BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL CONTE, DEBORAH HEALEY,
CAROLYN JACOBS and ADOLPH H. ASPEGREN,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

OBO ENTERPRISES LLC,
and JLO PROPERTIES LLC.,
Intervenors-Respondents.

LUBA No. 2011-112

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Paul Conte, Deborah Healey, Carolyn Jacobs and Adolph H. Aspegren, Eugene, filed the petition for review and argued on their own behalf.

Emily N. Jerome, City Attorney, Eugene, filed the response brief and argued on behalf of respondent.

James W. Spickerman, Eugene, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Gleaves Swearingen Potter and Scott LLP.

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

AFFIRMED 05/30/2012

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a decision rezoning property to a higher density residential zone with a site design review overlay.

FACTS

The subject property consists of three tax lots approximately .70 acres in size, currently developed with two dwellings and a small apartment complex. The property is designated on the Metropolitan Area General Plan (Metro Plan) map as High Density Residential. The current zoning is R-3 Limited High Density Residential, which has a maximum density of 56 dwelling units per net acre (du/na), and a maximum building height of 50 feet.

Intervenors seek to redevelop the subject property with a 63-unit apartment complex, with a density of 90 du/na, and a height of 51 feet, in excess of the R-3 maximums. Accordingly, intervenors filed an application to rezone the property to R-4 High Density Residential, which like the R-3 zone implements the Metro Plan High Density Residential designation, but would potentially allow a density of 112 du/na and a maximum height of 120 feet. Intervenors later revised the zone change application to request a Site Design Review (SR) overlay zone, and proposed a density cap of 92 du/na. Intervenors also applied for Needed Housing Site Review under the proposed SR overlay zone. Finally, intervenors applied for an adjustment which is not at issue in this appeal, for a total of three separate applications.

Most of the surrounding area is zoned R-3, with the exception of a property across the street rezoned in 1994 to R-4 with an 82 du/na density cap and SR overlay. The subject property is within the "Hilyard to Patterson Area" (HPA), a subarea depicted on the 1982 West University Refinement Plan (WURP) map. The WURP map designates the HPA subarea, including the subject property, as "Medium and High Density Residential." The

HPA subarea lies between two other subareas, a "Central" residential area zoned R-3 and also designated "Medium and High Density Residential," and a "Campus" residential area zoned for higher density R-4 and designed "High Density Residential." As discussed below, a WURP policy describes the HPA subarea as a "buffer" between the Central and Campus subareas.

On July 24, 2011, the city mailed nearby property owners notice of the initial public hearing before the hearings official, but did not provide notice of the hearing to the Department of Land Conservation and Development (DLCD), as required under ORS 197.610(1) (2009).[1] The hearings official held the initial, and only, evidentiary hearing on August 24, 2011. The record was held open for additional evidence through September 7, 2011, then for rebuttal from all parties through September 14, 2011. The applicant had until September 21, 2011, to submit final written argument.

On October 3, 2011, the hearings official issued a single decision approving the three applications (zone change, site review, and adjustment). The portion of the hearings official's decision approving the site design review includes conditions that limit building height to 51 feet and limit the maximum number of dwelling units to 63 units.

Petitioners appealed only the hearings official's approval of the R-4 zone change application to the city planning commission. On November 1, 2011, the planning commission conducted an on-the-record hearing. On November 15, 2011, the planning commission issued the city's final decision approving the zone change, with an additional condition limiting to 107 the maximum number of bedrooms. This appeal followed.

[1] ORS 197.610 and 197.615 were extensively amended in the 2011 session pursuant to HB 2129A (Oregon Laws 2011 ch. 280), and those amendments became effective January 1, 2012. All citations to either statute in this opinion are to the previous versions effective in 2011.

MOTIONS TO TAKE EVIDENCE OUTSIDE THE RECORD

A. The City's Motion

ORS 197.615(1) requires the city to provide DLCD with a copy of an adopted decision that amends a land use regulation, such as a zoning map amendment, within 5 days of the final decision. The city apparently did not send a copy of the decision until March 9, 2012, after the record was settled in this appeal and after petitioners petition for review was filed with LUBA. On March 23, 2012, the city filed a precautionary motion to take evidence under OAR 661-010-0045(1), requesting that LUBA accept the notice of adoption to "resolve disputes regarding the content of the record."[2] Petitioners object, arguing that there is no dispute regarding the content of the record.

OAR 660-010-0025(1)(d) requires that the record submitted to LUBA include "any notices concerning amendments to acknowledged comprehensive plans or land use regulations given pursuant to ORS 197.610(1) or 197.615(1) and (2)." In effect, the city is attempting to supplement the record to include a notice of adoption required by OAR 660-010-0025(1)(d). If the timing of the city's attempt to comply with OAR 660-010-0025(1)(d) would cause prejudice to petitioners' substantial rights, we would likely reject the attempt. OAR 661-010-0005. However, as far as we can tell, the petition for review does not mention ORS 197.615(1), and raises no issue regarding the city's failure to provide a timely notice of

[2] OAR 661-010-0045(1) provides, in relevant part:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

adoption to DLCD as required under ORS 197.615(1).[3] Petitioners do not identify any prejudice in this appeal that might result from accepting the belated record supplement so that the record includes the notice of adoption required by OAR 660-010-0025(1)(d). Accordingly, we accept the record supplement, and deny the precautionary motion to take evidence, as unnecessary.

B. Petitioner Conte's Motion

Petitioner Conte filed a motion to take evidence to allow LUBA to consider a chain of e-mails between Conte and city staff regarding the notice of hearing to DLCD required by ORS 197.610(1) and the post-decision notice of adoption to DLCD required by ORS 197.615(1). Petitioner argues that LUBA's consideration of the e-mails is warranted under OAR 661-010-0045(1) because they involve "disputed factual allegations in the parties' briefs concerning * * * procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." *See* n 2. Petitioner argues that the e-mails demonstrate that city staff were aware by late December 2011 that the city had failed to provide DLCD with the notice of hearing and notice of adoption.

However, there does not appear to be a "disputed factual allegation in the parties' briefs" regarding failure to provide either notice or whether city staff were aware that they had not provided either notice. The city does not dispute that it did not provide DLCD with a pre-hearing notice. As discussed below, the city disputes that ORS 197.610 required it to provide pre-hearing notice in the present case, but that is a legal, not factual, dispute. Nor does the city dispute that it failed to provide DLCD with a timely post-decision notice of adoption required by ORS 197.615(1). Further, as noted above, the petition for review includes no assignment of error challenging the city's failure, timely or otherwise, to provide

[3] The fourth assignment of error does challenge the city's failure to provide the *pre-hearing* notice of the initial evidentiary hearing, as required under ORS 197.610(1) (2009). But the fourth assignment of error does not challenge the city's failure to provide the *post-decision* notice of adoption required by ORS 197.615(1).

DLDC the notice of adoption required under ORS 197.615(1). As discussed below with respect to petitioners' proposed reply brief, petitioners can assign error only in the petition for review, and cannot raise in a reply brief new challenges to the city's decision or new assignments of error. Because the e-mails attached to petitioner Conte's motion do not relate to a "disputed factual allegation" in the parties' briefs and appear to be unnecessary to resolve any assignment of error in the petition for review or any other issue properly before us, petitioner's motion to take evidence is denied.

