BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

08/21/13 PM12:40 LUBA

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AUG 23 2013

OFFICE OF METRO ATTORNEY

METRO,
Petitioner,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

CHRISTOPHER K. ROBINSON
and CITIZENS FOR STEWARDSHIP
OF LAKE OSWEGO LANDS,
Intervenors-Respondents.

LUBA No. 2012-062

FINAL OPINION
AND ORDER

Appeal from City of Lake Oswego.

Roger A. Alfred, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Alison Kean Campbell and Office of Metro Attorney.

Evan Boone, Deputy City Attorney, Lake Oswego, filed a response brief and argued on behalf of respondent.

Jeffrey G. Condit, Portland, filed a response brief and argued on behalf of intervenor-respondent Christopher K. Robinson. With him on the brief was Miller Nash LLP.

Tyler D. Smith, Canby, filed a response brief and argued on behalf of intervenor-respondent Citizens for Stewardship of Lake Oswego Lands.

HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

REMANDED 08/21/2013

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision that amends the city's comprehensive plan and land
4 use regulations that protect tree groves.

5 **INTRODUCTION**

6 Once the facts and the city's and Metro's regulatory schemes for protecting tree
7 groves and upland wildlife habitat are understood, this is a relatively straightforward case.

8 **A. The City's Initial Tree Grove Protections**

9 In 1998, the city adopted comprehensive plan and land use regulations to comply with
10 Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces)
11 and division 23 of OAR chapter 660 (the Goal 5 rule). Using aerial photographs, the city
12 identified tree groves and included those tree groves on the city's Sensitive Lands Atlas. The
13 city applied a Resource Conservation (RC) overlay zone, which we discuss further below, to
14 a number of tree groves that are shown in the Sensitive Lands Atlas. The RC overlay zone
15 both allows development and partially protects those tree groves from development. At oral
16 argument the parties explained that the city's mapping of tree groves in the Sensitive Lands
17 Atlas was imprecise, and through applicant "delineations" tree groves on individual
18 properties are located more precisely. Under the RC overlay, an "applicant for a major or
19 minor development permit" on property subject to the RC overlay must "delineate" the tree
20 grove on the property. Lake Oswego Community Development Code (CDC)
21 50.07.004(8)(d)(i).[1] Once the delineation is approved by the city, the location of the RC

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[1] CDC 50.07.004(8)(d)(i) provides, in relevant part:

> "Except as provided in subsection 8.d.iv of this section, an applicant for a development subject to environmental review shall first delineate the stream, wetland, or tree grove. A delineation is a more precise, site specific determination of the location of the tree grove or water resource prepared by a qualified professional. The delineation shall include a map showing the delineated boundary to plus or minus two ft. The delineation map shall also show

1 overlay zone for the property is modified to conform to the delineated tree grove location.
2 CDC 50.07.004(8)(d)(iii).[2]

3 Under the RC overlay, an applicant for development approval must designate at least
4 50 percent of the applicant's property that is subject to the RC overlay "as the 'RC protection
5 area.'" CDC 50.05.010(5)(b)(i) ("The applicant for a major or minor development permit on
6 a property containing an RC [overlay] shall designate a minimum of 50% of the RC [overlay]
7 after delineation as the 'RC protection area.'"). Areas "outside of the [RC] protection area
8 may be fully developed pursuant to applicable regulations." CDC 50.05.010(5)(b)(ii). But
9 with limited exceptions, "no development [is] permitted within the [RC] protection area." *Id.*

10 To summarize, the city's tree grove protection program can be viewed as a series of
11 steps. The first step occurred in 1998 when tree groves were identified in the city SL Atlas,
12 and the RC overlay zone was applied to protect those tree groves. The second step,
13 delineation, occurs whenever properties are developed. That delineation locates the tree
14 groves more precisely and the RC overlay zone is refined for the to-be-developed property to
15 match the delineation. The third step requires the applicant who proposes development to
16 identify a RC protection area, where development is not allowed. Once those steps are

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the protected riparian area if required for the particular resource. Resource boundaries shall be delineated as follows:

"(1) Tree Groves

"The RC district shall be delineated as follows: The boundary of a tree grove shall be measured at the outer edge of a contiguous tree canopy based on aerial photos and/or visual field observations, but shall not include any tree canopy that is within a wetland or below the top bank of a stream[.]"

