BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

COMMUNITY PARTICIPATION ORGANIZATION 4M
and JILL WARREN,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2020-110

FINAL OPINION
AND ORDER

Appeal from Washington County.

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

Jacquilyn E. Saito filed the response brief and argued on behalf of respondent.

ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

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

REMANDED 09/29/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal Ordinance 869, a legislative decision and a post-acknowledgment plan amendment (PAPA) that amends the county's Community Development Code (CDC) Significant Natural Resource (SNR) provisions.[1]

MOTION TO FILE OVERLENGTH RESPONSE BRIEF

The county filed a precautionary motion to file an overlength response brief. The county subsequently filed a response brief that complies with the word-count limitation in our rules. OAR 661-010-0035(2); OAR 661-010-0030(2)(b). Accordingly, the county's motion to file an overlength response brief is moot.

MOTION TO TAKE OFFICIAL NOTICE

The county moves the Board to take official notice of a portion of the county's comprehensive plan. Petitioners do not oppose that motion. Under ORS 40.090(7), LUBA may take official notice of an "ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom." LUBA routinely takes official notice of local government comprehensive plans and land use regulations. *McNamara v. Union County*, 28 Or LUBA 722, 723 (1994). The county's motion to take official notice is granted.

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[1] In this opinion, we refer to the challenged decision as Ordinance 869 and the PAPA.

BACKGROUND

Ordinance 869 flows from prior challenges to the county's application of the CDC SNR provisions. As will become apparent in this decision, the issues in this appeal highlight the tensions between the statewide adopted policies of (1) protecting significant natural resources and (2) providing a clear and relatively unfettered pathway to the development of housing.

Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) is "[t]o protect natural resources and conserve scenic and historic areas and open spaces." In 1981, the Land Conservation and Development Commission (LCDC) adopted its first set of administrative rules implementing Goal 5. *See generally* OAR chapter 660, division 16 (providing requirements and application procedures for complying with Goal 5). Under those administrative rules, local governments are required to inventory and adopt programs to protect certain Goal 5 resources. In *Hatley v. Umatilla County*, the Court of Appeals summarized the logistics of local government compliance with Goal 5 as follows:

> "Pursuant to OAR chapter 660, division 16, local governments must conduct three tasks to comply with Goal 5. First, local governments must inventory key resource sites. OAR 660-016-0000. Then, local governments must identify conflicting uses with the inventoried Goal 5 resource sites and determine the 'economic, social, environmental and energy' (ESEE) consequences of allowing those conflicting uses for those resource sites. OAR 660-016-0005(1). Last, based on its determination of the ESEE consequences, the local government must develop a 'program to achieve the Goal.' OAR 660-016-0010." 256 Or App 91, 94, 301 P3d 920, *rev den*, 353 Or

867 (2013).

During the 1980s, the county inventoried and mapped Goal 5 SNRs, including significant fish and wildlife habitat. The county's adopted Goal 5 program includes policies and standards that balance development with preservation and protection in mapped SNR areas. Record 1896.

In 1996, LCDC revised its administrative rules implementing Goal 5. *See generally* OAR chapter 660, division 23 (providing procedures and requirements for complying with Goal 5). The revised Goal 5 administrative rules authorize Metro to "adopt one or more regional functional plans to address all applicable requirements of Goal 5 and this division for one or more resource categories."[2] OAR 660-023-0080(3). Pursuant to that authority, Metro developed a regional fish and wildlife protection program. Record 1898. In concert with Metro's planning efforts, the county, along with other cities and local agencies, conducted a Goal 5 analysis of SNRs and developed a comprehensive program for the protection of fish and wildlife habitat within the Tualatin basin. *Id.* In 2005, the county adopted components of the Tualatin Basin Program into its land use legislation, Metro incorporated the Tualatin Basin Program into its regional program and adopted its regional program into Title 13 of its Urban Growth

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[2] Metro is a metropolitan service district organized under ORS chapter 268, whose primary responsibilities under its charter and governing statutes include coordinating the growth of the cities in the Portland metropolitan region and planning for regional parks, open spaces and recreational facilities, and the regional transportation system.

