



# Oregon

Kate Brown, Governor

## Department of Land Conservation and Development

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Re: City of Corvallis Enforcement Proceedings (ORS 197.319-197.324): Final Order of the  
Land Conservation and Development Commission (17-ENF-001881)

Dear Party:

Enclosed is the Final Order of the Land Conservation and Development Commission for the  
above-referenced matter.

Please contact Gordon Howard, Principal Urban Planner, if you have any questions.

Respectfully,

Jim Rue  
Director

cc: Steven Shipsey, DOJ  
Ed Moore, Regional Representative, DLCD  
Rob Hallyburton, Community Services Division Manager, DLCD  
Amie Abbott, Commission Assistant, LCDC

BEFORE THE  
LAND CONSERVATION AND DEVELOPMENT COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF A REQUEST TO	)	FINDINGS, CONCLUSION AND
PLACE AN ENFORCEMENT ORDER	)	ENFORCEMENT ORDER
AGAINST THE CITY OF CORVALLIS	)	17-ENF-001881
PURSUANT TO ORS 197.324	)	

INTRODUCTION

This order by the Land Conservation and Development Commission (Commission) is in response to a Petition for Enforcement under ORS 197.319 to ORS 197.335 against the City of Corvallis (City) filed by GPA1, LLC and Oregon Home Builders Association (Requestors). The Commission considered the petition at its meeting of December 21, 2016 and concluded good cause existed to initiate an enforcement proceeding to determine whether, under ORS 197.320(10),

the City's approval standards, special conditions on approval of specific development proposals or procedures for approval do not comply with ORS 197.307(4) or (6), as alleged by GPA1, LLC, and Oregon Home Builders Association (collectively, 'Requestors').

*Commission Notice of Contested Case Hearing*, December 28, 2016, p. 1. The Commission listed two questions to be answered:

- (1) whether the needed housing statute applies to City provisions for lands on the residential buildable lands inventory that are subject to Planned Development regulations, and if so, whether those provisions comply with ORS 197.307; and
- (2) whether the City's clear and objective standards related to Hillside Development are possible to satisfy.

*Id.*

The Department of Land Conservation and Development (Department), at the direction of the Commission, employed John Bagg as a part time and temporary hearings officer to hear the matter. After a pre-hearing meeting to consider a schedule and evidentiary matters, Mr. Bagg

issued an *Order Setting Schedules and Procedures* on January 6, 2017. Thereafter, the Department permitted appearance by two limited parties, 1000 Friends of Oregon and Northwest Alliance Corvallis, under OAR 137-003-0005. The parties, including the two limited parties, filed briefs. On February 6, 2017 Mr. Bagg conducted a contest case hearing, and on February 28, 2017 he issued a preliminary order. After all parties filed exceptions to the preliminary order, the Commission held a hearing on March 20, 2017 to consider the proposed order, the exceptions, and the Department's recommendation.

### NATURE OF THE CONTROVERSY

Before both the Commission and the hearings officer, Requestors asserted, in sum, that the City was in violation of Goal 10 (Housing) and ORS 197.307, addressing needed housing.<sup>1</sup> Requestors said the City refused to identify and regulate Requestors' property, consisting of some 223 acres within the City limits, as being within the City's acknowledged "Buildable Lands Inventory" (BLI). The property is zoned for residential development as shown on the City's zoning map.<sup>2</sup> Also, as evidenced by a black line surrounding the subject property, Requestors' property is subject to the City's Planned Development overlay zone. Exhibit M, attachment A-5. The overlay, in one version or another, has been applicable to the property since the late 1960s. In 1980, the City applied a Planned Development overlay zone in its current form

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<sup>1</sup> "Needed housing" is defined in ORS 197.303(1) as "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types...." There follows a list of housing types including single family, attached and detached, multiple family, government assisted, mobile home or manufactured dwelling and farmworker housing. The definition does not apply to a city with a population of less than 2,500 or a county with a population less than 15,000. The City does not fall within this exception.

