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

TED M. COOPMAN,
Petitioner,

and

PAUL T. CONTE and GARY NANCE,
Intervenors-Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

AL JOHNSON,
HOME BUILDERS ASSOCIATION OF LANE COUNTY,
ELIZA KASHINSKY, JOSHUA KASHINSKY, ANNE BROWN,
CHRISTOPHER DEEL, PATTY HINE, ISAAC JUDD,
ANGIE R. MARZANO, SIGH O'NARA, BABE O'SULLIVAN,
BILL RANDELL, CARLEEN REILLY, SETH SADOFSKY,
KEVIN SHANLEY, HEATHER SIELICKI, SUE WOLLING,
1000 FRIENDS OF OREGON, BETTER HOUSING TOGETHER,
and DEVNW,
Intervenors-Respondents.

LUBA No. 2022-056

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Charles W. Woodward IV filed the petition for review and reply briefs and argued on behalf of petitioner.

Paul T. Conte and Gary Nance filed the joint intervenors-petitioners' brief and joint reply brief. Paul T. Conte argued on behalf of themselves.

Lauren Sommers filed the respondent's brief and argued on behalf of respondent.

Al Johnson filed an intervenor-respondent's brief and argued on behalf of themselves.

Bill Kloos filed an intervenor-respondent's brief and argued on behalf of intervenor-respondent Home Builders Association of Lane County.

Andrew Mulkey filed an intervenors-respondents' brief and argued on behalf of intervenors-respondents 1000 Friends of Oregon, Better Housing Together, and DevNW.

Eliza Kashinsky, Joshua Kashinsky, Anne Brown, Patty Hine, Isaac Judd, Angie R. Marzano, Sigh O'Nara, Babe O'Sullivan, Bill Randall, Carleen Reilly, Seth Sadofsky, Kevin Shanley, Heather Sielicki, and Sue Wolling filed a joint intervenors-respondents' brief. Eliza Kashinsky argued on behalf of themselves.

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

AFFIRMED 01/27/2023

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

Petitioner appeals Ordinance 20667, which approves amendments to the Eugene-Springfield Metropolitan Area General Plan (Metro Plan) and Eugene Code (EC) related to middle housing.[1]

BACKGROUND

This appeal concerns the city's adoption of amendments to the EC and Metro Plan (collectively, Middle Housing Amendments (MHA)) implementing House Bill 2001 (2019), a portion of which is codified at ORS 197.758 and which we refer to as the Middle Housing Statute.[2] Or Laws 2019, ch 639, § 2.

The Middle Housing Statute requires large cities, including Eugene, to allow duplexes, triplexes, quadplexes, townhouses, and cottage clusters on properties zoned for residential use that allow for the development of detached

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[1] The Metro Plan is a regional comprehensive plan adopted by the Cities of Eugene and Springfield and Lane County.

[2] ORS 197.758(2) provides:

> "Except as provided in subsection (4) of this section, each city with a population of 25,000 or more and each county or city within a metropolitan service district shall allow the development of:
>
> "(a) All middle housing types in areas zoned for residential use that allow for the development of detached single-family dwellings; and
>
> "(b) A duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings."

single-family dwellings. The Middle Housing Statute required the city to amend its comprehensive plan and adopt land use regulations not later than June 30, 2022. Or Laws 2019, ch 639, § 3(1)(b). Had the city failed to implement the Middle Housing Statute within that time, then the city would have been required to directly apply a model ordinance adopted by the Land Conservation and Development Commission (LCDC). *Id.* § 3(2), (3). LCDC adopted administrative rules implementing the Middle Housing Statute at OAR chapter 660, division 46. LCDC also adopted a model code for large cities, which is Exhibit B to OAR 660-046-0010.

The Middle Housing Statute does not prohibit local governments from permitting single-family dwellings in areas zoned to allow for single-family dwellings or from allowing middle housing in areas not required under the statute. ORS 197.758(6). The MHA do not require or trigger the development of middle housing. The choice to construct middle housing is left to the developer or property owner.

Rather than adopting LCDC's model code, the city adopted the MHA to allow for the development of middle housing types on residentially zoned properties where the development of detached single-family dwellings is allowed. In some respects, the MHA exceed the minimum requirements of ORS 197.758 and OAR chapter 660, division 46, based on the city's policy choice to encourage and, in some cases, incentivize the development of middle housing. Petitioner appeals the MHA.