Management Functional Plan, and LCDC acknowledged Title 13 as complying with Goal 5. Record 1899, 2188; Metro Code 3.07.1330(b)(5). As a result, the county's adopted Goal 5 program now consists of the program originally adopted in the 1980s as supplemented by the Tualatin Basin Program in 2005.

In 2017, the legislature enacted and the Governor signed Senate Bill (SB) 1051. Or Laws 2017, ch 745. SB 1051 amended several statutes, including, as relevant here, ORS 197.307(4), which requires that local governments adopt and apply only clear and objective standards, conditions, and procedures regulating the development of housing.[3] We refer to that provision in this opinion as the clear and objective requirement. SB 1051 amended ORS 197.307 and enlarged the clear and objective requirement. Specifically, the legislature deleted the requirements that the proposed development of housing be "on buildable land" and that it be for "needed housing." Or Laws 2017, ch 745, § 5. Prior to SB 1051,

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[3] ORS 197.307(4) provides:

> "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:
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> "(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."

the county was not limited to applying only clear and objective standards to the development of housing in areas with mapped SNRs, because those areas were not considered "buildable land." *Warren v. Washington County*, 76 Or LUBA 295 (2017).

After the enactment of SB 1051, we determined that three subsections of the CDC regulating the development of housing in SNR-mapped areas were unenforceable as not clear and objective: CDC 422-3.3, CDC 422-3.4, and CDC 422-3.6. *Warren v. Washington County*, 78 Or LUBA 375 (2018), *aff'd*, 296 Or App 595, 439 P3d 581, *rev den*, 365 Or 502 (2019) (*Warren*).

In 2020, LCDC issued an enforcement order requiring the county to adopt clear and objective standards for the invalidated portions of CDC 422. The county adopted Ordinance 869 to comply with that enforcement order. Record 49. The county maintains that Ordinance 869 amends only those SNR provisions determined to be not clear and objective and that it is intended to make those provisions clear and objective, within the county's existing Goal 5 program. This appeal followed.

SECOND ASSIGNMENT OF ERROR

A. The county is required to apply Goal 5 to the PAPA.

Pursuant to OAR 660-023-0250(3), a local government that adopts a PAPA generally must apply Goal 5 whenever the PAPA "affects a Goal 5 resource." OAR 660-023-0250(3) provides:

"Local governments are not required to apply Goal 5 in

consideration of a PAPA) unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
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> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or
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> "(c) The PAPA amends an acknowledged [urban growth boundary (UGB)] and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area."

OAR 660-023-0050(2) requires that, "[w]hen a local government has decided to protect a resource under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards." We refer to that provision in this opinion as the clear and objective standard.[4] Petitioners argue that Ordinance

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[4] OAR 660-023-0050(2) provides:

> "When a local government has decided to protect a resource site under OAR 660-023-0040(5)(b), implementing measures applied to conflicting uses on the resource site and within its impact area shall contain clear and objective standards. For purposes of this division, a standard shall be considered clear and objective if it meets any one of the following criteria:
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> "(a) It is a fixed numerical standard, such as a height limitation of 35 feet or a setback of 50 feet;

869 contains standards that are not clear and objective and therefore violates OAR 660-023-0050(2).

The county responds that the clear and objective standard does not apply to Ordinance 869 because it does not "affect[] a Goal 5 resource" and, thus, it is not within the range of PAPAs described in OAR 660-023-0250(3), quoted above. As we understand it, the county argues that Ordinance 869 does not affect a Goal 5 resource because Ordinance 869 does not comprehensively revise the county's Goal 5 program and, instead, amends only those provisions of CDC 422 that were determined to be unenforceable housing standards because they were not clear and objective.

Hatley v. Umatilla County, 66 Or LUBA 265 (2012), *aff'd in part, rev'd in part, and rem'd*, 256 Or App 91, 301 P3d 920, *rev den*, 353 Or 867 (2013), which petitioners and the county cite for its discussion of OAR 660-023-

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> "(b) It is a nondiscretionary requirement, such as a requirement that grading not occur beneath the dripline of a protected tree; or
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> "(c) It is a performance standard that describes the outcome to be achieved by the design, siting, construction, or operation of the conflicting use, and specifies the objective criteria to be used in evaluating outcome or performance. Different performance standards may be needed for different resource sites. If performance standards are adopted, the local government shall at the same time adopt a process for their application (such as a conditional use, or design review ordinance provision)."

