

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

ICON CONSTRUCTION AND DEVELOPMENT, LLC,
Petitioner,

vs.

CITY OF OREGON CITY,
Respondent,

and

PARK PLACE NEIGHBORHOOD ASSOCIATION,
JACKIE HAMMOND-WILLIAMS, ENOCH HUANG,
and ROYA MANSOURI,
Intervenors-Respondents.

LUBA No. 2022-100

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Garrett H. Stephenson filed the petition for review and reply briefs and argued on behalf of petitioner. Also on the brief was Joseph O. Gaon, Andrew J. Lee, and Schwabe, Williamson & Wyatt, P.C.

Carrie A. Richter filed the respondent's brief and argued on behalf of respondent. Also on the brief was William K. Kabeiseman and Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

Jesse A. Buss filed an intervenors-respondents brief and argued on behalf of intervenors-respondents Park Place Neighborhood Association and Jackie Hammond-Williams. Also on the brief was Willamette Law Group, PC.

1 Sean T. Malone filed an intervenors-respondents brief and argued on
2 behalf of intervenors-respondents Enoch Huang and Roya Mansouri.

3
4 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
5 Member, participated in the decision.

6
7 REMANDED 05/19/2023

8
9 You are entitled to judicial review of this Order. Judicial review is
10 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city commission decision denying its application for a general development permit, variance, and various adjustments.

MOTION TO TAKE OFFICIAL NOTICE

The city's response brief describes the history of the city's planning actions concerning petitioner's property and includes the sentence: "This annexation and zone change was approved in 2018 through the adoption of Ordinance 18-1007."

Respondent's Brief 3. A footnote to the sentence provides:

"Attached as Appendix A is the City's annexation and zone change decision set forth in Ordinance No 18-1007, including a February 5, 2018 staff report adopted by reference. LUBA may take official notice of this decision under ORS 40.090(2) as it was adopted by the City decision-maker and sets forth the relevant standards for this appeal." Respondent's Brief 3 n 2.

Although the language in the footnote does not ask us to take official notice, we assume that the city intended this footnote to be a motion for official notice. OAR 661-010-0046(2)(a) provides:

"A motion to take official notice shall contain a statement explaining with particularity what the material sought to be noticed is intended to establish, how it is relevant to an issue on appeal, and the authority under ORS 40.090. The motion to take official notice shall be filed in writing and as a separate document and shall not be contained within a brief or other filing."

In its reply brief, petitioner argues that we should not take official notice of the city's Appendix A. In addition to observing, correctly, that the city violated our

1 rules by not making its motion to take official notice in a separate pleading,
2 petitioner argues that we should not take official notice of Appendix A because
3 the city does not identify the authority under which we may take official notice
4 or explain the relevance of some of the materials provided in Appendix A as
5 required by our rule.

6 Although the city's footnote cites ORS 40.090(2) as the authority for
7 official notice, the city does not explain why this statute supports our taking
8 official notice.¹ Moreover, we agree with petitioner that the city does not explain
9 what Appendix A is intended to establish or the relevance of Appendix A to an
10 issue in the appeal. Instead, the city merely states that the appendix "sets forth
11 the relevant standards for this appeal." Respondent's Brief 3 n 2.

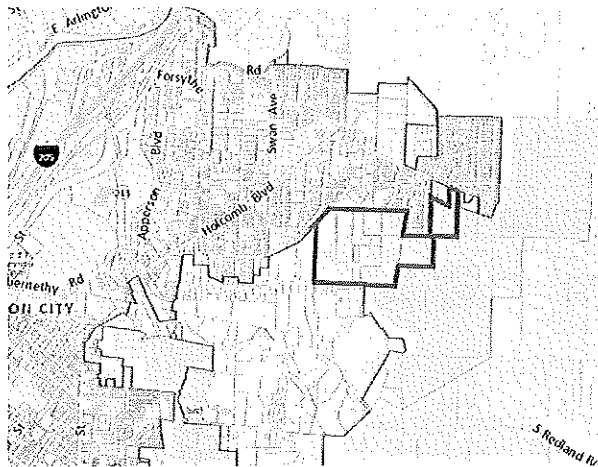
12 The motion for official notice is denied.

13 **FACTS**

14 **A. Planning History of the Subject Property**

15 The 92-acre subject property is located north of Livesay Road and south
16 of Holcomb Boulevard. It is shown in outline in the graphic below.

¹ ORS 40.090(2) provides that material subject to judicial notice includes "[p]ublic 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." The city may have intended to cite ORS 40.090(7), which refers to city ordinances.



Record 7281.

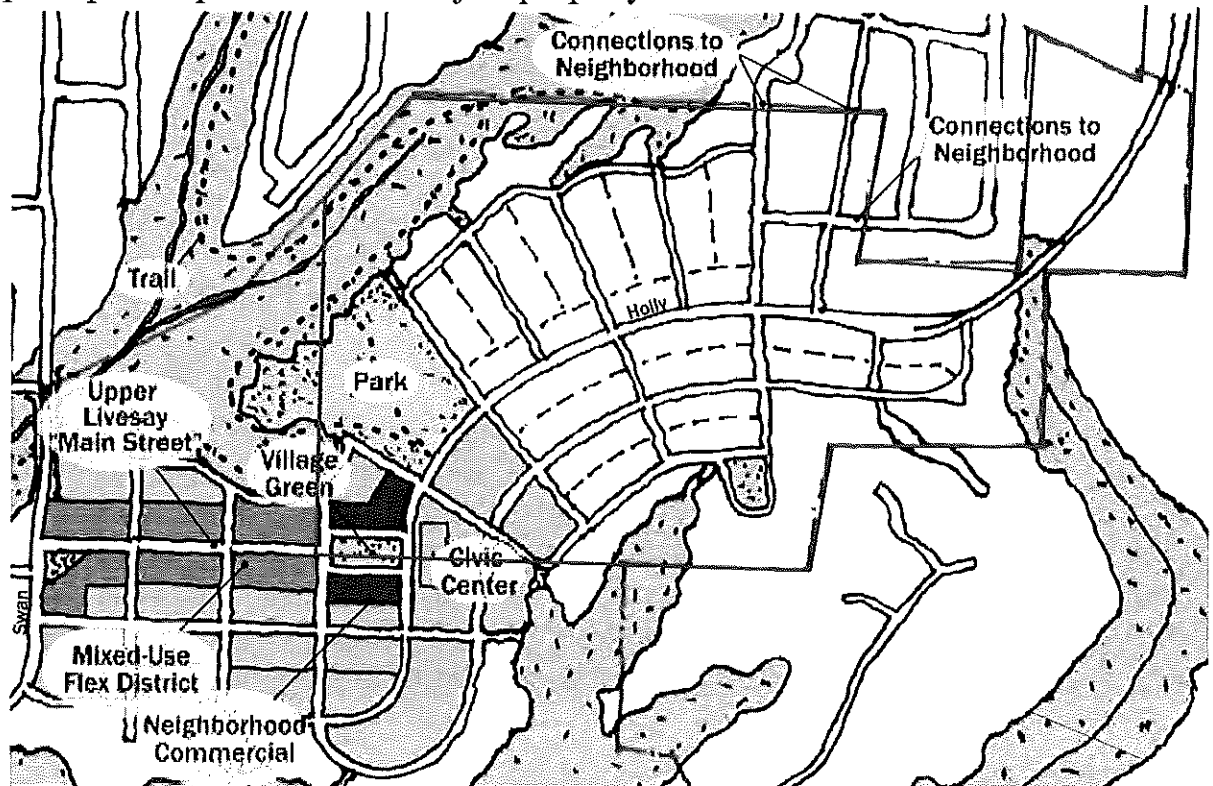
The subject property includes 56 acres that were included in the city's original, 1979, urban growth boundary and approximately 35 acres added to the boundary in 2002. The Oregon City Comprehensive Plan (OCCP) explains that