REPLY BRIEFS

Petitioners move to file a reply brief that responds to waiver and other "new matters" raised in intervenors' response brief, pursuant to OAR 661-010-0039. There is no opposition to the motion or proposed reply brief, and that reply brief is allowed.

Petitioners also move to file a separate reply brief that responds to alleged "new matters" in the city's response brief, specifically (1) the city's contention that it was not required to provide pre-hearing notice to DLCD pursuant to ORS 197.610(2), and (2) the city's contention that the petition for review does not challenge the city's failure to provide post-adoption notice to DLCD as required by ORS 197.615(1). The first contention is clearly a "new matter" raised for the first time in the response brief. The second contention is also a "new matter," and a reply brief is warranted to respond to the city's argument that the petition for review does not challenge non-compliance with ORS 197.615(1). We therefore accept the reply brief. However, we note that the city's second contention is correct: the petition for review, specifically the fourth assignment of error, does not mention ORS 197.615(1) or include any argument that the city failed to comply with ORS 197.615(1). Portions of the reply brief can be read to advance that new argument as a basis for reversal or remand. *See* Reply Brief 5 ("the Board should remand the decision, giving the City an opportunity to provide proper notice under ORS 197.610 and ORS 197.615"). A new assignment of error or basis for reversal or remand cannot be advanced for the first time in a

reply brief. *Porter v. Marion County*, 56 Or LUBA 635 (2008). Therefore, to the extent arguments in the reply brief advance what is in effect a new assignment of error or new basis for reversal or remand, we do not consider such arguments.

INTRODUCTION

The third and fourth assignments of error challenge alleged procedural or notice errors, while the first and second assignments of error challenge the merits of the planning commission decision. We first address the procedural assignments of error.

THIRD ASSIGNMENT OF ERROR

At the only evidentiary hearing held in this appeal, the August 24, 2011 hearing, the hearings official announced that the record would be held open for "new evidence" until September 7, 2011, then until September 14, 2011, for rebuttal to new evidence submitted during the first open record period, and finally until September 21, 2011, for the applicant to submit final written argument. On September 14, 2011, at the close of the second open record period, the applicant's representatives submitted final written argument. In relevant part, the September 14, 2011 letter includes two hypothetical analyses of how the property could be developed under the existing R-3 zoning without open space and with potentially a greater number of bedrooms than authorized in the decision, apparently to rebut arguments from opponents that rezoning the property to allow the proposed development is inconsistent with Metro Plan policies A.12 and A.13, which we discuss later below.[4]

No party objected to the September 14, 2011 letter. In his October 3, 2011 decision, the hearings official cited one of the hypothetical analyses in the September 14, 2011 rebuttal

[4] Petitioners also note that the September 14, 2011 letter includes a statement that if the zone change to R-4 is denied, the applicant intends to modify the design and reduce the density to comply with the existing R-3 zone. This statement is factual, but we fail to see how it constitutes "evidence" as defined at ORS 197.763(9)(b) (defining "evidence" as facts offered to demonstrate compliance or noncompliance with approval standards). The applicant's intent to file a different application subject to different standards if the rezone application is denied has no bearing on compliance or noncompliance with the approval standards governing the rezone application.

letter as an additional basis to conclude that the proposal is consistent with Metro Plan Policy A.12, which as discussed below requires in relevant part that higher residential density be coordinated with adequate open space. Record 212.

Petitioners appealed the hearings official's decision to the planning commission, but the appeal raised no issues regarding the September 14, 2011 letter. Petitioners advanced two assignments of error to the planning commission, arguing in relevant part that the hearings official erred in interpreting and applying Metro Plan Policies A.12 and A.13, among others. The planning commission affirmed the hearings official's interpretation and application of Policy A.12. With respect to Policy A.13, which as discussed below requires that the city increase residential density, while considering the impacts of increased residential density on neighborhoods, the planning commission incorporated the September 14, 2011 letter as "further evidence that the impacts of the increased residential density were considered, consistent with Metro Plan Policy A.13." Record 9.

On appeal to LUBA, petitioners argue that the city erred in accepting and relying upon "new evidence" included in the September 14, 2011 letter, without providing petitioners notice of the right to request that the record be re-opened to rebut that new evidence. According to petitioners, the two hypothetical analyses of how the property could be developed under the existing R-3 zoning constitute "new evidence."

Intervenors respond that the hypothetical analyses of what could be developed under the R-3 zone are simply arguments based on application of the existing R-3 zoning to undisputed facts already in the record, not new evidence. In addition, intervenor argues that if petitioners believed that the September 14, 2011 letter improperly included new evidence, petitioners were obligated to object to acceptance of that new evidence during the proceedings below.

We assume without deciding that the two hypothetical analyses constitute or include "new evidence" rather than argument based on evidence already in the record. Even with

that assumption, however, we agree with intervenors that in order to preserve that issue for appeal to LUBA, petitioners were obligated to object during the proceedings below, if there was an opportunity to do so.[5] In the reply brief, petitioners argue that because the alleged procedural error occurred after the close of the evidentiary record, it was not possible for petitioners to raise that procedural error as an issue below, citing *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993). However, the portion of *Mazeski* that petitioners cite concerns the ORS 197.763(1) "raise it or waive it" principle, which is limited to the close of the record at or following the final evidentiary hearing, not the independent obligation to object to a procedural error during the proceedings below, if there is opportunity to lodge an objection.[6] In *Mazeski*, we explained that ORS 197.763(1) does not supersede or replace the long-standing principle that, in order to raise procedural error before LUBA as a basis for remand, the petitioner must object to the procedural error below, if there is opportunity to do so. *See Brown v. City of Portland,* 33 Or LUBA 700 (1997) (where a revised site plan was improperly introduced after the close of the record, the petitioner was aware of the submission but did not object below despite opportunity to do so, the procedural error does not warrant reversal or remand).

In the present case, petitioners apparently did not have opportunity under the applicable procedures to object to the hearings official's consideration of the letter between September 14, 2011 and October 3, 2011, the date the hearings official issued his decision. However, we do not understand why petitioners could not have objected to acceptance and

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[5] *Miles v. City of Florence*, 190 Or App 500, 510, 79 P2d 382 (2003), discussed below, embodies a similar principle, based on the exhaustion requirement of ORS 197.825(2)(a). The city does not cite to *Miles* in responding to the third assignment of error, so we do not consider it in resolving this assignment of error.

[6] ORS 197.763(1) provides, in relevant part:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. * * *"

consideration of any new evidence in the September 14, 2011 letter in their appeal to the planning commission. If petitioners believed that the record developed by the hearings official that was placed before the planning commission on appeal included evidence that the city improperly accepted and the hearings official improperly considered, it was incumbent upon petitioners to raise that objection if there was opportunity to do so, in order to preserve that issue for LUBA's review. Petitioners cite no place in the record where such an objection was made. The appeal document, at Record 175-83, does not mention the September 14, 2011 letter or object to the city's consideration of that letter for any purpose. Further, petitioners' written testimony, at Record 77-125, does not raise such an objection.[7] Had petitioners made that objection, the planning commission might have cured any procedural error by declining to consider portions of the September 14, 2011 letter that allegedly includes new evidence, or taking other steps. We agree with intervenors that petitioner's failure to object to the alleged procedural error, despite apparent opportunity to do so during the planning commission proceedings below, precludes reversal or remand based on the alleged procedural error.