0250(3)(a), is instructive. In *Hatley*, the petitioner appealed county ordinances that amended the county's land use regulations regarding wind energy facilities. The county adopted the two challenged ordinances following LUBA's remand in *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012). In *Cosner*, LUBA concluded that, because the county had adopted additional measures intended to protect inventoried Goal 5 resources from the impacts of wind energy facility development, those ordinances amended the county's Goal 5 program and the county erred in failing to address the Goal 5 administrative rules. On remand, the county deleted the language in the ordinances that had included measures to protect inventoried Goal 5 resources from the impacts of wind energy facility development.

> "Specifically, the county deleted the requirement that the applicant for a wind energy facility demonstrate that the facility will not conflict with significant Goal 5 resources within the Walla-Walla sub-basin, and that the facility will not be located within critical winter habitat. Critical winter habitat is a Goal 5 resource. Ordinance No. 2012-05 left unchanged requirements that the facility not be constructed on soils identified has highly erodible, and that the facility be set back at least two miles from streams and tributaries that contain federally listed threatened and endangered species." *Hatley*, 66 Or LUBA at 278.

We agreed with the county that it did not err in failing to apply the Goal 5 rules to the remaining restrictions on developing wind energy facilities on highly erodible soils and within two miles of streams with federally listed species. *Id.* at 280. We explained that the question under OAR 660-023-0250(3)(a) is whether the PAPA "amends a portion of an acknowledged plan or land use regulation

adopted 'in order to protect' a significant Goal 5 resource or to address specific requirements of Goal 5." *Id.* In *Hatley*, the county adopted the challenged plan amendments to protect highly erodible soils and federally listed species. It was undisputed that highly erodible soils and streams with federally listed species were not inventoried Goal 5 resources in the county. We reasoned that the fact that those amendments may provide additional protection to some of the riparian and fish habitat areas listed in the county's Goal 5 inventory did not necessarily mean that the ordinances amended "a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource" for purposes of OAR 660-023-0250(3)(a). Accordingly, we agreed with the county that it was not required to address Goal 5 as part of the PAPA adopted on remand. The Court of Appeals affirmed that part of our decision. *Hatley*, 256 Or App at 100-06.

The county argues that this case is similar to *Hatley* and that Goal 5 does not apply. The county argues that the county adopted Ordinance 869 to comply with ORS 197.307(4) and to satisfy the demands of LCDC's enforcement order, *not* "to protect a Goal 5 resource." OAR 660-023-0250(3)(a).

The county's argument focuses on the county's motivation for adopting Ordinance 869. However, the inquiry under OAR 660-023-0250(3)(a) focuses on the purpose of the acknowledged plan or land use regulation provisions that a PAPA "creates or amends." It is undisputed that CDC 422 is part of the county's program to protect inventoried Goal 5 resources—that is, acknowledged land use

regulations that were "adopted in order to protect a significant Goal 5 resource." OAR 660-023-0250(3)(a). Ordinance 869 creates new regulations and amends existing regulations in CDC 422. Accordingly, Ordinance 869 is within those decisions described in OAR 660-023-0250(3), and OAR 660-023-0050(2) applies.[5] We proceed to the merits of petitioners' argument that Ordinance 869 contains standards that are not clear and objective, as required by OAR 660-023-0050(2).

B. OAR 660-023-0050(2) requires clear and objective standards.

As explained above, the county may adopt and apply only clear and objective standards regulating the development of conflicting uses in SNR areas. OAR 660-023-0050(2). "Clear and objective" are terms of art in the land use context. The legislature adopted the clear and objective requirement for housing development in 1981. Or Laws 1981, ch 884, § 5. LCDC adopted the clear and objective standard for implementing Goal 5 in 1996. As discussed further below, LCDC provided a non-exclusive list of criteria for determining whether a standard is clear and objective. OAR 660-023-0050(2)(a) - (c). Because ORS 137.307(4) and OAR 660-023-0050(2) use the same terms "clear and objective," we conclude that LCDC generally intended that the legal standard that applies to determine whether a provision satisfies the clear and objective requirement in

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[5] That conclusion is not contrary to the reasoning in *Hatley*. In *Hatley*, the challenged PAPA did not amend the county's existing Goal 5 program or create a new land use regulation in order to protect a Goal 5 resource.

