FAIR HOUSING COUNCIL OF OREGON -- PLANNING FOR HOUSING: DON'T FORGET THE BASICS

Introduction to Oregon Land Use Law: Decision makers and their staff operate in a matrix that assigns specific standards to all substantive decisions. *Anderson v. Peden*, 284 Or 313, 314-315, 587 P2d 59 (1979):

> "Zoning law is not common law but a branch of state and local legislation and administrative law, created by particular statutes, rules, charters, comprehensive plans, ordinances, and resolutions, and the criteria governing such matters as "conditional uses" must be sought there rather than in cases from other cities, counties, or states."

Oregon Housing Obligations -- Goal 10, the Needed Housing Statutes, and the Goal 10 Rule provide the framework for local government housing obligations in Oregon.

A. Objectives of Goal 10

> Goal 10 requires cities and counties
> [t]o provide for the housing needs of citizens of the state.
> Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

OAR 660-015-0000(10)

Goal 10 imposes an affirmative duty on local governments to assure opportunities for the provision of adequate numbers of needed housing units at prices and rents that are affordable to Oregonians. Goal 10 also seeks "greater certainty in the development process so as to reduce housing costs." OAR 660-08-000(1).

Goal 10 is implemented through two LCDC administrative rules: OAR chapter 660, division 8, and OAR chapter 660, division 7. The latter rule applies only to local governments within the Portland metropolitan region. There is also legislation to ensure compliance with the goal. *See* ORS 197.295-197.313, 197.475-197.490, 197.831.

B. Historical Perspective on State Standards for Needed Housing.

The policy expressed in Goal 10 has been further articulated over the years in LCDC policy statements, statutes, and LCDC rulemaking. The first effort was the LCDC's "St. Helens Policy," an informal policy statement adopted in 1979. The Legislature expanded and codified this policy in 1981. That initial statutory language, as amended over the years, appears in ORS 197.303 and 197.307. The LCDC adopted its division 7 (Portland Metro area) and the division 8 rule (all of state) to implement the

goal and the statute in 1981 and 1982, respectively.

1. St. Helens Policy

The 1979 St. Helens Policy intended to ensure that there is enough land with the right zoning inside urban growth boundaries (UGBs) to meet a city's need for housing types and costs. The policy required that standards, conditions and procedures for needed housing be clear and objective and not discourage needed housing through unreasonable cost or delay.

2. "Needed Housing" Statute

The Legislature codified the St. Helens Policy in 1981. SB 419, 1981 Or Laws, Chapter 884, Sections 5 and 6. The codification is now known as the "Needed Housing Statute." This initial enactment reflected several policies that remain in the statute today. First, it linked a demonstration of a need for housing to the requirement to permit such housing in zones with sufficient buildable land. Section 5(2) of the Act stated:

> "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 a zone or zones with sufficient buildable land to satisfy that need."

Second, it defined "needed housing" in terms of housing types and price levels, and provided an expanded definition after the start of a city's first periodic review. Section 6(1) of the Act stated:

> "[U]ntil the beginning of the first periodic review * * * "needed housing" means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review * * * "needed housing" also means housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy and manufactures homes, as defined in section 4 of this 1981 Act, located in either mobile home parks or subdivisions."

Third, it required that the standards, conditions, and approval procedures for needed housing be clear and objective. Section 5(4) of the Act stated:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

All three of these policies remain in the statute today, although the statute has been

amended many times. The original language of the 1981 Needed Housing Statute has been amended in 1983, 1989, 1993, 1997, and 1999.

In 1983 "government assisted housing" was added to the definition in ORS 197.303(1) of needed housing types that applies after the start of periodic review. SB 406, 1983 Or Laws, Chapter 795, Section 1. The policy in ORS 197.307(1) was expanded to embrace issues of affordability and government assistance. *Id.* Section 3.

In 1989 "mobile home parks" and "manufactured homes" were added to the definition of needed housing. The Act established, in ORS 197.307(5), a full list of the potential placement standards that cities can use to regulate where manufactured homes can go outside of mobile home parks. HB 2863, 1989 Or Laws, Chapter 380.

In 1989 the provision of farm worker housing was the subject of separate new legislation. SB 735, 1989 Or Laws, Chapter 964. The Act expanded the policy statement in ORS 197.307 that applies inside urban growth boundaries to include "housing for seasonal and year-round farm workers." *Id.* section 6. It created new sections on "Farmworker Housing," codified at ORS 197.677-197.685 that are focused primarily on rural areas. The Act adopted for farm-worker housing in rural areas the same basic standards that apply to needed housing in urban areas. *Shadrin v. Clackamas County*, 34 Or LUBA 154 (1998). If there is a demonstrated need for seasonal farm-worker housing, the use must be allowed in zones with sufficient buildable land. And approval standards, conditions, and approval procedures must be clear and objective and may not discourage such housing through unreasonable cost or delay. *Id.* section 5. Finally, it added similar provisions to ORS 197.312, which applies to cities and counties. *Id.* sections 7, 10.

In 1993 firmer direction was given to cities and counties to plan for manufactured homes inside urban growth boundaries. HB 2835, 1993 Or Laws, Chapter 184. The Act required plans and codes to be amended to allow for manufactured homes, including on individual lots, in all zones allowing single-family dwellings, and to regulate placement only under the standards in ORS 197.307(5).