Before addressing the assignments of error, we set out our standard of review. The challenged decision is a legislative land use decision. We explained the applicable standard of review of legislative land use decisions in *Restore Oregon v. City of Portland*:

> "LUBA's standard of review of a decision that amends a comprehensive plan is set out at ORS 197.835(6). LUBA is required to reverse or remand the amendment if it 'is not in compliance with the goals.' ORS 197.835(6). LUBA is also required to reverse or remand a decision that amends a land use regulation if, as relevant here, '[t]he regulation is not in compliance with the comprehensive plan.' ORS 197.835(7)(a).
>
> "Because the challenged decisions are legislative rather than quasi-judicial, there is no generally applicable requirement that the decisions be supported by findings, although the decisions and record must be sufficient to demonstrate that applicable criteria were applied and 'required considerations were indeed considered.' *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). With respect to evidence, Statewide Planning Goal 2 (Land Use Planning) requires that a decision that amends a comprehensive plan or land use regulation be supported by an adequate factual base. An 'adequate factual base' is equivalent to the requirement that a quasi-judicial decision be supported by substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff'd*, 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)." 80 Or LUBA 158, 162 (2019), *aff'd*, 301 Or App 769, 458 P3d 703 (2020).

With that background, we proceed to the assignments of error.

ASSIGNMENT OF ERROR (Petitioner)

Petitioner argues that the city misconstrued applicable law and made inadequate findings not supported by substantial evidence in finding that the MHA comply with Statewide Planning Goal 11 (Public Facilities and Services) and Metro Plan Residential Density Policy A.12 (Policy A.12).

Goal 11 is "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." Goal 11 requires cities to "develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons." Goal 11 provides:

> "A public facility plan is a support document or documents to a comprehensive plan. The facility plan describes the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plan or plans within an urban growth boundary containing a population greater than 2,500."

Goal 11, Planning Guideline 3, provides: "Public facilities and services in urban areas should be provided at levels necessary and suitable for urban uses." Goal 11, Implementation Guideline 3, provides: "The level of key facilities that can be provided should be considered as a principal factor in planning for various densities and types of urban and rural land uses." OAR chapter 660, division 11, contains rules regulating public facility planning.

ORS 197.758(5) provides:

"Local governments may regulate siting and design of middle

housing required to be permitted under this section, provided that the regulations do not, individually or cumulatively, discourage the development of all middle housing types permitted in the area through unreasonable costs or delay. Local governments may regulate middle housing to comply with protective measures adopted pursuant to statewide land use planning goals."

OAR 660-046-0010(3) implements ORS 197.758(5) and provides, in part:

"A Medium or Large City may regulate Middle Housing to comply with protective measures (including plans, policies, and regulations) adopted and acknowledged pursuant to statewide land use planning goals. Where Medium and Large Cities have adopted, or shall adopt, regulations implementing the following statewide planning goals, the following provisions provide direction as to how those regulations shall be implemented in relation to Middle Housing, as required by this rule.

"* * * * *

"(e) Goal 11: Public Facilities and Services - Pursuant to OAR 660-011-0020(2), a public facility plan must identify significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan. This includes public facility projects to support the development of Middle Housing in areas zoned for residential use that allow for the development of detached single-family dwellings. Following adoption of Middle Housing allowances by a Large City, the Large City shall work to ensure that infrastructure serving undeveloped or underdeveloped areas, as defined in OAR 660-046-0320(8), where Middle Housing is allowed is appropriately designed and sized to serve Middle Housing."[3]

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[3] OAR 660-046-0320(8) provides: "'Undeveloped or underdeveloped areas' means areas with lot sizes greater than one-half an acre that are zoned to allow single family detached dwellings and are currently developed at a density of two dwelling units per acre or less."

