BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JILL WARREN,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

VENTURE PROPERTIES, INC.,
Intervenor-Respondent.

LUBA No. 2018-089

FINAL OPINION
AND ORDER

Appeal from Washington County.

Kenneth P. Dobson, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Washington County.

Michael C. Robinson, Portland, filed the response brief. Garrett H. Stephenson, Portland, argued on behalf of intervenor-respondent. With them on the brief was Schwabe, Williamson & Wyatt P.C.

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

AFFIRMED 11/14/2018

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving a six-lot subdivision.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. Intervenor-respondent Venture Properties, Inc. (intervenor) objects that Section 2 of the reply brief challenges a finding that petitioner failed to challenge in the petition for review. Because the issues that Section 2 of the reply brief and intervenor's objection to it address are not germane to our disposition of the appeal, and because resolving the dispute would lengthen an already long opinion, we allow the reply brief.

FACTS

Intervenor applied for approval of a six-lot subdivision on land located in the county. The subject property is a 2.8-acre parcel zoned R-5 (Residential 5 Units Per Acre).[1] The property is located between SW Birch Street and SW Cedarcrest Street, 200 feet to the west of SW 80th Avenue, in the Metzger Progress area of the county. Ash Creek runs through the property, and

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[1] The R-5 zone allows development at a density of "no less than four units per acre, except as permitted by Section 300-2 or by 302-6.2[.]" Washington County Community Development Code (CDC) 302-6.1. The staff report concluded that the minimum density allowed on the site is 11 units and the maximum is 14 units. Record 791.

approximately the northern half of the subject property is included on the Metzger-Progress Community Plan map of Significant Natural Resources (SNR Map) as "Wildlife Habitat" and "Water Areas and Wetlands and Fish and Wildlife Habitat."[2] The SNR Map is part of the county's Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) (Goal 5) program.

The property is included within Metro's Urban Growth Boundary (UGB) and is included in Metro's 2014 Buildable Lands Inventory (Metro BLI). *See Warren v. Washington County*, 76 Or LUBA 295, 304 (2017) (granting intervenor's motion to take official notice of the Metro ordinance that adopted the Metro BLI for the region, and concluding that the subject property is included in the Metro BLI).[3] Clean Water Services (CWS) is the regional sewerage agency in the area in which the subject property is located. CWS regulations require

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[2] Washington County Community Development Code (CDC) 422-2.2 describes "Water Area and Wetlands and Fish and Wildlife Habitat" as "Water areas and wetlands that are also fish and wildlife habitat."

CDC 422-2.3 describes "Wildlife Habitat" as "Sensitive habitats identified by the Oregon Department of Fish and Wildlife, the Audubon Society Urban Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands."

[3] Intervenor previously submitted an application to develop a six-lot subdivision on the property, and the county approved the application. The county's decision was appealed to LUBA and we remanded the decision. After our decision in *Warren*, 76 Or LUBA 295, intervenor withdrew the application and submitted a new application for a similar six-lot subdivision.

"vegetated corridors" up to 50-feet wide adjacent to permanent streams (CWS Vegetated Corridors), including Ash Creek, to include enhancement plantings.

Intervenor proposed to subdivide the property into six lots averaging approximately 6,000 square feet each, along with a private street to access three of the lots, and to set aside approximately 58 percent of the property from development. Intervenor's proposal includes Tract A, containing approximately 64,317 square feet of natural resource area, consisting of the Ash Creek floodplain and associated wetlands and vegetated corridors, and Tract B, an open space tract containing 6,247 square feet of wildlife habitat.

The hearings officer approved the application, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

The hearings officer concluded that ORS 197.307(4) (2017) prohibits the county from applying criteria in CDC Chapter 422, and specifically, CDC 422-3.6, CDC 422-3.4, and CDC 422-3.3A, because the applicable criteria in those provisions are not "clear and objective." In her first assignment of error, petitioner argues that ORS 197.307(4) (2017) does not prohibit the county from applying provisions of CDC Chapter 422, for several reasons that we set out in more detail below. We first set out and discuss the statutes at ORS 197.295 to 197.314, including ORS 197.307(4) (2017), before turning to petitioner's assignment of error.