<sup>2</sup> The parties do not dispute the underlying zoning applicable to the property. The zoning map is included in the record. See *Corvallis Planning Commission Staff Report* of March 25, 2015, *Exhibit M*. See also *Exhibit F.5*, a city comprehensive plan land use designation map of January 5, 1999. Also helpful is the city's *Statement of Facts*, and pp. 8-11 of *GPA1, LLC and OHBA Petition for Enforcement*.

to the subject property (commonly known as the Timberhill property). The result, according to Requestors, is their development proposal is made subject to the City's discretionary development criteria instead of the "clear and objective" development criteria otherwise applicable to lands within the BLI and treated as land "needed" for housing under ORS 197.307(4).<sup>3</sup> See the discussion of applicable statutes below.

Requestors also claimed the City's standards governing development on sloped land are so stringent as to prevent development under the clear and objective slope standards applicable to portions of the subject property. The Commission understands the parties to agree that any exercise of the City's variance procedure forces the question into the City's discretionary standards; that is, the variance procedure does not provide clear and objective standards applicable to particular variance requests.

The City responds on several grounds. It argued before the Commission that the Requestors could seek relief from the discretionary or subjective standards applicable to property subject to a Planned Development overlay by applying to nullify or remove the Planned Development overlay. The City added that as portions of the original Timberhill property were developed under planned development standards, the subject property is also properly developable under the same discretionary standards.

With respect to the BLI and its importance to this controversy, the City responded that it did not have or could not find a copy of the acknowledged BLI map and therefore could not determine whether the Requestors' property was within the BLI. Consistent with that assertion, the City argues in its *Reply Brief* of February 2, 2017 that the 1998 BLI and the new 2016

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<sup>3</sup> A complete history of the proposed development and applicable city controls and actions is available in both Requestors' and the City's *Statement of Facts* included in the record of this proceeding.

Urbanization Study we understand to be part of the City's current revision to its BLI, demonstrate a surplus of buildable residential land. With the surplus, it follows that the instant property is not "needed" to meet the City's housing needs for the applicable 20 year planning period, as the Commission understands the City's view. The City also asserts the subject property is "constrained" legally because of application of the City's Planned Development overlay. This "constraint," according to the City, requires application of discretionary development standards.

### THE STATUTORY SCHEME

Any discussion of the claims of the participants must be prefaced by a discussion of the regulatory scheme applicable to satisfying the Goal 10 requirement "to provide for the housing needs of the citizens of the state." The goal calls for an inventory of buildable lands for residential use and mandates that plans encourage availability of needed housing units, that is, "housing types determined to meet the need shown for housing within an urban growth boundary... ." See OAR 660-015-0000(10). The goal's requirement is now codified in ORS 197.296 and applicable to Corvallis as it has a population of 25,000 or more persons. Goal 2 requires that the inventory be included as part of the comprehensive plan.<sup>4</sup> As relevant to this inquiry, ORS 197.296(3) requires that the local government:

- (a) Inventory the supply of buildable lands within the urban growth boundary and determine the housing capacity of the buildable lands; and

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<sup>4</sup> Goal 2: Land Use Planning, provides:

All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents. The plans, supporting documents and implementation ordinances shall be filed in a public office or other place easily accessible to the public. The plans shall be the basis for specific implementation measures. Goal 2, Part 1—Planning (OAR 660-015-0000(2)).

(b) Conduct an analysis of housing need by type and density range, in accordance with ORS and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years.

As relevant here, ORS 197.295(1) defines “buildable lands” as follows:

“Buildable lands” means lands in urban and urbanizable areas that are suitable, available and necessary for residential uses. “Buildable lands” includes both vacant land and developed land likely to be redeveloped.