With respect to Goal 11, the city found:

> "The [MHA] do not make changes to the City's provision of public facilities and services or to the currently adopted Eugene/Springfield Public Facilities and Services Plan (PFSP). Consistent with the PFSP, the City will continue to plan and develop public facilities to support the land uses designated in the City's acknowledged comprehensive plan, including public facility projects that support the development of middle housing. Therefore, the amendments are consistent with Statewide Planning Goal 11.
>
> "The City of Eugene updated the PFSP during the adoption of Eugene Urban Growth Boundary in 2017 to ensure that all residential lands could be served. More recently, the City of Eugene and City of Springfield received a grant from the Department of Land Conservation and Development [(DLCD)] on October 6, 2021 to update the PFSP, including updates specifically focused on supporting housing development. Consistent with OAR 660-046-0010(3)(e), following adoption of the [MHA], the City will work to ensure that infrastructure serving areas where middle housing is allowed, including any undeveloped or underdeveloped areas as defined in OAR 660-046-0320(8), is appropriately designed and sized to serve the land uses allowed by the City's comprehensive plan and land use regulations, including middle housing uses." Record 174.

Policy A.12 requires that the city "[c]oordinate higher density residential development with the provision of adequate infrastructure and services, open space, and other urban amenities." With respect to Policy A.12, the city found:

> "The [MHA] will allow middle housing in more residential areas within the city limits. Existing adopted city policies and regulations, including, but not limited to, the [PFSP], the Parks and Recreation System Plan, and the land use code, regulate the provision of adequate infrastructure and services, open space, and other urban amenities within the city limits. The proposed amendments do not apply to areas that are within the city's urban growth boundary

> (UGB) but outside the city limits. Properties located outside the city limits but within the UGB will be evaluated for their ability to access urban facilities and services at the time of future annexation.
>
> "As discussed in the findings regarding compliance with Goal 11, incorporated herein by reference, the [MHA] do not change the City's provision of public facilities and services or amend the currently adopted [PFSP]. Consistent with the PFSP and OAR 660-046-0010(3)(e), the City will continue to plan and develop public facilities to support the land uses designated in the City's acknowledged comprehensive plan, including public facility projects that support the development of middle housing. For all these reasons, the amendments are consistent with policy A.12." Record 178.

Petitioner argues that the city erred in finding compliance with Goal 11 and Policy A.12 because the city did not evaluate and formally plan for the increased demand on existing public facilities that may result from increased density due to the development of middle housing. Petitioner argues that Goal 11, its implementing regulations, and Policy A.12 require the city to amend the PFSP *before* the city can amend the Metro Plan and EC to allow middle housing.

We reiterate the applicable standards of review. Legislative decisions do not require the same detailed findings that are required for a quasi-judicial decision. Instead, the decision and record must demonstrate that "required considerations were indeed considered." *Citizens Against Irresponsible Growth*, 179 Or App at 16 n 6. We understand petitioner to argue that the city was required but failed to consider the increased demand on public facilities that may result from the development of middle housing allowed by the MHA.

With respect to evidence, the challenged legislative decision must be supported by an adequate factual base, which we have interpreted to be equivalent to the substantial evidence standard. *City of North Plains*, 27 Or LUBA at 378. Petitioner argues that, in the absence of any analysis in the record "comparing the projected impacts resulting from these amendments to current facility capacities as established by the PFSP, the findings of compliance with Goal 11 are not based on substantial evidence." Petition for Review 16.

In sum, petitioner argues that Goal 11 and Policy A.12 require the city to assess the infrastructure capacity needed to support the increased density allowed by the MHA and update the PFSP based on those increased density assessments and assumptions *prior to* adopting the MHA. For the reasons explained below, we conclude that Goal 11 and Policy A.12 do not require the planning sequence that petitioner asserts.

Goal 11 requires the city to adopt a PFSP to plan for development. The current PFSP was adopted in 2017, two years prior to the enactment of the Middle Housing Statute. The city is currently in the process of updating its PFSP, including updates specifically focused on supporting housing development. Nothing in the language of Goal 11 requires that the city update the PFSP prior to adopting amendments to the Metro Plan and EC that may result in increased demand on public facilities.