A. ORS 197.295-197.314 – The Needed Housing Statutes

The statutes that are set out at ORS 197.295 to ORS 197.314 are commonly referred to as the Needed Housing Statutes. With their initial enactment in 1981, those statutes incorporated into law the "St. Helens' Policy," which was adopted as a policy by the Land Conservation and Development Commission (LCDC) in 1979. *See The Robert Randall Co. v. City of Wilsonville*, 15 Or LUBA 26 (1986) (so explaining).

ORS 197.296(2) through (7) impose planning obligations on Metro and certain cities, and require them to provide for a supply of buildable land that is sufficient to meet the projected housing needs for the relevant 20-year planning period. Statewide Planning Goal 10 (Housing) (Goal 10) also requires the city to inventory buildable lands for residential use. Regional and local governments that are subject to these requirements must (1) inventory the existing supply of buildable lands within the UGB; (2) project housing need for the relevant planning period based on population growth and other factors; and then (3) if the existing inventory is inadequate to accommodate housing needs, take specified actions necessary to ensure there is an adequate supply of buildable land within the UGB during that planning period.

ORS 197.303(1) (2017) sets out the definition for "needed housing."[4] The buildable lands inventory and housing capacity analysis required by ORS

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[4] ORS 197.303(1) (2017) provides:

197.296(3)(a) must include a determination of the number of units and amount of land needed for each "needed housing" type listed in ORS 197.303(1)(a)-(e). ORS 197.296(3)(b). ORS 197.307(3) requires that local governments must plan for and permit "needed housing" "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."

"As used in ORS 197.307, 'needed housing' means all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 USC 1437a. 'Needed housing' includes the following housing types:

"(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

"(b) Government assisted housing;

"(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;

"(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and

"(e) Housing for farmworkers."

As we discuss below, ORS 197.307(4) (2017) restricts the standards, conditions and procedures that local governments may apply when considering development applications for housing. A local government may not subject "housing, including needed housing" to standards, conditions, and procedures that are not "clear and objective." ORS 197.307(4) (2017).[5] We refer to this provision in this opinion as the clear and objective requirement.[6]

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[5] ORS 197.307(6) allows a local government to adopt an alternative approval process for applications for needed housing, if the alternative approval process authorizes a density that is greater than the density authorized under the "clear and objective standards" described in ORS 197.307(4). In other words, a local government may adopt an alternative approval process that includes discretionary standards and that allows for greater density than would otherwise be allowed if only "clear and objective" standards applied to a development application, as long as development continues to be allowed under clear and objective standards at a density at or above the density authorized in the zone. There is no dispute that the county has not adopted such an alternative approval process.

[6] Relatedly, ORS 227.173(2) and ORS 215.416(8)(b) provide for cities and counties, respectively, that:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

Further, ORS 197.831 places the burden on the local government to demonstrate, before LUBA, that standards and conditions imposed on needed housing that are required to be clear and objective "are capable of being imposed only in a clear and objective manner."

B. ORS 197.307(4) (2017) (Senate Bill 1051)

In 2017, the legislature enacted and the Governor signed Senate Bill 1051 (SB 1051), which amended several statutes, including, as relevant here, ORS 197.307(4). Prior to the enactment of SB 1051, ORS 197.307(4) provided:

> "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." (Emphasis added.)

Among many other changes, SB 1051 amended ORS 197.307(4), as follows:

> "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 housing, including needed housing.* The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
>
> "(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." (Emphasis added.)

SB 1051 made two changes to the statute that are relevant here. First, SB 1051 deleted the requirement that, in order for ORS 197.307(4) to apply and allow the local government to apply only clear and objective standards, the proposed development must be "needed housing" as defined in ORS 197.303(1). The statute now applies to "the development of housing, including needed housing[.]"