“A 1990 Urban Growth Management Agreement between [the city] and [the county] guides land use designations and extension of public services to urbanizing areas. Per that agreement, [the city] (rather than the [c]ounty) provides public services in urbanizing areas and applies Comprehensive Plan designations to those areas. [The county] applies zoning to land within the UGB (but outside city limits) to generally designate it as Future Urbanizable (FU-10) until the [c]ity annexes those properties and applies [c]ity zoning.” OCCP 33.²

Accordingly, prior to annexation in 2018, the subject property was zoned Future Urban (FU-10) by the county and designated Future Urban on the city's comprehensive plan.

² We note that the OCCP was amended in December 2022, after the subject decision became final. Those amendments do not affect our analysis and we refer to the current version of the OCCP.

1 In 2008, the city adopted the Park Place Concept Plan (PPCP) as part of
2 the city's comprehensive plan, in order to comply with Metro's rules requiring
3 the adoption of a concept plan for an area prior to its development.³ The subject
4 property is within the North Village area described in the PPCP. The PPCP
5 conceptual plan depiction of the subject property is shown in outline below:



6
7 Record 7283

8 In 2017, Hidden Falls Development, acting on behalf of the owners of the
9 subject property, filed an application with the city for annexation and rezoning.

³ Metro is a regional metropolitan service district that coordinates land use planning in Clackamas, Multnomah, and Washington counties, and cities within those counties. ORS 197.015(14); ORS 195.025; ORS 268.385.

1 In 2018, the city approved the annexation and rezoning of the subject property,
2 subject to conditions of approval. The city rezoned the property to include 1.5
3 acres of Low-Density Residential Development and 4.5 acres of Neighborhood
4 Commercial, with the remaining property zoned Medium-Density Residential.
5 The city adopted a condition of approval requiring that master plan approval be
6 obtained prior to development at the rezoned densities.⁴ Oregon City Municipal
7 Code (OCMC) 17.65.020(A), in part, explains that

8 “A master plan or planned unit development is a two-step process
9 that includes *a general development plan and a detailed*
10 *development plan*. A general development plan incorporates the
11 entire area where development is planned for up to the next twenty
12 years from the date of final approval, including the identification of
13 one or more development phases. The general development plan
14 may encompass land that is not currently under the applicant’s
15 control, but which eventually may be controlled by the applicant
16 during the duration of the master plan.” (Emphasis added.)

⁴ The condition of approval states

“Prior to issuing any development approval authorized by this annexation and zone change, the applicant shall obtain General and Detailed Development Plan approval, that includes the approximate 92-acre property, pursuant to OCMC 17.65. Until such time, all development shall conform to requirements in the County’s FU-10 zoning * * *.” Record 1294-95 (underscoring omitted).

1 **B. Processing of Petitioner’s Application**

2 On July 20, 2021, petitioner applied for approval of a general development
3 plan (called the Park Place Crossing Master Plan). In its application narrative,
4 petitioner described its proposal as

5 “a master-planned community within the Park Place Concept
6 Area. * * * This application for a General Development
7 Plan/Master Plan does not involve approval of physical alterations
8 to the [subject property.] * * * The application does not include an
9 application for approval of a Detailed Development Plan (DDP),
10 Flood Management Overlay District review, Natural Resources
11 Overlay District review, or any construction at this time. The 20-
12 year General Development Plan guides the project through the
13 anticipated build out timeframe.

14 “The Park Place Crossing (PPC) Master Plan consists of +/- 476
15 residential lots planned to be provided in six residential phases. The
16 project also includes a community park, open space, regional storm
17 water management facility, retail/civic, and trails components.”
18 Record 6574.

19 Petitioner applied for a general development permit, adjustments to lot
20 size, density and garage orientation standards, and a variance for lot sizes for the
21 subject property. The planning commission held hearings on the application on
22 April 25, 2022, May 9, 2022, May 23, 2022, July 11, 2022, July 25, 2022, and
23 August 22, 2022.

24 In its August 19, 2022 submittal to the planning commission, petitioner
25 argued that its application was for needed housing, and that ORS 197.307(4)
26 barred the application of certain local approval criteria identified by petitioner in
27 its submittal to the application because those criteria were not clear and

1 objective.⁵ Record 2158-62. We refer to this as petitioner's needed housing
2 argument.

