BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOUSING LAND ADVOCATES,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent,

and

E3 DEVELOPMENT, LLC,
and PDX REDEVELOPMENT LLC,
Intervenors-Respondents.

LUBA Nos. 2016-031/105

FINAL OPINION
AND ORDER

Appeal from City of Happy Valley.

Rebekah Dohrman, Eugene, filed the petition for review and argued on behalf of petitioner. With her on the brief was Dohrman Land Law, LLC.

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

David J. Petersen, Portland, filed a response brief on behalf of intervenor-respondent E3 Development, LLC. With him on the brief were Sarah Einowski and Tonkon Torp LLP. Sarah Einowski argued on behalf of intervenor-respondent E3 Development, LLC.

Ty K. Wyman, Portland, filed a response brief and argued on behalf of intervenor-respondent PDX Redevelopment, LLC. With him on the brief were

1 Jonathan A. Bennett and Dunn Carney Allen Higgins & Tongue LLP.
2
3 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
4 Member, participated in the decision.
5
6 REMANDED 03/24/2017
7
8 You are entitled to judicial review of this Order. Judicial review is
9 governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals an amendment to a city comprehensive plan and zoning map.[1]

FACTS

A. The Application

The 4.78-acre subject property was previously zoned Mixed Use Residential – Medium (MUR-M2), which allows multi-family dwellings, but does not allow single-family dwellings. Intervenor-respondent E3 Development, LLC (E3) applied to rezone the property to Mixed Use Residential – Single Family (MUR-S), which allows both single-family and multi-family dwellings. The application also included requests for variances and a 31-lot subdivision to allow development of detached single-family residential dwellings on individual lots. E3 is the applicant. Intervenor-respondent PDX Redevelopment, LLC (PDX) is the contract purchaser of the property. We refer to the city, E3 and PDX sometimes herein as respondents.

B. Procedural History

These consolidated appeals have a relatively complicated procedural history. The planning commission held a hearing on E3's application on

[1] The City of Happy Valley apparently has a single map that serves as both its comprehensive plan map and zoning map. Happy Valley Land Development Code (HVLDC) 16.11.090(1).

1 January 12, 2016. That hearing was continued to February 9, 2016, and the
2 application was approved by the planning commission. Petitioner appealed the
3 planning commission decision directly to LUBA (LUBA No. 2016-031).

4 Respondent City of Happy Valley (city) then filed a motion to dismiss
5 that appeal, arguing that petitioner failed to exhaust an available local appeal of
6 the planning commission's decision to the city council. LUBA denied that
7 motion, determining that city council review was required in any event and no
8 local appeal was necessary to meet the exhaustion requirement, because ORS
9 227.180(1)(b) does not authorize city councils to delegate final decision-
10 making for applications for comprehensive plan map amendments to planning
11 commissions. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA
12 405, 415 (2016). Shortly thereafter, on June 6, 2016, the city withdrew the
13 planning commission's decision for reconsideration. Then on September 27,
14 2016, the city issued and provided notice of a city council decision approving
15 the application on reconsideration. The decision incorporated a staff report,
16 which includes a number of exhibits.

17 Upon receiving notice of the new decision, petitioner filed a notice of
18 intent to appeal that decision (LUBA No. 2016-105), and filed a motion to
19 dismiss its original appeal, arguing that respondent's decision on
20 reconsideration was untimely. LUBA denied petitioner's motion and provided
21 petitioner an opportunity to amend its original filing in LUBA No. 2016-031.
22 Petitioner then filed an amended notice of intent to appeal in LUBA No. 2016-

031. That amended notice of intent to appeal sought review of the September 27, 2016 city council decision rendered following the city's withdrawal and reconsideration of the planning commission's earlier decision. Because petitioner had already filed an appeal of that September 27, 2016 decision in LUBA No. 2016-105, the appeals were consolidated.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to arguments in the respondents' briefs that petitioner failed to adequately preserve certain issues presented in the petition for review and, for that reason, has waived its right to raise those issues at LUBA under ORS 197.763(1) and ORS 197.835(3). The motion is granted. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184, 187 (2008), *aff'd* 221 Or App 677, 191 P3d 712 (2008).