Intervenors-respondents Kashinsky *et al.* point out that the current PFSP concludes that, "[w]ith the improvements specified in the [PFSP] projects lists,

all urbanizable areas within the Eugene-Springfield urban growth boundary can be served with water, wastewater, stormwater, and electrical service at the time those areas are developed." PFSP 10. The PFSP also specifically contemplates the impacts of increased development densities through in-fill and redevelopment. *Id.* at 118. Whether the MHA result in an increase in developed density beyond what was planned for in the PFSP will depend on the number of middle housing units that are developed and other factors such as the locations of middle housing developments. To be sure, the proponents of the Middle Housing Statute hope that the MHA will quickly result in increased density. However, it is unclear whether and to what extent the MHA will result in actual increased density in the number of built dwelling units. Importantly, even if the city had determined that the MHA will result in increased density that exceeds existing infrastructure or planned infrastructure improvements, Goal 11 does not require that the city amend the PFSP to evaluate the adequacy of its infrastructure prior to or concurrently with adopting the MHA.[4]

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[4] The legislature specified one way in which a city could proceed with infrastructure planning in relation to middle housing. The legislature authorized DLCD to grant an extension of time for a local government to implement the Middle Housing Statute where the local government identified specific areas where water, sewer, storm drainage, or transportation services were either significantly deficient or expected to be significantly deficient before December 31, 2023. Or Laws 2019, ch 639, § 4(1), (2). The statute required DLCD to adopt rules establishing a process for such Infrastructure-Based Time Extension Requests (IBTERs). *Id.* § 4(6). LCDC adopted those rules at OAR 660-046-0300

We agree with the city and intervenors-respondents that the city was not required to amend its PFSP prior to adopting the MHA. Thus, we conclude that the city's findings that the MHA are consistent with Goal 11 are adequate, are supported by substantial evidence, and do not misconstrue applicable law.

Policy A.12 is to "[c]oordinate higher density residential development with the provision of adequate infrastructure and services, open space, and other urban amenities." As quoted above, the city found that the MHA are consistent with Policy A.12 because they do not change the city's provision of public facilities and services or amend the PFSP and because the city "will continue to plan and develop public facilities to support the land uses designated in the City's acknowledged comprehensive plan, including public facility projects that support the development of middle housing." Record 178.

Petitioner argues that Policy A.12 required the city to assess the adequacy of the existing infrastructure *prior to* adopting the MHA and that, "by finding compliance without the required analysis, the City misconstrued applicable law." Petition for Review 17. Petitioner does not develop a challenge to the city's interpretation of Policy A.12 under the applicable standard of review. Instead, petitioner's argument under Policy A.12 relies on the same prior planning argument that we rejected above. We reject the Policy A.12 argument for the same reasons.

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to 660-046-0370. Cities were required to file any IBTERs not later than June 30, 2021. *Id.* § 4(4)(b). The city did not file an IBTER.

Moreover, we will defer to the city's interpretation of its own plan or regulation if that interpretation is not "inconsistent with the express language of the comprehensive plan or land use regulation" or inconsistent with the underlying purposes or policies of the plan or regulation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)). When used as a verb, the term "coordinate" means "to bring into a common action, movement, or condition." *Webster's Third New Int'l Dictionary* 501 (unabridged ed 2002). The policy to "coordinate" does not impose a specific sequence for planning infrastructure. Petitioner has not established that the city's interpretation and of Policy A.12 is inconsistent with the express language or the underlying purposes or policies of Policy A.12.

Petitioner's assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (Intervenors-Petitioners)

Intervenors-petitioners argue that the city erred in finding compliance with Statewide Planning Goal 15 (Willamette River Greenway), which is "[t]o protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway." Goal 15 provides, in part:

> "Developments shall be directed away from the river to the greatest possible degree; provided, however, lands committed to urban uses within the Greenway shall be permitted to continue as urban uses, including port, industrial, commercial and residential uses, uses pertaining to navigational requirements, water and land access needs and related facilities[.]"

Pursuant to Goal 15, the city adopted a Greenway overlay and criteria for development within the Greenway. EC 9.8800 - 9.8825. Greenway permits are required for "intensification of uses, changes in use, or developments." EC 9.8805. The permit standards are designed to direct development away from the river, maintain access to the river, and preserve habitat and vegetation near the river. For example, EC 9.8815(1) provides: "To the greatest possible degree, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river." EC 9.8815(2) provides: "To the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means." The phrase "the greatest possible degree" derives from Goal 15 and is "intended to require a balancing of factors so that each of the identified Willamette Greenway criteria is met to the greatest extent possible without precluding the requested use." EC 9.8815(5).

With respect to Goal 15, the city found:

> "The [MHA] do not contain any substantive changes to the City's Willamette River Greenway regulations; therefore, Statewide Planning Goal 15 does not apply. The only change to the Willamette Greenway regulations is a new citation to a renumbered code section." Record 176.