3 The planning commission did not make findings addressing petitioner's
4 needed housing argument. The planning commission voted to approve the
5 application, and adopted findings that the applicable criteria petitioner challenged
6 were met. As approved by the planning commission, petitioner's proposal
7 included:

8 *"426 residential units to be developed over 6 phases including 342*
9 *detached single family residential units and 121 attached or paired*
10 *townhomes with an overall net density of 9.2 units per acre.*

11 *"A master plan adjustment to accommodate changes in the lot*
12 *dimensions and lot area up to 20% and a variance to reduce the*
13 *minimum lot size for the attached single family lots to 1800 square*
14 *feet.*

15 "The primary transportation access point for the first two phases of

⁵ 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:

"(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."

1 development or 209 homes would be through a single new road
2 connection to Holcomb Blvd. The 59 additional units proposed for
3 Phase 3 would be directed through the existing Trailview
4 neighborhood to Winston Drive. When the vehicle trips moving
5 through Trailview neighborhood exceed 2000, anticipated during
6 Phases 4-6, Holly Lane would be extended to the south to connect
7 with Redland Road.

8 “A 4.3-acre community park and 14.6 acres of open space including
9 trails.

10 “2.43 acres of land available in separate tracts to provide a
11 continuous corridor for the Livesay Main Street area that might
12 include neighborhood commercial, retail or mixed-use development
13 and civic space.

14 “Stormwater is to be treated by a series of street drains and a regional
15 stormwater pond.” Record 1-2 (emphasis added).

16 Intervenor Park Place Neighborhood Association (PPNA) and several
17 individuals, including intervenors Hammond-Williams, Huang, and Mansouri,
18 appealed the planning commission decision to the city commission.

19 On October 11, 2022, the city commission held a single on-the-record
20 public hearing on the appeals limited to only argument, and at the conclusion,
21 closed the record. Record 62-63. On October 17, 2022, the city council
22 deliberated on the appeals and tentatively voted to deny the applications. Record
23 1. On October 21, 2022, the city council adopted findings of fact and conclusions
24 of law to deny the applications. This appeal followed.

25 **SECOND ASSIGNMENT OF ERROR**

26 ORS 197.522 provides in part:

27 “(2) A local government shall approve an application for a permit,

1 authorization or other approval necessary for the subdivision or
2 partitioning of, or construction on, *any land for needed housing* that
3 is consistent with the comprehensive plan and applicable land use
4 regulations.

5 “(3) If an application is inconsistent with the comprehensive plan
6 and applicable land use regulations, the local government, *prior to*
7 *making a final decision on the application*, shall allow the applicant
8 to offer an amendment or to propose conditions of approval that
9 would make the application consistent with the plan and applicable
10 regulations. If an applicant seeks to amend the application or
11 propose conditions of approval:

12 “(a) A county may extend the time limitation under ORS 215.427
13 for final action by the governing body of a county *on an*
14 *application for needed housing* and may set forth a new time
15 limitation for final action on the consideration of future
16 amendments or proposals.

17 “(b) A city may extend the time limitation under ORS 227.178 for
18 final action by the governing body of a city *on an application*
19 *for needed housing* and may set forth a new time limitation
20 for final action on the consideration of future amendments or
21 proposals.

22 “(4) A local government shall deny an application that is
23 inconsistent with the comprehensive plan and applicable land use
24 regulations and that cannot be made consistent through amendments
25 to the application or the imposition of reasonable conditions of
26 approval.”⁶ (Emphases added.)

⁶ ORS 197.522(1)(a) provides: “As used in this section * * * ‘[n]eeded housing’ has the meaning given that term in ORS 197.303.”

ORS 197.303(1) provides:

“‘needed housing’ means all housing on land zoned for residential use or mixed residential and commercial use that is determined to

1 Petitioner's second subassignment of error is that the city council committed
2 procedural error because it did not allow petitioner to propose amendments to its
3 application or conditions of approval as required by ORS 197.522(3) prior to
4 making its final decision on the application.

5 **A. Applicability of ORS 197.522**

6 The city posits several reasons ORS 197.522 is not applicable and we begin
7 there. The city first responds to this assignment of error, in part, by arguing that
8 ORS 197.522 does not apply because petitioner's application is not for "the
9 development of housing" within the meaning of ORS 197.307. See n 5. The city
10 contends that the application for approval of a general development plan is not
11 "the development of housing" because it is only the first of a two-stage process
12 to gain development approval, and that no housing will be developed as a direct
13 result of a general development plan approval.

14 We agree with petitioner that the general development plan application is
15 for the development of housing and that the standards, conditions, and procedures

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[.]"

1 required in order to gain general development plan approval “regulat[e] the
2 development of housing[.]” ORS 197.307(4). OCMC 17.65.030(B) and (C)
3 require petitioner to gain general development plan approval in order to develop
4 the property, which, as noted, is planned and zoned in part for development with
5 housing. The annexation condition of approval provided that if the property was
6 developed consistent with the city zoning, a development plan was required.
7 Record 3. We explained in *Group B, LLC v. Corvallis*, that ORS 197.307(4) does
8 not exempt conditions imposed by a prior development plan approval that did not
9 approve needed housing from the requirement that the city only apply clear and
10 objective criteria to the development of needed housing. 72 Or LUBA 74, 82,
11 *aff’d*, 275 Or App 577, 366 P3d 847 (2015).

12 The city also argues that the petitioner could not rely upon ORS 197.522
13 because petitioner elected to proceed under, what the city characterizes as, a
14 discretionary approval path when it sought the general development plan and
15 adjustments to lot size, density, and garage orientation standards, and a variance
16 for lot sizes for the subject property. The city argues that petitioner had, what the
17 city characterizes as, an available clear and objective path provided by *the*
18 *county’s* FU-10 zoning, but instead chose the above path. Respondent’s Brief 14-
19 15. We reject that argument.

20 ORS 197.307(6) authorizes local governments to adopt an alternative
21 process for approving needed housing under standards that are not clear and
22 objective, as long as the applicant retains the option of proceeding under an

1 approval process that complies with ORS 197.307(4).⁷ In *Group B, LLC*, we
2 concluded that the city’s land use legislation had at no relevant time provided a
3 clear and objective approval process that complied with ORS 197.307(4).
4 Instead,

5 “[the p]etitioner’s filing of an application for a Planned
6 Development Major Modification was required by the city code to
7 develop Tract B with the proposed needed housing, which is a
8 permitted use in the PD (RS-12) zone, not an ‘option’ that petitioner
9 voluntarily exercised for purposes of ORS 197.307(6). Under ORS
10 197.307(6), a local government may impose unclear, subjective or
11 discretionary standards and conditions on needed housing only if it

⁷ ORS 197.307(6) provides:

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

- “(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;
- “(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and
- “(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.”