In 1997 new language was added to ORS 197.307(3) addressing the regulation of "appearance or aesthetics." HB 2772, 1993 Or Laws, Chapter 733 (codified as ORS 197.307(3)(b)-(e)). With minor exceptions, subsection (b) required the application of only "clear and objective approval standards or special conditions, as provided in subsection (6) of this section [ORS 197.307(6)], regulating appearance or aesthetics" for needed housing developments or for a "permit, as defined in ORS 215.402 or 227.160, for residential development." Subsection (d) added some new flexibility for local governments. It allowed local governments to have, in addition to the approval process in (b), an alternate approval track for needed housing that is not based solely on clear and objective standards, provided any applicant retained the option of proceeding under either track. The alternative process language appears at ORS 197.307(3)(d). It states:

> "In addition to an approval process based on clear and objective standards as provided in paragraph (b) of this subsection, a local government may

> adopt an alternative approval process for residential applications and permits based on approval criteria that are not clear and objective provided the applicant retains the option of proceeding under the clear and objective standards or the alternative process and the approval criteria for the alternative process comply with all applicable land use planning goals and rules."

The DLCD supported the 1997 legislation, explaining that it should help achieve the 15-year old state mandate for clear and objective standards, which the DLCD has not fully been able to achieve through the periodic review process. See Ltr from B. Rindy, DLCD, Minutes and Ex. H, HB 2501 Public Hearing, House Committee on Environment and Energy, Feb. 21, 1997. The DLCD letter stated in part:

> "This bill would strengthen current law requiring that approval standards be "clear and objective." This policy was created by the courts in 1979, and was enacted into statutes and LCDC Rule sin 1981 – after the state's approval of many local ordinances. Therefore, there are many jurisdictions in the state that have not adopted clear and objective ordinances. DLCD has attempted to correct these ordinances through our periodic review of local plans, but given the statutory time frame for periodic reviews, we anticipate it will be several years until we bring all jurisdictions into compliance. This bill could greatly accelerate this compliance."

The 1997 language added in ORS 197.307(3)(b) relating to appearance and aesthetics was interpreted narrowly in *Rogue Valley Assn. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998), *aff'd* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 594 (1999), which was a facial challenge to new hillside development regulations. The Court recognized that ORS 197.307(6), dating from 1981, requires clear and objective standards, conditions and procedures with respect to <u>all</u> regulations affecting development of needed housing. It therefore read the new language in ORS 197.307(3)(b) as only being triggered only for regulations that apply exclusively to appearance and aesthetics. 158 Or App at 6. The Court also held that a facial challenge to new regulations must demonstrate that the standards are categorically incapable of being applied consistent with the requirement for clear and objective procedures. 158 Or App at 5.

In 1999 the Legislature corrected the *Rogue Valley* decision by clarifying the requirement for clear and objective standards and facilitating challenges to new regulations on this issue. It made three changes. First, it amended the language in ORS 197.307(3)(b) by dropping the cross reference to subsection (6) and adding language triggering the clear and objective requirement when regulations relating to appearance or aesthetics "in whole or in part." ORS 197.307(3)(b) now states:

> "A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance

> or aesthetics to an application for development of needed housing or to a permit, as defined in ORS 215.402 or 227.160, for residential development. The standards or conditions shall not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone."

Second, it added to ORS 215.416(8)(b) and 227.173(2) a requirement that regulations be clear and objective on their face. The language is:

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

Third, it added the language in ORS 197.831 shifting the burden of proof to local governments who are defending appeals of regulations that are supposed to be clear and objective. ORS 197.831 states:

> "In a proceeding before the Land Use Board of Appeals or on judicial review from an order of the board that involves an ordinance required to contain clear and objective approval standards for a permit under ORS 197.307 and 227.175, the local government imposing the restrictions shall demonstrate that the approval standards are capable of being imposed only in a clear and objective manner."
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> *Note:* The "alternative approval process" language in ORS 197.307(3)(d), which allows discretionary standards, appeared in 1997 with the new language stating the requirement for clear and objective standards relating to appearance or aesthetics. As noted by the Court in the *Rogue Valley* decision, the more general requirement for only clear and objective standards, conditions, and procedures has been in ORS 197.307(6) since 1981. It is not clear whether the discretionary approval track allowed in section (3)(d) applies only to matters of appearance and aesthetics described in ORS 197.307(3)(b), or whether it applies to all matters, thus allowing an alternative approval process to ORS 197.307(6) generally.

3. Division 7 and Division 8 Rules

The LCDC's Division 8 rule was adopted in 1982, immediately following the 1981 Needed Housing statute. The stated purpose is "to define standards for compliance with Goal 10 "Housing" and to implement ORS 197.303 through 197.307."

The Division 8 rule elaborates on the statute in several important ways. The local plan must justify the mix of housing types and densities in the "housing needs projection," which is defined in the rule. That projection must be supported by sufficient buildable land designated on the plan map to satisfy the need. OAR 660-008-0010. The statutory requirement for clear and objective standards for development of needed

housing is repeated verbatim. OAR 660-008-0015.