Second, SB 1051 deleted the phrase "on buildable land." The extent and meaning of that second legislative choice is the central dispute in this appeal.

C. First Assignment of Error

During the proceedings below, intervenor argued that ORS 197.307(4) (2017) prohibited the hearings officer from applying various provisions of CDC Chapter 422 that were not "clear and objective" within the meaning of the statute. The hearings officer agreed, concluding that:

> "[T]he removal of 'needed' from the statute made it broadly applicable to housing in general, and not only to 'needed housing' under the needed housing statute and its implementing rules. Further, the removal of 'on buildable land' from the end of the statute also broadened the statute's applicability to all land, and not only 'buildable land' as defined under Oregon law." Record 12.

1. Buildable Land

In her first assignment of error, petitioner argues that ORS 197.307(4) (2017) does not apply to intervenor's proposed development because according to petitioner, the portion of the property that is subject to resource protection standards is not "buildable land" as defined in ORS 197.295(1). At the outset, we note that petitioner does not identify the standard of review as required by OAR 661-010-0030(4)(d), but merely argues that the hearings officer's interpretation "was in error[]" and lists the reasons. Petition for Review 22. There is no dispute

that the challenged decision is a limited land use decision. ORS 197.015(12). We review challenges to limited land use decisions pursuant to ORS 197.828.[7]

In her first assignment of error, petitioner argues that the portion of the property that is identified as "Water Area and Wetlands and Fish and Wildlife Habitat" and "Wildlife Habitat" is not "buildable land." Petition for Review 21; *see* n 2. Petitioner argues that notwithstanding the changes made in SB 1051, the

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[7] ORS 197.828 provides:

> "(1) The Land Use Board of Appeals shall either reverse, remand or affirm a limited land use decision on review.
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> "(2) The board shall reverse or remand a limited land use decision if:
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> > "(a) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision;
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> > "(b) The decision does not comply with applicable provisions of the land use regulations;
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> > "(c) The decision is:
> >
> > > "(A) Outside the scope of authority of the decision maker; or
> > >
> > > "(B) Unconstitutional; or
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> > "(d) The local government committed a procedural error which prejudiced the substantial rights of the petitioner."

clear and objective requirement continues to apply only in circumstances where housing is proposed for development "on buildable land" as defined in ORS 197.295(1).[8] That is so, petitioner argues, for several reasons.

First, petitioner argues that although ORS 197.307(4) (2017) no longer includes the phrase "on buildable land," LCDC's rule that implements Goal 10, at OAR 660-008-0015, continues to include the phrase, and therefore limits the application of ORS 197.307(4)(2017)'s to "buildable land."[9] Second, petitioner argues that ORS 197.307(3) continues to include the phrase "buildable land," and argues the continuing reference in ORS 197.307(3) to "buildable land" provides

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[8] Petitioner does not argue that the application is not an application for "needed housing" as defined in ORS 197.303(1) (2017), or that it is not an application for "housing" within the meaning of ORS 197.307(4) (2017).

[9] Petitioner cites the definition of "buildable land" in the rule that implements Goal 10 generally, rather than the definition of "buildable land" that applies to cities and counties within the Metro UGB. As relevant here, LCDC's rule that implements Goal 10 for cities and counties within the Metro UGB, at OAR 660-007-0005(3), defines "Buildable Land" as:

> "[R]esidentially designated land within the Metro urban growth boundary, including both vacant and developed land likely to be redeveloped, that is suitable, available and necessary for residential uses. * * * Land is generally considered 'suitable and available' unless it:
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> " * * * * *
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> "(b) Is subject to natural resource protection measures determined under Statewide Planning Goals 5, 6 or 15[.]"

context for interpreting the legislature's intended meaning in deleting the phrase "on buildable land" in ORS 197.307(4) (2017).