ORS 137.307(4) also applies to determine whether a provision satisfies the clear and objective standard in OAR 660-023-0050(2).

1. CDC 422-3.5

CDC 422-3.5, adopted by Ordinance 869, requires applications for development on sites containing or within 100 feet of mapped SNR areas to submit "[a] Habitat Assessment that identifies the size, extent and type of wildlife habitat located in the field-verified Water-Related Fish and Wildlife Habitat and Upland/Wildlife Habitat. The Assessment will evaluate and rate the different habitat values using the methodology outlined in the Habitat Assessment Guidelines." At the time that the county adopted Ordinance 869, the county had not yet adopted the referenced Habitat Assessment Guidelines. Petitioners argue that CDC 422-3.5 is not "clear and objective" because it does not itself specify the standards for the required habitat assessment.

Petitioners explain that the county ultimately adopted the Habitat Assessment Guidelines in December 2020, after adopting Ordinance 869 in October 2020.[6] Petitioners argue that the substance of those guidelines is irrelevant to this assignment of error because they postdate Ordinance 869 and

[6] The county's decision adopting the Habitat Assessment Guidelines is the subject of a separate pending appeal in LUBA No. 2021-002.

are not in the record in this appeal.[7] Petitioners do not argue in this appeal that the guidelines themselves are not clear and objective.

The county responds that the fact that the Habitat Assessment Guidelines were referenced in but not adopted until after Ordinance 869 does not violate the clear and objective standard in OAR 660-023-0050(2). The county asserts that the habitat assessment required by CDC 422-3.5 is clear and objective because it is "a nondiscretionary requirement, such as a requirement that grading not occur beneath the dripline of a protected tree." OAR 660-023-0050(2)(b). According to the county, "CDC 422-3.5 requires an applicant to submit a Habitat Assessment according to objective, discrete parameters." Response Brief 26. The county argues that, if CDC 422-3.5 is not clear and objective because the Habitat Assessment Guidelines were undefined when CDC 422-3.5 was adopted, then, under that same reasoning, the example of a clear and objective standard in OAR 660-023-0050(2)(b) would not be clear and objective because the terms "grading," "beneath," "dripline," and "protected" are not defined.

We disagree with the county that the standard in CDC 422-3.5 is the type of nondiscretionary requirement described in OAR 660-023-0050(2)(b). CDC 422-3.5 may be characterized as a "nondiscretionary" requirement insofar as it requires the submission of a habitat assessment. However, as explained further

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[7] No party has asserted that Habitat Assessment Guidelines are subject to official notice or requested that we take official notice thereof.

below, CDC 422-3.6, which was also adopted by Ordinance 869, allows the county to, "at its discretion, waive [the] submittal requirements of Section 422-3," including CDC 422-3.5.

CDC 422-3.5 does not provide the criteria that must be used in the habitat assessment. Instead, it points to the Habitat Assessment Guidelines. A standard that is required to be clear and objective is not rendered unclear or subjective simply because it refers to other criteria for satisfaction. However, the referenced criteria must also be clear and objective. *See Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 412-13 (2002) (concluding that a local code provision that referred to and was governed by standards located elsewhere in the code did not violate ORS 197.307(4) where the petitioners did not explain why the referenced standards themselves violated ORS 197.307(4)).

OAR 660-023-0050(2)(c) provides that a performance standard is clear and objective if it "specifies the objective criteria to be used in evaluating outcome or performance" and at the same times adopts a process for the application of those criteria. The habitat assessment requirement in CDC 422-3.5 is more similar to a performance standard than a nondiscretionary standard. CDC 422-3.5 specifies the criteria for the habitat assessment—the Habitat Assessment Guidelines—and the process for its application as a submittal requirement. However, the county has not argued or explained that the Habitat Assessment Guidelines are themselves clear and objective. The Habitat Assessment Guidelines are not in the record before us. Accordingly, we cannot conclude that

CDC 422-3.5 is clear and objective, as required by OAR 660-023-0050(2). In these circumstances, we agree with petitioners that remand is appropriate for the county to resolve this issue on a record that includes the Habitat Assessment Guidelines that the county adopted after the PAPA.