WAIVER

PDX argues that petitioner failed to demonstrate that it preserved its issues for appeal under ORS 197.763(1), which 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 officer, and the parties an adequate opportunity to respond to each issue."

Petitioner's preservation section in its brief is quite short:

> "Petitioner raised and argued the issues presented under this assignment of error in its letter dated January 19, 2016. Record 729-777, 778-790. App. D." Petition for Review 14.

PDX argues that LUBA and the parties are not required to search the record to determine where petitioner preserved an issue below, and that a bare citation to nearly 60 pages of the record cannot be sufficient to demonstrate that the issues were raised below.

In its reply brief, petitioner explains that it is depending on a 6-page letter beginning at Record 729, which it submitted below, which appears throughout the record multiple times. Many of the pages cited in petitioner's statement of preservation are appendices to that letter. In an appendix to its reply, petitioner cites the specific record page where each issue was preserved, all of which are presented in the 6-page letter at Record 729-734. Based on the above, we agree with petitioner that its issues on appeal were raised below.

The city specifically argues that notwithstanding petitioner's letter, petitioner waived its fourth sub-assignment of error because it did not raise an issue regarding compliance with Metro Code (MC) 3.07.120 in the local proceedings and therefore cannot raise it for the first time on appeal. ORS 197.763(1); ORS 197.835(3). Petitioner's letter to the planning commission was adequate to preserve the issue for LUBA review:

> "The applicant has not demonstrated compliance with Title I of the Metro Urban Growth Management Functional Plan, which requires each city to maintain or increase its housing capacity. [Petitioner does] not believe that the applicant can meet this requirement because the requested zone change would reduce the

> city's housing capacity with respect to scarce needed housing types, densities, location, and affordability ranges." Record 733.

If Title I of the Metro Urban Growth Management Functional Plan was a lengthy, multi-section Title, the above general reference might not be adequate to preserve petitioner's right raise the MC 3.07.120 issue that it raises in the fourth subassignment of error. *See Savage v. City of Astoria*, 68 Or LUBA 225, 231 (2013) (raising generalized traffic concern without citing the transportation planning rule (TPR) is insufficient to preserve a right to alleged technical TPR violations at LUBA). However, as petitioner points out in its reply brief, Title I of the Metro Urban Growth Management Functional Plan only includes two sections, the "Purpose and Intent" section at 3.07.110 and the "Housing Capacity" section at MC 3.07.120. We agree with petitioner that the MC 3.07.120 issue that it raises under its fourth subassignment of error was adequately preserved for LUBA review.

Before turning to petitioner's assignment of error, we note that our rules impose the following obligation on petitioners:

> "Set forth each assignment of error under a separate heading. Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required. Each assignment of error must state the applicable standard of review. Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error shall be combined[.]" OAR 661-010-0030(4)(d).

1 As we explain in more detail below, petitioner's single assignment of error
2 raises many issues under five subassignments of error. Petitioner's preservation
3 statement generally refers to its assignment of error, without specifically
4 identifying *any* of the issues raised in that assignment of error. Petitioner then
5 generally refers to 60 pages of the record, without any specific reference to the
6 content of its letter to fulfill its obligations under OAR 661-010-0030(4)(d).
7 That approach to complying with OAR 661-010-0030(4)(d) invites the kind of
8 wavier challenges that were filed in this case and then requires that petitioner
9 file a reply brief to provide the kind of issue identification and preservation
10 detail that should have been provided in the petition for review. While
11 petitioner is not the only petitioner at LUBA who has failed to file a petition for
12 review that complies with OAR 661-010-0030(4)(d), petitions for review that
13 do not comply with OAR 661-010-0030(4)(d) needlessly complicate LUBA
14 appeals.

15 **COMBINED ASSIGNMENT OF ERROR**

16 Petitioner argues the decision's findings fail to adequately address or
17 demonstrate that the disputed amendment is consistent with a number of state,
18 regional and local land use planning laws that were adopted to ensure an
19 adequate supply of buildable land for a diverse and adequate supply of housing,
20 and the kind of land use regulations that will encourage such housing.
21 Petitioner also contends the record does not include substantial evidence to
22 support the city's findings of compliance with those laws. Petitioner's

combined assignment of error is broken down into with five sub-assignments of error alleging that the city's decision inadequately demonstrated the approved amendment complies with:

1. The Needed Housing Statutes at ORS 197.295 to 197.314
2. Land Conservation and Development Commission (LCDC) Goal 10 administrative rules at OAR 660-007 and -008
3. Statewide Planning Goal 10 (Housing)
4. Metro Code Section 3.07.120(e)
5. Happy Valley Comprehensive Plan Policies

We address petitioner's arguments based on these five-subassignments of error.