> "The [MHA do] not contain any changes to the City's Willamette River Greenway regulations or to the Greenway policies in the Metro Plan; therefore, Statewide Planning Goal 15 does not apply." Record 214.

Intervenors-petitioners challenge the city's Goal 15 findings on three bases. First, they argue that the city's Goal 15 findings are inadequate because they do not address whether the MHA will result in an intensification of uses within and that is incompatible with the Greenway. Second, intervenors-petitioners argue that the MHA fail to comply with Goal 15 because they allow a significant intensification of housing development in the Greenway without required review of the potential impacts. Third, they argue that the MHA apply standards and criteria that are not clear and objective to housing development in the Greenway, in violation of ORS 197.307(4).

The city responds that intervenors-petitioners misapprehend the requirements of Goal 15. We agree. Goal 15 requires the city to adopt standards to review proposed development activity within the Greenway, which the city has done and which are unaffected by the MHA. Goal 15, Implementation Measure 3, sets out the requirements for Greenway compatibility review, which applies to applications for specific development.[5] A Greenway permit is required

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[5] Goal 15, Implementation Measure 3, provides:

> "Greenway Compatibility Review: Cities and counties shall establish provisions by ordinance for the review of intensifications, changes of use or developments to insure their compatibility with the Willamette River Greenway. Such ordinances shall include the matters in a through e below:
>
> "a. The establishment of Greenway compatibility review boundaries adjacent to the river within which review of

developments shall take place. Such boundaries in urban areas shall be not less than 150 feet from the ordinary low water line of the Willamette River; in rural areas such boundaries shall include all lands within the boundaries of the Willamette River Greenway;

"b. The review of intensification, changes of use and developments as authorized by the Comprehensive Plan and zoning ordinance to insure their compatibility with the Greenway statutes and to insure that the best possible appearance, landscaping and public access are provided. Such review shall include the following findings, that to the greatest possible degree:

"(1) The intensification, change of use or development will provide the maximum possible landscaped area, open space or vegetation between the activity and the river;

"(2) Necessary public access will be provided to and along the river by appropriate legal means;

"c. Provision is made for at least one public hearing on each application to allow any interested person an opportunity to speak;

"d. Provision is made for giving notice of such hearing at least to owners of record of contiguous property and to any individual or groups requesting notice; and

"e. Provision is made to allow the imposing of conditions on the permit to carry out the purpose and intent of the Willamette River Greenway Statutes.

"f. As an alternative to the review procedures in subparagraphs 3(a) to 3(e), a city or county governing body may prepare and adopt, after public hearing and notice thereof to DOT, a design plan and administrative review procedure for a portion of the Greenway. Such design plan must provide for findings

for intensification, change in use, or development of a specific property. Goal 15 does not require Greenway review for comprehensive plan and code changes that may allow increased residential density within the Greenway. Instead, Goal 15 is implemented through the city's Greenway permit program. We agree with the city that it was not required to comply with Goal 15 in adopting the MHA because the MHA do not amend the city's Greenway permit program or allow any specific development within the Greenway. Based on that conclusion, intervenors-petitioners' argument that the MHA fail to comply with Goal 15 provides no basis for remand. We conclude that the city's Goal 15 findings are adequate to establish that the city considered the issue of the applicability of Goal 15.

Intervenors-petitioners argue that the Greenway standards will apply to applications for middle housing; therefore, according to intervenors-petitioners, the MHA apply standards and criteria that are not clear and objective to housing development in the Greenway, in violation of ORS 197.307(4), which 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:

> equivalent to those required in subparagraphs 3(b)(1) and (2) of paragraph F so as to insure compatibility with the Greenway of proposed intensification, changes of use or developments. If this alternative procedure is adopted and approved by DOT and LCDC, a hearing will not be required on each individual application."

"(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."

Approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." *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 594 (1999). We have explained that the term "clear" means "easily understood" and "without obscurity or ambiguity," and that the term "objective" means "existing independent of mind." *Nieto v. City of Talent*, ___ Or LUBA ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 9 n 6).