Petitioners argue that other provisions of CDC 422, as amended or adopted by Ordinance 869, are not clear and objective. We proceed to analyze those issues because they are likely to persist on remand.

2. CDC 422-7

Ordinance 869 amended and renumbered *former* CDC 422-3.6 as CDC 422-7. That provision prohibits uses that would "seriously interfere" with SNRs outside the UGB unless the interference can be "mitigated."[8] Petitioners argue that those terms are not clear and objective, and they observe that the language of CDC 422-7 is very similar to the language of *former* CDC 422-3.6, which we determined was not clear and objective in *Warren*. 78 Or LUBA at 387-88.

The county responds that it chose not to change the standard for rural areas because the needed housing rule in ORS 197.307(4) requires clear and objective

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[8] CDC 422-7 provides:

> "For any proposed use in a Water-Related Wildlife Habitat or an Upland/Wildlife Habitat outside a UGB and as identified in the Rural/Natural Resource Plan, there shall be a finding 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."

standards for the development of housing within a UGB, citing the definition of "needed housing" in ORS 197.303(1).[9] The county contends that ORS 197.307(4) does not require clear and objective standards for the development of housing outside a UGB.

The county is mistaken. As we explained above, SB 1051 amended ORS 197.307 and enlarged the clear and objective requirement by removing the

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[9] ORS 197.303(1) provides:

> "As used in ORS 197.286 to 197.314, '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 U.S.C. 1437a. 'Needed housing' includes the following housing types:
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> "(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
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> "(b) Government assisted housing;
>
> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
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> "(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
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> "(e) Housing for farmworkers."

previous requirements that the proposed development of housing be "on buildable land" and that it be for "needed housing." By its terms, the clear and objective requirement applies to "the development of housing, including needed housing." ORS 197.307(4). The applicability of ORS 197.307(4) is not confined to areas within a UGB by the definition of needed housing in ORS 197.303(1).

More to the point, petitioners argue that CDC 422-7 imposes standards for the development of conflicting uses in SNR areas that are not clear and objective, as required by OAR 660-023-0050(2). As we explained above, that clear and objective standard applies to Ordinance 869. We agree with petitioners that the terms "seriously interfere" and "mitigated" in CDC 422-7 render that provision not clear and objective under OAR 660-023-0050(2) for the same reasons that we determined *former* CDC 422-3.6 was not clear and objective under ORS 197.307(4) in *Warren*. CDC 422-7 requires the county to consider whether the proposed development will "seriously interfere" with fish and wildlife habitat and, if so, whether those impacts can be "mitigated." Such a standard is not clear and objective because it requires the county to conduct a "subjective, value-laden analysis designed to balance or mitigate impacts." *Warren*, 78 Or LUBA at 387 (quoting *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 549 (1999)).

3. CDC 422-5.5

CDC 422-5.5, adopted by Ordinance 869, provides: "Unauthorized removal of trees in the Preservation Area is subject to the compliance standards

in Section 215 (Code Compliance). Notwithstanding Section 215, unauthorized removal of trees may be mitigated subject to compliance with the standards of 422-5.3." CDC 422-5.5 allows a developer to "mitigate" the unauthorized removal of trees in designated preservation areas.

Petitioners argue that the term "mitigated" is undefined and renders that provision not clear and objective. The county responds that "mitigated" is not a standard in CDC 422-5.5 but, instead, is used as a verb. The county argues that compliance with CDC 422-5.5 is achieved through satisfaction of the standards in CDC 422-5.3, also adopted by Ordinance 869, which, in turn, requires satisfaction of other standards. The county does not explain how those standards are clear and objective, and it is not clear to us that they are. For example, CDC 422-5.3(C)(2) provides: "The Preservation Area shall be enhanced to Good Condition, as defined in the Habitat Assessment Guidelines. Invasive species shall be removed, and native plants shall be installed and maintained in accordance with Section 407-8."