A. The Needed Housing Statutes (First Subassignment of Error)

Although this subassignment of error refers generally to the needed housing statutes, which are set out at ORS 197.295 through ORS 197.314, the only statutes that petitioner specifically identifies and discusses under this subassignment of error are ORS 197.307(3) and (4), which provide:

> "(3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.
>
> "(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves

or cumulatively, of discouraging needed housing through unreasonable cost or delay."

ORS 197.296 requires that local governments inventory the supply of buildable lands with urban growth boundaries and "[c]onduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years." ORS 197.296(3)(b). However, as respondents point out, the needed housing planning obligations set out at ORS 197.296 *et seq* do not apply directly to the City of Happy Valley, which is located within the territory of the Metropolitan Service District (Metro). ORS 197.296(1)(a) provides:

> "(1)(a) The provisions of this section apply to metropolitan service district regional framework plans and local government comprehensive plans for lands within the urban growth boundary of a city that is *located outside of a metropolitan service district* and has a population of 25,000 or more." (Emphasis added.)

LCDC and Metro in turn have adopted requirements, including a number of planning requirements for member cities and counties to comply with ORS 197.307(3) and (4). Respondents contend that this subassignment of error seems to take the position that in adopting this comprehensive plan and zoning map amendment, the city must first establish that the city, and by implication Metro, currently complies with ORS 197.307(3) and (4).

We agree with respondents that petitioner appears to fundamentally misunderstand the city's obligations under relevant state, regional and local

housing planning laws when amending its acknowledged comprehensive plan and land use regulations in a way that reduces minimum residential density. We address those obligations more directly below in our discussion of other subassignments of error. Because petitioner's first subassignment of error fails to adequately explain why petitioner believes the obligations imposed by ORS 197.307(3) and (4) are implicated by the city's decision to approve an amendment of its acknowledged comprehensive plan and zoning map for a 4.78-acre property, this subassignment of error is denied.

B. LCDC Goal 10 Administrative Rules and Statewide Planning Goal 10 Generally (Second and Third Subassignments of Error)

1. Petitioner's Goal and Administrative Rule Arguments

Statewide Planning Goal 10 (Housing) is "[t]o provide for the housing needs of citizens of the state[,]" and provides in relevant part:

> "[b]uildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."[2]

Petitioner argues that when a city with an acknowledged comprehensive plan and implementing ordinances amends its implementing ordinance to downzone or impose other substantial restrictions on lands within its

[2] This Goal 10 language states essentially the same planning obligation that is set out at ORS 197.296(3)(b), quoted *supra*.

acknowledged Goal 10 land supplies, the city must demonstrate that its actions do not leave it with less than adequate supplies in the types, locations, and affordability ranges affected, citing the *Opus Development* line of cases (*Opus Development v. City of Eugene*, 28 Or LUBA 670 (1995) (*Opus I*); 30 Or LUBA 360 (1996) (*Opus II*), *aff'd*, 141 Or App 249, 918 P2d 116 (1996) (*Opus III*). Petitioner asserts that the city's findings are not supported by facts that demonstrate that the decision will result in the city meeting its housing needs over any particular planning period. Petitioner also asserts that because the city and applicant cannot show that the amendment complies with OAR 660-007-0030 and 660-007-0035 (discussed next), the decision cannot comply with Goal 10. Petitioner also argues broadly that Goal 10 requires that the local comprehensive plans inventory land, identify needed housing and designate and zone enough buildable land to satisfy the identified housing need, citing ORS 197.296.

As we have already noted, ORS 197.296 applies to Metro and does not apply directly to the City of Happy Valley. But LCDC has adopted administrative rules that govern needed housing planning obligations within Metro. Those administrative rules do impose some obligations on cities and counties within the Metro boundary.

