

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 MARIPOSA TOWNHOUSES and  
5 SOUTHERN OREGON PEDIATRICS,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF MEDFORD,  
11 *Respondent,*

12  
13 and

14  
15 CRC HEALTH OREGON, INC.,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2013-046

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from City of Medford.

24  
25 Sydnee B. Dreyer, Medford, filed the petition for review and argued on behalf of  
26 petitioners. With her on the brief was Huycke, O'Connor, Jarvis, Dreyer, Davis & Glatte,  
27 LLP.

28  
29 Kevin R. McConnell, City Attorney, Medford, filed a response brief and argued on  
30 behalf of respondent.

31  
32 Michael J. Gelardi, Portland, filed a response brief and argued on behalf of intervenor-  
33 respondent. With him on the brief was Davis Wright Tremaine LLP.

34  
35 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,  
36 participated in the decision.

37  
38 AFFIRMED

12/17/2013

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

**NATURE OF THE DECISION**

Petitioners appeal a letter signed by the city planning director, in which the planning director concludes that a methadone clinic qualifies as a permitted use in the Service Commercial and Professional Office (C-S/P) zone.

**MOTION FOR REPLY BRIEF**

Petitioners move for permission to file a reply brief to respond to new issues in the response briefs. The motion is allowed.

**MOTION TO TAKE EVIDENCE**

Along with their petition for review, petitioners filed a motion to take evidence pursuant to OAR 661-010-0045. In that motion, petitioners ask that we consider certain extra-record evidence in resolving their third assignment of error. However, the proffered extra-record evidence is only relevant if we sustain petitioners' arguments regarding an alleged approval criterion. Because we reject those arguments, and deny the third assignment of error, the proffered extra-record evidence is not relevant, and we deny the motion.

**MOTION TO DISMISS**

LUBA will dismiss an appeal as moot, where LUBA's review of the appealed decision would have no practical effect. *Jacobsen v. City of Winston*, 61 Or LUBA 465, 466 (2010); *Friends of Clean Living v. Polk County*, 36 Or LUBA 544, 549-50 (1999); *Davis v. Bandon*, 19 Or LUBA 526, 527 (1990). Respondent argues that because the methadone clinic that is the subject of the decision on appeal has now been moved to the disputed location and is in operation, LUBA's decision will have no practical effect, and this appeal should be dismissed as moot.

If we were to sustain one or more of petitioners' assignment of error, the appealed decision would have to be remanded and the ultimate result of such a remand could be that

1 the disputed methadone clinic may not be operated in the C-S/P zone. This appeal is not  
2 moot, and the motion to dismiss is denied.

3 **FACTS**

4 Respondent and intervenor-respondent (respondents) earlier moved to dismiss this  
5 appeal, arguing that the challenged decision is not a “limited land use decision” and is  
6 excluded from the statutory definition of “land use decision” by ORS 197.015(10)(a), which  
7 excludes a decision “[t]hat is made under land use standards that do not require interpretation  
8 or the exercise of policy or legal judgment.” In denying that motion, we set out the relevant  
9 facts in some detail. We repeat below the statement of facts from our September 5, 2013  
10 Order with minor changes.

11 Intervenor operates a methadone clinic in the City of Medford. Intervenor was asked  
12 by the city to relocate that methadone clinic to a new site. Intervenor selected a site that is  
13 zoned C-S/P. The Medford Land Development Code (LDC) identifies permitted uses and  
14 conditional uses in its commercial and industrial zoning districts based on the Standard  
15 Industrial Classification (SIC) manual. LDC 10.337.<sup>1</sup> The SIC manual uses a two-, three-  
16 and four-digit identification system to provide increasingly detailed descriptions of uses.  
17 Among the two-digit “Major Group” of uses allowed in the C-S/P zone are “Health  
18 Services.” A table from the LDC is set out on the following page.

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<sup>1</sup> LDC 10.337 provides, in part:

“The uses allowed within each commercial and industrial zoning district are based on the Standard Industrial Classification (SIC) Manual, 1987 Edition. This chapter classifies uses by Industry Group Number (3 digits) of the SIC Manual. When necessary to resolve any ambiguity in defining a use classification as per this chapter the Industry Number (4 digit) classification contained in the SIC Manual shall be used as the acceptable reference source.”