ORS 197.296(4)(a) further defines “buildable lands” to include:

- (A) Vacant lands planned for zoned for residential use;
- (B) Partially vacant lands planned or zoned for residential use;
- (C) Lands that may be used for a mix of residential and employment uses under the existing planning or zoning; and
- (D) Lands that may be used for residential infill or redevelopment.

A map of buildable lands is required under ORS 197.296(4)(c), which states:

Except for land that may be used for residential infill or redevelopment, a local government shall create a map or document that may be used to verify and identify specific lots or parcels that have been determined to be buildable lands.<sup>5</sup>

The statute does not address land that may fall within the definition of “buildable” but is surplus to the land needed for housing for the 20-year planning period. That is, the statute treats buildable land, or, “land zoned for residential use,” as needed for housing “for the next 20 years.”

It has been argued before us by Limited Party 1000 Friends of Oregon that the legislature’s treatment of apparently all “[v]acant lands planned or zoned for residential use” as “buildable lands” would appear to preclude consideration of the Requestors’ property (or any residentially zoned property, for that matter) as surplus to the 20-year planning period. In short,

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<sup>5</sup> The parties have not argued that the subject property falls within land for infill or redevelopment.

under this interpretation, if the land is “buildable,” it is to be included in the BLI or some document such as a zoning map under ORS 197.296(4)(C)(c).

ORS 197.307 addresses what is to be done with “buildable land.” Subsection (1) of the statute declares the availability of “affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income...a matter of statewide concern.” ORS 197.307(3) provides that when a need has been shown for housing within an urban growth boundary, 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.” This subsection would appear to announce that if land is zoned for residential use, it is to be used to satisfy needed housing requirements. Under the evident statutory scheme, whether the zoned land is within or without the BLI would, then, appear to be irrelevant to whether it is used or not used to satisfy the housing need. Once the local jurisdiction identifies land as available for residential use (presumably by so designating the land as residential in the comprehensive plan or zoning ordinance), it is (1) available and must be used to satisfy housing needs, and (2) its development is subject to the provisions of ORS 197.307.

However, in the alternative, “needed housing” as defined under ORS 197.303 consists of housing “determined to meet the need shown for housing within an urban growth boundary....” ORS 197.296(2) requires a local government subject to its provisions to “demonstrate that its comprehensive plan or regional framework plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years.” In addition, Goal 14 (OAR 660-015-0000(14)), requires local governments to create urban growth boundaries that satisfy a “[d]emonstrated need to accommodate long range urban population, consistent with a 20-year population forecast.” ORS

197.307(4) requires a local government to “adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land.” Thus, if “needed housing” is only that housing needed to meet 20-year needs, and clear and objective standards need only be applied to needed housing, a city is not required to apply clear and objective standards to housing capacity in excess of a 20-year planning need. It should be noted that, if all urban growth boundaries corresponded in size to the 20-year identified need, there would be no housing capacity surplus to that need. However, as a practical matter there are a number of urban growth boundaries in Oregon which, for historical reasons, have residential land housing capacity in excess of 20-year need.<sup>6</sup> Within land identified for needed housing, or zoned for such use, the legislature mandates certain development standards apply. Subsection (4) of ORS 197.307, in pertinent part, sets standards for development of needed housing on buildable land.

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 needed housing on buildable land described in subsection (3) of this section.

Subsection (6) offers a limited exception to the “clear and objective” standards of development requirement set out in ORS 197.307(4).

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

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<sup>6</sup> Nothing to which the Commission been cited in the City’s regulations address or otherwise identify land otherwise designated or planned for residential use as “surplus.” The Commission does not reach a conclusion on whether the present statutory treatment of “buildable” necessarily precludes the City from creating a new land use zone or category, declaring it applicable to land not needed for housing for the 20-year planning period, and treating it outside the “buildable lands” category. It must also be noted, however, that no authority to which the Commission has been cited authorizes such new “surplus” land classification. Even if legally permissible, the Commission would expect such a new category would need to be explicitly stated in the City’s land use regulations. As is discussed later in this order, the Commission finds that the City has not done so.