Buildable lands must carry residential plan designations to accommodate the types and density of the housing needs projection. OAR 660-008-0020. Applying residential plan designations may be deferred only in limited circumstances. To defer such designations, the plan must identify public facility constraints as the cause and must contain a policy commitment, strategy and timeline for resolving the constraints.

Buildable lands must also carry residential zoning. Rezoning of land to the maximum planned residential density may be deferred under a process that is reasonably justified. OAR 660-008-0025. To do so the plan must explain the upzoning process, explain why it will work to provide needed housing, and apply only clear and objective standards in upzoning decisions.

Cities must consider the needs of the region when determining their fair allocation types and densities. The local coordination body (the county) has the obligation to coordinate among jurisdictions to ensure that needed housing is provided on a regional basis through coordinated comprehensive plans. OAR 660-008-0030.

The LCDC's Division 7 Rule was adopted in 1981, essentially in tandem with the Division 8 Rule. It supplements the Division 8 Rule for the land inside the Metro UGB. The purpose statement explains its intent to provide an adequate number of needed housing units inside the Metro UGB. It references the LCDC's determination that the proposed housing density in the initial Metro acknowledgment submittal was too low. OAR 660-007-0000.

Division 7 requires Metro cities to have enough buildable land for at least 50 percent of new residential units to be attached single family or multiple family units. Cities may justify an alternate percentage by demonstrating changing circumstances. OAR 660-007-0030. For those cities that are subject to the 50 percent standard, the rule sets floor of six, eight or ten units per buildable acre, depending on the city. Several small cities are exempt. OAR 660-007-0035. Also exempt are those cities that have justified an alternative to the 50 percent standard. In these cities the average density of single and multiple family housing must meet or exceed that provided for at acknowledgment. OAR 660-007-0037.

C. Planning Requirements

1. Identification of "Needed Housing"

Goal 10 requires local governments to determine and justify in their comprehensive plans a mix of housing types and densities that is "(a) Commensurate with the financial capabilities of present and future area residents of all income levels during the planning period; (b) Consistent with any adopted regional housing standards, state statutes, and [LCDC] administrative rules; and (c) Consistent with Goal 14

["urbanization"] requirements." OAR 660-08-005(5). Local governments then must designate sufficient buildable land on their comprehensive plan maps to satisfy the identified housing needs by type and density. OAR 660-08-010.

The housing types identified in acknowledged comprehensive plans to meet local government housing needs projections are referred to by rule and statute as "needed housing." OAR 660-08-005(11); ORS 197.303. On or after the beginning of a local government's first periodic review, needed housing includes not only those identified housing types, but also (1) attached and detached single-family housing and multiple-family housing for both owner and renter occupancy; (2) government- assisted housing; (3) mobile home or manufactured dwelling parks as provided in ORS 197.475-197.490; (4) manufactured homes in manufactured dwelling subdivisions; and (5) manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions. ORS 197.303(1). This definition is relaxed somewhat for cities with populations less than 2,500 and counties with populations less than 15,000. ORS 197.303(2).

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998), *("Rogue Valley")*, LUBA questioned whether a city could exclude high-cost or luxury housing as a needed housing type. Although LUBA did not specifically decide the issue, it described the legislative history and context of the statute, finding that the clear language of OAR 660-008-0005(5)(a) describing housing needs projections includes housing types that are commensurate with all income levels. As a result, high-cost housing that is identified in the comprehensive plan as a needed housing type is protected by the requirements of Goal 10. The court of appeals affirmed LUBA's decision. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 158 Or App 1, 970 P2d 685, *aff'd* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 594 P2d (1999).

Additionally, in areas employing seasonal and year-round farmworkers, local governments must include housing for such workers within their projections for needed housing. ORS 197.307(3). Moreover, ORS 197.312(2) prohibits local governments from imposing any approval standards, special conditions, or procedures on seasonal and year-round farmworker housing that are not clear and objective or that have the effect, individually or cumulatively, of discouraging farmworker housing through unreasonable cost or delay or by discriminating against such housing.

ORS 197.312(1) further prohibits discrimination against needed housing types through charter amendments. The legislature enacted ORS 197.312 in 1983 following an effort by the city of Forest Grove to prohibit by charter multifamily housing and government-assisted housing. *State of Oregon v. City of Forest Grove*, 9 Or LUBA 92 (1983).

2. Buildable Lands Inventory

The term *buildable lands* means "lands in urban and urbanizable areas that are suitable, available and necessary for residential uses." ORS 197.295(1). *See also* OAR 660-08-005(2). Because urban and urbanizable areas are located only inside urban growth boundaries (UGBs), Goal 10 has no effect on residential development outside UGBs.

Land is "suitable and available" if it is residentially designated vacant or redevelopable land within an urban growth boundary "that is not constrained by natural hazards, or subject to natural resource protection measures, and for which public facilities are planned or to which public facilities can be made available." OAR 660-08-005(13). Generally, this excludes publicly owned land. OAR 660-08-005(13). Land is considered "redevelopable" if, due to present or expected market forces, a strong likelihood exists that the existing development will be converted to a more intensive residential use during the planning period. OAR 660-08-005(12). Under OAR 660-08-005(2), however, local jurisdictions are not required to determine redevelopment potential in preparing their buildable lands inventory.