Finally, petitioners argue that the city committed an additional procedural error by failing to notify them that they had a right under ORS 197.763(6)(c) to request that the evidentiary record be re-opened to respond to new evidence submitted during the open record period.[8] Petitioners contend that the notice of hearing was inadequate because it failed to

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[7] In fact, petitioner Conte's written testimony, at Record 102, quotes the portion of the hearings official's findings where he relies upon one of the hypothetical analyses in the September 14, 2011 letter, but petitioner did not raise at that point any objection that the hypothetical analysis constitutes new evidence or, as far as we have been informed, at any point during the proceedings below.

[8] ORS 197.763(6) provides, in relevant part:

> "(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open

"[i]nclude a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings," as required by ORS 197.763(3)(j).

Intervenors respond that the right to request under ORS 197.763(6)(c) that the record be re-opened to rebut new evidence applies only to evidence submitted during the period the record was left open for such evidentiary submissions, and does not provide a right to request that the record be re-opened to rebut new evidence that was improperly included with the applicant's final written argument, under ORS 197.763(6)(e). We understand intervenors to argue that petitioners have not demonstrated that any inadequacy in the notice of hearing prejudiced their substantial rights with respect to the right to rebut alleged new evidence included in the final written argument. ORS 197.835(9)(a)(B) (LUBA may remand for procedural error that prejudices the substantial rights of the petitioner). We agree with intervenors. ORS 197.763(6)(c) is concerned with rebuttal of evidence properly submitted in the open record period, not evidence improperly submitted as part of final written argument, so a general explanation of ORS 197.763(6)(c) in the notice of hearing would not have assisted petitioners. In any case, if petitioners believed that the notice of hearing was inadequate, petitioners could have objected to *that* alleged procedural error during the

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> for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.
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> "* * * * *
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> "(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.
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> "* * * * *
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> "(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. * * *"

planning commission proceedings below, but did not. That failure to object means that any inadequacy in the notice of hearing is not a basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

ORS 197.610(1) requires a local government to provide DLCD with notice of the initial evidentiary hearing on a proposed land use regulation amendment, at least 45 days before the date of that initial evidentiary hearing.[9] It is undisputed that the city did not provide DLCD with the notice of hearing required by ORS 197.610(1). Petitioners argue that remand is necessary for the city to provide the required notice, citing *North East Medford Neighborhood Coalition v. City of Medford*, 214 Or App 46, 162 P3d 1059 (2007) (failure to provide the notice required by ORS 197.610(1) is a substantive matter that does not depend on whether the failure to provide notice prejudiced any party's participatory rights).

ORS 197.610(2) provides an exemption to the requirement to provide pre-hearing notice to DLCD, where the local government determines that the statewide planning goals do not apply to the particular proposed amendment. In the petition for review, petitioners note

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[9] ORS 197.610 (2009) provides, in relevant part:

> "(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of the Department of Land Conservation and Development at least 45 days before the first evidentiary hearing on adoption. * * *
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> "(2) When a local government determines that the goals do not apply to a particular proposed amendment or new regulation, notice under subsection (1) of this section is not required. In addition, a local government may submit an amendment or new regulation with less than 45 days' notice if the local government determines that there are emergency circumstances requiring expedited review. In both cases:
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> > "(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615 (1) and (2); and
> >
> > "(b) Notwithstanding the requirements of ORS 197.830 (2), the director or any other person may appeal the decision to the board under ORS 197.830 to 197.845."

that neither the hearings official nor the planning commission made an express determination that the goals do not apply to the application. The city should have provided DLCD with a notice of hearing, petitioners argue, because the statewide planning goals *do* apply to the zone change from R-3 to R-4. Specifically, petitioners argue, "the issues being appealed directly involve Statewide Planning Goal 2 Land Use Planning, as Petitioners assert the City erred in its application of the acknowledged comprehensive plan, and Statewide Planning Goal 10 Housing, Planning Guideline A.2 and Implementation Guideline B.4." Petition for Review 49-50 (footnotes omitted).

The city responds that no issue was raised during the evidentiary proceedings below regarding notice to DLCD and that no issue was raised that any statewide planning goal applied to the proposed rezone from R-3 to R-4. Therefore, the city argues, any such issues are waived. ORS 197.763(1); ORS 197.835(3).[10] In addition, the city argues that no issue regarding notice to DLCD or the statewide planning goals was raised in petitioners' local appeal of the hearings official's decision to the planning commission, which therefore precludes LUBA's review of such issues. *Miles v. City of Florence*, 190 Or App 500, 510, 79 P2d 382 (2003) (a party many not raise an issue before LUBA when that party failed to specify the issue as a ground for appeal before the local appeal body). In any case, the city

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[10] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings official, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

argues, petitioners have not demonstrated that either Goal 2 or Goal 10 applied to the rezone from R3 to R4.

Petitioners do not respond to the city's waiver argument under ORS 197.763(1) and *Miles*, other than to argue that it is a "red herring." Reply Brief 1. We do not understand the response. If petitioners believed that the goals apply to the proposed amendment, and therefore the city was obligated to provide DLCD with a notice of hearing under ORS 197.610(1), to preserve that issue on appeal to LUBA the issue must have been raised prior to the close of the record during the proceedings below. Further, to preserve the issue under *Miles*, the issue must have been specified as a ground for appeal in the local appeal to the planning commission. Petitioners do not assert that the issue was raised below or specified in the local appeal.[11]

Further, even if the issue had been preserved, we agree with the city that petitioners have failed to demonstrate that any statewide planning goal applies to the rezoning and thus that the city was obligated to provide DLCD with notice of the hearing under ORS 197.610(1). In the petition for review, petitioners assert that Goal 2 (Land Use Planning) "applied" to the rezone within the meaning of ORS 197.610(2), apparently because the city applied several comprehensive plan provisions. However, Goal 2 is a general planning goal, and petitioners do not explain why any Goal 2 requirement "applied" to the rezone for purposes of ORS 197.610(2).[12] Petitioners' argument that Goal 10 applies is equally vague.

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[11] To the extent the e-mails attached to petitioner Conte's motion to take evidence are intended to respond to the city's waiver arguments, to the effect that petitioner had advised the city that no DLCD notice had been sent, we note that the earliest e-mail is dated December 9, 2011, well after the close of the record and the issuance of the planning commission's final decision.

[12] Goal 2 requires in relevant part that city actions related to land use "shall be consistent with the comprehensive plans of cities and counties * * *." Although it is not clear, petitioners appear to believe that because various comprehensive plan provisions apply to the rezoning decision, Goal 2 necessarily also "applies" for purposes of ORS 197.610(2), even if only derivatively. However, under that theory, the exemption at ORS 197.610(2) would never apply, since every plan and land use regulation amendment must be consistent with the comprehensive plan, which means that Goal 2 would apply to every plan or land use

Petitioners argue that two Goal 10 guidelines apply. However, as the city correctly notes, goal guidelines are advisory and do not constitute mandatory standards that must be applied in making land use decisions subject to the goals. *Downtown Comm. Assoc. v. City of Portland*, 80 Or App 336, 722 P2d 1258 (1986); ORS 197.015(9).

Finally, petitioners suggest briefly in the petition for review, and at greater length in the reply brief, that in order to invoke ORS 197.610(2) and avoid the obligation to provide notice of hearing to DLCD as required under ORS 197.610(1), the city was required to make an *express* determination in the city's final decision that the goals do not apply to the proposed amendment. Because the city did not make such an express determination in its final decision, we understand petitioners to argue, the city cannot rely upon ORS 197.610(2) and thus was obligated to provide DLCD with notice of the hearing.

