledgment action notices that DLCD receives, it is also possible that DLCD sent the notice required by ORS 197.610(1) and OAR 660-018-0025 without first reviewing the proposed text. Presumably one of DLCD's functions under ORS 197.610(1) is to ensure that the notice that DLCD provides under ORS 197.615(1) to persons who have requested notice accurately describes the proposed post-acknowledgment

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[16] The city argues, and petitioners do not dispute, that the city provided DLCD with a copy of the adopted text *after* the challenged amendments were approved, as required by ORS 197.615(1).

[17] In *No Tram* we ultimately concluded that a second notice that the city sent to DLCD that did include the required text of the proposal was sufficient to comply with ORS 197.610(1), notwithstanding that the second notice to DLCD was sent less than 45 days before the first evidentiary hearing. 44 Or LUBA at 658.

action. No doubt that is one reason why OAR 660-018-0020(1)(c) and (2) so clearly specify that the proposed text must accompany the 45-day notice to DLCD. Without the proposed text DLCD cannot compare the city's description of the proposed action with the proposed text to ensure that the description is accurate. In addition, without the proposed text, DLCD may not be able to make an informed decision about whether to participate in the city's proceedings under 197.610(3). Because the city did not provide the proposed text, as required by ORS 197.610(1) and OAR 660-018-0020(1)(c) and (2) we cannot assume that the ORS 197.610 to 197.625 process performed its function.

The fifth assignment of error is sustained.

The city's decision is remanded.

APPENDIX

"Goal 11: PUBLIC FACILITIES AND SERVICES

"**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.**

"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. A provision for *key facilities* shall be included in each plan. Cities or counties shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons. * * *

"* * * * *

"**A Timely, Orderly, and Efficient Arrangement** – refers to a system or plan that coordinates the type, locations and delivery of public facilities and services in a manner that best supports the existing and proposed land uses.

"**Rural Facilities and Services** – refers to facilities and services suitable and appropriate solely for the needs of rural lands.

"**Urban Facilities and Services** – Refers 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.

"**Public Facilities Plan** – A public facility plan is a support document or documents to a comprehensive plan. The facility plan describes the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plan or plans within an urban growth boundary containing a population greater than 2,500.

"* * * * *

"**GUIDELINES**

"A. PLANNING

"* * * * *

"5. A public facility or service should not be provided in an urbanizable area unless there is provision for the coordinated development of all the other urban facilities and services appropriate to that area.

"* * * * *" (Bold type in original, underlining and italics added.)