1           **“80 HEALTH SERVICES.** This major group includes establishments primarily  
 2 engaged in furnishing medical, surgical, and other health services to persons.

3

|     |                                       | C-S/P | C-N | C-C | C-R | C-H | I-L | I-G | I-H |
|-----|---------------------------------------|-------|-----|-----|-----|-----|-----|-----|-----|
| 801 | Offices of Doctors of Medicine        | P     | P   | P   | P   | P   | X   | X   | X   |
| 802 | Offices of Dentists                   | P     | P   | P   | P   | P   | X   | X   | X   |
| 803 | Offices of Osteopathic Physicians     | P     | P   | P   | P   | P   | X   | X   | X   |
| 804 | Offices of Other Health Practitioners | P     | P   | P   | P   | P   | X   | X   | X   |
| 805 | Nursing and Personal Care Facilities  | P     | X   | P   | P   | P   | X   | X   | X   |
| 806 | Hospitals                             | Cs    | X   | X   | X   | X   | X   | X   | X   |
| 807 | Medical and Dental Laboratories       | P     | P   | P   | P   | P   | P   | X   | X   |
| 808 | Home Health Care Services             | P     | P   | P   | P   | P   | X   | X   | X   |
| 809 | Health and Allied Services, nec       | P     | P   | P   | P   | P   | X   | X   | X   |
|     | - Occupational Health Facility        | P     | P   | P   | P   | P   | P   | P   | P   |

4           Among the identified three-digit “Industry Groups” listed under the Health Services is  
 5 809, “Health and Allied Services,” which is listed as a “P” or permitted use.<sup>2</sup> The four-digit  
 6 SIC classifications further refine the three-digit “Health and Allied Services” industry groups.  
 7 One of those four-digit classifications is 8093 “Specialty Outpatient Facilities, Not Elsewhere

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<sup>2</sup> The letter C means the use is allowed as a conditional use, and the letter X means the use is “specifically prohibited.” LDC 10.337.

1 Classified.” The Occupational Safety & Health Administration (OSHA) description of that  
2 classification, of which we take official notice, is set out below:

3 “8093 Specialty Outpatient Facilities, Not Elsewhere Classified

4 “Establishments primarily engaged in outpatient care of a specialized nature  
5 with permanent facilities and with medical staff to provide diagnosis,  
6 treatment, or both for patients who are ambulatory and do not require inpatient  
7 care. \* \* \*

8 “● Alcohol treatment, outpatient clinics

9 “● Biofeedback centers

10 “● Birth control clinics (family planning)

11 “● Drug treatment, outpatient clinics

12 “● Outpatient detoxification centers

13 “● Outpatient mental health clinics

14 “● *Outpatient treatment clinics for alcoholism and drug addiction*

15 “● Rehabilitation centers, outpatient (medical treatment)

16 “● Respiratory therapy clinics” (emphasis added).<sup>3</sup>

17 The above establishes that “Outpatient treatment clinics for alcoholism and drug  
18 addiction” are permitted uses in the C-S/P zone, and we do not understand any party to  
19 dispute that interpretation of the LDC. One of the issues presented in this appeal is whether  
20 the LDC authorization for “Outpatient treatment clinics for alcoholism and drug addiction” is  
21 broad enough to authorize intervenor-respondent’s (Allied’s) methadone clinic.<sup>4</sup>

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<sup>3</sup> The Specialty Outpatient Facilities classification is set out at the Occupational Safety & Health Administration (OSHA) website, which is located at [https://www.osha.gov/pls/imis/sic\\_manual.html](https://www.osha.gov/pls/imis/sic_manual.html).

<sup>4</sup> Intervenor-respondent CRC Health Oregon, Inc. does business as Allied Health Services-Medford.

1           The city letter that is the subject of this appeal was written in response to a March 22,  
2 2013 letter from intervenor’s attorney to the planning department. We set out the relevant  
3 parts of that March 22, 2013 letter below.