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.

Importantly for the instant purpose, the above provision allowing use of an alternative approval process does not offer local governments an at will exception to the clear and objective standards requirement. Rather, under ORS 197.307(6)(a) applicant retains “the option of proceeding under the approval process that meets the [clear and objective] requirements” of ORS 197.307(4).”

#### DISCUSSION

Requestors insist their property is entitled to be developed under “clear and objective standards” for the principal reason it is within the City’s BLI. While the Commission did not include the matter of whether Requestors’ property was within or outside of the City’s BLI, the Commission will consider that issue as it is directly applicable to whether or not the “needed housing statute applies to City provisions for lands on the residential buildable lands inventory that are subject to Planned Development regulations... .” *Commission Notice of Contested Case Hearing*, December 28, 2016, p. 1.

Requestors included the City’s BLI as Exhibit F to their petition. The BLI shows a June 1998 date. At page B-4, a flow chart sets out a graphic illustration dividing “all land” into land already developed, or vacant land. Land already developed is then divided into land in public use

or land likely to be developed during the planning period. Such land is treated as not available to support new development during the planning period. Vacant land is then divided into buildable land (land partially vacant or totally vacant) or constrained land. Constrained land is not available to be developed and is further described as having physical or policy constraints, “e.g., Zoning.” As mentioned earlier, the City regards application of its Planned Development overlay constitutes a legal constraint. What remains, at the bottom of the graphic, is land available to support new development during the planning period consisting of redevelopable land and buildable land, whether partially vacant or totally vacant. Individual properties are not described.

The BLI (Exhibit F) includes maps which are the subject of some disagreement between the parties to this proceeding. Requestors insist the maps must be considered part of the BLI. They point to inclusion of the maps in Exhibit F. Perhaps significantly, the BLI and the accompanying maps were included in the City of Corvallis-Benton Community Public Library.<sup>7</sup> The City asserted, in this proceeding, that it did not have or could not find maps that could be identified as part of and included in the City’s BLI. According to the City, the official copy of its BLI on file with DLCD includes no maps. *See Response Brief of City of Corvallis* at 8-13. As the City consistently asserts, the maps included in Exhibit F are simply illustrative and have no force in terms of land designation. The City further warns that it has no record of any ordinance adopting the BLI expressly or by incorporation in the comprehensive plan. According to the City, the current City plan references the BLI as a supporting document. The City’s

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<sup>7</sup> Goal 2 provides:

D. FILING OF PLANS City and county plans should be filed, but not recorded, in the Office of the County Recorder. Copies of all plans should be available to the public and to affected governmental units.

The City’s Comprehensive Plan identifies the Corvallis Public Library as a location for public access to an official copy of the Corvallis Comprehensive Plan.

comprehensive plan in Article 9, Housing at sec. 9.8 does show the BLI as a supporting document. The parties do not cite to any other City document further explaining what significance attaches to the term “supporting document.”<sup>8</sup>

The Commission has difficulty accepting the City’s denial of any land use regulatory efficacy in the 1998 BLI (Exhibit F). Indeed, one approaching the City for a copy of the comprehensive plan and BLI would look to the City’s comprehensive plan and this document as the official statement of the City’s BLI as of the date published, June 1998. Each of the maps included in pockets at the back of the BLI show a library index number and an identifying note as follows:

BUILDABL 1998  
Corvallis (Or.)  
Buildable land inventory  
and land need analysis

The maps would appear to be part of the City’s BLI.