Under OAR 660-08-010 and ORS 197.307(3), sufficient buildable land must be designated on the comprehensive plan map to satisfy the need identified for housing. Moreover, each local buildable lands inventory must document the amount of buildable land in each residential plan designation. OAR 660-08-010.

In 1995 the legislature created new provisions under ORS 197.296 that required local governments to provide for sufficient buildable lands during legislative review of the urban growth boundary. ORS 197.296(2). The requirements ensure accommodation of estimated housing needs for a period of 20 years and apply only to certain communities. Only cities with a population of 25,000 or more within the UGB, a growth rate exceeding the average rate of growth for the state for three of the last five years, or cities with a functional plan prepared by a metropolitan service district are subject to the new requirements, unless they are waived by LCDC.

As part of legislative review of a UGB, including periodic review, the 1995 law requires a city to (1) inventory buildable lands within the UGB, (2) make a determination of the actual density and mix of housing types within the UGB over the last five years or since the last periodic review, whichever is greater, (3) conduct an analysis of housing need by type and density to determine the amount of land needed for the next 20 years, and (4) determine the average density and mix of housing types that must occur to meet the 20-year housing needs projections compared to the actual density and mix of housing types. ORS 197.296(3)(a)-(c), (5).

When sufficient buildable lands are not available, a city must either amend its UGB to allow for the expansion of residential development or amend its comprehensive plan, functional plan, or land use regulations to allow for an increase in the intensity of

residential development. That is, a city may choose either to "grow out" or "grow up." ORS 197.296(4)(a)-(b). A city amending its UGB must, in addition to accommodating housing needs, coordinate with the affected school district in providing lands necessary for the siting of new public school facilities.

If the UGB is not amended, then the city must take other legislative actions to "demonstrably increase" the likelihood that sufficient densities will be developed to accommodate housing needs. In establishing that an action will "demonstrably increase" the likelihood that sufficient densities or housing types will be developed, the city must, at a minimum, ensure that land zoned is in appropriate locations for needed housing types and at densities that are likely to be achieved by the housing market. ORS 197.296(7). A city that chooses this second approach must monitor and report on development activity and density by housing type.

Under either approach, a city must demonstrate that the comprehensive plan and land use regulations comply with the goals and rules adopted by LCDC. ORS 197.296(6). Under ORS 197.296(4)(c) a city may take a combination of these actions in providing sufficient buildable lands.

To provide sufficient densities or housing types, the city may do any of the following:

(1) Increase the permitted density on existing residential land;
(2) Provide financial incentives for higher density housing;
(3) Provide additional density beyond that generally allowed in zoning districts in exchange for amenities and features provided by the developer;
(4) Remove or ease approval standards or procedures;
(5) Provide minimum density ranges;
(6) Provide redevelopment and infill strategies;
(7) Authorize housing types not previously allowed by the plan or regulations; or
(8) Adopt an average residential density standard. ORS 197.296(7)(a)-(h).

When ORS 197.296 is triggered it imposes on the local government the requirement to conduct analysis of needs and then take action based on its findings. LUBA has found that Goal 14 prohibits segmenting the ORS 197.296 requirements into a series of plan amendment steps. See *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

Postacknowledgment amendments to plans and land use regulations that trigger Goal 10 compliance must demonstrate that buildable land inventories are still adequate. See, e.g., *Home Builders Assoc. of Lane County v. City of Eugene*, 52 Or LUBA 341 (2006)(refinement plan amendments making policy choice to convert extensive residential acreage to parks); *Home Builders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 370, 447 (2002)(new regulations protecting trees and impact buildable lands);

Opus Development Corp. v. City of Eugene, 28 Or LUBA 670, 694-95 (1995) (refinement plan amendments). This obligation also arises in the context of site-specific decisions that redesignate residential lands. See, e.g., *DLCD v. City of Warrenton*, 37 Or LUBA 933, 946 (2000)(inadequate that inventory is unaffected by redesignation of 41 acres of medium density land).

Postacknowledgement land use regulations, including legislative review of the UGB and other comprehensive plan or land use regulatory amendments that affect the amount of buildable land, must also provide analysis to show that sufficient land will be available for the development of needed housing types. Identifying available land within the UGB without showing how that land is suitable for construction of needed housing identified in the buildable land inventory is inadequate. *Rogue Valley Assn. of Realtors v. City of Ashland,* 35 Or LUBA 139 (1998), *aff'd* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 594 (1999).

It is equally unavailing in meeting the requirements of Goal 10 to assume that already developed residential land is not part of the buildable lands inventory. *Opus Development Corp. v. City of Eugene,* 28 Or LUBA 670, 693-695 (1995) (*Opus I*). Even developed land must be evaluated to determine compliance with Goal 10 because OAR 660-008-0005(12) requires that "redevelopable land" also be considered when there exists the "strong likelihood" that redevelopment to more intensive residential uses will occur during the planning period. *Opus I, supra*, 28 Or LUBA at 695. Comprehensive plan amendments affecting areas that are already developed and that affect needed housing must include adequate findings to comply with Goal 10, including "redevelopable" lands.