[2] CDC 50.07.004(8)(d)(iii) provides:

"An approved delineated boundary shall replace the boundary in the Sensitive Lands Atlas for the purposes of review of the development proposal for compliance with this section. If and when the proposed development receives final approval, including resolution of any appeals, the boundary of the RP or RC district as shown in the [Sensitive Lands Atlas] shall be modified to be consistent with the delineated boundary."

complete, development of the remaining part of the property, the part located outside the RC protection area, can proceed, subject to any other applicable city regulations.

B. Metro's Title 13

Title 13 of Metro's Urban Growth Management Functional Plan is "Nature in the Neighborhoods." Title 13 is codified at Metro Code (MC) 3.07.1310 *et seq*. Title 13 was adopted by Metro in 2005, in part, to comply with Goal 5 and Goal 6 (Air, Water and Land Resources Quality). In adopting Title 13, Metro adopted inventory maps that identify, among other things, wildlife habitat, including riparian and upland habitat. Title 13 requires Metro cities to adopt measures to protect inventoried wildlife habitat. Although they are not a precise match, the city's tree groves generally correspond with areas that Metro identified in adopting Title 13 as upland wildlife habitat.

Many local governments had carried out Goal 5 planning before Title 13 was adopted, and Metro wished to retain that existing Goal 5 planning. Title 13 includes what the parties refer to as the "no rollback" provision, which is codified at MC 3.07.1330(A)(2) and set out below:

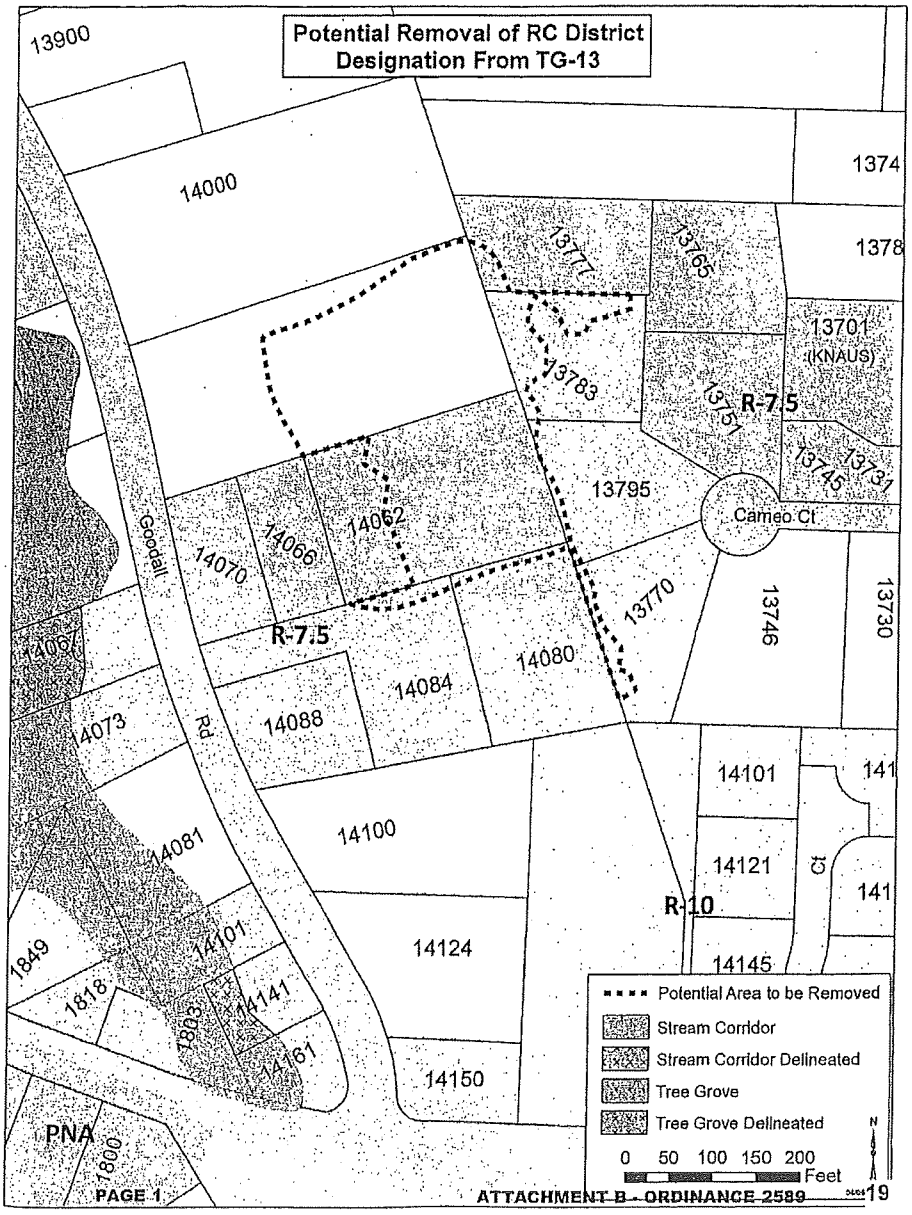
> "A city or county that, prior to December 28, 2005, adopted any comprehensive plan amendments or land use regulations that (a) apply to areas identified as upland wildlife habitat on the Inventory Map but not identified as riparian habitat on the Inventory Map, (b) limit development in order to protect fish or wildlife habitat, and (c) were adopted in compliance with division 23 of OAR chapter 660, shall not repeal such amendments or regulations, nor shall it amend such provisions in a manner that would allow any more than a de minimis increase in the amount of development that could occur in areas identified as upland wildlife habitat[.]"