We concluded above that the standards in the Habitat Assessment Guidelines must be clear and objective in order for a standard that relies on those guidelines to be clear and objective. Accordingly, we cannot conclude on the record before us that CDC 422-5.5 is clear and objective, as required by OAR 660-023-0050(2). In these circumstances, we agree with petitioners that remand is appropriate for the county to resolve this issue on a record that includes the Habitat Assessment Guidelines.

4. CDC 422-3.6

CDC 422-3.6, adopted by Ordinance 869, allows the county, "at its discretion," to waive submittal requirements for development applications in mapped SNR areas outside the UGB. Petitioners argue that that provision does not provide any clear and objective criteria for the exercise of that discretion.[10] The county does not respond to that argument. While the standard for waiver requires, at a minimum, that the proposed development be more than 100 feet from mapped SNR areas, waiver is otherwise at the county's unfettered discretion and based on the applicant addressing Washington County Rural/Natural

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[10] CDC 422-3.6 provides:

> "For development applications outside the UGB that contain mapped [SNRs], the Review Authority may. at its discretion, waive submittal requirements of Section 422-3 when proposed development is more than 100 feet from [SNR] areas mapped as Water Areas and Wetlands or Water-Related Fish and Wildlife Habitat and the submittal addresses how Rural/Natural Resource Plan Element Policy 10, Implementing Strategy e. applies to the development site (Section 422-3.3)."

Washington County Rural/Natural Resource Plan Element Policy 10 is "to protect and enhance Significant Fish and Wildlife Habitat." Policy 10, Implementing Strategy e, provides that the county will

> "[i]mplement the recommendations of the Oregon Department of Fish and Wildlife Habitat Protection Plan for Washington County and to mitigate the effects of development in the Big Game Range within the EFU, EFC and AF-20 land use designations. The recommendations of the Wildlife Habitat Protection Plan shall be applied to development applications for land outside [a UGB]."

Resource Plan Element Policy 10, Implementing Strategy e. CDC 422-3.6 does not provide a clear and objective measurement to establish whether an applicant has adequately addressed Policy 10, Implementing Strategy e. Nor has the county argued, let alone established, that Policy 10, Implementing Strategy e, is itself clear and objective. We agree with petitioners that CDC 422-3.6 is not clear and objective because it allows the county to exercise discretion without any clear and objective parameters. *See Roberts v. City of Cannon Beach*, ___ Or LUBA ___, ___ (LUBA No 2020-116, July 23, 2021) (slip op at 25) ("[A] standard is not clear and objective if it is capable of being applied in multiple ways in a manner that allows the [local government] to exercise significant discretion in choosing which interpretation it prefers.").

The second assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county adopted Ordinance 869 without first providing for public review and participation in the county's adoption of the Habitat Assessment Guidelines that are referenced in Ordinance 869. Petitioners argue that the county thereby "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner." ORS 197.835(9)(a)(B). Petitioners assert that, because the county did not provide an opportunity in the PAPA proceeding for petitioners to review the Habitat Assessment Guidelines that are referenced in the PAPA, petitioners were

unable to meaningfully participate in the PAPA proceeding with respect to those guidelines.

Petitioners do not identify any specific applicable procedure that required the county to adopt the Habitat Assessment Guidelines contemporaneously with and in the same proceeding as Ordinance 869. Nevertheless, we concluded under the second assignment of error that the county has not established that Ordinance 869 adopted only clear and objective standards, as required by OAR 660-023-0050(2), and we remand for the county to resolve that issue on a record that includes the Habitat Assessment Guidelines that the county adopted after the PAPA. On remand, the county should provide an opportunity for the public to review and comment on the Habitat Assessment Guidelines, as they relate to the PAPA. With that disposition, the fourth assignment of error is moot.

THIRD ASSIGNMENT OF ERROR

As explained above, Goal 5 and its implementing administrative rules require the county to inventory significant resource sites and develop regulations to protect certain sites. "'Protect,' when applied to an individual resource site, means to limit or prohibit uses that conflict with a significant resource site." OAR 660-023-0010(7). Petitioners argue that Ordinance 869 violates Goal 5 because it allows some significant wildlife habitat to be developed without any protections limiting conflicting uses. For example, CDC 422-5.2, adopted by Ordinance 869, exempts development on a site with a habitat area of less than 2,000 square feet from otherwise applicable tree preservation requirements. CDC

422-5.2(E).[11] Petitioners argue that the Goal 5 administrative rules provide no such exceptions to the requirement that the county "protect" SNRs, including significant wildlife habitat.