3. The Plan Inventory as a Measure of Goal 10 Compliance

The data contained in the housing needs projection and the buildable lands inventory enables LCDC, during periodic review, to determine compliance with Goal 10. If insufficient land has been designated to meet identified housing needs, or if the plan fails to provide adequate housing opportunities for each needed housing type, the plan violates Goal 10 and LCDC may require changes.

4. Special Requirements for the Portland Metropolitan Area

Goal 10 has been implemented to ensure that each local government does its fair share to meet the housing needs of Oregon households. *Seaman v. City of Durham,* 1 LCDC 283, 289-290 (1978).

For the Portland metropolitan area, LCDC has established specific standards for housing mix and density to ensure that all local governments "do [their] part towards solving the needs of the area's residents of all income levels, as far as is reasonably possible given the constraints of land, materials, and similar costs." *Seaman v. City of*

Durham, supra, 1 LCDC at 291. Each jurisdiction other than small developed cities (i.e., those containing less than 50 acres of buildable land in 1977) must either "designate sufficient buildable land to provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing or justify an alternative percentage based on changing circumstances." OAR 660-07-030(1).

Changing circumstances could include such factors as Metro forecasts of dwelling units by type; changes in household structure, size, or composition by age; changes in economic factors affecting demand for single-family versus multiple-family units; and changes in price ranges or rent levels relative to income levels. OAR 660-07-030(1)(a)-(d).

OAR 660-07-035 further requires each city and county subject to this 50% standard to provide housing opportunities at overall densities of between six and 10 dwelling units per net buildable acre. Those standards do not apply to jurisdictions that justify an alternative new construction mix under OAR 660-07-030. OAR 660-07-037. Instead, those jurisdictions must (1) provide for average densities of detached single-family housing and multiple-family housing which is equal to or greater than the densities respectively provided for those housing types in the plan at the time of the original LCDC acknowledgment; and (2) evaluate whether the factors in OAR 660-07-030 support increases in the density of either or both of these types of housing. OAR 660-07-037(1)-(2). If the evaluation supports increases in density, then necessary amendments to residential plan and zone designations must be made. OAR 660-07-037(3).

> NOTE: OAR 660-07-030 modifies an earlier rule that the court of appeals overturned, in part, in *City of Happy Valley v. LCDC,* 66 Or App 795, 799-801, 677 P2d 43, *aff'd as modified,* 66 Or App 803, *rev. denied,* 297 Or 82 (1984). The court held that ORS 197.303(2)(a) prevents LCDC from ordering cities with populations below 2,500 to provide a *specific* housing mix *by type,* as required for larger jurisdictions under the definition of "needed housing" in ORS 197.303(1). The court noted, however, that smaller cities remain subject to compliance with the "less specific and stringent" requirement in ORS 197.307(3) to permit needed housing at particular price ranges and rent levels. *City of Happy Valley, supra,* 66 Or App at 800.

5. Special Requirements for Manufactured Housing

The term *needed housing* includes both dwellings in mobile home or manufactured dwelling parks and manufactured homes in manufactured dwelling subdivisions or on individual lots outside such subdivisions. ORS 197.303(1). ORS 197.307(3) requires cities and counties to permit these housing types in one or more zoning districts with sufficient buildable land to meet the need. Note, however, ORS 197.303(2), which provides that cities with a population under 2,500 and counties with a population under 15,000 need not provide for manufactured homes on individual lots.

a. Mobile Home and Manufactured Dwelling Parks

Planning for mobile home and manufactured dwelling parks must satisfy the standards in ORS 197.475-197.490. Each local government must permit these parks in areas planned and zoned for a residential density of six to 12 units per acre. ORS 197.480(1). Mobile home and manufactured dwelling parks generally may not be established on land within UGBs which is zoned for commercial or industrial uses. ORS 197.490.

ORS 197.480(2) identifies factors to consider in determining the need for mobile home or manufactured dwelling parks. That need assessment must include the need for land to accommodate the potential displacement of inventoried mobile home or manufactured dwelling parks sited in areas planned and zoned or generally used for commercial, industrial, or high-density residential development. ORS 197.480(2)(d), (3).

As with "stick-built" housing (*see* ORS 197.307(6)), cities and counties may regulate manufactured housing only through "clear and objective" criteria and standards. When a public hearing is required for park approval, application of those criteria and standards is the sole issue to be determined. ORS 197.480(5). For a detailed discussion of the statute and its direct application to site-specific decisions see *Multi-Tech Engineering Services, Inc. v. Josephine County*, 37 Or LUBA 314 (1999)(remanding denial of mobile home park for applying nonclear and objective standards) and the second appeal of the same local decision on remand, *Doob v. Josephine County*, 39 Or LUBA 276 (2001).

The statute prohibits local governments from establishing criteria or standards that would preclude the development of mobile home or manufactured dwelling parks within the intent of ORS 197.295 and 197.475-197.490. ORS 197.480(5).