However, even if the maps are nothing more than a non-binding “helpful hint” or some other vagary, under ORS 197.296(3) and (4) a city’s buildable lands capacity is to be included in its BLI. Someone approaching the City could look to the flow chart at page B-4 in the BLI, and see that residentially designated land is regarded as “buildable.” That use of the chart is enough. In other words, as the inventory is a required document, and as it describes the land considered buildable, and as Requestors’ land fits the description of buildable land under the flow chart at

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<sup>8</sup> Under ORS 227.186(2), comprehensive plans and legislative acts relating to comprehensive plans must be by ordinance. The statute was enacted in 1999, after the instant BLI was adopted or made a “supporting document.” Someone approaching the city’s plan and noting the reference to the BLI as a supporting document might well assume the BLI was included in the plan and had force as part of the plan. The city offers no citation to any express or even implied official denial of the effective quality of the BLI as part of the city’s land use regulations applicable in this proceeding. Indeed, at the hearing conducted by the hearings officer, hearings officer asked the city attorney if the lack of formal adoption of the BLI meant the city was acknowledging it had no BLI. The city replied that it does have a BLI. The BLI was “accepted and used” as a “supporting document,” according to the city.

page B-4, Requestors' land is in the City's BLI as buildable. The Commission determines that whether or not the BLI is adopted by ordinance in the City's comprehensive plan appears to be irrelevant for the instant purpose. Unless the City wishes the Commission to consider the City to not have a BLI, no conclusion is possible other than the BLI, Exhibit F, is part of the City's operative land use regulatory scheme.<sup>9</sup> As stated, the Requestors' property is included in the BLI as residential land and is therefore subject to statutory requirements applicable to "needed lands" within the City's urban growth boundary.

The above conclusion might end the controversy were it not for the City's Planned Development overlay. As mentioned earlier, the City regards the Planned Development application as a legal constraint taking land out of the category of buildable land needed for housing (and therefore making it exempt from the "clear and objective" standards in ORS 197.307(4)). The City advises that GPA1's predecessor in interest "chose the Planned Development process as the way to develop its site for a variety of master planned purposes, always including what is now needed housing." *Initial Brief of City of Corvallis*, at 4. As understood, the City regards that early choice to bring the property within the City's Planned Development provisions effectively controlled the applicable development standards. Indeed, as the City explained at the January 26, 2017 hearing, once an area subject to the Planned Development overlay is developed or partially developed under that scheme, the remainder of the area is locked into the Planned Development standards. *See Initial Brief of City of Corvallis*, pp 4-5 setting out the history of application of the Planned Development zone, at the prior owners request(s), to the subject property. By "area" as used in the instant context, we

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<sup>9</sup> Such an interpretation would put the city in the odd position of announcing it was in violation of Goal 2 and ORS 197.296(3) and (4) requiring an inventory of buildable lands. If the BLI has no real authority, the city cannot rely on it for any purpose associated with the comprehensive plan. *See D.S. Parkland Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000) and *Hildenbrand v. City of Adair Village*, 217 Or App 623, 177 P3d 40 (2008).

understand the City to refer to the identified whole of the development. As the original ownership of the instant property, known as the “Timberhill” property, was of some 800 acres (the present site is 223 acres), and as most of the original property has been developed using planned development standards, the City treats the remaining vacant land as locked into at planned development approval process along with the City’s discretionary development standards.<sup>10</sup>

First, the Commission rejects the City’s assertion that the Planned Development overlay on Requestors’ property constitutes a “legal constraint” that removes this land from the residential buildable lands inventory. *See* Exhibit F, at B-4. The Planned Development overlay is indicative of local land use policy choice and does not and should not control whether the land falls within the statutory definition of “buildable” land in ORS 197.295(1) and 197.296(4)(a)(A). The City and Limited Party Northwest Alliance of Corvallis argue that the city’s interpretation of the Planned Development overlay as a “legal constraint” constitutes a local interpretation of its plan that is entitled to deference because it is construing a term or harmonizing conflicting provisions.<sup>11</sup> However the city is not entitled to such deference in this situation, because the city’s interpretation also implicates a state administrative rule, OAR 660-008-0005(2), which provides a definition of “buildable lands,” and the city’s interpretation of land with a Planned Development overlay designation as unbuildable is not consistent with any of the exceptions to the definition of “buildable land” listed in this administrative rule.<sup>12</sup>

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<sup>10</sup> Requestors’ *Petition for Enforcement* before the Commission filed November 22, 2016 includes a history of the property and its regulation at pp 8-9.