C. The city's Amended Tree Grove Protection Program

The challenged decision adopted amendments that have the effect of removing the RC overlay from six tree groves. Petitioner only challenges the city's decision to remove the RC overlay with regard to one of those tree groves, tree grove (TG)-13. In removing the RC-overlay from TG-13, the city relied on the *de minimis* exception to the MC 3.07.1330(A)(2)

1 "no rollback" provision. We include a map from the record below to assist in describing TG-

2 13.



3

4 On the map, TG-13 is shown by the dotted line, which corresponds with both the TG-

5 13 boundary and the boundary of the RC overlay in this area. Sometime before the city

6 adopted the challenged decision, the parent lot of Goodall Road 14070, 14066 and 14062 was

1 divided to create those lots.[3] And the parent lot of 13783, 13795 and 13770 Cameo Court
2 was divided to create those lots. As part of the process that led to city approval of those land
3 divisions, the small amount of tree grove along the backs of 13770 and 13795 Cameo Court,
4 the larger amount of tree grove area at the rear of 13783 Cameo Court, and the roughly two-
5 thirds of 14062 Goodall Road that is shown as remaining in TG-13 was designated as a RC
6 protection area. As long as the RC overlay remains in place, those RC protection areas could
7 not be developed.[4] The practical effect would be that most of 14062 Goodall Road could not
8 be developed, and approximately the rear one-third of 13783 Cameo Court could not be
9 developed.

10 The small area of tree grove shown at the rear of 14084 and 14080 Goodall Road and
11 13777 Cameo Court and the large tree grove area on the unnumbered lot to the north of
12 14070, 14066 and 14062 Goodall Road (hereafter the unnumbered lot), while located within
13 TG-13 and subject to the RC overlay, has not been delineated and is not yet a RC protection
14 area.

15 To summarize, at the time of the challenged decision, TG-13 and the RC overlay in
16 this area was made up of a large RC protection area on 14062 Goodall Road, a smaller RC
17 protection area on 13783, 13795, and 13770 Cameo Court (most of which was on 13783), a
18 small area of undelineated RC overlay along the rear of 14080 and 14084 Goodall Road and
19 13777 Cameo Court, and a large area of undelineated RC overlay on the unnumbered lot.

20 Before the city below, Metro staff offered the following explanation for its
21 understanding of how the *de minimis* exception to the "no rollback" provision should be
22 applied (*i.e.*, the exception to the MC 3.07.1330(A)(2) "no rollback" provision that allows

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[3] The numbers on the map apparently are street addresses rather than lot or parcel numbers.