The 1997 Legislature adopted a law to further limit the authority of local governments to regulate manufactured dwelling parks. ORS 197.314. Cities or counties are prohibited from establishing a minimum lot size of less than one acre within the urban growth boundary where a manufactured dwelling park is allowed. ORS 197.314(5). A jurisdiction also cannot prohibit placement of manufactured dwellings in a mobile home or manufactured dwelling park zoned for eight to 12 units per acre based solely on the age of the dwelling. ORS 197.485(1).

However, local governments may adopt standards for manufactured dwelling parks of less than three acres, requiring manufactured houses to have a pitched roof (not exceeding three feet in height for each 12 feet in width) and/or standards requiring siding and roofing similar to that commonly used within the community or comparable to surrounding dwellings. ORS 197.314(6).

The statute also permits local governments to impose "reasonable safety and inspection requirements" for homes not constructed in conformance with the National Manufactured Home Construction and Safety Standards Act of 1974. ORS 197.485(3).

b. Manufactured Homes in Subdivisions and on Individual Lots

ORS 197.307(5) provides a list of placement standards for manufactured homes located outside of mobile home parks and authorizes cities and counties to adopt "any or all" of those standards, or "any less restrictive standard." The placement standards address concerns such as foundations, roof slope and materials, exterior siding, carports, and the like. Cities and counties also may subject "a manufactured home and the lot upon which it is sited" to other development standards, architectural requirements, and minimum lot-size requirements, but only if conventional single family residential dwellings are subject to the same standards. ORS 197.307(5)(g).

Manufactured homes are allowed outside of parks. The 1993 Legislature enacted ORS 193.314, which requires cities and counties to amend their comprehensive plans for all land zoned for single-family residential uses to allow for siting of manufactured homes. The only exceptions are set forth in ORS 193.314(3) and (5).

D. Implementation of Goal 10

Goal 10 and Goal 2 (land use planning) require local governments to adopt implementation measures that are consistent with and adequate to carry out comprehensive plan policies. The principal housing implementation measures are the zoning map and ordinance and the land development (subdivision) ordinance.

Many communities also apply site or design review ordinances to certain housing types. Subdivisions, partitions, design review, and site review are among "limited land use decisions." ORS 197.015(13). Since 1991 cities have been prohibited from applying plan standards to limited land use decisions unless those standards have been fully incorporated into the land use regulations. ORS 197.195(1). Cities that have incorporated discretionary plan standards into their codes may, however, be unable to apply them if the needed housing statute is invoked.

1. The "Clear and Objective" Test in practice

Cities and counties may set approval standards to permit a particular housing type outright, impose special conditions on approval, or establish approval procedures. ORS 197.307(4). Local approval standards, special conditions, or procedures regulating the development of needed housing "must be clear and objective, and must not have the effect, either of themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." OAR 660-08-015; ORS 197.307(6). *See also* OAR 660-07-015. This requirement for clear and objective standards may not apply when rezoning

land for housing for which the buildable lands inventory is already adequate. See *Evergreen Development, Inc. v. City of Coos Bay*, 38 Or LUBA 470 (2000).

Generally, standards for approval of needed housing are clear and objective in the meaning of ORS 197.307(6) if the local government demonstrates that they do not impose "subjective, value-laden analyses that are designed to balance or mitigate impacts." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 594 P2d (1999) *("Rogue Valley")*. While this characterization may seem intuitive and straight-forward, it has proven rather difficult to apply consistently. As LUBA commented, "[F]ew tasks are *less* clear or *more* subjective than attempting to determine whether a particular land use approval criterion is clear and objective." *Rogue Valley*, 35 Or LUBA at 155 (1998). One LUBA opinion provided a list of examples of approval standards that violated ORS 197.307(6).

In *Rogue Valley* LUBA quoted verbatim from the St. Helens Policy to provide examples of language that flunks the standard. 35 Or LUBA at 158 n 27:

> Examples of discretionary criteria that are not to be applied to "needed housing" are as follows:
>
> "-be in harmony with the surrounding neighborhood;
> "-preserve and stabilize the value of adjacent properties;
> "-encourage the most appropriate use of the land;
> "-have a minimal adverse impact on the livability, value and appropriate development of abutting properties and the surrounding area compared with the impact of development that is permitted outright;
> "-preserve assets of particular interest to the community;
> "-not be detrimental or injurious to property and improvement in the neighborhood or to the general welfare of the community;
> "-will not unduly impair traffic flow or safety in the neighborhood." St. Helens Housing Policy 4 (Examples of Standards and Conditions).

The focus of the inquiry is on mandatory approval standards that are actually applied. Code language expressing purpose or policy is not required to be clear and objective, so long as it does not apply as a standard for approval for development. *Home Builders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 370, 424 (2002)("*HBA*"). Similarly exempt is code language requiring "consideration" of specified priorities where no discretion is exercised in evaluating the correctness of that consideration. *Id.* at 395. Using analogous reasoning, LUBA examined plan language calling for proposed development to be "coordinated" with ODOT and to "consider and complement the intended function" of a road. The related ordinance further required that "[l]and use decision should consider the planned corridor location and avoid conflicts where feasible." This language was challenged as being unclear as to what role ODOT would play in decision-making, and for presenting a developer with a permitting process

that was "vague and of indeterminate length." LUBA found the consultation requirement to be a widely used planning strategy that did not impose any substantive approval criteria; the required "consideration" did not impose substantive approval criteria, but merely a purpose statement not required to be clear and objective. *1000 Friends of Oregon v. City of Newberg*, 49 Or LUBA 626, 628-630 (2005).