4           “This law firm represents Allied Health Services-Medford, Inc. (‘Allied’) with  
5 regard to the siting of Allied’s methadone clinic in Medford. In June 2012,  
6 Allied and the City agreed to work together to relocate Allied’s existing clinic  
7 at 837 East Main Street to a more suitable location in the City by August 1,  
8 2013. \* \* \* Allied has now identified a new location for the clinic and seeks  
9 confirmation from the City Planning Department that this location is  
10 appropriately zoned for Allied’s clinic.

11           “Allied’s proposed clinic location is 777 Murphy Road, near the intersection  
12 with State Street. \* \* \* [T]he Medford City Attorney’s office has  
13 communicated to Allied that this location is suitable to the city because there  
14 are no schools or licensed child care facilities within 1,000 feet of the  
15 proposed clinic location.

16           “The Murphy Road site is zoned [C-S/P]. This zone allows ‘Health and  
17 Allied Services’ listed under [SIC] 809 as permitted uses. \* \* \* SIC 8093  
18 specifically encompasses drug treatment facilities. \* \* \* Allied therefore  
19 believes that the clinic is a permitted use in the C-S/P zone.” Record 5.

20 Allied’s March 22, 2013 letter asks the city to confirm “whether the [Planning] Department  
21 concurs with Allied’s understanding of the LDC). The text of the city’s short March 26,  
22 2013 letter in response is set out below:

23           “I would like to respond to your letter to me dated March 22, 2013, in which  
24 you requested information regarding the above-referenced property. We have  
25 researched our files and determined that the zoning of the property is Service  
26 Commercial and Professional Office, C-S/P. In accordance with the Standard  
27 Industrial Classification manual, we concur with you that the use referenced in  
28 your letter is classified as follows:

- 29                   “8093 Specialty Outpatient Facilities, Not Elsewhere Classified
- 30                   “●     Outpatient treatment clinics for alcoholism and drug  
31                   addiction

32           “That use is a permitted use in the C-S/P zone.” Record 1.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 In their first and second assignments of error, petitioners contend the city’s letter is  
3 not supported with sufficient findings to establish that Allied’s methadone clinic qualifies as  
4 an “Outpatient treatment clinics for alcoholism and drug addiction.” Petitioners also contend  
5 there is not substantial evidence in the record that such is the case.

6 If all the city’s March 26, 2013 decision decides is that the LDC authorization for  
7 “Outpatient treatment clinics for alcoholism and drug addiction” in the C-S/P district is broad  
8 enough to authorize outpatient methadone clinics, we have no trouble affirming that decision.  
9 A “methadone clinic” is a “treatment clinic for alcoholism and drug addition,” under the  
10 plain meaning of those terms and their component terms.<sup>5</sup> So long as a methadone clinic is

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<sup>5</sup> *Webster’s Third New International Dictionary* does not define the term “methadone clinic.” The online dictionary *Wikipedia* provides the following definition:

“A **methadone clinic** is a clinic which has been established for the dispensing of methadone (Dolophine), a schedule II opioid analgesic, to those who abuse heroin and other opioids. The focus of these clinics is the elimination or reduction of opioid usage by putting the patient on methadone. Some clinics also offer short- or long-term detoxification services to their patients using methadone. A common term for the type of treatment at a methadone clinic is ‘replacement therapy’. While generally considered successful as a treatment method, the use of this maintenance treatment is often viewed as controversial.”

*Webster’s Third New International Dictionary* (unabridged 2002) includes the following definitions:

“**clinic** \* \* \* **3 a**: an institution connected with a hospital or medical school where diagnosis and treatment are made available to outpatients \* \* \* [.]” *Id* at 423.

“**methadone** \* \* \*: a narcotic drug \* \* \* administered \* \* \* for the relief of pain \* \* \* [.]” *Id.* at 1422.

“**outpatient** \* \* \*: a patient who is not an inmate of a hospital but receives diagnosis or treatment in a clinic or dispensary connected with the hospital – distinguished from *inpatient*.” *Id.* at 1603.