1 **2. The Metro Housing Rule, OAR Chapter 660, Division 7**

2 **a. The Purpose of the Metro Housing Rule**

3 The LCDC administrative rules that govern housing within the Metro
4 urban growth boundary are at OAR chapter 660, division 7.[3] The purpose of
5 OAR chapter 660, division 7 is to clarify the more general planning
6 obligations, with regard to ensuring an adequate supply of buildable lands, and
7 planning for a mix of housing type, which are scattered across a number of
8 statutes, Goal 10 and LCDC administrative rules. OAR 660-007-0000 sets out
9 the following "Statement of Purpose":

10 > "The purpose of this division is to ensure opportunity for the
11 > provision of adequate numbers of needed housing units and the
12 > efficient use of land within the Metropolitan Portland (Metro)
13 > urban growth boundary, to provide greater certainty in the
14 > development process and so to reduce housing costs. OAR 660-
15 > 007-0030 through 660-007-0037 are intended to establish by rule
16 > regional residential density and mix standards to measure Goal 10
17 > Housing compliance for cities and counties within the Metro urban
18 > growth boundary, and to ensure the efficient use of residential land
19 > within the regional UGB consistent with Goal 14 Urbanization.
20 > OAR 660-007-0035 implements the Commission's determination
21 > in the Metro UGB acknowledgment proceedings that region wide,
22 > planned residential densities must be considerably in excess of the
23 > residential density assumed in Metro's 'UGB Findings'. The new
24 > construction density and mix standards and the criteria for varying
25 > from them in this rule take into consideration and also satisfy the

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[3] OAR chapter 660, division 8 imposes housing planning obligations on cities generally, but OAR chapter 660, division 7 applies to Metro cities where the requirements of OAR chapter 660, divisions 7 and 8 conflict. OAR 660-008-0000(2). Our focus in this decision is on the more applicable and detailed requirements of OAR chapter 660, division 7.

price range and rent level criteria for needed housing as set forth in ORS 197.303."

b. Metro Housing Rule Density and Mix of Housing Type Requirement

The "mix" standard referenced above in OAR 660-007-0000 appears at OAR 660-007-0030, which provides in part:

"New Construction Mix

"(1) Jurisdictions other than small developed cities must either designate sufficient buildable land *to provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing*[.]"(Emphasis added.)[4]

The "density" standard referenced above is at OAR 660-007-0035 and provides in relevant part:

"Minimum Residential Density Allocation for New Construction

"The following standards shall apply to those jurisdictions which provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing:

"(1) The Cities of Cornelius, Durham, Fairview, Happy Valley and Sherwood *must provide for an overall density of six or more dwelling units per net buildable acre*. These are relatively small cities with some growth potential (i.e. with a regionally coordinated population projection of less than

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[4] OAR 660-007-0030(1) authorizes jurisdictions to "justify an alternative percentage" and sets out factors to be considered in justifying an alternative percentage.

8,000 persons for the active planning area)." (Emphasis added.)[5]

c. How and When the Metro Housing Rule Applies

OAR 660-007-0060 is titled "Applicability," and provides in relevant part:

> "(1) The new construction mix and minimum residential density standards of OAR 660-007-0030 through 660-007-0037 shall be applicable at each periodic review. During each periodic review local government shall prepare findings regarding the cumulative effects of all plan and zone changes affecting residential use. The jurisdiction's buildable lands inventory (updated pursuant to OAR 660-007-0045) shall be a supporting document to the local jurisdiction's periodic review order.
>
> "(2) For plan and land use regulation amendments which are subject to OAR 660, Division 18[6], the local jurisdiction shall either:
>
> "(a) Demonstrate through findings that the mix and density standards in this Division are met by the amendment; or
>
> "(b) Make a commitment through the findings associated with the amendment that the jurisdiction will comply

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[5] OAR 660-007-0037 authorizes those jurisdictions that justify an alternative new construction mix under OAR 660-007-0030(1), *see* n 4, to adopt a different average minimum density standard than set out in OAR 660-007-0035.

[6] OAR chapter 660, division 18 governs post-acknowledgement plan amendments. The decision before us is a post-acknowledgment plan amendment.

1 with provisions of this Division for mix or density
2 through subsequent plan amendments."

3 We will return to the OAR 660-007-0060 "Applicability" section in the
4 conclusion below. But we emphasize here that it imposes different obligations
5 at periodic review and when adopting post-acknowledgment plan amendments.