Petitioner additionally argues that the legislative history of SB 1051 does not include any expressions of the legislature's intent to prohibit the county from applying subjective standards contained in CDC provisions that implement the county's Goal 5 program to intervenor's application for a residential subdivision. In support, petitioner points to a statement from a senator that petitioner argues provides evidence that the legislature did not intend to prohibit the county from applying standards adopted to protect Goal 5 resources:

> "Operative July 1, 2018, [SB 1051] will require cities and counties to approve an application if clear and objective development standards for needed housing are met; it expands the definition of needed housing to include affordable housing and housing on land zoned for residential use; the land must be zoned for residential use; cities and counties may not require developers to build below density or height requirements authorized in local zoning code if it has the effect of reducing density unless it is necessary for health, safety, or habitability, *or to comply with statewide planning goals*. * * *. This bill will not compromise the quality or integrity of the state's land use process." Record 128 (emphasis added).

Finally, petitioner argues that the hearings officer's interpretation of the statute would violate the canon of construction to avoid "absurd results" that are inconsistent with the apparent policy of the legislature, by prohibiting the county from applying discretionary code provisions that are intended to protect Goal 5 resources. *See State v. Vasquez-Rubio*, 323 Or 275, 283, 917 P2d 494 (1996) (stating that canon).

Intervenor responds that the express language of SB 1051 is unambiguous, and that SB 1051's deletion of the phrase "on buildable land" from ORS 197.307(4) expressly eliminated any previous requirement that may have existed that the local government must determine whether property that is the subject of a proposal to develop needed housing is "buildable land" as defined in ORS 197.295(1).[10] Intervenor argues that the continuing reference in ORS 197.307(3) to "buildable land" is not context for interpreting the unambiguous language in ORS 197.307(4) (2017), because ORS 197.307(3) does not apply to development applications for needed housing.

As context, intervenor also cites ORS 197.307(5), which was enacted long before SB 1051 was enacted in 2017, and contains two specific exemptions from the clear and objective requirement. ORS 197.307(5) provides:

> "The provisions of subsection (4) of this section do not apply to:
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> "(a) An application or permit for residential development in an area identified in a formally adopted central city plan, or a

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[10] As noted above, in *Warren v. Washington County*, 76 Or LUBA 295, we held that the subject property's inclusion in Metro's BLI meant that:

> "[a]t least some portion [of the property] has previously been determined by Metro to be 'buildable land' as defined in ORS 197.295(1). Accordingly, petitioners may not, in an appeal of the county's decision approving a subdivision of that land, argue that no part of the subject property is 'buildable land,' because that would amount to an impermissible collateral attack on Metro's decision to include at least portions of the subject property in the BLI." *Id.* at 304.

> regional center as defined by Metro, in a city with a population of 500,000 or more.
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> "(b) An application or permit for residential development in historic areas designated for protection under a land use planning goal protecting historic areas."

Intervenor argues that ORS 197.307(5) demonstrates the legislature knows how to exempt certain areas and resources from the reach of ORS 197.307(4), and it did not do so for lands designated for natural resource protection in SB 1051.

Intervenor also points out that petitioner's argument relies in part on an LCDC rule that has not yet been amended since SB 1051 was enacted, and that any inconsistency between the rule and SB 1051 is resolved in favor of the legislative enactment and not the rule. In response to petitioner's arguments regarding the legislative history of SB 1051, intervenor points to legislative history that supports a construction of SB 1051 that is consistent with the hearings officer's interpretation. Intervenor cites testimony from the chief sponsors of the house companion version of SB 1051, House Bill (HB) 2007. That testimony explains that HB 2007 was intended to "increase housing supply by removing barriers to development at the local level," and to ensure that housing is built on land zoned residential at the density permitted in the local zoning code, "unless doing so poses a risk to health, safety, or habitability." Record 138-39.

In construing the meaning of a statute, our task is to determine the legislature's intent in adopting the statute, looking at the text, context, and legislative history of the statute, and resorting, if necessary, to maxims of statutory construction. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-

12, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). For the reasons set forth below, we think the hearings officer's conclusion that ORS 197.307(4) (2017) prohibits him from applying standards in the CDC that are not clear and objective to intervenor's application is correct.