The city responds, and we agree, that neither ORS 197.610(2) nor OAR chapter 660, Division 018, the administrative rule that implements ORS 197.610, requires an express determination in the final decision adopting the amendment that the goals do not apply, in order to invoke ORS 197.610(2). *Petersen v. Columbia County*, 33 Or LUBA 253 (1997), provides some guidance on this point. In *Petersen*, the county did not recognize in initially adopting an ordinance that the ordinance amended a land use regulation and was therefore subject to ORS 197.610 and 197.615. Consequently, the county initially provided neither of the notices required under those statutes, most particularly the notice of adoption, which is required under ORS 197.615 regardless of whether a notice of hearing is required under ORS 197.610. LUBA remanded the ordinance to the county to determine what it should do to comply with ORS 197.610 and 197.615. On remand, the county sent to DLCD the notice of

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regulation amendment, and notice of hearing would always be required. Other than the part of Goal 2 that addresses statewide planning goal exceptions, which is not at issue here, Goal 2 is a pure planning process goal without substantive requirements. To give effect to ORS 197.610(2), we believe that the legislature probably did not intend to require notice of an amendment under ORS 197.610(1) when the only statewide planning goal that arguably "applies" is Goal 2.

adoption required by ORS 197.615(1), indicating in that notice of adoption that the county had determined that no goals applied. The petitioners attempted to appeal that notice of adoption to LUBA, seeking in part to challenge the county's determination that the goals did not apply. We dismissed the appeal, in doing so noting that:

> "A determination that the goals do not apply to an amendment of a comprehensive plan or land use regulation must be made at the time the amendment is adopted. In this case, the determination that the goals do not apply was made when, at the time of adopting the Ordinance, the goals were found not to apply (or at least were not applied) and hence were not a factor in shaping the Ordinance. Whether the determination was correct is not before us. The notice of adoption does not state a new determination. DLCD or any persons, including petitioners, could have appealed the decision to adopt the Ordinance to LUBA under ORS 197.830 to 197.845, and contended the goals did apply. ORS 197.615(2)(b). The appeal could have addressed inadequacies in the Ordinance with respect to the application of the goals." *Id.* at 257.

In other words, the determination that the goals do not apply is made at the time the amendment is adopted, and that determination can be implicit, based on the fact that the decision adopting the amendment does not apply the goals.[13] Further, the correctness of that determination, whether explicit or implicit, can be challenged only in an appeal of the amendment, by arguing that one or more goals in fact apply to the amendment. We rejected, above, petitioners' argument that any goals apply to the rezone at issue in this case. Although we understand petitioners to argue that *Petersen* was wrongly decided, and that regardless of whether the goals apply the city is obligated to adopt *express* findings in the decision that no goals apply in order to avoid the obligation to provide notice of hearing under ORS 197.610(1), we reject the argument.

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[13] This point intersects with the discussion of waiver above. If the issue of goal applicability is raised below with the specificity required by ORS 197.763(1), the local government is thereby obligated to respond to that issue, in the course of which it could either adopt findings making an explicit determination that the goals do not apply or, if it agreed that the goals apply, provide the notice required by ORS 197.610(1) and adopt findings addressing the applicable goals. However, if no issue of goal applicability is raised below, nothing in any statute or administrative rule cited to us requires the local government to adopt an express determination that the goals do not apply, as part of the final decision adopting the amendment.

The fourth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Eugene Code (EC) 9.8865(1) and (2) provide that a proposed zone change must be consistent with applicable provisions of the Metro Plan as well as consistent with any applicable refinement plan. The applicable refinement plan in this case is the WURP, which is incorporated into the Metro Plan. In six sub-assignments of error, petitioners contend that the city erred in concluding that the rezone from R-3 to R-4 is consistent with applicable provisions of the Metro Plan and WURP. We address each in turn.

A. WURP Land Use Diagram Text

The WURP includes a land use diagram, or map, that depicts the area of the subject property as being designated for "Medium and High Density Residential." The text accompanying the land use diagram states:

> "The Land Use Diagram is not a zoning map. In nearly every case there is more than one zoning district that could be applied and still provide for the suggested land use patterns. *This Land Use Diagram reinforces existing zoning patterns and does not call for any zoning reclassifications.* * * *" (emphasis added).

Petitioners argue, based on the emphasized sentence above, that the WURP precludes any rezoning, or at least expresses a clear preference for retaining the current zoning. The planning commission rejected that interpretation, finding:

> "The appellant relies only on the last sentence above to assert that the intent is to maintain existing zoning patterns. When taken in context with the prior sentence, which notes that more than one zoning district could be applied for and still provide for the suggested land use pattern, the text clearly does not prohibit a zone change as proposed in this instance. Rather, the proposal is consistent with this diagram text, and for the reasons already described, the proposed R-4/92/SR zoning is consistent with the WURP." Record 13.[14]

[14] Elsewhere, the planning commission explained:

On appeal, petitioners argue that the planning commission misconstrued the above-quoted WURP text, and that the second sentence simply points out that the land use diagram, unlike a zoning map, does not assign a single zone to particular areas. However, petitioners, argue, the final, emphasized sentence must be read as some kind of constraint on rezoning, and the planning commission erred in misconstruing the text to impose no constraint.

We agree with the city that the planning commission correctly found that the quoted WURP text does not preclude rezoning. We disagree with petitioners that the final sentence must be read as a constraint on rezoning. That the land use diagram "reinforces" existing land use patterns does not mean that such patterns cannot change, and that the diagram does not "call for" or *require* rezoning does not suggest that rezoning to a zone that also implements the land use diagram designation is constrained or even particularly discouraged.[15]

B. HPA Sub-Area "Should be a Buffer"

The WURP describes the HPA sub-area that includes the subject property as follows:

> "This combined designation for medium *and* high density residential use is interpreted to allow both R-3 and R-4 zones which are also consistent with the corresponding High-Density Residential designation in the Metro Plan. The existing R-3 and proposed R-4 zones are thus consistent with the refinement plan, by implementing the High-Density Residential designation that requires over 20 dwelling units per acre. In this case, the language in the refinement plan does not limit which zone implements the high-density residential use, as is done elsewhere in the Central Residential Area (see WURP, page 62), but the Planning Commission finds that it was appropriate to include the proposed density limitation and site review overlay based on the land use diagram text described below [the 'buffer' language discussed in subsection B below]." Record 11.

[15] Petitioners cite to *Bothman v. City of Eugene*, 52 Or LUBA 701 (2006), which involved a refinement plan policy that "discourage[s] future rezonings" of certain properties, and argue that the WURP language at issue in this appeal is similar to the refinement plan language at issue in *Bothman*. However, the WURP description of the HPA sub-area does not "discourage" rezoning. In the findings quoted at n 14, the planning commission noted that the WURP description of the Central sub-area expressly provides that the "existing zoning should be retained," whereas the HPA description includes no such language. Clearly, when the drafters of the city's refinement plans intend to preclude or discourage rezoning, they know how to express such intent. No WURP language cited to our attentions includes such language with respect to the HPA sub-area.

> "The [HPA area] is currently zoned R-3 and is developed with mostly single-family dwellings and apartment buildings. This area should be a buffer between the campus high-density housing area and the woonerf[16] area to the west. The area is residential in character and should remain so. * * *."