6 Petitioner asserts that the city has not made and cannot make the
7 demonstration called for in subsection OAR 660-007-0060(2)(a) or the
8 commitment called for in subsection OAR 660-007-0060(2)(b), as both would
9 require a demonstration of surplus in housing supplies.

10 **3. The City's Findings**

11 The city's incorporated staff report provided the following findings on
12 Goal 10:

13 "In conjunction with the proposed development, the applicant is
14 requesting that the City process a Comprehensive Plan/Zoning
15 Map amendment of a 31-lot subdivision and variance applications.
16 If approved, the proposed use will provide additional housing
17 within the City. In addition, the applicant has provided
18 supplemental findings (Exhibit S), which are included in the
19 written record, addressing Goal 10. Therefore, this criterion is
20 satisfied." Record 91.

21 That staff report incorporates Exhibit S, which is a letter from E3's previous
22 attorney, which in relevant part provides a 10-page analysis of the decision's
23 compliance with Goal 10. Exhibit S takes the position that because the MUR-S
24 zone, like the MUR-M2 zone it replaced, authorizes both "attached single
25 family housing [and] multiple family housing," it complies with the OAR 660-
26 007-0030(1) requirement "to provide the opportunity for at least 50 percent of

1 new residential units to be attached single family housing or multiple family
2 housing[.]"

3 With regard to the OAR 660-007-0035(1) requirement that Happy Valley
4 "must provide for an overall density of six or more dwelling units per net
5 buildable acre," Exhibit S takes the position that the MUR-S zone imposes a
6 six-dwelling unit minimum density requirement.

7 Petitioner argues that the city's findings do not adequately address or
8 demonstrate how the comprehensive plan amendment is consistent with the
9 OAR chapter 660, division 007, and that the record does not contains
10 substantial evidence supporting the findings the city did adopt.

11 **4. Conclusion**

12 Petitioner is correct that the city's finding that the fact that the 31-lot
13 subdivision will provide some housing demonstrates that the plan and zoning
14 map amendment complies with applicable needed housing requirements
15 improperly construes the applicable law, for a number of reasons. First the plan
16 and zoning map amendment that is the subject of this appeal does not approve
17 the 31-lot subdivision. And even if it did, the fact that that subdivision may
18 provide *some* housing does not mean "that the mix and density standards in
19 [OAR chapter 660, division 7] are met by the amendment," which is what OAR
20 660-007-0060(2)(a) requires.

21 But petitioner fails to recognize that OAR 660-007-0060, set out earlier,
22 imposes different obligations at the time of periodic review versus when

1 approving post-acknowledgement plan and land use regulation amendments.
2 Petitioner essentially argues that the city, in approving the disputed post-
3 acknowledgment plan amendment, must demonstrate that the overall density in
4 the city as a whole currently meets the mix and density standards before it can
5 determine if the amendment takes the city out of compliance with the mix and
6 density standards. That argument is based on a misconstruction of OAR 660-
7 007-0060. Under OAR 660-007-0060(1), a local government is required at its
8 first and subsequent periodic reviews to update its buildable lands inventory
9 and demonstrate that its buildable lands that are zoned for residential
10 development comply with the mix and density standards.[7] Petitioner reads
11 OAR 660-007-0060 effectively to require that a local government do that every
12 time it adopts a post-acknowledgment amendment to comprehensive plan and
13 zoning map.

14 The city's more limited obligation when it adopts a post-
15 acknowledgment plan and land use regulation amendment is set out at OAR
16 660-007-0060(2). That rule was set out earlier but for ease of reference it is set
17 out again below:

18 "(2) For plan and land use regulation amendments which are
19 subject to OAR 660, Division 18, the local jurisdiction shall
20 either:

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[7] As we understand it, Happy Valley has never engaged in periodic review.

1 "(a) Demonstrate through findings that the mix and
2 density standards in this Division are met *by the*
3 *amendment*; or

4 "(b) Make a commitment through the findings associated
5 with the amendment that the jurisdiction will comply
6 with provisions of this Division for mix or density
7 through subsequent plan amendments." (Emphasis
8 added.)