Although the *Webster’s Third New International Dictionary* (unabridged 2002) definition of “methadone” does not say that methadone is used as a treatment for heroin addiction, *Webster’s Ninth New Collegiate Dictionary* (1991) does:

“**methadone** \* \* \*: a synthetic addictive narcotic drug \* \* \* used esp. in the form of its hydrochloride for the relief of pain and as a substitute narcotic in the treatment of heroin addiction.” *Id* at 747.

1 operated on an outpatient basis, it is authorized in the C-S/P zone as an “Outpatient treatment  
2 clinic[] for alcoholism and drug addiction.”

3 Despite the lack of clarity in intervenor’s March 22, 2013 letter and the city’s lack of  
4 clarity in responding to that letter, there is simply no reason to believe Allied sought the city’s  
5 blessing for other unspecified medical services, if any, that Allied may have been offering at  
6 its clinic on March 22, 2013. That letter does not mention anything other than a methadone  
7 clinic, which the city would reasonably understand to be limited to providing methadone as a  
8 treatment therapy for persons with addictions to other drugs. Certainly Allied did not identify  
9 any other services or infer that any other services are provided at its methadone clinic. It is  
10 fair to infer from the March 22, 2013 letter that Allied was only seeking confirmation that a  
11 methadone clinic (the only use actually mentioned in the March 22, 2013 letter) is  
12 permissible in the C-S/P zone as an “Outpatient treatment clinic[] for alcoholism and drug  
13 addiction.” As respondents point out, that view of the scope of Allied’s clinic is consistent  
14 with the state regulatory scheme it must operate within.<sup>6</sup> And as far as intervenor’s and the  
15 city’s failure to specify explicitly that the methadone clinic is an *outpatient* clinic and would  
16 need to be operated as an outpatient clinic to qualify as an “Outpatient treatment clinic[] for  
17 alcoholism and drug addiction,” that requirement and understanding is inferable from both  
18 letters.

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<sup>6</sup> OAR 415-012-0010(9) sets out the following definition: “‘Letter of Approval (LOA)’ means a certificate issued by the Assistant Director to applicants who are in substantial compliance with applicable administrative rules for alcohol and drug use disorder treatment in an outpatient setting, Driving Under the Influence of Intoxicants (DUII) diagnostic assessment, or prevention services, and which is renewable every three years.” OAR 415-012-0020(5) provides, in part:

“Services eligible for an LOA include but are not limited to:

“(a) Outpatient alcohol or other drug treatment;

“(b) Outpatient methadone maintenance and outpatient methadone detoxification[.]”

We understand respondents to suggest Allied’s clinic operates under a LOA, although we cannot confirm that from the record.



1 Zoning classification determinations are often hypothetical and are necessarily  
2 dependent on and limited to the assumptions or statements in the request or application.  
3 Therefore the city’s March 26, 2013 zoning classification determination does not classify any  
4 unspecified uses or activities as an “Outpatient treatment clinic[] for alcoholism and drug  
5 addiction.” If Allied’s methadone clinic currently provides other services that go beyond  
6 those permissible at an outpatient methadone clinic and beyond those services or activities  
7 that are permissible at one of the other allowable uses in the C-S/P zone, that will be a  
8 potential enforcement issue, and nothing the city said in its March 26, 2013 letter provides  
9 otherwise.

10 The first and second assignments of error are denied.

11 **THIRD ASSIGNMENT OF ERROR**

12 LDC 10.307 through 10.332 set out the purposes of the city’s 17 different zoning  
13 districts. LDC 10.326 sets out the purpose of the C-S/P zone:

14 “The C-S/P district provides land for professional offices, hospitals, and  
15 limited service commercial uses. This district is intended to be customer-  
16 oriented, however, retail uses are limited. *Development in this zone is expected*  
17 *to be suitable for locations adjacent to residential neighborhoods.* (Emphasis  
18 added.)

19 Citing *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001), petitioners contend the city erred  
20 by failing to determine whether Allied’s methadone clinic will be suitable for this location,  
21 which is adjacent to residential neighborhoods.