The planning commission found that density, height and other restrictions imposed as part of the zone changes and site review permit are sufficient to ensure that the property as developed would continue to act as a buffer between the R-3-zoned Central sub-area and the R-4 zoned Campus sub-area, largely because the density and height allowed are significantly less than the maximum density and height allowed in the R-4 zone.[17]

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[16] "Woonerf" apparently is a planning term that characterizes an area with narrow streets where pedestrians and cyclists have legal priority over motorists.

[17] The planning commission found, in relevant part:

> "* * * [I]n order to determine the intended role of the area as a 'buffer,' the plan areas to the east and west should be understood. The Central Residential Area (woonerf) located to the west is currently zoned R-3, and text describing the area notes that it shall remain so. The maximum building height in the Central Residential Area, based on the R-3 zoning, is 50 feet with a maximum density of 56 dwelling units per acre. The Campus High-Density Residential area to the east is primarily zoned R-4 with a building height maximum of 65 feet, and a maximum density of 112 units per acre. The subject property is in the area described to be a buffer between these other areas.
>
> "* * * The applicant proposed a 92 unit per acre density cap, which limits the overall potential impact by reducing the density below the maximum that would otherwise be allowed by the R-4 zone. The applicant also proposed (and the Hearings Official approved) application of the site review overlay. As discussed above, the site review overlay is a tool that is appropriate to address impacts from future development of the subject property.
>
> "While not the subject of this appeal, the applicant voluntarily provided a concurrent development plan under the code's needed housing site review requirements, in order to show the neighborhood and decision makers how they intend to develop the site and thereby address concerns about potential impact in the area. The applicant proposed a four-story 63-unit apartment complex with a basement parking garage. The proposed building height of 51 feet is only 1 foot above the R-3 maximum, while 14 feet less than the 65 feet allowed in the R-4 area to the east. The Hearings Official also provided a condition of approval in the related Site Review, to require that: 'Development on this site shall be limited to 4-stories (with a maximum building height of 51 feet per EC 9.0500), include a maximum of 63 units and shall also include an additional basement flood on-site parking garage.' * * *
>
> "The Transportation Planning Rule (TPR) Analysis * * * also analyzes R-3 traffic impacts versus R-4 traffic impacts. Based on the trip generation data provided, the proposed development would generate 10 more p.m. peak hour trips than the maximum R-3 development and 5 less trips than the maximum R-4 development on the subject site. The analysis also concludes that the R-4 designation and property location encourages traffic

Petitioners argue that the planning commission's conclusion that the rezone from R-3 to R-4 under the 92 du/na restriction and site review overlay zone is consistent with the above description of the HPA as a "buffer" between the Central sub-area and the Campus sub-area is not supported by substantial evidence. Petitioners argue first that there is no evidence supporting the finding that the density limitation of 92 du/na, which is much closer to the 112 du/na allowed in the R-4 zone than to the 56 du/na allowed in the R-3 zone, is consistent with the "buffer" requirement. Petitioners suggest that to adequately buffer the Central sub-area, the allowed density can be no greater than 84 du/na, the median point between the R-3 and R-4 density maximums, similar to a nearby parcel in the HPA, which was rezoned in 1994 to R-4 with a maximum density limitation of 82 du/na.

Although styled as an evidentiary challenge, petitioners' disagreement with the planning commission findings is essentially a disagreement with its interpretation of the HPA provision. The planning commission clearly did not interpret the buffer language to require a numerical cap no greater than the median between the R-3 and R-4 maximum densities, as petitioners contend it must. Instead, the planning commission looked at a number of factors, including density, height, and the proposed design to determine whether the rezone is consistent with the buffer language in the description of the HPA sub-area. That approach does not yield a fixed density cap that applies across the board to all R-4 rezonings in the

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patterns focusing on bicycle and pedestrian traffic with little vehicular impact, consistent with the area as buffer.

"The Planning Commission notes with particular importance that in this zone change request, that we are able to rely at least in part on evidence provided through the concurrently approved site review application, in finding compliance with both the Metro Plan and WURP. More specifically, the concurrent development proposal provides unique, site-specific evidence addressing factors such as building height and bulk, parking, open space and traffic that supports our determination that the proposed zone change will remain consistent with the WURP requirement that this subarea should remain as a 'buffer' between adjacent subareas. * * *

"With the additional findings above, the Planning Commission concludes that the proposed zone change from R-3 to R-4/92/SR is consistent with the intent of the language above to remain as a buffer. * * *." Record 11-12.

HPA, but petitioners have not established that the planning commission must interpret the buffer language to require such a fixed density cap. Although the planning commission might have adopted petitioners' preferred interpretation that the "buffer" description impliedly limits density to the median density of 84 du/na, nothing in the WURP text or record cited to our attention compels that interpretation or renders erroneous the planning commission's more flexible interpretation.

C. WURP "Medium and High Density Residential" Designation

As noted, the Metro Plan designates the subject property High Density Residential, a designation that is consistent with both the R-3 and R-4 zones. Confusingly, the WURP land use diagram designates the HPA sub-area for both "Medium *and* High Density Residential."[18] (Emphasis added.)

Petitioners argue that the WURP "Medium and High Density designation" must be intended to limit density to some level below R-4 maximum, and the planning commission thus erred in interpreting the WURP designation to potentially allow up to maximum R-4 density. Petitioners contend that to give effect to the WURP Medium and High Density Residential designation, the maximum density should be limited to either the maximum allowed in the R-3 zone, 56 du/na, or alternatively the median point between the maximum densities in the R-3 and R-4 zones, 84 du/na. In any event, petitioners argue, the decision must be remanded for the planning commission to determine a specific density maximum for the HPA sub-area that is less than the R-4 maximum.

[18] Petitioners argue that at the time the WURP was adopted in 1982 the R-3 zone minimum and maximum densities overlapped the density ranges for the medium density and high density Metro Plan designations. According to petitioners, the intent of the WURP "Medium and High-Density Designation" was to provide for consistency between WURP areas zoned R-3 and the city's plan designations. If we understand correctly, the R-3 zone was later amended so that its minimum density of 20 du/na now falls entirely within the Metro Plan high density designation, which treats density of 20 du/na or above as high-density. If that history is accurate, then the "Medium and High-Density Designation" is perhaps better viewed as an artifact of an earlier plan and zoning scheme rather than, as petitioners argue, an intentional effort to limit maximum density.

On its face, designating the HPA for both medium *and* high density residential suggests an intent to expand rather than constrain the potential density range. There is nothing in the designation itself that suggests an implied limitation on maximum density. The only textual or contextual limitation cited to us is the "buffer" language in the HPA description. As noted above, the planning commission concluded that rezoning the subject property with a 92 du/na cap, along with a height limitation, location, design and other factors, ensured consistency with the buffer language. We affirmed the planning commission interpretation on that point, and rejected petitioners' preferred interpretation that the buffer language requires a fixed or specific density cap. The question here is whether the WURP land use diagram "Medium and High-Density Designation" implies an additional or independent limitation on maximum density in the HPA. Petitioners argue that it does, and that the maximum density in the HPA should be either the R-3 maximum 56 du/na, the median of 84 du/na, or some other specific, fixed maximum that the planning commission must determine in the first instance.