9 OAR 660-007-0060(2) gives the city two options, option (a) or option
10 (b). The city took advantage of option (a). Under option (a) the focus is on
11 "the amendment." The amendment adopts a zoning district that allows both
12 single family dwellings and multi-family dwellings. If there is some reason
13 why that zoning is inconsistent with the OAR 660-007-0030 new construction
14 mix requirement for "the opportunity for at least 50 percent of new residential
15 units to be attached single family housing or multiple family housing,"
16 petitioner does not identify that reason.

17 Turning to the OAR 660-007-0035(1) requirement for an "overall
18 density of six or more dwelling units per net buildable acre," while the
19 reference to "overall density" introduces some ambiguity, that language must
20 be read together with the OAR 660-007-0060(2)(a) requirement that the city
21 "[d]emonstrate through findings that the mix and density standards in this
22 Division are met *by the amendment*." To interpret OAR 660-007-0060(2)(a) to
23 require that the city establish that the city's current supply of residentially
24 zoned land complies with the mix and density standards, before and after the
25 amendment, would make the obligation under 660-007-0060(2)(a), as a matter

of substance, identical to the obligation that is imposed under 660-007-0060(1) at the time of periodic review. Those sections employ different language and presumably were not intended to impose identical obligations. We reject petitioner's interpretation.

Under OAR 660-007-0060(2)(a), when amending an acknowledged comprehensive plan and zoning map designation, the city's obligation is more limited, and that obligation is focused on "the amendment." Here the MUR-S plan and zoning map designation that the city applied requires a minimum density of six dwelling units per acre. That minimum density requirement satisfies the applicable minimum density standard, at least with regard to the amendment. If that amendment, considered with all other post-acknowledgment plan and land use regulation amendments, causes the city's supply of residentially zoned land, viewed as a whole, to fall under the "six or more dwelling units per net buildable acre" standard, the mechanism under OAR chapter 660, division 7 to correct that overall imbalance is periodic review.[8] OAR 660-007-0060(2)(a) only requires that the amendment itself must comply with the density standard.

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[8] Periodic review is a process that follows initial LCDC acknowledgement of city and county comprehensive plans, whereby LCDC periodically reviews local government comprehensive plans and land use regulations to ensure they remain in compliance with the statewide planning goals and related land use laws. ORS 197.628 through 197.651.

1 We need not and do not attempt here to decide whether the city could,
2 consistent with OAR 660-007-0060(2)(a), approve a post-acknowledgement
3 plan amendment that applied a plan and zoning map designation that had no
4 minimum density requirement or had a minimum density requirement of less
5 than six dwelling units per acre and, if so, what the city would be required to
6 do to demonstrate the amendment does not violate the density standard. It may
7 be that the city's only route to approve such an amendment would be to
8 proceed under option OAR 660-007-0060(2)(b) to "[m]ake a commitment
9 through the findings associated with the amendment that the jurisdiction will
10 comply with provisions of this Division for mix or density through subsequent
11 plan amendments."
12 Petitioner's second and third subassignments of error are denied.[9]

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[9] Because it was not necessary to do so, we have not addressed PDX's attempt to demonstrate that the city complies with the six dwelling units per acre standard both before and after the challenged amendment. There are at least two obvious errors in that demonstration that render the conclusions it reaches highly questionable at best. First, PDX uses "maximum allowed density" in each of the city's zones to arrive at an estimate of 20,438 possible dwelling units on the lands currently zoned for residential use in the city. PDX then uses that number of units to estimate that the "overall density of six or more dwelling units per net buildable acres is met." PDX offers no explanation for why it used *maximum* possible density in the city's existing zoning districts to estimate *minimum* density, and we cannot think of one. PDX compounds that error by subtracting 697 acres of residentially zoned land for required rights-of-way after it used those same acres in computing the 20,438 possible dwelling units, an error that further inflates the resulting overall density.

1 **C. Metro Code (Fourth Subassignment of Error)**

2 Petitioner argues that the city's findings do not adequately address or
3 demonstrate how the amendment complies with Metro Code (MC) 3.07.120(E)
4 and the record does not contain substantial evidence supporting these findings.

5 MC 3.07.120(E) provides:

6 "A city or county may reduce the minimum zoned capacity of a
7 single lot or parcel so long as the reduction has a negligible effect
8 on the city's or county's overall minimum zoned residential
9 capacity."

