

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

3
4 EAST PARK, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent.*

11
12 LUBA No. 2022-050

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Salem.

18
19 Edward H. Trompke filed the petition for review and reply brief and argued
20 on behalf of petitioner. Also on the brief was Jordan Ramis PC.

21
22 Daniel B. Atchison filed the respondent's brief and argued on behalf of
23 respondent.

24
25 RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board
26 Member, participated in the decision.

27
28 REVERSED 08/30/2022

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city council decision denying a conditional use permit (CUP) for a 291-unit multi-family apartment complex.

MOTION TO STRIKE

OAR 661-010-0039 provides that a reply brief is allowed and required to be filed “within seven days of the date the respondent’s brief is filed.” On July 20, 2022, the city filed the respondent’s brief. On July 29, 2022, petitioner filed a reply brief. On August 2, 2022, the city filed a motion to strike petitioner’s reply brief as untimely.

The city cites *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 1031 (2018), for the proposition that “[t]he Board has determined that the 2010 amendment [to OAR 661-010-0039] created a filing deadline and that a violation of the rule is not a ‘mere technical violation.’”¹ Motion to Strike 1. Our holding in *Yamhill Creek Solar* is specific to the facts of that case. In *Yamhill Creek Solar*, the petitioner filed a request to file a reply brief 48 days after the response briefs were filed. We noted that the reply brief was not lengthy and that time remained before oral argument such that the respondents had adequate time to prepare responses to the reply brief. We nevertheless struck the reply brief because we

¹ OAR 661-010-0005 provides that “[t]echnical violations not affecting the substantial rights of the parties shall not interfere with the review of a land use decision or limited land use decision.”

1 determined that the unexplained and unjustified 48-day delay was egregious and
2 not a mere technical violation that could be overlooked.

3 Here, petitioner did not offer an explanation for its late filing of the reply
4 brief or request an extension of time to file the reply brief. The reply brief was,
5 however, filed two, rather than 48, days after the respondent's brief was filed and
6 11 days before oral argument. The city does not argue that its substantial rights
7 have been affected by the late filing, and we conclude that the late filing is a
8 technical violation.

9 The motion to strike is denied.

10 **MOTION TO TAKE OFFICIAL NOTICE**

11 Petitioner requests that we take official notice of (1) the Department of
12 Land Conservation and Development's (DLCD's) notice to local jurisdictions of
13 the passage of Senate Bill 1051 (2017), extending the application of ORS
14 197.307(4) to all housing inside an urban growth boundary (the DLCD notice);
15 (2) the city's comprehensive plan map; and (3) a housing needs analysis.² *Blatt*
16 *v. City of Portland*, 21 Or LUBA 337, 341, *aff'd*, 109 Or App 259, 819 P2d 309
17 (1991), *rev den*, 319 Or 727 (1992) (LUBA has authority to take official notice
18 of the law set out in ORS 40.090).

19 We take official notice of the DLCD Notice as an official act of an
20 executive department of the state pursuant to ORS 40.090(2). The comprehensive

² See Petition for Review 5 n 1, 6 n 2, 26 n 10.

1 plan map is a city enactment, and we take official notice of it pursuant to ORS
2 40.090(7).³ The copy of the housing needs analysis provided to us is marked
3 “draft” in the document’s footers. App to Petition for Review 65-180. Petitioner
4 has not established that the draft provided is subject to official notice, and the
5 request that we take official notice of it is denied.

6 The motion to take official notice is granted, in part.

7 **FACTS**

8 The vacant, 10.7-acre subject property is located at the corner of SE State
9 Street and SE Cordon Road, and it is zoned Commercial Retail (CR). Petitioner
10 sought to develop a 291-unit garden apartment complex on the subject property.
11 On September 22, 2021, petitioner submitted a “[CUP], Class 3 Site Plan Review,
12 Class 2 Adjustment, Class 2 Driveway Approach Permit, and Class 1 Design
13 Review consolidated application.” Record 14.

³ ORS 40.090 provides that law judicially noticed includes:

“(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.”