1 offers a path that allows needed housing subject only to clear and
2 objective standards and conditions. We understand the city to argue
3 that the 1981 DDP (as interpreted) is itself clear and objective and
4 that development under the clear and objective 1981 DDP was thus
5 an available option for purposes of ORS 197.307(6). We reject the
6 argument. * * * [E]ven if Condition 12 or the 1981 DDP explicitly
7 and unambiguously prohibited any building in the area now
8 comprising Tract B, we do not see that the 1981 DDP would
9 constitute a 'clear and objective' alternative 'approval process' for
10 needed housing within the meaning of ORS 197.307(6). Because the
11 city has identified no clear and objective approval process for
12 needed housing on Tract B that an applicant could choose, the city
13 cannot rely on ORS 197.307(6) to authorize imposition of the
14 subjective standards for modifying the DDP at LDC 2.5.40.04." *Id.*
15 at 83-84.

16 Petitioner's application proposes housing, to be constructed in a
17 subsequent phase, and ORS 197.307(4) allows the city to adopt and apply only
18 clear and objective standards and conditions to an application for the
19 development of housing. Moreover, the county's FU-10 zoning is not sufficient
20 to provide the requisite approval process based on clear and objective standards,
21 conditions, and procedures. The county's FU-10 zoning is not a *city* adopted clear
22 and objective approval path as set out in ORS 197.307(4). FU-10 is a county
23 zone. Furthermore, petitioner responds, and we agree, that the FU-10 zone fails
24 to allow residential density at levels required by city zoning as set out in ORS
25 197.307(6)(c).

26 The city next argues that petitioner's predecessor in interest bound
27 petitioner to develop the property under an approval process that is not clear and
28 objective. Again, *Group B, LLC* is instructive. In *Group B, LLC*, the city argued

1 that the petitioner was bound by choices of its predecessor-in-interest. According
2 to the city, the petitioner's predecessor-in-interest had taken advantage of the
3 flexibility associated with a planned development process over other
4 development options and, thus, the city argued that it was consistent with ORS
5 197.307(4) and (6) to apply subjective criteria to the application. We concluded
6 that although we might agree if (1) the prior approval had been for needed
7 housing, and (2) that applicant had chosen that path instead of an available clear
8 and objective path in the city's legislation, such was not the case. Rather,

9 "the 1981 DDP did not propose or approve needed housing, and the
10 choices the 1981 applicant made in gaining approval for The Regent
11 do not force petitioner to accept a subjective approval track for
12 needed housing, or otherwise provide a basis for the city to avoid its
13 obligation under ORS 197.307(4) to apply only clear and objective
14 standards and conditions to proposed needed housing on buildable
15 land." *Group B, LLC*, 74 Or LUBA at 84.

16 In *Group B, LLC*, we explained that at no relevant time had the city's land
17 use legislation offered a "clear and objective" path for approval of needed
18 housing on the subject property. Because the city identified no clear and objective
19 approval process for needed housing that an applicant could choose, the city
20 could not rely on ORS 197.307(6) to authorize imposition of subjective
21 standards. *Id.*; see also *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018), *aff'd*,
22 296 Or App 490, 437 P3d 1236 (2019) (explaining that ORS 197.307(6)
23 authorizes local governments to adopt an alternative process for approving
24 needed housing under standards that are not clear and objective only if the

1 applicant retains the option of proceeding under an approval process that
2 complies with ORS 197.307(4)); *Home Builders Assoc. v. City of Eugene*, 41 Or
3 LUBA 370 (2002) (discussing the city's two-track system).

4 Here, the city requires a general development plan in order to develop
5 housing consistent with the city zoning and the general development plan process
6 regulates the development of housing.⁸ That the annexation condition of approval
7 allowed for a development consistent with county FU-10 densities does not
8 relieve the city of its obligation to provide an approval process that meets the
9 requirements of ORS 197.307(4). In other words, the fact that an applicant retains
10 the option to proceed under the county's FU-10 standards, which we assume
11 *arguendo* contain only clear and objective standards, is not sufficient for the city
12 to meet its obligations under ORS 197.307(4) to provide a clear and objective
13 path so that the city may require an applicant to proceed on an alternative,
14 discretionary path under ORS 197.307(6).

⁸ We also observe that the GDP approval criteria themselves reference needed housing. OCMC 17.65.050(C)(5) provides:

“The proposed general development plan, including development standards and impact mitigation thresholds and improvements, adequately mitigates identified impacts from each phase of development. *For needed housing, as defined in ORS 197.303(1), the development standards and mitigation thresholds shall contain clear and objective standards.*” (Emphasis added.)

1 The city also argues petitioner elected to pursue an alternative approval
2 path because it sought a variance under discretionary approval standards in
3 conjunction with its general development plan, and therefore may not now claim
4 that the city could apply only clear and objective standards to its applications.
5 Petitioner responds that it

6 “was effectively required to file for a variance under OCMC 17.60
7 to allow certain lots for attached dwellings to be 1800 square feet,
8 because OCMC 17.65.050(C)(9) requires a mix of residential uses
9 with no single use exceeding 75% of the total, and the PPCP requires
10 a certain minimum number of units.” Petition for Review 15.

11 The city commission adopted findings “reject[ing] the notion that
12 development with such significant adjustment/variance requests was necessary
13 to achieve the overall PPCP density goals.” Record 15. In reaching this
14 conclusion the city commission observed that:

15 “One of the criteria relevant for granting an adjustment OCMC
16 17.65.070(E)(2) provides:

17 “(2) If more than one adjustment is being requested, the cumulative
18 effect of the adjustments results in a project that is still
19 consistent with the overall purpose of the zone;”

20 “The purpose of the PPCP, as described throughout these findings,
21 is to achieve a certain quality and character of development. These
22 objectives are undermined by lot sizes that depart so significantly
23 from what the zoning code requires. The Commission estimates that
24 about half of the R-5 zoned lots where single-family residences are
25 proposed are below the minimum lot size.” Record 15.