SB 1051 removed the phrase "on buildable land" from the previous version of ORS 197.307(4). The express removal of the phrase "on buildable land" from ORS 197.307(4) disconnected any previous link that may have existed between a property's inclusion on a buildable lands inventory or qualification as "buildable land" pursuant to ORS 197.295(1) from the requirement to apply only clear and objective standards to an application to develop housing. Now, ORS 197.307(4) applies the clear and objective requirement to all land proposed for "the development of housing, including needed housing."

Context for interpreting a statute can include "other provisions of the same statute and other related statutes." *PGE*, 317 Or at 611. We do not think that the fact that ORS 197.307(3) continues to use the phrase "buildable land" is particularly relevant context for reviewing the meaning of ORS 197.307(4) (2017).[11] ORS 197.307(3) is concerned with estimating housing demand and land

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[11] ORS 197.307(3) provides:

> "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

supply, and imposes a planning mandate on local governments that requires local governments to allow needed housing "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." ORS 197.307(4), differently, cabins the standards and criteria that a local government may apply when considering an application for the development of housing to those that are "clear and objective." The two sections of ORS 197.307 address different concerns, and ORS 197.307(3) continues to require local governments to allow needed housing in "one or more zoning districts" that include "sufficient buildable land to satisfy" the need for "housing within an urban growth boundary at particular price ranges and rent levels[.]"

However, ORS 197.307(5), the section that immediately follows the clear and objective requirement in ORS 197.307(4), provides some context for interpreting SB 1051. ORS 197.307(5)(b) contains an existing exemption from the clear and objective requirement in ORS 197.307(4) for one category of protected Goal 5 resources – historic resources. The existence of that statute demonstrates that the legislature knows how to create specific exemptions to the clear and objective requirement, and in particular to exempt some Goal 5 resources from the clear and objective requirement. *Bridgeview Vineyards, Inc. v. State Land Board*, 211 Or App 251, 263-64, 154 P3d 734, *rev den* 340 Or 690

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described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need."

(2007). The legislature has not created an exemption from the clear and objective requirement for other Goal 5 resources, or other areas, except the two specified in ORS 197.307(5)(a) and (b).

LCDC's current rules that continue to implement the previous version of ORS 197.307(4) do not assist us in interpreting the meaning of the statute, because the amended version of the statute controls over an inconsistent unamended rule. *State v. Newell*, 238 Or App 385, 392, 242 P3d 709 (2010). Finally, the legislative history of SB 1051 tends to support the hearings officer's interpretation. The chief sponsor of the bill stated that the goal of the legislation was to build more housing units unless a safety or health issue exists. Record 139. The staff measure summary explains that:

> "Currently, cities and counties are required to have a set of clear and objective development standards for 'needed housing.' *The measure strengthens existing statute by clarifying that jurisdictions must approve an application if it meets the clear and objective standards outlined within the city or county comprehensive plan or zoning ordinances. The measure updates the definition of 'needed housing' to include affordable housing and housing built on land zoned for residential use* so local jurisdictions can assess whether they are [providing] sufficient affordable housing when completing their housing needs assessments. *In addition, the measure maintains existing exemptions from clear and objective standards for Central City Portland, or regional centers as defined by Metro, and historic areas,* and the ability for developers to use a discretionary process." Record 145 (Emphases added.)

The staff measure summary evidences a legislative recognition of maintaining the two existing exemptions from the clear and objective requirement.

On balance, the legislative history tends to support the interpretation of SB 1051 that the hearings officer adopted. The statement from a senator that petitioner quotes in her brief does not address the issue of whether the clear and objective requirement applies to buildable land. It merely indicates that that particular senator believed the amendments to the statute would not affect the "quality or integrity of the state's land use process." Record 128.