Before it was amended in 2017, the "clear and objective" requirement imposed by ORS 197.307(4) applied only to the development of "needed housing" on "buildable land." The statute did not prevent local governments from applying standards, conditions, and procedures that were *not* clear and objective to regulate the development of housing on other types of land. OAR 660-008-0005(2)(b) excludes from the definition of "buildable land" land that is "subject to natural resource protection measures determined under Statewide Planning Goals 5, 6, 15, 16, 17 or 18." Land within the established Greenway boundaries is not "buildable land," so the clear and objective requirement did not apply to the city's Greenway permit standards for the development of housing within the

Greenway. In Senate Bill 1051 (2017), the legislature expanded the application of the "clear and objective" requirement to all housing, removing the references to "needed housing" and "buildable land." Thus, since 2017, the clear and objective requirement has applied to applications for the development of housing within the Greenway.

The city does not dispute that the current Greenway standards are not clear and objective. Instead, the city argues that the legislature intended and authorized the city to apply existing Greenway standards to applications for middle housing. In support of that argument, the city cites ORS 197.758(5), which provides:

> "Local governments may regulate siting and design of middle housing required to be permitted under this section, provided that the regulations do not, individually or cumulatively, discourage the development of all middle housing types permitted in the area through unreasonable costs or delay. *Local governments may regulate middle housing to comply with protective measures adopted pursuant to statewide land use planning goals*." (Emphasis added.)

The city argues that the legislature thereby authorized the city to apply the Greenway standards to applications for middle housing, irrespective of whether those standards are clear and objective as required by ORS 197.307(4).

The MHA do not adopt or amend any standards for development of housing within the Greenway. The city might apply the Greenway standards to future applications for middle housing within the Greenway, and those standards may or may not comply with the clear and objective requirement in ORS 197.307(4). However, even if we agreed that the Greenway standards violate

ORS 197.307(4), that violation is in the Greenway standards, not in the MHA. Accordingly, intervenors-petitioners' argument under ORS 197.307(4) provides no basis for us to remand the MHA. In other words, the challenged decision does not present the issue that intervenors-petitioners raise, and, thus, it is not before us for review in this appeal. Accordingly, we do not resolve the issue of whether the Greenway standards, if applied to applications for middle housing, violate ORS 197.307(4).

Intervenors-petitioners' first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (Intervenors-Petitioners)

Intervenors-petitioners argue that the Middle Housing Special Use Limitations adopted in the MHA include standards that are not clear and objective, in violation of ORS 197.307(4). Intervenors-petitioners argue that the phrases "dwelling unit size" "and "income-qualified middle housing" are not clear and objective.

A. Dwelling Unit Size

EC 9.2741(4)(a) provides minimum lot areas required for different types of middle housing. Duplexes are allowed on lots that are at least 2,250 square feet, triplexes are allowed on lots that are at least 3,500 square feet, fourplexes and cottage clusters are allowed on lots that are at least 4,500 square feet.

EC 9.2741(4)(b) provides for reduced minimum lot areas for dwelling units that are "less than 900 square feet as calculated using the formula in [EC 9.2741(4)(c)]." That formula is:

"AS = (X1+ X2 + X3 …+ X N) divided by N

"Where:

"AS = Average Size of all Dwelling Units in a Duplex, Triplex, Fourplex, Townhouse Project, or Cottage Cluster

"N = Total number of dwelling units in the duplex, triplex, fourplex, townhouse project, or cottage cluster. N is equal to the number of X# dwellings included within the parenthesis in the calculation.

"X# = Dwelling unit size. The size of one dwelling unit that is a part of a duplex, triplex, fourplex, townhouse project, or cottage cluster. Dwelling unit size is the total square footage of a dwelling, which is measured by adding together the square foot area of each full story or level in a dwelling. The square foot area must be measured at the exterior perimeter walls of each story of the dwelling, not including eaves, and is defined as all square footage inside of a dwelling, including, but not limited to, living rooms, kitchen, bedrooms, bathrooms, hallways, entries, closets, utility rooms, stairways, and bathrooms. For townhouses and attached duplexes, triplexes, and fourplexes, the exterior perimeter walls of a dwelling shall be measured from the midpoint of any common wall for that portion of the structure that shares a common wall with another unit in the townhouse project, duplex, triplex, or fourplex. The following are not included in the calculation of dwelling unit size: attached or detached garages; outdoor living areas and structures, including, but not limited to uncovered porches, uncovered decks, patios, porches, exterior stairways, decks, carports, and covered areas enclosed by no more than 50% on all sides; and crawlspaces, attics, and other areas that do not constitute a full story of the building."