26 We do not, however, understand the city commission to have reached the
27 merits of petitioner’s adjustment or variance applications. The city commission

1 did not for example, cite the variance approval criteria in its decision. The only
2 development path available to develop housing is to first gain approval of a
3 general development plan, which, as we have explained, was required to be clear
4 and objective, because it was the only path.

5 Finally, intervenors PPNA and Hammond-Williams argue that petitioner's
6 project could not be made consistent with the city's comprehensive plan
7 transportation requirements, and accordingly ORS 197.522(4) allowed the city to
8 deny the applications.⁹ However, the city council did not adopt any findings
9 regarding whether the applications were consistent with provisions of the city's
10 transportation system plan, and accordingly, we do not consider intervenors'
11 arguments.

12 **B. Interpretation of ORS 197.522**

13 Having concluded that the petitioner's general development plan is subject
14 to ORS 197.522, we must evaluate what ORS 197.522 requires.

15 In an October 10, 2022 letter submitted to the city commission the day
16 before the city commission's only public hearing, petitioner requested:

17 "that, if the City Commission determines that the [general

⁹ ORS 197.522(4) provides that

"A local government shall deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through amendments to the application or the imposition of reasonable conditions of approval."

1 development plan] application does not meet any land use provision
2 which the City Commission determines to be applicable and ‘clear
3 and objective,’ that the record be reopened for the sole purpose of
4 allowing the [petitioner] to discuss its compliance with such land
5 use provisions and to offer [conditions of approval] to ensure
6 compliance with those provisions.” Record 1301.

7 This is the first time we are applying ORS 197.522 as amended in 2015.
8 We will construe ORS 197.522 by examining the text, context, and any pertinent
9 legislative history. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009);
10 *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

11 **1. Text**

12 ORS 197.522(3) provides, in part, that

13 “[i]f an application is inconsistent with the comprehensive plan and
14 applicable land use regulations, the local government, *prior to*
15 *making a final decision on the application, shall allow the applicant*
16 *to offer an amendment or to propose conditions of approval* that
17 would make the application consistent with the plan and applicable
18 regulations. *If an applicant seeks to amend the application or*
19 *propose conditions of approval * * ** [the local governing body may
20 extend the timeline for making a final decision.]” (Emphases
21 added.)

22 Language providing that the city “shall” allow an applicant to take an action
23 expresses a command. *Webster’s Third New Int’l Dictionary* 2085 (unabridged
24 ed 2002). ORS 197.522(3) is properly read to provide that if ORS 197.522(3) is
25 implicated, the local government does not have discretion to refuse to allow the
26 submission of conditions or an application amendment. ORS 197.522(3) also
27 provides that if an applicant seeks to amend its application or propose conditions
28 of approval, the city may extend the timeline for making its final decision. The

city is not required to approve an application that it determines cannot be made consistent with the applicable criteria through conditions or amendments proposed by an applicant. ORS 197.522(4).

2. Context and Legislative History

Related statutes may provide helpful context when interpreting a statute. *PGE*, 317 Or at 611 (explaining context as including provisions of the same statute and other related statutes) (citing *Southern Pacific Trans. Co. v. Dept. of Rev.*, 316 Or 495, 498 (1993); *Sanders v. Oregon Pacific States Ins. Co.*, 314 Or 521, 527, 840 P2d 87 (1992)). ORS 197.307 clearly sets out the reasoning behind the state's needed housing statutes, explaining that:

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

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

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

ORS 197.307(4)(b) provides that city procedures may not have the effect of discouraging needed housing through unreasonable delay. The legislature has therefore evidenced its intent to have cities zone areas to facilitate the provision of housing under clear and objective standards when the housing is or may be

1 made to conform to the applicable standards, and to avoid unreasonable delay in
2 doing so.

3 ORS 197.797(6)(a) applies to quasi-judicial land use applications such as
4 petitioner's and provides that prior to the conclusion of the initial evidentiary
5 hearing, a party may request an opportunity to submit additional material
6 concerning the application and that the local hearings authority is required to
7 grant such a request. The requirement that the request be made "prior to the
8 conclusion of the initial evidentiary hearing" provides a time component. ORS
9 197.522(3) does not expressly explain the process by which the city is to apply
10 it, but ORS 197.522 also contains a time component. The submission of
11 conditions or proposed amendments is allowed if the local government has
12 determined that the application is inconsistent with applicable criteria. The
13 provision in ORS 197.522(3)(b) allowing the city to extend the time required for
14 it to make a final land use decision if the applicant seeks to submit conditions
15 supports our conclusion that the legislature intended to allow a request to propose
16 conditions after the decision maker has tentatively determined that the existing
17 proposal fails to meet relevant standards.

18 The city must "allow the applicant to offer an amendment or to propose
19 conditions of approval that would make the application consistent with the plan
20 and applicable regulations" only "if an application is inconsistent with the
21 comprehensive plan and applicable land use regulations." ORS 197.522(3).
22 Whether an application "is inconsistent with the comprehensive plan and

1 applicable land use regulations” is a city determination that depends on the
2 application of the comprehensive plan and applicable land use regulations. Here,
3 the planning commission determined that the application is consistent with the
4 comprehensive plan and applicable land use regulations. Differently, the city
5 commission decided that with the comprehensive plan and applicable land use
6 regulations. Petitioner could not have been aware that the application is
7 inconsistent with the comprehensive plan and applicable land use regulations
8 until after the city commission made that determination. Petitioner requested an
9 opportunity to amend the application or propose conditions of approval if the city
10 commission determined that application is inconsistent with the comprehensive
11 plan and applicable land use regulations. Record 1301. ORS 197.522(3) required
12 the city to provide petitioner notice of the reasons for denial and allow petitioner
13 an opportunity to offer an amendment or to propose conditions of approval *prior*
14 *to making a final decision on the application.*

15 **B. Preservation of Error**

16 The city argues that petitioner is precluded from raising the issue raised in
17 the second assignment of error because petitioner failed to object to the alleged
18 error during the proceedings below. Respondent’s Brief 28. Petitioner argues that
19 it preserved the issue because it “specifically raised ORS 197.522(3) and urged
20 that, as a procedural matter, the City Commission could not outright deny the
21 application without providing [petitioner] the opportunity to cure any alleged
22 deficiencies.” Petition for Review 21 (emphasis omitted).