[4] As far as we are informed, the small area at the rear of 14084 and 14080 Goodall Road that falls within TG-13 has not yet been delineated and no RC protection area has yet been designated on those lots. More than half of the large unnumbered lot immediately to the north of 14070, 14066 and 14062 Goodall Road was within TG-13, but was located outside the city at the time of the appealed decision.

amendment of city regulations that protect upland wildlife habit so long as the allowed increase in development of inventoried upland wildlife habitat, which is made possible by the amendment, is *de minimis*:

> "When determining the increase in the amount of development that could occur in the upland habitat areas, staff looked at the amount and location of RC overlay proposed for removal from the individual parcels, parcel size, current zoning and potential for subdividing, * * * current development status, and adjacent development pattern (i.e. parcel size, structure size, access points) as well as noting that the RC overlay currently allows for a 50% reduction in the overlay.
>
> "Staff attempted to be realistic in determining how much development would most likely occur in these areas. If a parcel was developed to its maximum potential under the existing code, then it was determined that any additional development (i.e. an addition, deck/patio, storage shed) would be minor and would meet the de minimis standard. If a parcel contained a significant amount of tree grove and could be subdivided, then most likely the development that could occur in areas identified as wildlife habitat would not be minor and the de minimis standard could not be met. In addition, when both instances occurred in a single tree grove, the final determination was based on the relative size of the tree grove that could be impacted in relation to the overall size of the tree grove." Record 252.

Metro staff took the position below that the MC 3.07.1330(A)(2) "no rollback" provision did not apply at all to two of the affected tree groves because one of those tree groves (TG-23) was designated due to its scenic qualities, not its habitat value, and the other tree grove (TG-30) was not designated as upland habitat by Metro. Applying the above described methodology, Metro staff took the position that one tree grove (TG-24) was located entirely in Clackamas County so that county rather than city land use regulations currently apply, and removing the city RC-overlay therefore would have no impact on the upland wildlife habitat. With regard to two other tree groves, Metro staff took the position below that removing the RC overlay only affected three lots (TG-31) or six lots (TG-32) and since those lots were already developed with homes and could not be further divided to allow development of additional houses, the *de minimis* exception applied. TG-13 was the only one of the six tree groves affected by the challenged city decision that Metro contended (1) is

subject to the MC 3.07.1330(A)(2) "no rollback" provision and (2) does not meet the *de minimis* exception.

With regard to TG-13, Metro reasoned that for five lots – 13777, 13795 and 13770 Cameo Court, and 14080 and 14084 Goodall Road – the impact on upland "wildlife habitat will be minor" because those lots are already developed, include only a small area of tree grove along the rear of the lot, and cannot be further divided. Record 252. As for the unnumbered lot, like TG-24, Metro took the position that removing the tree grove designation and RC overlay would have no effect on the possible development of upland wildlife habitat because at the time of the city's decision the unnumbered lot was located entirely outside city limits, in Clackamas County, and therefore is subject to county rather than city land use regulations.[5] However, for 14062 Goodall Road and 13783 Cameo Court, Metro took the position that the *de minimis* exception to the MC 3.07.1330(A)(2) "no rollback" provision did not apply and that given the significant amount of upland wildlife habitat that could be developed on those two lots with removal of the RC overlay, removal of the RC overlay from TG-13 did not qualify under the *de minimis* exception:

> "The vacant parcel located at 14062 Goodall Road contains the largest portion of the tree grove (32,129 square feet) for the properties in the City and has the potential to be subdivided into four lots. Even if this parcel was not subdivided, the additional development that could occur on this lot that would impact the wildlife habitat would not be minor in nature given the amount and location of the identified tree grove, the existing driveway access point and the adjacent development pattern.
>
> "* * * * *
>
> "The sixth lot (13783 Cameo Court) is vacant and has the potential to be partitioned into two lots. Given the amount [of upland habitat on 13783 Cameo Court] (7,646 square feet) and the location of the tree grove on the parcel, if the partition did occur it is most likely that more than a de minimis amount of development would occur in the wildlife habitat area.

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[5] The unnumbered lot has now been annexed by the city and the parties dispute the legal significance of that annexation in the event LUBA remands the city's decision.

> "Based on the significant amount of wildlife habitat that could be impacted through the development of 14062 Goodall Road and the potential partition of 13783 Cameo Court, the removal of this tree grove from the Sensitive Lands Atlas does not meet the de minimis standard in Metro Code Section 3.07.1330(A)(2)." Record 252-53.