“* * * * *

“(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

1 The hearings officer held public hearings on the application on December
2 22, 2021, and January 26, 2022. On March 9, 2022, the hearings officer issued a
3 decision denying the application. On March 15, 2022, petitioner appealed the
4 hearings officer's decision to the city council. On April 25, 2022, the city council
5 held a public hearing on the application, closed the hearing, deliberated, and
6 affirmed the hearings officer's decision. The city council's findings supporting
7 its denial include:

8 “(a) The [CUP], Class 3 Site Plan Review, Class 2 Adjustment,
9 Class 2 Driveway Approach Permit, and Class 1 Design
10 Review collective application to develop a new multi-family
11 apartment complex containing 291 dwelling units for
12 property approximately 10.7 acres in size, as proposed, fails
13 to comply with the approval criteria set forth in [Salem
14 Revised Code (SRC)] 240.005(d) for granting a [CUP].

15 “(b) Because the [CUP] was not granted for the proposed use, the
16 Class 3 Site Plan review, Class 2 Adjustment, Class 2
17 Driveway Approach Permit, and Class 1 Design Review
18 applications processed collectively with the [CUP] were
19 denied as well.” Record 15.

20 This appeal followed.

21 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

22 **A. ORS 197.307**

23 ORS 197.307 provides, in part:

24 “(1) The availability of affordable, decent, safe and sanitary
25 housing opportunities for persons of lower, middle and fixed
26 income, including housing for farmworkers, is a matter of
27 statewide concern.

1 “(2) Many persons of lower, middle and fixed income depend on
2 government assisted housing as a source of affordable,
3 decent, safe and sanitary housing.

4 “(3) When a need has been shown for housing within an urban
5 growth boundary at particular price ranges and rent levels,
6 needed housing shall be permitted in one or more zoning
7 districts or in zones described by some comprehensive plans
8 as overlay zones with sufficient buildable land to satisfy that
9 need.

10 “(4) Except as provided in subsection (6) of this section, *a local*
11 *government may adopt and apply only clear and objective*
12 *standards, conditions and procedures regulating the*
13 *development of housing, including needed housing.* The
14 standards, conditions and procedures:

15 “(a) May include, but are not limited to, one or more
16 provisions regulating the density or height of a
17 development.

18 “(b) May not have the effect, either in themselves or
19 cumulatively, of discouraging needed housing through
20 unreasonable cost or delay.” (Emphasis added.)

21 In *Warren v. Washington County*, the court explained:

22 “Before it was amended in 2017, ORS 197.307(4) provided that
23 local governments generally could restrict development of ‘needed
24 housing’ on ‘buildable land’ only through application of regulations
25 and procedures that were ‘clear and objective’:

26 ‘Except as provided in subsection (6) of this section, a local
27 government may adopt and apply only clear and objective
28 standards, conditions and procedures regulating the
29 development of needed housing on buildable land described
30 in subsection (3) of this section. The standards, conditions and
31 procedures may not have the effect, either in themselves or
32 cumulatively, of discouraging needed housing through
33 unreasonable cost or delay.’

1 “ORS 197.307(4) (2015). By its terms, the ‘clear and objective’
2 standard imposed by ORS 197.307(4) then applied only to
3 development of needed housing on buildable land. The statute did
4 not prevent local governments from applying standards, conditions,
5 and procedures that were *not* clear and objective to regulate housing
6 development on other types of land.

7 “* * * ORS 197.307(4) no longer refers to ‘buildable land,’ and, by
8 its terms, provides that local government can regulate the
9 development of housing only through clear and objective standards,
10 conditions, and procedures.” 296 Or App 595, 597-98, 439 P3d 581,
11 *rev den*, 365 Or 502 (2019) (emphasis in original; footnote omitted).

12 In *Roberts v. City of Cannon Beach*, the court confirmed:

13 “In 2017, the legislature extended the ‘clear and objective’
14 requirement to the development of all housing. *See* Or Laws 2017,
15 ch 754, § 5; *see also Warren v. Washington County*, 296 Or App
16 595, 598, 439 P3d 581, *rev den*, 365 Or 502 (2019) (after the 2017
17 amendments, ORS 197.307(4) ‘provides that local government can
18 regulate the development of housing only through clear and
19 objective standards, conditions, and procedures’). The legislature
20 accomplished that change by simply amending the provision that
21 formerly addressed only needed housing to apply to ‘housing,
22 including needed housing.’ Or Laws 2017, ch 745, § 5 (‘[A] local
23 government may adopt and apply only clear and objective standards,
24 conditions and procedures regulating the development of **housing**,
25 **including** needed housing * * *.’ (Additions in bold.)). In our view,
26 that change was meant to expand application of the existing ‘clear
27 and objective’ standard to all housing; it did not demonstrate any
28 intention to change or reformulate the existing ‘clear and objective’
29 standard.” 316 Or App 305, 311, 504 P3d 1249 (2021), *rev den*, 370
30 Or 56 (2022) (footnote omitted).