1 According to the city, the time to object to the city's failure under ORS
2 197.522 was during or following the city commission's October 17, 2022
3 deliberations, after the October 11, 2022 hearing had concluded and when the
4 record was closed. Alternatively, the city argues that it did not have any
5 obligation under ORS 197.522(3) because petitioner never proffered any
6 amendments or conditions. Respondent's Brief 31.

7 We reject the city's argument that petitioner failed to preserve its
8 procedural assignment of error. Prior to the first city commission hearing,
9 petitioner requested that if the city commission determined that certain criteria
10 were not met, the record be reopened to allow petitioner to develop responsive
11 proposals. The city does not identify any response to that request during the
12 proceedings below. We agree with petitioner that its October 10, 2022 request
13 that the record be reopened pursuant to ORS 197.522(3) to respond to a potential
14 denial was sufficient to preserve the issue.

15 Second, ORS 197.522 refers to what happens "if an application is
16 inconsistent with the comprehensive plan." Petitioner argues that it could not
17 propose amendments or conditions of approval prior to knowing the basis for any
18 denial, and that it properly raised the applicability of ORS 197.522(3) to the city
19 council prior to the tentative decision. The city cites *Oien v. City of Beaverton*
20 for the proposition that an applicant may need to develop proposed conditions of
21 approval before knowing whether or not the local government would approve its
22 application without conditions. 46 Or LUBA 109 (2003). *Oien* did not however,

1 concern the needed housing statute or ORS 197.522, which clearly includes a
2 time component referencing the proposal of conditions *after* the city has
3 identified issues with compliance.

4 Petitioner advised the city in its October 10, 2022 letter that it was asserting
5 a right to respond if the city commission was going to deny its application. We
6 agree with petitioner that this assignment of error was preserved. Nothing in ORS
7 197.522 requires the proposed conditions be submitted with the request that the
8 record be reopened.

9 **D. Substantial Prejudice**

10 We will reverse or remand a land use decision where the local government
11 “[f]ailed to follow the procedures applicable to the matter before it in a manner
12 that prejudiced the substantial rights of the petitioner[.]” ORS 197.835(9)(a)(B).
13 Petitioner argues it has suffered substantial prejudice because the city prohibited
14 it “from offering conditions that might have moved the City Commission to
15 affirm the Planning Commission’s approval.” Petition for Review 27.

16 We agree with the city that the substantial rights referenced in ORS
17 197.835(9)(a)(B) include an adequate opportunity to prepare and submit
18 evidence, and a full and fair hearing, but do not include a right to a specific
19 outcome. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014), *aff’d*, 269
20 Or App 598, 346 P3d 668 (2015). While we agree with the city that petitioner is
21 not entitled to a specific result, ORS 197.522(3) requires the city to give
22 petitioner the opportunity to develop responsive amendments or conditions of

1 approval “prior to making a final decision on the application[.]” The city
2 commission’s failure to allow petitioner to propose conditions after it determined
3 that criteria were not met but prior to making a final decision on the application
4 denied petitioner the opportunity to a full and fair hearing. The city erred when
5 the city failed to provide petitioner a reasonable opportunity to respond and
6 propose alternative ways of meeting the city’s requirements prior to making a
7 final decision on the applications.¹⁰

8 The second assignment of error is sustained.

9 **FIRST ASSIGNMENT OF ERROR**

10 We restate ORS 197.307 in relevant part:

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

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

¹⁰ In this case, petitioner requested an opportunity to amend the application or propose conditions of approval prior to the city’s final decision on the application. We need not and do not address in this decision whether, absent such a request, ORS 197.522(3) requires the city to provide an applicant notice of tentative denial and an opportunity to amend the application or propose conditions of approval.

1 “(b) May not have the effect, either in themselves or
2 cumulatively, of discouraging needed housing through
3 unreasonable cost or delay.”

4 In its October 10, 2022 letter to the city commission, in response to the
5 arguments from the appellants, petitioner argued that ORS 197.307(4) prohibited
6 the city commission from applying standards that were not clear and objective to
7 deny the general development plan application. Those standards included OCMC
8 17.65.050(C)(6) and (7).

9 In its final written decision, the city commission identified a number of
10 issues it would not consider because the issues were either not raised in a notice
11 of appeal filed by project opponents, or because the city commission would not
12 consider new evidence. Record 6-7. The city commission concluded that it could
13 not address petitioner’s arguments under ORS 197.307(4) because OCMC
14 17.50.190(F) limited its scope of review to “issues * * * listed in the notice of
15 appeal.” The city council found:

16 “As required by OCMC 17.50.190(F) review of appeals by the City
17 Commission is limited by two factors. First, all issues for City
18 Commission consideration must have been raised in a notice of
19 appeal. Second, the City Commission cannot consider new
20 evidence. The City Commission received testimony, both written
21 and oral, that exceeded these limitations and for that reason, it was
22 not considered. The list of issues not considered includes:

23 “Various master plan criteria are not ‘clear and objective’ and
24 therefore, do not apply to this application for ‘needed housing’
25 under ORS 197.30[7](4).” Record 6.

26 Petitioner challenges that determination in the first subassignment of error.

1 The city commission next found:

2 “There are nine applicable approval criteria for granting a [general
3 development plan] but this denial focuses primarily on two of them.
4 OCMC 17.65.050(C)(6) and (7) provide:

5 ““The proposed general development plan is consistent with the
6 Oregon City Comprehensive Plan.’

7 ““The proposed general development plan is consistent with the
8 underlying zoning district(s) and any applicable overlay zone or
9 concept plans.” Record 7.

10 The city commission concluded that the “[general development plan] proposal
11 fails to show that it is consistent with the [PPCP] as required by OCMC
12 17.65.050(C)(6) and (7) and therefore, these applications are denied.” Record 15.

13 The city commission explained:

14 “The PPCP has been adopted as an ancillary document to the City’s
15 Comprehensive Plan. Therefore, approval of the [general
16 development plan] required finding consistency with the PPCP
17 which, in turn, serves to achieve compliance with the
18 Comprehensive Plan. As noted above, finding ‘consistency’ does
19 not mean ‘identical.’ It does not require that all development follow
20 the PPCP map exactly with respect to uses, densities or road
21 locations. However, it does require that all development respond to
22 and further the ‘key priorities’ and design principles either as
23 prescribed or in some other way that indicates that it will achieve
24 the overall PPCP objectives. For the reasons discussed in greater
25 detail below, the proposal fails to present a development proposal
26 that will achieve PPCP consistency.” Record 7.