Standards that vaguely incorporate other standards are not inherently deficient. Thus, a provision requiring compliance with "all applicable standards" is ok when the other standards that would apply could be determined. *HBA*, 41 Or LUBA at 397-398. A requirement that sidewalks be located, designed and constructed "according to the provisions of this land use code and other adopted plans and policies" is ok because it simply referred to other clear and objective standards that might apply; the other standards did not have to explicitly identified *Id.* at 410. See also *id.* at 413 ("[T]hat code provisions refer generally to other applicable standards, does not in and of itself offend ORS 197.307(6)"). Moreover, the clear and objective standards requirement does not apply to rezoning of land in a buildable lands inventory to a designation consistent with a comprehensive plan. *EEC Holdings v. City of Eugene*, 65 Or LUBA 179 (2012), *aff'd without opinion* 251 Or App 526,287 P3d 426 (2012).

a. Standards that are clear and objective

The following have been found to be clear and objective. A standard requiring a showing that stormwater runoff from residential PUD would not "create negative impacts," notwithstanding the fact that standard is one that might be difficult to meet; *HBA*, 41 Or LUBA at 415-416; *see also, 1000 Friends of Oregon v. LCDC (Hood River Co.)*, 98 Or App 138, 143, 778 P2d 978 (1998) (prohibition on all adverse impacts on specific resources is clear and objective).

LUBA sees numerical standards as presumptively clear and objective. "Numerical or absolute standards are almost paradigmatically clear and objective" *HBA*, 41 Or LUBA at 389-390; see also *Rogue Valley* 35 Or LUBA at 157, n 25 (providing example of landscaping exceed 15 percent of lot area). LUBA upheld an approval standard requiring "no proposed grading on portions of the development site that meet or exceed 20% slope." Against a challenge that the method for measuring slope gradient was not clear, LUBA upheld the standard explaining that "the slope of a property is an objectively determinable fact, and the absence of instructions on how to determine slope does not offend ORS 197.307(6)." *HBA*, 41 Or LUBA at 410-411. However, in *Southeast Neighbors' Neighborhood Assoc. v. City of Eugene*, __ Or LUBA __, (LUBA No. 2013-004, July 12, 2013, *aff'd without opinion,* 259 Or App 139, 314 P3d 1004 (2013), LUBA said that a standard limiting grading to 20% slopes was clear and objective even if the standards for measurement of the slope were not set out and the staff used a 5-foot slope contour requirement in its application forms without such standard being present in its regulations. Moreover, the possibility that an applicant may need to seek a variance of administrative adjustment does not violate the clear and objective standard.

Words and phrases that may not be clear and objective standards when standing on their own can be found to be meet the test when read in context. For example, subjective code language requiring buildings on steep slopes to be cut into the hillside "to reduce visual bulk" was clear enough when read in context with a diagram in the code explaining, in sufficient detail, what circumstances require excavation. *Rogue Valley*, 35 Or LUBA at 163. In response to a challenge to a requirement for consistency with designations shown on the Metro Plan Land Use Diagram, a large scale map that did not depict individual lot lines, LUBA found the requirement to be clear and objective because the plan directed decision makers to refinement plans, plan text and other sources sufficient to make the determination. *HBA*, 41 Or LUBA at 391. A standard requiring a developer to take action when streets connecting the proposed development suffer from "an inadequate driving surface" was cured when the code provision also referenced a specific, standardized street rating system. *Id.* at 405-406. A code provision setting vague procedural requirements for dealing with incomplete applications was upheld because a statute applied directly to cure the ambiguity. "[LUBA] concluded that, insofar as the requirements of the sections themselves may fall short of being 'clear and objective,' any resulting problems can be rectified through the notices that [the statute] requires the city to provide applicants for permits." *Rogue Valley*, 158 Or App at 4.

b. Standards that are not clear and objective

The following have been found to be unclear or subjective. Provisions generally granting city discretion to impose conditions if it is deemed necessary to mitigate any potential negative impact caused by the development" violate ORS 197.307(6). *HBA*, 41 Or LUBA at 388; *Rogue* Valley, 35 Or LUBA at 159.

A requirement that replacement trees be of a "similar resource value" as the trees to be removed; *Rogue Valley*, 35 Or LUBA at 160; a code provision giving the city discretion to require a revegetation plan in lieu of replacement trees; *id.* at 163; the requirement that hillside grading must "[retain] existing grades to the greatest extent possible [and] avoid an artificial appearance by creating smooth flowing contours of varying gradients;" and the requirement that terraces "should be designed with small incremental steps," and that "[p]ads for tennis courts, swimming pools and large lawns are discouraged;" *id.* at 161. Also found to miss the mark: Code language calling for developments to "minimize" possible conflicts between pedestrians and vehicles, "where necessary" for traffic circulation, which posed "vague requirements" granting the city "considerable discretion in approving or denying needed housing;" *HBA*, 41 Or LUBA at 399-400; a provision allowing the city to require, as a condition of approval, dedication of public ways "to facilitate community needs," which afforded the right to determine community needs; *id.* at 403-404; language allowing the city to require right-of-way or other improvements to develop transit facilities "where a need" for such facilities "has been identified;" *id.* at 409; requirement that street alignment "minimize excavation and embankment," "avoid impacts on natural resources," and "not prevent the adjoining property from developing consistent with applicable standards;" *id.* at 404, n 27; requirement that an applicant provide "adequate" drainage for the proposed housing by constructing facilities "adequate for the drainage of the area;" *id.* at 410; language requiring local streets be designed to discourage non-local traffic where, in the city's