Intervenors-petitioners argue that the methodology of measuring square footage from the exterior perimeter wall and including all spaces inside of the dwelling creates confusion and multiple potential interpretations. For example,

intervenors-petitioners argue that the terms "full story" "story" and "level" are undefined and subject to varying interpretations.

The city and intervenors-respondents respond, and we agree, that the challenged standard provides a clear methodology for measuring dwelling unit size. The measurement is taken from the exterior of the walls, as opposed to the interior walls or some other point. It includes all space within the dwelling, regardless of how that space is used. The fact that the standard does not address all architectural variations that might exist among residential buildings within the city does not make that standard unclear. As we have explained, the fact that a standard requires some interpretation in its application does not make that term unclear or subjective. *Roberts v. City of Cannon Beach*, ___ Or LUBA ___ (LUBA No 2020-116, July 23, 2021), *aff'd*, 316 Or App 305, 504 P3d 1249 (2021), *rev den*, 370 Or 56 (2022); *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011), *aff'd*, 249 Or App 309, 275 P3d 1010 (2012). We conclude that the phrase "dwelling unit size" is clear and objective.

B. Income-Qualified Middle Housing

EC 9.2741(4)(d) provides for reduced minimum lot areas "[w]hen at least 50 percent of the dwelling units in a duplex, triplex, fourplex, or cottage cluster meet the definition of income-qualified middle housing." EC 9.0500 defines "income-qualified middle housing" as follows:

> "A unit in a duplex, triplex, fourplex, townhouse or cottage cluster exclusively for low-income individuals and/or families, sponsored by a public agency, a non-profit housing sponsor, a developer, a

> combination of the foregoing, or other alternatives as provided for in the Oregon Revised Statutes or Federal Statutes, to undertake, construct, or operate housing for households that are low-income. For purposes of this definition, low-income means having income at or below 80 percent of the area median income."

Intervenors-petitioners argue that the phrase "income-qualified" is ambiguous because the phrase "area median income" is not defined and can have different meanings. According to intervenors-petitioners, the "area" could be the Eugene city limits or the Eugene-Springfield metropolitan area or some other area. Thus, intervenors-petitioners argue that the phrases "income-qualified" and "area median income" are not clear.

The city responds that a reasonable person reading EC 9.2741(4)(d) would understand that the phrases "income-qualified" and "area median income" refer to terms of art related to federal income-qualified housing regulations and that the phrase "area median income" refers to United States Department of Housing and Urban Development (HUD) income calculations. The phrase "area median income" is used in several other definitions in EC 9.0500, including the definitions of "subsidized low-income disabled housing," "subsidized low-income housing," "subsidized low-income senior housing," and "subsidized low-income senior housing partial." In all of those definitions, the EC defines "low-income" as "income at or below 80 percent of the area median income as defined by [HUD]." We agree with the city that it is adequately clear from the context of the code that the phrase "area median income" is a term of art that relies on and refers to HUD income calculations.

Intervenors-petitioners quote a HUD publication that explains that the phrase "area median income" is based on HUD's annual estimation of median family income for each metropolitan area. Intervenors-Petitioners' Brief 50. In *Roberts*, we concluded that a standard that used the phrase "Oregon Coordinate Line," which was undefined in the code, was nonetheless clear and objective because that phrase referred to a specific and ascertainable surveyed line. Similarly, here, the phrases "income-qualified" and "area median income" refer to ascertainable calculations made by HUD. We conclude that the phrases "income-qualified" and "area median income" are clear.

Finally, intervenors-petitioners claim that the failure to specify the duration of the requirement to provide income-qualified units renders this standard unclear and subjective. Intervenors-petitioners have not cited any legal obligation that the city identify a period during which middle housing must remain income-qualified to be entitled to the minimum lot area reduction in EC 9.2741(4)(d). In order to be eligible for the minimum lot area reduction in EC 9.2741(4)(d), an applicant must show that at least 50 percent of the units in a duplex, triplex, fourplex, or cottage cluster meet the definition of "income-qualified middle housing" at the time of land use approval or building permit issuance. There is nothing unclear or subjective about that requirement.

Intervenors-petitioners' second assignment of error is denied.

The city's decision is affirmed.