We disagree with petitioners. The Central sub-area is also designated Medium and High-Density. If that designation in itself implied a limited density of 56 du/na, then there would be no need for the express language in the Central sub-area description that the existing R-3 zoning be retained. There is no textual or contextual basis in the WURP to mandate a maximum density equal to the median between the R-3 and R-4 zones, or any other specific, fixed maximum density less than the maximum densities stated in the code. Indeed, if the planning commission interpreted the WURP to imply a specific, fixed maximum density generally applicable to all properties in the HPA sub-area that differed from the maximum densities otherwise provided in the code, it would run the risk of legislating in the guise of interpretation. We conclude that the planning commission did not err in rejecting petitioners' arguments that the Medium and High-Density Designation implies a limitation on maximum density of 56 du/na, 84 du/na, or any other specific limit.

D. Metro Plan Policy A.12

Metro Plan Policy A.12 requires the city to "coordinate higher density residential development with the provision of adequate * * * open space, and other urban amenities." EC Table 9.5500(9) requires development in both the R-3 and R-4 zones to provide 20 percent of the development site with common open space. However, EC Table 9.5500(9) provides an exemption from the above requirement when the development exceeds higher density thresholds: 45 du/na in the R-3 zone and 90 du/na in the R-4 zone. Because the proposed development exceeds a density of 90 du/na, the city did not require any common open space.

Petitioners argued below that the rezone to R-4 is inconsistent with Policy A.12, because it allows higher residential density without assuring the provision of adequate open space. The planning commission rejected that argument, adopting the hearings official's findings, which concluded that the rezone is consistent with Policy A.12 based on the proximity of an existing city park, and assertions in the applicant's September 14, 2011 final argument that the same exemption would apply under the R-3 zone and that the proposed courtyard and other open space features of the design are nearly equivalent to the open space that would be required under the code open space requirements.[19]

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[19] The planning commission found:

> "* * * The Planning Commission finds that the Hearings Official did not err in relying on the applicant's September 14, 2011 rebuttal letter (pages 45-50 of the record) which notes that an open space exemption is allowed in the existing R-3 zoning as well as R-4 zoning, and further notes that the proposal provides a central courtyard and open space features to ensure adequate open space. * * * The Planning Commission confirms that the Hearings Official also correctly relied on the concurrent site review development proposal, at least in part, in responding to this policy." Record 5.

The hearings official's findings state, in relevant part:

> "This policy requires some type of concurrency analysis to coordinate increases of density development with adequate infrastructure. * * * The applicant's analysis in its application states that the zone change would provide adequate open space due to close proximity to an existing park on East 14th Avenue (application statement at 7). The neighborhood associations

On appeal, petitioners contend that EC Table 9.5500(9), in exempting higher density development from the 20 percent open space requirement in the R-3 and R-4 zones, is inconsistent with Policy A.12, because it provides *less* open space for *higher* density development, contrary to the policy to coordinate higher residential density with provision of adequate open space. Petitioners are correct that there is tension between Policy A.12 and the EC Table 9.5500(9) open space exemption for higher density development, but the code exemption presumably reflects a balancing of all applicable plan policies, including Policy A.13, discussed below, which states that it is city policy to "increase overall residential density[.]" The legislative balance that the city drew in choosing to adopt the code open space exemption for higher density development cannot be challenged in the present appeal.

Nonetheless, petitioners argue that Policy A.12 requires the provision of "adequate" open space, even if higher density development is exempt from the code 20 percent open space requirement. According to petitioners, the city's finding that the increased density allowed under the R-4 zone is consistent with Policy A.12 is based largely on "new evidence" improperly included in the September 14, 2011 final written argument, specifically the assertion that the "proposed apartment building provides a central courtyard and other open space features that are nearly equivalent" to the 20 percent code requirement. Record 212. Further, petitioners argue that there is no analysis explaining why the courtyard and open space features provided are "adequate" with respect to the increased density.

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argued the application would be exempt from open space requirements because its density would be in excess of 90 units per acre (citing EC 9.5500(9) and Table 9.5500(9)), and Jefferson Westside Neighbors states that the existing park is 'tiny' * * *. The applicant's rebuttal (Sept. 14, 2011) contained additional analysis—specifically that if the zone change were denied, the applicant could build at a density greater than 45 units per acre and be similarly exempt from open space requirements (*see* EC Table 9.5500(9)), and that the proposed apartment building provides a central courtyard and other open space features that are nearly equivalent to the code requirements. This latter statement demonstrates that the application would provide additional coordinated open space. The application complies with [Policy A.12]." Record 212

As explained above, petitioners failed to object to any "new evidence" included in the September 14, 2011 final written argument despite opportunity to do so. Assuming without deciding that the assertion that the "proposed apartment building provides a central courtyard and other open space features that are nearly equivalent" to the 20 percent code requirement is "new evidence" rather than argument based on existing evidence in the record, the city's reliance in part on that assertion cannot be challenged in this appeal. With respect to "adequacy," the city did not attempt a quantitative correlation of the increased density (92 du/na) allowed with the open space provided by the central courtyard, etc. However, the city found that the proposed design provides open space "nearly equivalent" to the 20 percent code requirement. Combined with the proximity to the city park, the city concluded that the open space was "adequate" for purposes of Policy A.12. While Policy A.12 requires that increased density be "coordinated" with "adequate" open space, the policy does not necessarily require the kind of strict concurrency that we understand petitioners to suggest, with each quantum of increased density matched with an equivalent increase in open space. The planning commission concluded that providing open space "nearly equivalent" to that otherwise required (but for the exemption) under the code for development in the R-3 and R-4 zones is "adequate." Petitioners have not demonstrated that Policy A.12 requires more.

E. Metro Plan Policy A.13

Metro Plan Policy A.13 requires the city to "[i]ncrease overall residential density * * * while considering impacts of increased residential density on historic, existing and future neighborhoods." Petitioners argue that the city inadequately identified the potential impacts of increased residential density on existing and future neighborhoods, with respect to (1) traffic-related impacts, (2) off-site parking impacts, and (3) open space and building bulk/height impacts.

1. Traffic-Related Impacts

To demonstrate compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060, the applicant submitted a traffic study concluding that the rezone to R-4 would result in 10 additional p.m. peak hour trips over the R-3 zoning, but would not "significantly affect" any transportation facility within the meaning of the TPR. The hearings official and planning commission cited the traffic study in partial support of their findings that the rezone is consistent with Policy A.13. Petitioners argue that the traffic study evaluated only impacts on vehicular traffic flow, and did not specifically evaluate impacts of increased traffic on pedestrians and bicyclists. Petitioners also complain that the traffic study did not evaluate traffic impacts from up-zonings of other property in the HPA sub-area, which may be encouraged by the present rezone.

Policy A.13 requires the city to consider the impacts of increased residential density on "future" neighborhoods, but we disagree with petitioners that it requires the city to evaluate the traffic impacts of hypothetical future rezonings of different properties in the surrounding area. With respect to vehicular traffic impacts on pedestrians and bicyclists, the hearings official and planning commission did not adopt specific findings addressing possible impacts to pedestrians and bicyclists. However, it is not clear to us how vehicular traffic impacts on pedestrians and bicyclists are separable, or can be separately analyzed, from vehicular traffic impacts on transportation facilities, which presumably include crosswalks and bike lanes. The hearings official concluded that adding 10 net p.m. peak hour vehicular trips to the neighborhood's transportation system is "insignificant," noting that the city's transportation standards require traffic analysis only for development generating 100 or more peak hour trips, and the analysis is expected to include only intersections that receive 50 or more additional trips. Record 219. The planning commission found that R-4 zoning "encourages traffic patterns focusing on bicycle and pedestrian traffic with little vehicular impact." Record 8. Thus, city concluded that the rezone to R-4 will have "insignificant" or

"little" vehicular impact on the neighborhood, in part because the zone encourages traffic patterns weighted toward bicycle and pedestrian traffic rather than vehicular traffic. Given those unchallenged conclusions, we disagree with petitioners that the city was obligated to adopt findings attempting to separately evaluate impacts of vehicular traffic on pedestrians and bicyclists as opposed to impacts on the transportation system as a whole. The city's findings are adequate to demonstrate that the city "considered" the impacts of increased density on the neighborhood.