discretion it was "necessary to insure safety," and "promote the welfare of the general public, pedestrians, bicyclists and residents of the subject area;" *id.* at 388, n 16; a requirement that a developer pave all streets and alleys offsite that the city manager determines are "impacted by the development," which was unclear as to which streets could be considered "impacted;" *id.* at 410; landscaping standards requiring installed plant materials to "meet current nursery industry standards," and to be maintained "in a healthy and attractive manner," which require discretionary and qualitative judgments; *id.* at 417; language requiring building cul-de-sacs with an exception applicable when "topographic constraints, existing development or natural features" prevent compliance; *id.* at 415; language requiring consistency with a "city-adopted natural resource inventory" was deficient when it was unclear whether this referred to only acknowledged Goal 5 inventories or might also include other natural resource inventories; *id.* at 396.

A requirement that the maximum number of trees be preserved, when balanced with "other provisions of this chapter," creates a vague balancing test leaving too much discretion with the decision makers, when it is unclear which "other provisions" would need to be balanced and who would do the balancing. *Rogue Valley*, 35 Or LUBA at 162. A requirement that "fill slope angles" be determined according to the "types of materials of which they are composed" was unclear absent an indication as to how those determinations would be made. *Id.* at 164.

Numerical standards can become unclear and subjective based on their context. Setback and height limitations can be unclear because they rely on ambiguous or undefined terms, or the starting point for measurement is unclear. *Rogue Valley*, 35 Or LUBA at 154 n 20. A requirement for a 100-foot buffer around rare plant or animal populations is unclear and subjective based on how the "area occupied" is determined. *HBA*, 41 Or LUBA at 393. A 50 buffer protecting "waterways" from the "top of the bank" was unclear because those terms were undefined by the code, had multiple meanings, and could lead to divergent or discretionary conclusions with different geographic consequences *Id.* A requirement that all dwellings in a PUD be within one-quarter mile of a recreation area or open space was flawed for failing to state whether the distance to be measured along streets or as the crow flies. *Id.* at 415. A standard that new dwellings be within a four minute response time for emergency medical services was deficient for failure to explain how the time is measured, that is, what assumptions to make about traffic, time of day, and other variables. LUBA opined that adoption of response time maps would have worked. Absent such clarity, nothing explains "how response time is calculated or how, absent adoption of maps or a clear method of delineation, a needed housing applicant can reasonably determine whether proposed development is permitted." *Id.* at 402-403.

2. Venues for raising the clear and objective issue

The requirement for clear and objective standards is founded in Goal 10, statutes, and the LCDC rules implementing the goal and the statutes. With this broad foundation, local enactments and decisions can be held to the standard in nearly all contexts – initial

acknowledgment, periodic review, post acknowledgment amendments, and development review for specific sites.

For example, in its initial acknowledgment review of Eugene's plan, the LCDC directed the city to remove discretionary standards for approval of needed housing. See LCDC Compliance Order (Aug. 23, 1982) and Staff Report (Aug. 19, 1982) at 28-19. When Eugene reformulated its zoning code in 2001 as a post-acknowledgment amendment, that code was reviewed by LUBA for compliance with the clear and objective standards requirement in *HBA*, 41 Or LUBA 370 (2002).

Similarly, Corvallis reformulated its zoning code as a periodic review work task in 2000. The LCDC reviewed the code for compliance with Goal 10 and found the Planned Development overlay zone on residential lands to violate the requirement for clear and objective standards. LCDC Work Task Order 02-WKTASK-001412 (June 27, 2002) at 4. To comply, the city adopted language allowing any property owner the absolute right to strip the PD overlay. That amendment was applied in *7th Street Station LLC v. City of Corvallis*, __ Or LUBA __ (LUBA No. 2007-140, Nov. 21, 2007). The same code was appealed to LUBA to secure compliance with the statute, and was remanded for stipulated amendments. *Century Properties, LLC v. City of* Corvallis, LUBA No. 2001-015 (May 3, 2006). However, in *Shamrock Homes, LLC v. City of Springfield*, __ Or LUBA __, (LUBA No. 2012-077, July 12, 2013), if the code provision previously existed, it could not be challenged until applied.

The language of the statute and the Division 8 rule, to the extent it implements the statute, must usually be applied directly in the context of specific land use decisions related to needed housing. Indeed, LUBA has opined that, except in rare circumstances, the question of whether the standards cause unreasonable cost or delay in needed housing can only be determined in the factual context of a specific application. *HBA*, 41 Or LUBA at 422

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