10 Petitioner asserts that because the challenged rezoning reduces the
11 minimum zoned capacity of the subject parcel, the only way to comply with
12 MC 3.07.120(E) is to calculate the overall minimum zoned residential capacity
13 within the City before and after the proposed amendment. Petitioner asserts that
14 the city erred when it compared the area of the subject parcel to the area of the
15 city as a whole and then concluded that the zone change results in only a
16 "negligible effect[.]"

17 The city argues that the decision finding at Record 97 is sufficient to
18 address MC 3.07.120(e). That finding provides:

Petitioner faults PDX for not reducing the total acres to account for "restricted hazard areas." Reducing the 3,668.5 acres to account for "restricted hazard areas," without more, would actually *increase* the resulting density. But of course since those acres were used to compute the 20,438 possible units, a reduction in that total would be required to account for the reduction in acres to result in net buildable acres.

1 "The area to be re-designated from MUR-M2 to MUR-S is small
2 in terms of the overall area of the City. The area involved in the
3 'downzone' is approximately five acres in size and the City is
4 approximately 8.32 square miles in size, a large part of which is
5 residential. Due to size/scale alone, the effect of the City's overall
6 minimum zoned residential capacity due to the zone change is
7 negligible. Therefore, this criterion has been satisfied."

8 We agree with petitioner that the city's comparison to the area of the subject
9 property and the total land area of the city is not the comparison MC
10 3.07.120(e) calls for. The findings also state that "a large part of [the city] is
11 residential." That finding is closer to the mark, but still is inadequate because
12 it neither identifies what the minimum zoned residential capacity of the subject
13 property is nor how much that minimum zoned residential density is reduced by
14 the challenged amendment.

15 The respondents point to evidence that they contend demonstrates that
16 MC 3.07.120(e) negligible change standard is satisfied. We cannot follow the
17 city's math or its computational assumptions. But in some cases it is clear the
18 city's and respondents' proposed comparisons are also not comparing the
19 things that MC 3.07.120(e) requires to be compared. MC 3.07.120(e) requires
20 a comparison of (1) the reduction of the "minimum zoned capacity" of the
21 4.78-acre subject property with (2) the "city's * * * overall minimum zoned
22 residential capacity."[10]

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[10] The city's estimate of a .003 percent reduction is based on a comparison of the reduction of minimum zoned capacity for the subject property with the expected surplus of multi-family dwellings over the planning period in the

1 The minimum density in the MUR-M2 zone is 25 units per acre. The
2 minimum density in the MUR-S zone that the amendment applies in its place is
3 six units per acre. The subject property is 4.78 acres in size. Without
4 accounting for rights of way or any other areas that should be excluded to
5 arrive at an estimate of net buildable acres under OAR 660-007-0005(1), the
6 "minimum zoned capacity of [the subject] single lot or parcel" under MUR-M2
7 zoning was 4.78 X 25 = 119.5.[11] The "minimum zoned capacity of [the
8 subject] single lot or parcel" under MUR-S zoning is 4.78 X 6 = 29. The
9 reduction of the "minimum zoned capacity" of the 4.78-acre subject property
10 was 119.5 units – 29 units = <u>90.5 units</u>.

11 Using the minimum densities for the following zones that have minimum
12 densities MUR-S (six du/ac), MUR-A (10 du/ac), MUR-M1 (15 du/ac), MUR-
13 M2 (25 du/ac), MUR-M3 (35 du/ac), and SFA (10 du/ac) multiplied by the
14 acres in each of those zoning districts shown on Record 53, and again not

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entire Metro region. City Response Brief 16-17. That is not the comparison required by MC 3.07.120(e). The city also points to intervenor's estimate of 20,438 units based on the *maximum* number of units per acre allowed under the city's residential zoning districts rather than the *minimum* number of units per acre. The city claims that produces a reduction of a mere .004 percent. City Response Brief 17. We agree that such a reduction qualifies as negligible, but again that is not the comparison required by MC 3.07.120(e).

[11] OAR 660-007-0005(1) provides:

> "A 'Net Buildable Acre' consists of 43,560 square feet of residentially designated buildable land, after excluding present and future rights-of-way, restricted hazard areas, public open spaces and restricted resource protection areas."