2. Off-Site Parking Impacts

The proposed development provides 71 off-street parking spaces in a basement garage, more than the minimum 50 spaces required under the code for the proposed density. The planning commission cited this fact in its findings under Policy A.13. Petitioners fault the city for failing to calculate and quantify the number of off-street parking spaces that will actually be needed by the development allowed by the increased residential density, and for failing to impose a condition of approval requiring the actual number of needed spaces, if more than the code minimum number of parking spaces, which petitioners contend will set a precedent for future rezonings.

Petitioners do not explain why it is necessary to calculate the need for off-street parking created by the increased residential density, or impose conditions requiring more than the minimum number of parking spaces, in order to satisfy the obligation under Policy A.13 to "consider" the impacts of increased density on the neighborhood. The city considered the impacts of increased density with respect to off-site parking impacts, and relied on the fact that the applicant will provide significantly more off-street parking than the code requires, as partial support for its conclusion that the rezone is consistent with Policy A.13. Petitioners have not demonstrated that Policy A.13 requires more.

3. Open Space and Building Bulk/Height Impacts

With respect to impacts on open space, the planning commission noted that the same exemption from the code 20 percent open space requirement is available in both the R-4 and R-3 zones, and concluded that the rezone to R-4 had no impact on the availability of open space in the neighborhood for purposes of Policy A.13. With respect to building bulk and height, the planning commission considered assertions in the September 14, 2011 final written argument that under the R-3 zone the applicant could construct a similar building with even more density, by making changes to the roof pitch to reduce the height by one foot and reduce the number of units, while increasing the number of bedrooms. In addition, the planning commission considered proposed design elements that break up bulk and mass, and conditions of the site review approval that limit height and density, concluding that these elements "all contribute to this proposal's success in addressing potential future impacts from increased residential density in this case."[20]

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[20] The planning commission found:

> "As noted in the September 14, 2011 letter from [the applicant's representative], while the development is exempt from open space requirements because of the density it achieves, the same exemption is available in the R-3 zone. Therefore, open space requirements would not necessarily change between the R-3 and R-4 zoning. The applicant provides additional evidence that the bulk and mass were also considered noting that the building is configured in a horseshoe design to break up the massing along East 15th Avenue and it exceeds articulation and window coverage requirements in the applicable Multi-Family development standards. To ensure the development will be constructed as designed, a condition was established for the concurrent site review approval (pages 30-42 of the record) which requires the following: 'Development on this site shall be limited to 4-stories (with a maximum building height of 51 feet per EC 9.0500), include a maximum of 63 units and shall also include an additional basement floor for on-site parking garage.
>
> "The Planning Commission considers these additional factors and also incorporates the applicant's September 14, 2011 rebuttal letter * * * as further evidence that the impacts of the increased residential density were considered, consistent with Metro Plan Policy A.13. The Planning Commission finds that application of the site review overlay, a density cap at 92 units per acre (R-4 otherwise allows up to 112 units per acre) and, as addressed above, a development plan through concurrent site review approval, all contribute to this proposal's success in addressing potential future impacts from increased residential density in this case." Record 9.

Petitioners fault the city for considering hypothetical development allowed in the R-3 zone, arguing that there are not enough details in the September 14, 2011 letter to determine whether that hypothetical development would be legal or economically practicable. Absent more details, petitioners argue, the city cannot rely upon hypothetical development allowed in the R-3 zone to demonstrate that the rezoning to R-4 is consistent with Policy A.13.

The R-3 development scenario is only one consideration the city relied upon in concluding that the rezone is consistent with Policy A.13, and petitioners have not demonstrated that the other considerations the city cited regarding open space, building bulk and height are insufficient to demonstrate consistency with Policy A.13. The lack of a detailed showing that it is legally or economically practicable to develop the property under R-3 zoning to a similar density allowed in the R-4 zone might undercut the value of that particular "consideration" for purposes of Policy A.13, but petitioners have not demonstrated absent such a showing the city's findings regarding open space, building bulk and height and consideration of associated impacts are inadequate or not supported by substantial evidence.

F. Metro Plan Policy A.25

In relevant part, Plan Policy A.25 requires the city to "increase the stability and quality of older residential neighborhoods, though measures such as * * * appropriate zoning * * *."[21] Petitioners argue that rezoning the property to R-4 is inconsistent with the policy to "increase the stability of older residential neighborhoods" because it will act as precedent encouraging rezoning and redevelopment of the HPA, which in turn will destabilize the existing neighborhood. According to petitioners, Policy A.25 should be understood to

[21] Metro Plan Policy A.25 provides in full:

> "Conserve the metropolitan area's supply of existing affordable housing and increase the stability and quality of older residential neighborhoods, through measures such as revitalization; code enforcement; appropriate zoning; rehabilitation programs; relocation of existing structures; traffic calming; parking requirements; or public safety considerations. These actions should support planned densities in the area."

express a preference that current zoning be retained, because maintaining existing zoning is an effective way to ensure stability of existing neighborhoods.

However, Policy A.25 does not say anything about retaining existing zoning. It is a general policy that recites "appropriate zoning" as one method of effecting the policy of increasing the stability of older residential neighborhoods, but does not suggest what zoning is "appropriate." Further, the last sentence of Policy A.25 comments that "[t]hese actions should support planned densities in the area." The HPA is planned for high density residential uses, implemented by the R-3 and R-4 zones. The planning commission quoted with approval the hearings official's finding that the existing R-3 zone would allow the applicant to remove the existing dwellings on the property and construct multi-family apartments. Petitioners do not challenge that finding or explain why it is inconsistent with Policy A.25 to rezone the property from one high density residential zone that allows existing single-family dwellings to be replaced by a multi-family apartment with a *different* high density residential zone that allows exactly the same. Petitioners have not demonstrated that the city erred in concluding that the rezone is consistent with Policy A.25.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners advance two sub-assignments of error under the second assignment of error. First, petitioners argue that the city erred in failing to impose conditions of approval on the zone change to R-4 to ensure that development of the property is subject to the limits and features of the proposed building approved in the concurrent site review decision. Second, petitioners argue that the Site Review overlay zone and the resulting requirement to obtain site review approval are insufficient to ensure that future development of the property will be consistent with Metro and WURP policies.

A. Conditions Imposed on the R-4 Zone Change

The hearings official and, to a greater extent, the planning commission, relied in part on features of the proposed apartment building approved in the site review permit to conclude that the rezone to R-4 is consistent with applicable Metro Plan policies, including A.12 and A.13. The hearings official imposed several conditions of approval on the site review permit, but did not impose any express conditions of approval on the rezone to R-4. In particular, the hearings official did not condition the rezone on construction of the particular building approved in the site review permit. The planning commission on appeal imposed a condition of approval on the zone change, limiting the number of bedrooms to 107, to help ensure consistency with Policy A.13, but otherwise also did not impose any conditions on the rezone that required construction of the building approved in the site review permit.