22 A zoning district purpose statement that is worded as an approval criterion for  
23 individual decisions can operate as an approval standard. *Tylka v. Clackamas County*, 22 Or  
24 LUBA 166, 173 (1991). However, absent wording to the contrary, generally worded zoning  
25 purpose statements are not mandatory approval standards for permits and other site specific  
26 land use decisions. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 392  
27 (2008); *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312, 322-23 (2003).

1 The purpose statement in *Crowley* stated a number of purposes for the city's  
2 Controlled Development (CD-1) zone.<sup>7</sup> A separate provision of the City of Bandon's zoning  
3 ordinance provided that "[i]n the CD-1 zone \* \* \* uses are permitted outright provided that  
4 the use promotes the purpose of the zone \* \* \*." 41 Or LUBA at 90 n 4. LUBA concluded  
5 that the "provided that" language meant "on condition that" and that permitted uses in  
6 Bandon's CD-1 zone must be shown to promote the purpose of the zone. *Id.* at 95. The  
7 critical language in the LDC in this appeal is quite different. It is a description of the city's  
8 expectations for the development it has authorized in the C-S/P zone. That expression of  
9 expectations is not an approval standard that the city must apply whenever it approves a  
10 permitted use in the C-S/P zone or issues a zoning classification decision to determine  
11 whether a particular use is authorized in the C-S/P zone.

12 The third assignment of error is denied.

#### 13 **FOURTH ASSIGNMENT OF ERROR**

14 A decision on a statutory "permit," as ORS 227.160(2) defines that term, must be  
15 preceded by a hearing or notice of the permit decision must be given and an opportunity for a  
16 local appeal must be provided. ORS 227.175(3); ORS 227.175(10). The city did not follow  
17 those procedures in this appeal, and petitioners contend that was error.

18 Earlier in this appeal we determined that the challenged decision is a "decision which  
19 determines the appropriate zoning classification for a particular use" (a zoning classification  
20 determination) within the meaning of ORS 227.160(2)(b), which expressly excludes such

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<sup>7</sup> That purpose statement is set out below;

“The purpose of the CD-1 zone is to recognize the scenic and unique qualities of Bandon's ocean front and nearby areas and to maintain these qualities as much as possible by carefully controlling the nature and scale of future development in this zone. It is intended that a mix of uses would be permitted, including residential, tourist commercial and recreational. Future development is to be controlled in order to enhance and protect the area's unique qualities.”  
41 Or LUBA at 90 n 3.

1 decisions from the statutory definition of “permit.”<sup>8</sup> ORS 227.175(11) requires that the  
2 zoning classification determinations be entered into a registry, something petitioners contend  
3 the city failed to do.<sup>9</sup> Based on that failure, citing cases that predate the legislation that  
4 enacted the current versions of ORS 227.160(2)(b) and 227.175(11), petitioners argue that the  
5 zoning classification determination should be viewed as a permit and subject to the hearing or  
6 notice and right of local appeal requirements that a permit is subject to.

7 Assuming the city failed to enter the challenged zoning classification determination  
8 into a registry, as required by ORS 227.175(11)(a), that may leave the city subject to a  
9 mandamus action to require that it do so, and that failure might have some impact on the  
10 deadline for appealing the decision to LUBA if there was a delay in a person learning of the  
11 decision based on that failure. But that failure does not change the nature of the zoning  
12 classification determination. Because zoning classification determinations are expressly  
13 exempted from the statutory definition of “permit,” the city’s zoning classification

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<sup>8</sup> ORS 227.160(2) provides in part:

“‘Permit’ means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. ‘Permit’ does not include:

“\* \* \* \* \*

“(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]”

<sup>9</sup> ORS 227.175(11), provides in part:

“A decision described in ORS 227.160 (2)(b) shall:

“(a) Be entered in a registry available to the public setting forth:

- (A) The street address or other easily understood geographic reference to the subject property;
- (B) The date of the decision; and
- (C) A description of the decision made.

“\* \* \* \* \*.”

1 determination in this case was not subject to the statutory permit requirements and the city  
2 did not err by failing to hold a hearing or provide notice and an opportunity for local appeal.

3           The fourth assignment of error is denied.

4           The city's decision is affirmed.