1 making any acreage reductions to arrive at net buildable acres, produces a total
2 of 5,893 units. Dividing the 90.5 units by 5,893 units shows that the effect of
3 the 90.5 unit reduction on the total 5,893 units is a reduction of 1.5 percent.
4 Acreage reductions in both the total number of units and the reduced minimum
5 capacity, to arrive at net buildable acres, will reduce both figures and could
6 therefore change the 1.5 percent reduction. But the resulting reduction is likely
7 at least approximately 1.5 percent, based on the zoning acreages set out at
8 Record 53, not the .003 and .004 reductions the city claims. *See* n 10. We
9 believe the issue of whether a reduction of approximately 1.5 percent qualifies
10 as "negligible" is debatable. Rather than try to resolve that debate ourselves,
11 without the benefit of argument on the point, we remand for the city to address
12 that issue in the first instance.
13 By engaging in the above math and interpretive exercise, we do not mean
14 to foreclose any approach by the city on remand to recalculate the minimum
15 zoned capacity of the subject property and the overall minimum zoned
16 residential capacity of the city's existing inventory of residentially zoned land
17 that includes minimum density requirements, to determine whether the effect of
18 the reduction is "negligible." But of course the city must be prepared to defend
19 its methodology and math.
20 Because the city's findings and the evidentiary record are inadequate to
21 demonstrate that the reduction in the minimum zoned capacity of the subject
22 property, when compared to the city's "overall minimum zoned residential

capacity," is "negligible," as MC 3.07.120(E) requires, the fourth subassignment of error must be sustained.

D. Happy Valley Comprehensive Plan Policies (Fifth Subassignment of Error)

Petitioner argues that the decision does not adequately address or demonstrate how the amendment complies with a number of Happy Valley Comprehensive Plan Policies. The city staff report listed the relevant comprehensive plan policies:

> "Policy 42: To increase the supply of housing to allow for population growth and to provide for the housing needs of a variety of citizens of Happy Valley.
>
> "Policy 43: To develop housing in areas in areas that reinforces and facilitate orderly and compatible community development.
>
> "Policy 44: To provide a variety of lot sizes, a diversity of housing types including single family attached (townhouses) duplexes, senior housing and multiple family and range of prices to attract a variety of household sizes and incomes to Happy Valley.
>
> "* * * * *
>
> "Policy 46: The City shall provide a range of housing that includes land use districts that allow senior housing, assisted living and a range of multi-family housing products. This range improves housing choice for the elderly, young professionals, single households, families with children, and other household types."

The staff report provides in response:

> "The applicant is requesting that the City process a 31-lot subdivision as part of their proposal. If approved 'Eagle Loft Estates' will provide additional housing opportunities within the City. Therefore, this criterion has been satisfied." Record 98.

Petitioner asserts that the decision does not make any connection between the proposed plan amendment and how the zoning gets the city closer to achieving inclusive housing options as directed by the comprehensive plan. Petitioner argues that the policies do not simply require more housing, but require that the city's housing supply meets the needs of a variety of citizens. Petitioner asserts that the city must know what lots are available and how many different types of housing are available, and that the city must include a discussion about whether the amendment itself adds to the range of housing choices in the city.

We do not agree with petitioner that any particular methodology is required to adopt adequate findings addressing the above quoted policies. But we do agree with petitioner that the planning staff's unexplained "additional opportunities" finding is inadequate.

However, the city council also adopted other findings addressing policies 42, 43 and 46. Record 289-90. Although petitioner briefly criticizes the findings concerning 42 and 43 as inadequate and dismisses the findings concerning 46 as "fluff," petitioner's criticism of those findings fails to demonstrate that the findings are inadequate. With regard to Policy 44, that policy merely requires the city to "provide a variety of lot sizes, a diversity of housing types including single family attached (townhouses) duplexes, senior housing and multiple family and range of prices to attract a variety of household sizes and incomes to Happy Valley." Petitioner does not argue that the prior MUR-M2 zoning was a superior vehicle for achieving Policy 44 or

1 that the MUR-S zone does not supply housing of the types mentioned in Policy
2 44.
3 Petitioner's arguments under the fifth subassignment of error are
4 insufficient to establish an additional basis for remand.
5 The fifth subassignment of error is denied.
6 The city's decision is remanded in accordance with our resolution of the
7 fourth subassignment of error.