31 The city council concluded that petitioner’s application was not for
32 “needed housing” and, thus, was not subject to ORS 197.307(4)’s clear and
33 objective standards provision, but it found that,

1 “even if ORS 197.307(4) applied in this situation, * * * the
2 applicable criteria are clear and objective because the criteria set
3 forth in SRC 240.005(d) are bound by the standards within the SRC.
4 As such, the City Council will apply the [CUP criteria] set forth in
5 SRC 240.005(d) to this application.” Record 19.

6 In the respondent’s brief, the city concedes that petitioner’s proposed
7 development is for housing and is subject to ORS 197.307(4), and, thus, that the
8 city may apply only clear and objective criteria to petitioner’s housing
9 application.⁴ However, the city asserts that the criteria it applied are clear and
10 objective. We agree with the parties that ORS 197.307(4) applies to petitioner’s
11 proposed housing development and, thus, the city may apply only clear and
12 objective standards.

13 **B. Second Assignment of Error**

14 The city’s CUP criteria are set out in SRC 240.005(d). SRC 240.005(d)(2)
15 requires that “[t]he reasonably likely adverse impacts of the use on the immediate
16 neighborhood can be minimized through the imposition of conditions.” SRC
17 240.005(d)(3) requires that “[t]he proposed use will be reasonably compatible
18 with and have minimal impact on the livability or appropriate development of
19 surrounding property.” Petitioner’s second assignment of error is that these

⁴ In the first assignment of error, petitioner argues that the development is for needed housing. The city maintains that the development is not for “needed housing.” We sustain petitioner’s second assignment of error, reverse the city’s decision, and order the city to approve the application. Thus, we need not and do not resolve the parties’ “needed housing” dispute.

1 criteria are not clear or objective and ORS 197.307(4) prohibited the city from
2 applying them to petitioner’s application.

3 The court discussed the applicable test in *Roberts*:

4 “LUBA, and, to a lesser extent, this court, have articulated and
5 refined the ‘clear and objective’ standard under ORS 197.307 over
6 many years. We agree with petitioners that, fundamentally, the
7 standard has two parts: First, a standard, condition, or procedure
8 must be objective. As LUBA has explained, ‘objective’ means
9 ‘existing independent of mind.’ *Nieto*[*v. City of Talent*], ___ Or
10 LUBA ___, ___ [(LUBA No 2020-100, Mar 10, 2021)] (slip op at 9
11 n 6). Standards are not objective ‘if they impose “subjective, value-
12 laden analyses that are designed to balance or mitigate impacts of
13 the development on (1) the property to be developed or (2) the
14 adjoining properties or community.”’” 316 Or App at 311.

15 In *Legacy Development Group, Inc. v. City of The Dalles*, we agreed with
16 the petitioner that “requirements in [the local code] that the [traffic impact study]
17 ‘should assess all nearby key intersections’ and ‘reflect the magnitude of the
18 project in accordance with accepted traffic engineering practices’” were not
19 objective “because they require a subjective analysis in order to determine the
20 meaning of ‘magnitude,’ ‘key,’ and ‘nearby,’ as well as the applicable ‘accepted
21 traffic engineering practices.’” ___ Or LUBA ___, ___ (LUBA No 2022-099,
22 Feb 24, 2021) (slip op at 12-13).

23 In this case, SRC 240.005(d)(2) and (3) are not objective. SRC
24 240.005(d)(2) requires evaluation of “reasonably likely adverse impacts” on an
25 undefined “immediate neighborhood.” Similarly, SRC 240.005(d)(3) requires
26 evaluation of whether the proposed use is “reasonably compatible” or will have

1 minimal impact on the “livability” and “appropriate development” of
2 neighboring property. The CUP criteria are intended to balance or mitigate the
3 impact of the proposed development on surrounding properties and require
4 subjective, value-laden judgments. They are not objective and may not be applied
5 to the application.

6 Application of the criteria in SRC 240.005(d)(2) and (3) required the city
7 to engage in a value-laden analysis regarding adverse impacts to surrounding
8 properties. The city’s analysis, which balances its desire for commercial
9 development against the proposed residential development, is prohibited by ORS
10 197.307(4).