The county responds by incorporating its argument under the second assignment of error, that the Goal 5 administrative rules do not apply to Ordinance 869 under OAR 660-023-0250(3). We rejected that response under the second assignment of error, and we reject it again here for the same reason.

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[11] CDC 422-5.2 provides:

"Exceptions

"The following are not subject to Section 422-5:

"A. Tree removal permitted under Section 407-3 (Tree Preservation and Removal).

"B. Construction or alteration of a residence or accessory structure when located on an existing lot or parcel created prior to November 27, 2020.

"C. A building permit for a previously approved development project, as long as the lotting pattern has not been modified and the land division was approved prior to November 27, 2020.

"D. Development associated with the regionally significant educational or medical facilities at Portland Community College, Rock Creek Campus, 17865 N.W. Springville Road, Portland as identified on Metro's Regionally Significant Educational or Medical Facilities Map.

"E. Development on a site with a Habitat Area of less than 2,000 square feet."

Moreover, while petitioners do not cite OAR 660-023-250(3)(b), petitioners' argument appears to be that the new list of exceptions in CDC 422-5.2 "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." OAR 660-023-0250(3)(b). It appears to us that the new list of exceptions allows at least some new, potentially conflicting uses without the county having followed the procedures required by the Goal 5 administrative rules for allowing conflicting uses.

Petitioners request that we reverse or remand under the third assignment of error. The proper disposition is remand, not reversal. OAR 660-023-0250(3)(b) requires that the county conduct an initial inquiry to determine whether new uses allowed under Ordinance 869 "could" conflict with Goal 5 resources. If the county's initial inquiry cannot eliminate the possibility of conflicts from the new uses allowed by the PAPA, then the county must repeat any of the steps in the Goal 5 planning process that are necessary to ensure that the county's Goal 5 obligations with respect to protected resources continue to be met. *Nicita v. City of Oregon City*, 75 Or LUBA 38, 51-52, *aff'd*, 286 Or App 659, 399 P3d 1087, *rev den*, 362 Or 300 (2017).

The third assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the PAPA is not in compliance with the county's comprehensive plan. ORS 197.835(7)(a). Petitioners argue that CDC 422-5.3(A),

adopted by Ordinance 869, will allow "outright the destruction of 75-85% of [the trees within] designated 'Wildlife Habitat' SNRs."[12] Petition for Review 11-12. Petitioners argue that that is inconsistent with Washington County Comprehensive Framework Plan for the Urban Area Policy 10, Implementing Strategies a and h, which require that the county facilitate the pursuit of "all reasonable methods" for preserving the unique values of SNRs prior to development and that the county regulate the removal of trees "in order to retain the wooded character and habitat of urban forested lands."[13] Petitioners contend

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[12] CDC 422-5.3 provides:

> "Preservation of a portion of the total Habitat Area on the development site is required, as follows:
>
> "A. The area required for preservation (Preservation Area) shall be determined based on either (1) or (2), below, but shall in no case be less than 500 square feet:
>
> "(1) A minimum of 25% of the Habitat Area (Option 1); or
>
> "(2) A minimum of 15% of the Habitat Area, when located adjacent to an on- or off-site Riparian Corridor or [Clean Water Services] Vegetated Corridor (Option 2)."

[13] Washington County Comprehensive Framework Plan for the Urban Area Policy 10 is "to protect and enhance Significant Natural Areas." Policy 10, Implementing Strategies a and h, provide that the county will:

> "a. Identify Significant Natural Resources and directions for their protection or development in the community plans. Those directions shall assure that the unique values of [SNRs] can be examined and that all reasonable methods for their

that the protections for significant wildlife habitat under Ordinance 869 further conflict with Policy 10 because CDC 422-3.1, as amended by Ordinance 869, allows developers to reduce the boundaries of designated habitat areas through a field verification process under the Habitat Assessment Guidelines. Finally, as discussed above, CDC 422-5.2 provides exceptions from tree preservation requirements for development on sites with habitat areas of less than 2,000 square feet and for other specified types of development. Petitioners argue that those exceptions conflict with Policy 10 and are not supported by any other policy in the county's comprehensive plan.