27 In its second subassignment of error, petitioner argues that the city commission
28 erred by applying OCMC 17.65.050(C)(6) and (7), which are not clear and
29 objective standards.

1 **A. First Subassignment of Error City Interpretation of Its Appeal**
2 **Requirements**

3 The city maintains that it correctly concluded that its scope of review was
4 limited to issues raised in the notices of appeal of the planning commission's
5 decision to the city commission.

6 For the reasons explained below, we agree with the city that the city
7 commission plausibly interpreted the city code to conclude that its scope of
8 review was limited to issues raised in the notices of appeal of the planning
9 commission's decision.

10 Petitioner argues that the city commission erred in interpreting its code to
11 require petitioner to file an appeal of the planning commission's approval of its
12 applications in order for the needed housing issue to fall within the city
13 commission's scope of review of the appeals. As petitioner describes its strategy
14 before the city commission, it "both (a) defended that approval on the bases
15 identified by the Planning Commission, and (b) relied on ORS 197.307(4) as an
16 independent basis for the City Commission to deny the appeals on the merits."
17 Petition for Review 9. According to petitioner, the city commission improperly
18 conflated issues raised in a notice of appeal with issues raised in response to
19 issues appealed.

20 LUBA must affirm a governing body's interpretation of its own land use
21 regulation if the interpretation is not inconsistent with the regulation's express

1 language, purpose, or policy. ORS 197.829(1).¹¹ The test under ORS 197.829(1)
2 is not whether the interpretation is correct, or the best or superior interpretation,
3 but whether the governing body’s interpretation is “plausible,” given its text and
4 context. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

5 OCMC 17.50.190(F) provides, in part, that “[a]ppeal hearings shall be
6 conducted by the city commission. The decision shall be on the record and the
7 issues under consideration shall be limited to those listed in the notice of appeal.”

8 OCMC 17.50.190(C)(4) provides that a notice of local appeal of a land use
9 decision “shall” include “[a] statement of the specific grounds for appeal.” No
10 one who filed a notice of appeal identified the needed housing statute as an issue.

11 The city commission’s interpretation of the code provision to conclude that

¹¹ ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 petitioner's presentation was limited to responding to the *substance* of the issues
2 listed in the notices of appeal is plausible. Nothing in the plain language of the
3 code requires the city commission to consider whether a criterion is applicable
4 where its applicability is not raised in a notice of appeal. We agree with the city
5 that the plain language of the ordinance provides that an issue will not be
6 considered if it is not described in a notice of appeal.

7 The city commission did not err in refusing to consider petitioner's needed
8 housing arguments.

9 The first subassignment of error is denied.

10 **B. Second Subassignment of Error Compliance with ORS**
11 **197.307(4)**

12 **1. Exhaustion Waiver**

13 The second subassignment of error is that the city commission erred in
14 applying OCMC 17.65.050(C)(6) and (7), criteria that are not clear and objective,
15 because the subject application is for needed housing. Petitioner argues that

16 "LUBA should, at a minimum remand this appeal to the City
17 Commission to address the merits of the interest[ed] parties' appeals
18 in relation to the needed housing statute. ORS 197.307(4). Those
19 appeals were sustained on the basis of issues regarding the
20 application of subjective standards, which – owing to ORS
21 197.307(4) – supplied no basis for denying [petitioner's] application
22 * * *." Petition for Review 14.

23 Petitioner raised the needed housing argument before the planning
24 commission and, as discussed in our resolution of the first subassignment of error,
25 the city commission interpreted its code to conclude that it could not consider

1 those issues. We understand the city to maintain that petitioner may not raise the
2 issue raised in the first assignment of error at LUBA because petitioner did not
3 appeal the planning commission's decision, under the doctrine of exhaustion
4 waiver articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382
5 (2003), *rev den*, 336 Or 615 (2004).

6 We rejected a similar argument in *Olstedt v. Clatsop County*, 62 Or LUBA
7 131 (2010). In *Olstedt*, intervenors argued that an issue was waived because no
8 party included the issue in their notice of appeal to the board of commissioners.

9 We explained

10 "Intervenors' last argument is apparently intended to invoke the
11 holding in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382
12 (2003), although intervenors do not cite the case. In *Miles*, the Court
13 of Appeals held that that where a local ordinance requires that an
14 appellant specify the grounds for local appeal, 'a party may not raise
15 an issue before LUBA when that party could have specified it as a
16 ground for appeal before the local body, but did not do so.' *Id.* at
17 510. The problem with intervenors' reliance on the reasoning in
18 *Miles* is that the notice of local appeal was filed by intervenors,
19 challenging the planning commission's denial of their application.
20 Petitioners did not file a notice of local appeal, and it would have
21 been strange to do so, since petitioners prevailed before the planning
22 commission, the planning commission considered only compliance
23 with LWDUO 5.015(2)(C) and (D), and its decision includes no
24 determination regarding LWDUO 2.050(2) at all. Thus, there was
25 no 'issue' regarding compliance with LWDUO 2.050(2) that any
26 party was in a position to appeal to the board of commissioners." *Id.*
27 at 139-40.

28 Here, the planning commission approved petitioner's general development
29 plan and the planning commission concluded that all applicable criteria were met.

1 The planning commission made no findings concerning whether applicable
2 criteria were limited by the needed housing statute. As in *Olstedt*, it would have
3 been strange for petitioner to file an appeal of the planning commission's decision
4 since petitioner prevailed before the planning commission, and the planning
5 commission's decision included no determination regarding the needed housing
6 statute that petitioner could appeal. In that circumstance, petitioner was not
7 required to file a precautionary local appeal in order satisfy the exhaustion
8 requirement in ORS 197.825(2)(a). It was sufficient for petitioner to raise the
9 issue before the planning commission to satisfy any exhaustion requirement.

10 Intervenor PPNA and Hammond-Williams join in the city's response and
11 additionally argue that this assignment of error is waived under ORS 197.797(1),
12 because petitioner did not raise the needed housing argument until three days
13 before the final planning commission hearing and close of the evidentiary
14 hearing. These intervenors argue that the purpose of the notice statutes is to
15 provide participants in the land use process *adequate* time to respond to issues.