<sup>11</sup> *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

<sup>12</sup> OAR 660-008-005(2) provides:

“Buildable Land” means residentially designated land within the urban growth boundary, including both vacant and developed land likely to be redeveloped, that is suitable, available and necessary for residential

With the matter of a policy constraint out of the way, the Commission turns to the City's argument about whether the City's Planned Development overlay, once applied, works to set discretionary development standards for a requested development project.

As discussed earlier, Oregon statutes mandate "clear and objective" development standards for land needed for housing. There is an option for use of other standards provided the applicant can opt-out of such standards and rely instead on clear and objective standards. That statutory setting was relied upon in a Commission approval of a "work task" for the City in 2004. The Commission's directive to the City called for adoption of the below revisions to the City's Land Development Code within 90 days following any final appellate judgement of any review of the City's periodic review.

- (1) With the consent of the property owner, to remove the PD overlay zone from residentially zoned property for which no Conceptual or Detailed Development Plan has been approved and is still in existence; and
- (2) To provide a process where a property owner may request and the City must approve the removal of a PD or PD overlay zone from residentially zoned property where the residentially zoned property does not have a Detailed Development Plan or a Conceptual Development Plan that includes a Detailed Development Plan on any part of the site.

*Approval order 03-WKTASK-001601, January 23, 2004, p. 6*

Based upon the language of the 2004 order, the City does not see the applicant option to proceed under clear and objective standards as applicable where an "area" is subject to a planned

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- uses. Publicly owned land is generally not considered available for residential uses. Land is generally considered "suitable and available" unless it:
- (a) Is severely constrained by natural hazards as determined under Statewide Planning Goal 7;
  - (b) Is subject to natural resource protection measures determined under Statewide Planning Goals 5, 6, 15, 16, 17 or 18;
  - (c) Has slopes of 25 percent or greater;
  - (d) Is within the 100-year flood plain; or
  - (e) Cannot be provided with public facilities.

development overlay or has, within the area, a conceptual or detailed planned development approval. As asserted during the hearing, once an area is subject to a Planned Development overlay, it is locked into discretionary approval criteria applicable to planned developments, according to the City. The owner may seek modification of the overlay, but grant of such a request is in the discretion of the City.

The City's view and the apparent operative language in the above Work Task approval do not mirror the clear language in ORS 197.307(6)(a) granting the "applicant" the authority to call for application of the "clear and objective" development standards in ORS 197.307(4). Again, nothing in ORS 197.307(6) limits the "applicant" from seeking and obtaining only clear and objective development standards to govern his or her project.<sup>13</sup> Indeed, nothing in the statutory scheme as outlined above suggests the mere application of a planned development overlay or zoning designation results in a legal constraint taking the property out of the "clear and objective" requirement in ORS 197.307(4).

The Commission notes that this order could be construed as being inconsistent with the Periodic Review work order the Commission issued in 2004. However in 2004, when the Commission approved the Corvallis periodic review work task submittals, the Commission's standard of review for work program tasks was "for compliance with the statewide planning goals." *Former OAR 660-025-0040(1)*. There was no statutory standard of review expressed in ORS 197.633 or elsewhere at that time. Subsequently, in 2011, ORS 197.633 was amended to establish the Commission's standard of review for "issues concerning compliance with

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<sup>13</sup> However, if one understands the terms "property owner" and "site" in the work task order to mean, respectively, the present property owner and the specific land for which the applicant seeks approval (and not surrounding land, whether or not once part of a single ownership), then there is no friction between the Commission's work task order No. 001601 and ORS 197.307(6). The wording in the order does not easily lend itself to such interpretation, however.