Finally, although we do not think it is necessary to refer to canons of construction to ascertain the meaning of SB 1051 because the text and context resolve the issue, we disagree with petitioner's characterization that the hearings officer's interpretation will produce "absurd results." Petition for Review 30. *See Craven v. Jackson County*, 135 Or App 250, 254, 898 P2d 809, *rev den* 321 Or 512 (1995) ("[a] party's disagreement with a legislative policy, however deeply felt, does not render the legislation absurd."); *Southwood Homeowners v. City Council of Philomath*, 106 Or App 21, 24, 806 P 2d 162 (1991) (the absurd results canon should be used sparingly, because it comes with a risk of judicial displacement of legislative policy on the basis of speculation that legislature could not have meant what it said). The legislative purpose behind SB 1051 was "to increase housing supply by removing barriers to development at the local level." Record 138. That choice may have inadvertently or purposefully resulted in local governments being prohibited from applying subjective standards to proposals for development of housing, including subjective standards that were adopted to protect Goal 5 resources. However, that is a choice that the legislature

is free to make, and as ORS 197.307(5) demonstrates, the legislature knows how to limit the clear and objective requirement when it so desires.

In conclusion, we construe ORS 197.307(4) (2017) as prohibiting the county from applying any standards, conditions and procedures that are not clear and objective to intervenor's application to develop a six-lot residential subdivision, without regard to whether intervenor's property is "buildable land" within the meaning of ORS 197.295(1).

2. CDC 422-3.6

CDC 422-3.6 requires the applicant to demonstrate that "the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated." The hearings officer concluded that CDC 422-3.6 is not "clear and objective," and therefore that he could not apply it to intervenor's application. Record 67-68. The hearings officer also adopted alternative findings that the application satisfies CDC 422-3.6. Record 60-67.

In a portion of her first assignment of error, we understand petitioner to argue that the hearings officer is bound by previous findings that CDC 422-3.6 was not satisfied, which the hearings officer adopted in approving a previous application for development of a subdivision on the property. *See* n 3. However, petitioner does not challenge the hearings officer's finding that CDC 422-3.6 is not clear and objective and that therefore it could not be applied to intervenor's

application. Accordingly, petitioner's arguments provide no basis for reversal or remand of the decision.

Generally, approval standards are clear and objective if they do not impose "subjective, value-laden analyses that are designed to balance or mitigate impacts[.]" *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P 2d 685, *rev den* 328 Or 549 (1999). Even if petitioner had challenged the hearings officer's finding that CDC 422-3.6 is not clear and objective, CDC 422-3.6 requires the county to consider whether the proposed development will "seriously interfere" with fish and wildlife habitat and if so, to mitigate impacts from the proposed development. Such a standard requires the county to conduct a "subjective, value-laden analysis designed to balance or mitigate impacts," which ORS 197.307(4) prohibits.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

CDC 422-3.4 in general requires the county to determine whether a proposed modification to a degraded riparian corridor will result in an "enhancement," and defines "enhancement" as:

> "a modification, as a result of which no later than five (5) years after completion of the project, the quality and/or quantity of the natural habitats is measurably improved in terms of animal and plant species numbers, number of habitat types and/or amount of area devoted to natural habitat."

In her second assignment of error, petitioner argues that the hearings officer erred in concluding that CDC 422-3.4 is not "clear and objective" and that it could not

be applied to intervenor's application.[12] Record 59. Petitioner reiterates her arguments in the first assignment of error that the clear and objective requirement does not apply because portions of the property are not "buildable land." Petition for Review 35. We reject those arguments for the same reasons described above.

The hearings officer found that CDC 422-3.4 is not clear and objective because it does not guide the decision maker as to how or what constitutes habitat that is "measurably improved." Record 59-60. We agree with the hearings officer that the county's standard that requires the county to determine whether habitat is "measurably improved" will occur, but which does not include any objective benchmarks for measuring improvement, is not "clear and objective." *Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 158.