16 ORS 197.797(1) provides that issues must be raised before the close of the
17 first evidentiary hearing. Petitioner did so, and we do not address this response
18 further. The issue was preserved for our review and we resolve it below.

19 **2. Clear and Objective Standards**

20 The Court of Appeals discussed the clear and objective standard in *Roberts*
21 *v. City of Cannon Beach*, explaining:

22 "LUBA, and, to a lesser extent, this court, have articulated and

1 refined the ‘clear and objective’ standard under ORS 197.307 over
2 many years. We agree with petitioners that, fundamentally, the
3 standard has two parts: First, a standard, condition, or procedure
4 must be objective. As LUBA has explained, ‘objective’ means
5 ‘existing independent of mind.’ *Nieto* [v. *City of Talent*], ___ Or
6 LUBA ___, ___ [(LUBA No 2020-100, Mar 10, 2021)] (slip op at 9
7 n 6). Standards are not objective ‘if they impose “subjective, value-
8 laden analyses that are designed to balance or mitigate impacts of
9 the development on (1) the property to be developed or (2) the
10 adjoining properties or community.”’” 316 Or App 305, 311, 504
11 P3d 1249 (2021), *rev den*, 370 Or 56 (2022).

12 The court discussed the “clear” requirement in *Roberts*, explaining that
13 clear means easily understood and without obscurity or ambiguity and that “a
14 condition that could be construed ‘to support either of two diametrically opposed
15 conclusions’ is not a ‘clear and objective’ standard or condition within the
16 meaning of ORS 197.307(4)).” *Roberts* at 312 (citing *Group B LLC*, 72 Or LUBA
17 at 82).

18 “Ultimately, in the context of ORS 197.307(4), the degree of clarity
19 required for standards, conditions, and procedures for housing
20 development represents a balance between the need of applicants for
21 an understandable route to approval of the applied-for development
22 and the need of local governments for code-drafting requirements
23 that are realistically achievable.” *Roberts*, 316 Or App at 312.

24 We will reverse or remand a land use decision if the local government
25 improperly construed the applicable law. ORS 197.835(9)(a)(D). ORS
26 227.173(2) provides that “[w]hen an ordinance establishing approval standards
27 is required under ORS 197.307 to provide only clear and objective standards, the
28 standards must be clear and objective on the face of the ordinance.” In addition,

1 ORS 197.831 places the burden on the local government to demonstrate that the
2 criteria are clear and objective.

3 OCMC 17.65.050(C)(6) and (7) require that “[t]he proposed general
4 development plan is consistent with the Oregon City Comprehensive Plan” and
5 “underlying zoning district(s) and any applicable overlay zone or concept plans.”

6 We agree with petitioner that “there are no ‘objective benchmarks’ for measuring
7 the compliance” with elements of the OCCP. Petition for Review 17. OCMC
8 17.65.050(C)(6) and (7) are ambiguous because they do not, on the face of the
9 ordinance, identify the provisions of the PPCP and comprehensive plan that a
10 general development plan must be consistent with. Moreover, the city concedes
11 that it applied criteria that were not clear and objective. Respondent’s Brief 14.

12 The second subassignment of error is sustained.

13 The first assignment of error is sustained in part.

14 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

15 Petitioner’s third assignment of error alleges that the city failed to adopt
16 adequate findings addressing OCMC 17.65.050(C)(3) and (5).¹² Petitioner’s

¹² OCMC 17.65.050(C) sets out the city’s criteria for approval of a general development plan and includes:

“3. Public services for transportation * * * are capable of serving the proposed development, or will be made capable by the time each phase of the development is completed.

“* * * * *

1 fourth assignment of error is that the city commission's findings that certain
2 provisions of the PPCP which serve as approval criteria are not plausible and not
3 entitled to deference. We understand petitioner's third and fourth assignments of
4 error to be precautionary and derivative of their first assignment of error, which
5 we sustain in part above. Accordingly, because on remand the city may apply
6 only clear and objective criteria, we need not and do not resolve these
7 assignments of error.

8 **DISPOSITION**

9 Petitioner argues that we should reverse the decision if we sustain the first
10 assignment of error and determine that the city commission improperly applied
11 criteria that are not clear and objective to the general development plan. Petitioner
12 further argues that even if we do not reverse the decision, we should remand it
13 because petitioner was not afforded the opportunity to propose amendments or
14 conditions of approval as ORS 197.522(3) requires.

15 OAR 661-010-0073(2)(c) provides that remand is the remedy when the
16 error is procedural. The city commission adopted a single decision in which it
17 denied the general development plan, the variance, and the adjustments, but its

“5. The proposed general development plan, including development standards and impact mitigation thresholds and improvements, adequately mitigates identified impacts from each phase of development. For needed housing, as defined in ORS 197.303(1), the development standards and mitigation thresholds shall contain clear and objective standards.”

1 findings address only general development plan criteria, and do not address the
2 adjustment or variance criteria.¹³ The city has not yet determined whether the
3 general development application satisfies clear and objective criteria in the
4 OCMC. In addition, we do not know whether petitioner will seek the variance
5 and adjustments in conjunction with its general development plan or amend its
6 application or propose conditions of approval, given that on remand the city may
7 apply only clear and objective approval criteria that are clear and objective on the
8 face of the OCMC to the general development plan.¹⁴ ORS 197.307(4); ORS
9 227.173. Accordingly, we conclude that remand is the appropriate remedy.

10 The decision is remanded to the city for the city to apply only clear and
11 objective criteria from the OCMC to the general development plan application
12 and, if the city concludes that the application is inconsistent with clear and
13 objective provisions, to provide petitioner an opportunity to amend its application
14 or propose conditions of approval prior to making a final decision on the
15 application, as required by ORS 197.522(3).

¹³ Petitioner argues that it was required to apply for a variance to allow certain lots for attached dwellings to be “1800 square feet because OCMC 17.65.050.C.9 requires a mix of residential uses with no single use exceeding 75% of the total, and the [Park Place Concept Plan] requires a certain minimum number of units [.]” Petition for Review 15.

¹⁴ Variances related to housing are generally not required to be clear and objective. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37, 48 (2014).