applicable laws” to be whether the work task submittal on the whole “complies with applicable statutes, statewide planning goals, administrative rules, \* \* \* and land use regulations.” ORS 197.633(3)(c). Accordingly, the Commission amended OAR 660-025-0040(1) to read “The commission, pursuant to ORS 197.644(2), has exclusive jurisdiction for review of completed periodic review work tasks for compliance with the statewide planning goals and applicable statutes and administrative rules, as provided in ORS 197.633(3).” Based on the foregoing, the Commission is now confronting a question of whether the city’s land use provisions comply with statute – a determination which was not clearly within its standard of review in 2004.

Additionally, the provision under which the Requestors initiated this petition for enforcement, ORS 197.320(10), was adopted into law by the Legislature in 2015. It explicitly requires the Commission to determine compliance with ORS 197.307(4) and 197.307(6).

Therefore, this order, which finds that the city provisions do not comply with ORS 197.307(4) and 197.307(6), could not have been adopted by the Commission in 2004, when the Commission’s rules did not authorize a finding of consistency with statutory provisions. Additionally, the Commission did not have any statutory authority in 2004 to determine compliance with ORS 197.307(4) and 197.307(6) in an enforcement order. Accordingly this order is not inconsistent with the 2004 Commission order approving the City’s Periodic Review task..

The Commission concludes, therefore, notwithstanding the language in Work Task Order No. 03-001601, that an applicant for a land use approval for housing under ORS 197.296 and 197.307 may ask for and receive “clear and objective” approval criteria, notwithstanding use of planned development discretionary criteria used in approval of other residential development projects in the vicinity, or even by previous property owners of the property in question. While the Commission realizes that the current statutes regarding clear and objective standards may

pose difficulties for local governments reviewing large, discretionary multi-phased “planned development” applications, such local governments should ensure that later phases of such applications comply with the intent of the original approval through available mechanisms such as conditions of approval, development agreements, or other contractual measures.

#### SLOPE STANDARD COMPLIANCE

The second of the Commission’s two questions for this contested case hearing asks “whether the City’s clear and objective standards related to Hillside Development are possible to satisfy.” *Notice of Contested Case Hearing*, December 28, 2016.<sup>14</sup> Requestors argue the City’s standards are impossible to meet given the applicable development density requirements. At the hearing, Requestors offered the declaration and oral testimony of Steven Hattori, a professional engineer. He said the cut and fill standards in the City’s code cannot be met for the steeper (over 10 percent) property in Corvallis. Some of Requestors’ property is subject to such slopes. *Petitioners’ Opening Brief* at pp. 31-32. The Hearings Officer understood Engineer Hattori’s testimony to assert that the City’s explicit slope limitations cannot be met given the specifics of the Requestors’ development application.

The City advises there is a variance process available through the Planned Development Overlay zone. That designation and process, however, is subject to discretionary criteria and approval. As Requestors argue, such a discretionary process is not allowed for property that should be subject only to clear and objective development standards.

The City’s oral cross-examination of Engineer Hattori at the hearing suggested the basic cut and fill standards could be met were the size of the dwellings reduced. Requestors have not

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<sup>14</sup> It should be noted at the outset that the standards mentioned are for particular grades. While the standards are clear and objective in the sense they give precise requirements for “cut and fill,” the reference to “clear and objective” is not an invocation of provisions of ORS 197.307(4).