Petitioner also argues that some provisions of CDC 422-3.4 are clear and objective, such as the requirement for an applicant to submit an Animal Life Census and the requirement for the county to submit the application to the Oregon Department of Fish and Wildlife (ODFW) for comment. However, the ultimate question that CDC 422-3.4(A) requires the county to answer is whether an "enhancement" will result in habitat that is "measurably improved in terms of animal and plant species numbers, number of habitat types and/or amount of area

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[12] Petitioner does not identify the standard of review as required by OAR 661-010-0030(4)(d) but states that "The Hearings Officer's refusal to apply CDC 422-3.4 was error for the following reasons." Petition for Review 34. As noted, the challenged decision is a limited land use decision and we review challenges to limited land use decisions pursuant to ORS 197.828.

devoted to natural habitat" in five years. Without any benchmarks for measurement included in the standard, it is not "objective."

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

CDC 422-3.3 is a companion standard to CDC 422-3.4, discussed above. As relevant here, CDC 422-3.3 prohibits "new or expanded alteration of the vegetation or terrain" in the Riparian Corridor (as defined in CDC Section 106) or in an area designated as "Water Areas and Wetlands and Fish and Wildlife Habitat," except in the circumstances set out in CDC 422-3.3(A)(1)-(7). *See* n 2. As relevant here, CDC 422-3.3(A)(7) allows an "enhancement" in the Riparian Corridor (as defined in CDC 106), or an area designated as Water Areas and Wetlands and Fish and Wildlife Habitat, in two circumstances. First, it allows "enhancement" if that area "has been degraded" as demonstrated by the concurrence of an ODFW biologist. That "enhancement," however, must "conform[] to the definition and criteria listed in [CDC] 422-3.4." Second, it allows "enhancement or alteration" of a non-degraded portion of the area if that work is "in conjunction with or needed to support the enhancement of the degraded area."

As explained above, the hearings officer determined that the term "enhancement" and the provisions of CDC 422-3.4 governing enhancement are not "clear and objective." In the third assignment of error, petitioner again argues that the "clear and objective requirement" does not apply because the property is

not buildable land. Petitioner also again argues that the term "enhancement" is not a "standard" as that term is used in ORS 197.307(4) (2017), and therefore it is not subject to the clear and objective requirement. We reject both of those arguments for the reasons explained above.

The remainder of petitioner's third assignment of error is difficult to follow. However, we understand petitioner to argue that the county's conclusion that the portion of the property that includes the CWS Vegetated Corridor area south of Ash Creek is "degraded" as that term is used in CDC 422-3.3(A)(7) is not supported by substantial evidence in the record.[13] That is so, according to petitioner, because a letter that ODFW issued subsequent to a prior letter that concluded that the CWS Vegetated Corridor south of Ash Creek is "degraded" clarified that ODFW's earlier letter did not intend to serve as "concurrence" within the meaning of CDC 422-3.3(A)(7). Petition for Review 41. We understand intervenor to respond that the hearings officer's conclusion that the area proposed for enhancement is "degraded" is supported by substantial evidence in the record.

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[13] The hearings officer's findings regarding CDC 422-3.3 are not particularly clear, but we understand the hearings officer to also have concluded that CDC 422-3.3 did not apply to intervenor's proposal because a condition of approval prohibits encroachment into the Water Areas and Wetlands and Fish and Wildlife Habitat and therefore, no "enhancement" can occur within that area. Record 58. The hearings officer also found that the CWS Vegetated Corridor area south of Ash Creek was "degraded" due to the presence of non-native plant species. Record 61.

Although we need not address this aspect of petitioner's third assignment of error because we agree with the hearings officer that CDC 422-3.4 and CDC 422-3.3 are not "clear and objective," under our standard of review in ORS 197.828(2)(a), we conclude that the "decision is [] supported by substantial evidence in the record." ORS 197.828(2)(a) provides that LUBA is authorized to reverse or remand a limited land use decision if the "decision is not supported by substantial evidence in the record." ORS 197.828(2)(a) further provides that "[t]he existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision[.]" ODFW's letter at Record 125 is evidence in the record to support the hearings officer's conclusion that the CWS Vegetated Corridor south of Ash Creek is "degraded" within the meaning of CDC 422-3.3(A)(7), if the county was not prohibited from applying that section.

The third assignment of error is denied.

The county's decision is affirmed.