11 The second assignment of error is sustained.

12 **C. Third Assignment of Error**

13 ORS 197.307(6) provides:

14 “In addition to an approval process for needed housing based on
15 clear and objective standards, conditions and procedures as provided
16 in subsection (4) of this section, a local government may adopt and
17 apply an alternative approval process for applications and permits
18 for residential development based on approval criteria regulating, in
19 whole or in part, appearance or aesthetics that are not clear and
20 objective if:

21 “(a) The applicant retains the option of proceeding under the
22 approval process that meets the requirements of subsection
23 (4) of this section;

24 “(b) The approval criteria for the alternative approval process
25 comply with applicable statewide land use planning goals and
26 rules; and

1 “(c) The approval criteria for the alternative approval process
2 authorize a density at or above the density level authorized in
3 the zone under the approval process provided in subsection
4 (4) of this section.”

5 The city council found:

6 “[Petitioner] may have requested the property be rezoned to a zoning
7 district that allows multi-family residential uses as an outright
8 permitted use, and therefore would provide a pathway for review of
9 the proposed housing development based entirely on clear and
10 objective standards. Instead, [petitioner] requested approval of the
11 proposed multi-family residential use under the current CR (Retail
12 Commercial) zoning designation by requesting a [CUP].” Record
13 19.

14 Although the city council found that utilizing the zone change process to
15 obtain zoning where housing is permitted outright would have provided
16 petitioner with a “clear and objective” path to approval, the city argues in the
17 respondent’s brief that the city did not require a zone change. Respondent’s Brief
18 9. The city’s response misses the point. ORS 197.307(6) provides that a local
19 government may provide a discretionary approval path for housing only *in*
20 *addition* to an existing clear and objective path. As discussed above, ORS
21 197.307(4) requires local governments to apply only “clear and objective”
22 development standards, conditions, and procedures to housing. ORS 197.307(6)
23 authorizes local governments to adopt an alternative process for approving
24 housing under standards that are not clear and objective, so long as the applicant
25 retains the option of proceeding under an approval process that complies with

1 ORS 197.307(4). *Dreyer v. City of Eugene*, 78 Or LUBA 391, 400 (2018), *aff'd*,
2 296 Or App 490, 437 P3d 1236 (2019).

3 As we explained above, the CUP criteria that the city applied are not clear
4 and objective, and the city’s code does not provide a clear and objective path for
5 housing development in the applicable CR zone. Accordingly, the SRC does not
6 provide an applicant with a path that complies with ORS 197.307(4), and, until
7 the city adopts a path that complies with subsection (4), the city cannot and has
8 not adopted an alternative path under subsection (6). Moreover, while petitioner
9 could potentially rezone the property to a zone where the proposed use is a
10 permitted use instead of a conditional use, ORS 197.307(4) requires a clear and
11 objective path for housing development notwithstanding how a local government
12 allows housing in the zone.

13 The third assignment of error is sustained.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioner’s first assignment of error is that the city misconstrued ORS
16 197.303(1) when it concluded that its proposal is not for “needed housing,” and
17 that the city failed to adopt findings explaining why the CUP criteria are capable
18 of being imposed only in a clear and objective manner, as required by ORS
19 197.831.⁵ Petition for Review 23. The city responds that the proposal is not for

⁵ ORS 197.303(1) defines “needed housing,” as used in ORS 197.286 to 197.314, in part, as

1 “needed housing” but argues that we need not resolve the first assignment of error
2 because the standards applied must be clear and objective regardless of whether
3 the project is for “needed housing.” We sustained the second and third
4 assignments of error and concluded that the city imposed criteria that are not clear
5 and objective as required by ORS 197.307(4).⁶ We do not reach the first
6 assignment of error.

“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:

“(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy[.]”

ORS 197.831 provides:

“In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner.”

⁶ We denied the motion to take official notice of a housing needs analysis marked “draft.”

1 **DISPOSITION**

2 ORS 197.835(10)(a) provides:

3 “The board shall reverse a local government decision and order the
4 local government to grant approval of an application for
5 development denied by the local government if the board finds:

6 “(A) Based on the evidence in the record, that the local government
7 decision is outside the range of discretion allowed the local
8 government under its comprehensive plan and implementing
9 ordinances[.]”

10 The city concedes that the CUP criteria discussed above were the only basis for
11 denial of petitioner’s application. Respondent’s Brief 8. As we explain above, the
12 city applied criteria to the housing application that were not clear and objective,
13 in violation of ORS 197.307(4).

14 The city’s decision is reversed, and the city is ordered to approve the
15 application.