presented a rebuttal to the City's argument as presented in the cross examination, although the Requestors assert in their Exception that the Hearings Officer misinterpreted the testimony of Engineer Hattori. The Requestors' assertion in their Exception exemplify the detailed, fact-based, and nuanced nature of this inquiry. The Commission is most reluctant to find in favor of the Requestors' assertion the City's standards are impossible to meet given the information presented to the Hearings Officer at the hearing. The Commission is cited to nothing in this record that would definitively answer whether or not the developer could fashion a plan that would fit within the City's cut and fill requirements and remain in compliance with other applicable City requirements. Requestors counsel suggested the matter of compliance with an otherwise impossible strict development standard might be answered by the opinion of a registered engineer. That is, if the engineer says the property may be developed safely as planned, notwithstanding an apparent violation of a standard, then the development should be allowed. That possibility has not been presented to the Commission. Further, the possibility portions of the subject property might be physically impossible to develop consistent with safety considerations suggests the City might be justified in simply denying an application for development on such property. That conclusion was not briefed or addressed in more than passing comment in this proceeding. The Commission concludes that it is unable to offer an answer to our second question. This issue is better confronted through a contest to a denial of a specific development application rather than in a proceeding, such as this, determining the more global matter of whether, in general, the City is in compliance with land use statute, goal or rule.

#### CONCLUSION

The Commission finds the Requestors' property to be within the definition of "buildable lands" in ORS 197.275(1) and 197.296(4)(a). The subject property is zoned for residential use. Further, whether or not the maps found in the copy of the City's BLI, Exhibit F, are part of the

BLI or not does not determine our conclusion. By the terms set out to define buildable land found in the BLI text at page B-4 (and the flow chart), Requestors' property is part of the City's required inventory of land defined as "buildable" under statute and "needed land" for fulfilling housing needs for the 20 year planning period. Further, because the Commission concludes the governing statutes discussed above establish residentially designated lands as developable under clear and objective standards, at the applicant's preference, it does not matter whether or not Requestors' land is under a Planned Development overlay. The applicant may simply request and be granted authority to proceed with his or her proposal under clear and objective development standards. ORS 197.307(6). Quite simply, what counts in this regard is the fact the property is designated (zoned) for residential development.

The Commission concludes the City of Corvallis' treatment of Requestors' development proposal fails to comply with the "clear and objective" development criteria requirement found in ORS 197.307(4). The Commission finds nothing in the City's presentation to demonstrate the City is exempt from the statutory requirement that it apply clear and objective development criteria. Requestors have asserted a right to have their proposal(s) considered under clear and objective criteria, and the City's apparent rejection of that request is without a legal basis under the present statutory scheme.

#### ORDER

Because the Commission understands the City's BLI is now under revision, the City must bring its inventory into compliance with Goal 2 and ORS 197.296(4)(C)(c) by providing maps or other descriptive material in the revised BLI. The completed document should be adopted by ordinance and treated as effective to state the legal status of property.

For now, and for the instant controversy, the Commission requires the City of Corvallis accept and grant any Requestor application to remove the Planned Development overlay

designation from subject property and otherwise review Requestors' application under clear and objective development standards. It follows that the option to request clear and objective development standards be applicable to any development proposals on residentially zoned land under City jurisdiction.

DATED THIS 21<sup>ST</sup> DAY OF MARCH 2017.

FOR THE COMMISSION:



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Jim Rue, Director  
Department of Land Conservation and Development

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this final order. Judicial review is pursuant to the provision of ORS 183.482(1).

**PROOF OF SERVICE**

I certify that on March 21, 2017, I served a copy of the Land Conservation and Development Commission's **FINAL COMMISSION ORDER NO. 17-ENF-001881** on Bill Kloos, Steven Pfeiffer, and Theresa Jacobs, attorneys for GPA1, LLC, and Oregon Home Builders Association; Jim Brewer and David E. Coulombe, attorneys for the City of Corvallis; Mary Kyle McCurdy, attorney for 1000 Friends of Oregon; and Sean T. Malone, attorney for Northwest Alliance Corvallis, by first class mail and PDF email to:

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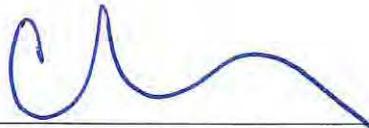
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DATED this 21<sup>st</sup> day of March 2017.



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Carrie MacLaren, Deputy Director  
Department of Land Conservation and Development