With respect to Policy 10, the county quoted Implementing Strategies b and i, which provide that the county will:

> "b. Outside of [SNRs], provide opportunity for the protection and enhancement of Regionally Significant Fish & Wildlife Habitat, as identified by Metro's Regionally Significant Fish & Wildlife Habitat Inventory Map, without penalty for the potential loss of development density that may result.
>
> "* * * * *

> preservation can be pursued prior to development, without penalty for the potential loss of development density that may result.
>
> "* * * * *
>
> "h. Develop tree conservation standards to regulate the removal of or damage to trees and vegetation in identified Significant Natural Areas within the unincorporated urban area, in order to retain the wooded character and habitat of urban forested lands."

"i. Coordinate with Clean Water Services [(CWS)] to adopt or amend local standards, which ensure that fish and wildlife habitats are adequately protected and enhanced in compliance with local, regional, state and federal requirements."

The county found:

"The County has coordinated with CWS, clarified the references to Metro's Regionally Significant Fish and Wildlife Inventory, provided consistency in the standards with Title 13 and the Tualatin Basin Program and identified reasonable methods for preservation of the County's SNRs and therefore finds that A-Engrossed Ordinance No. 869 is consistent with Policy 10 and these strategies." Record 61.

Petitioners argue that that finding is inadequate to reconcile Ordinance 869 with Policy 10. Moreover, petitioners argue that the county misconstrued Policy 10 by relying on Title 13 of Metro's Urban Growth Management Functional Plan and the Tualatin Basin Program, which petitioners contend are designed to protect regionally significant natural resources, as contrasted with the locally significant natural resources that were identified in the county's original ESEE analysis in the 1980s. *See* OAR 660-023-0080(1)(b) ("'Regional resource' is a site containing a significant Goal 5 resource, including but not limited to a riparian corridor, wetland, or open space area, which is identified as a regional resource on a map adopted by Metro ordinance."). Petitioners argue that the county's finding of consistency with Title 13 and the Tualatin Basin Program is irrelevant to finding that the PAPA is consistent with Policy 10.

"Because the challenged decision is a legislative rather than a quasi-judicial decision, there is no generally applicable requirement that the decision[]

be supported by findings, although the decision and record must be sufficient to demonstrate that applicable criteria were applied and 'required considerations were indeed considered.'" *Restore Oregon v. City of Portland*, ___ Or LUBA ___, ___ (LUBA Nos 2018-072/073/086/087, Aug 6, 2019) (slip op at 6), *aff'd*, 301 Or App 769, 458 P3d 703 (2020) (quoting *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002)). The county's findings demonstrate that the county considered Policy 10. Petitioners have not established that more detailed findings are required for a legislative decision. Petitioners' findings challenge is denied.

The county responds that the county board of commissioners implicitly balanced Policy 10 with other policies encouraging housing development and compliance with the clear and objective requirement.

We will defer to the county's interpretation of its comprehensive plan provisions so long as that interpretation is not inconsistent with the provisions' express language, purpose, or underlying policy. ORS 197.829(1).

> "[T]o the extent that the interpretation is directed at multiple statements that may be in conflict, the inconsistency determination is a function of two inquiries: (1) whether the interpretation in fact is an interpretation, *i.e.*, a considered determination of what was intended that plausibly harmonizes the conflicting provisions or identifies which ones are to be given full effect; and (2) the extent to which the interpretation comports with the 'express language' of the relevant provisions (including, necessarily, those provisions that, according to the interpretation at issue, are to be given full effect)." *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776 (2010).

We cannot tell from the county's decision that the county considered comprehensive plan policies regarding housing and balanced those policies against Policy 10. Accordingly, there is no implicit interpretation to which we may defer. In all events, because we remand the county's decision under the second and third assignments of error, and because the county may adopt new or different findings with respect to Policy 10 on remand, we do not resolve petitioners' argument in the first assignment of error that the county misconstrued Policy 10.

The first assignment of error is denied, in part.

The county's decision is remanded.