Petitioners contend that the city erred in failing to impose conditions of approval on the zone change to R-4/92/SR to limit development on the property to the proposed apartment building. Because the city relied upon features of the proposed building to demonstrate that the rezone to R-4/92/SR is consistent with applicable plan policies, petitioners argue, the city must condition the rezone on construction of the proposed building. Otherwise, petitioners argue, nothing prevents the applicant from applying for a new site review permit seeking approval for a different apartment building, without the features or restrictions, such as the 51-foot building height and courtyard design, that the city relied upon in part to demonstrate consistency with applicable plan policies.

Intervenors respond that petitioners failed to exhaust the issue of whether conditions on the zone change are necessary to limit development to the building approved in the site review permit, by failing to specify that issue in the appeal statement to the planning commission. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). In *Miles*, the Court of Appeals held that where the local code limits review of issues on local appeal to

those stated in the appeal document, issues not identified in the local appeal are not within LUBA's scope of review. Intervenors note that EC 9.7655(3) limits the issues on appeal to the planning commission to those "set out in the filed statement of issues." According to intervenors, the filed statement of issues does not include any argument that the zone change must be conditioned to limit development to that approved in the site review decision.

In the reply brief, petitioners argue that there is no exhaustion problem under *Miles*, for two reasons. First, petitioners argue that the hearings official did not rely on the concurrent site review approval to find consistency with applicable plan policies, so there was no "issue" regarding the need for conditions that could have been raised to the planning commission. According to petitioners, it was the planning commission that first relied on the concurrent site review approval to find consistency with the applicable plan policies, so the "error" challenged in the second assignment of error did not arise until the planning commission adopted its decision and could not have been identified in the local statement of issues. However, in findings addressing Policy A.12, the hearings official relied upon the fact that the "proposed apartment building provides a central courtyard and other open space features that are nearly equivalent to the code requirements" to demonstrate consistency with Policy A.12. Record 212; *see* n 19. The planning commission commented, accurately, that the hearings official "relied on the concurrent site review development proposal, at least in part, in responding to this policy." Record 5. It is true that the planning commission's findings rely more heavily on the proposed development than the hearings official's findings to address several plan policies, but it is not accurate to say that such reliance occurred for the first time in the planning commission findings.

We also note that the hearings official's decision includes a finding that under the current EC the zone change *cannot* be conditioned to limit building height, and any such

restrictions can be imposed only as a condition of site review.[22] That finding presumably explains why the hearings official imposed height and other restrictions only under the site review approval. If petitioners believed that finding was in error, and the hearings official could and should have imposed conditions on the zone change, it was incumbent on petitioners to raise that issue in the appeal statement if they wished to preserve the issue for appeal.[23]

Nevertheless, petitioners argue that the appeal statement in fact identified as an issue on appeal the failure to impose conditions limiting development to that approved in the site review decision. We disagree. The appeal statement states two bases for appeal. The first and most relevant is that "[t]he Hearings Official did not correctly interpret the following Metro Plan policies either individually or when considered together[.]" Record 196. Then follows several paragraphs discussing a number of plan policies. Petitioners direct us to the following paragraphs in the appeal statement. After quoting one of the hearings official's findings regarding Policy A.13, the appeal statement argues:

> "Of critical importance is that the Hearings Official did not cite <u>any</u> specific aspect of the site review overlay that made this R-4/92/SR upzone consistent with Metro Plan Policy A.13. In fact, he admits he *doesn't know* 'how extending the /SR Site Review overlay accomplishes' consistency with Policy A.13.
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> "* * * * *

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[22] The hearings official's decision states:

> "The staff report noted that the applicant's suggestion to impose a condition of zone change (or site review) approval, that would limit building height to a maximum of 51 feet, cannot be established through the zone change process as a site specific approval criterion (as was the case in Z 94-18). As such, the applicant's proposal to limit building height is addressed as part of the concurrent and voluntary request for 'Need[ed] Housing' site review approval, below." Record 216.

[23] Had petitioners done so, the planning commission might have chosen to impose such a condition. As noted, the planning commission on its own imposed a condition of approval on the R-4 zone change limiting the number of bedrooms to 107. Apparently, the planning commission does not agree with the staff report and the hearings official that under the EC conditions of approval cannot be attached to a zone change.

> "And yet, EC 9.8445 Site Review Approval Criteria – Needed Housing does not contain criteria that address the two major differences that distinguish the R-3 and R-4 zones – maximum density and maximum building height. Thus, adding site review to an upzone from R-3 to R-4 doesn't actually constrain either of these two fundamental standards that comprise the reason for the existence of a 'limited' high-density residential zone." Record 200-201 (underline and italics in original).

In our view, the foregoing falls short of identifying as an appeal issue the issue raised in this sub-assignment of error: the city's failure to impose conditions of approval on the zone change specifically limiting development to that approved in the site review decision. The quoted paragraphs do not mention conditions of approval or argue that the zone change must be conditioned. They are part of an argument that the hearings official misconstrued Policy A.13, a separate issue that the planning commission addressed as such, and which is addressed above in the first assignment of error. A reasonable decision maker could not divine from the above paragraphs that petitioners intended to raise as a basis for local appeal the hearings official's failure to condition the zone change. We agree with intervenors that petitioners failed to exhaust the issue raised under this assignment of error, by failing to specify it as a basis for local appeal under the reasoning in *Miles*.

B. SR Overlay Zone

In addressing Policy A.13's requirement to consider impacts of increased residential density on the neighborhood, the planning commission relied in part on the fact that the property will be subject to the SR overlay zone, which requires site review approval for any development of the property. The planning commission concluded that site review required under the SR overlay zone is "an appropriate tool to address impacts from higher density R-4 development." Record 9.

Petitioners dispute that finding, first arguing that because multi-family housing can qualify as "needed housing" it can be approved under the city's clear and objective "needed housing" track site review standards at EC 9.8445, rather than the subjective and more discretionary standards at EC 9.8440. If so, petitioners argue, future site review approvals

will not consider consistency with Metro Plan policies or WURP requirements, and thus site review approval will do nothing to address consistency with such plan policies and requirements. That may be true, but the point of the above-quoted planning commission finding is not that site review will consider consistency with plan policies, but that site review approval is one of the tools available to the city that will help ensure that impacts on the neighborhood are addressed when development is proposed. If that finding is accurate, it lends some support to the city's conclusion in the present case that rezoning the property to R-4 is consistent with Policy A.13.

Petitioners dispute, however, that the needed housing site review standards at EC 9.8445 add anything to the standards that would already apply to multi-family dwelling absent site review. However, EC 9.8445 allows the city to approve needed housing site review, with *conditions,* subject to a number of standards, including compliance with tree preservation and removal requirements, pedestrian circulation, public access, etc. It may be true that most of those standards would apply in any event to development even absent the site review required by the SR overlay zone. Even so, the authority to impose conditions on site review is not an insignificant tool in the city's kit for purposes of addressing impacts of development on the neighborhood. The city did not err in relying, in part, on site review required under the Site Review overlay as one of several means to address impacts of development on the neighborhood, for purposes of concluding that the rezone to R-4 is consistent with the Policy A.13 requirement to consider the impacts of increased density on the neighborhood.

The second assignment of error is denied.

The city's decision is affirmed.