In the decision on appeal, the city agreed with Metro's analysis that removal of the tree grove and RC overlay would have either no impact or a minor impact on the upland habitat on lots 13777, 13795 and 13770 Cameo Court and 14080 and 14084 Goodall Road and the unnumbered lot. However, the city disagreed with Metro's analysis of 14062 Goodall Road and 13783 Cameo Court:

> "Metro's analysis states that the parcel located at 14062 Goodall Road is vacant. However, at the July 10, 2012 hearing, the City Council received credible evidence that a large (5,500 square feet) single-family residence is under construction on the front third of the parcel. That, together with the adjacent development pattern, makes it very unlikely that the parcel would be subdivided to create three additional lots. Although a two-lot partition is technically feasible, given the size of the structure being built, together with the characteristics of adjacent development, it is also unlikely that the parcel will be divided. The City Council finds that removing the RC Overlay District from 14062 Goodall Road is not likely to result in additional development within the area identified as upland wildlife habitat.
>
> "Metro's analysis also states that the vacant parcel at 13783 Cameo Court has the potential to be partitioned into two lots. Similarly, while a two-lot partition is technically feasible for 13783 Cameo Court, it is very unlikely given the adjacent development pattern. The parcel was created through a three-lot partition 2006 and is similar in size to the neighboring parcels on Cameo Court. Since the tree grove is located to the rear and side of the existing lot, development of one single family residence can occur without impacting the upland habitat area.
>
> "The City Council concludes that the RC Overlay District designation should be removed from all of TG-13." Record 32.

We now turn to petitioner's assignments of error.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Metro's Argument**

3 In its first assignment of error, Metro argues that the *de minimis* exception to the "no
4 roll back" provision prohibits the city from removing its RC overlay from TG-13 because
5 doing so "would allow * * * more than a *de minimis* increase in the amount of development
6 that *could occur* in the areas identified as upland wildlife habitat." Petition for Review 5
7 (emphasis in original). 14062 Goodall Road includes a little over one acre, 45,079 square
8 feet. Since the minimum lot size in the R-7.5 zone is 7,500 feet, the lot could be divided into
9 as many as six lots and developed with six houses. 13783 Cameo Court is large enough to be
10 divided into two 7,500+ square-foot lots and developed with two houses. Metro contends the
11 city's findings make it clear that the city misconstrued the MC 3.07.1330(A)(2) "no rollback"
12 provision and its *de minimis* exception to allow removal of the RC overlay, which in turn
13 means additional development on those lots *could occur*, simply because the city believes
14 additional divisions of 14062 Goodall Road and 13783 Cameo Court are "unlikely" and
15 additional development in the upland habitat is "unlikely." Metro contends the "unlikely"
16 standard that the city applied is not the standard set out in MC 3.07.1330(A)(2) and therefore
17 represents a misconstruction of applicable law. Metro also contends that there is not
18 substantial evidence to support the city's finding that the additional divisions and
19 development that removal of the RC overlay makes possible is unlikely."[6]

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[6] With regard to 14062 Goodall Road, Metro argues;

> "The city has not adopted adequate findings supported by evidence in the record to support its conclusion that additional land divisions and development are 'unlikely,' when the code would allow a six-lot subdivision. Regardless, 'unlikely' is not the standard. The standard is whether additional development could 'occur' under the existing code. There is no dispute that additional development is allowed on 14062 Goodall Road, the city is merely choosing to hope that it won't happen. The city has misconstrued MC 3.07/1330(A)(2) and adopted inadequate findings not supported by an adequate factual base regarding application of that standard." Petition for Review 6.

With regard to 13783 Cameo Court, Metro argues;

1 Finally, Metro argued below that removing the RC overlay from TG-13 would have
2 no impact on the upland habitat on the unnumbered lot, because at the time the unnumbered
3 lot was located outside the city in Clackamas County and subject to county land use
4 regulations. The city agreed with Metro and took that position in the decision on appeal. No
5 party has assigned error to that position. But now that the city has annexed the unnumbered
6 lot, Metro argues that "[i]n the event of remand, it would be appropriate for the city to
7 consider potential impacts on the entirety of Tree Grove 13 including this newly annexed
8 property." Petition for Review 8.

9 Although it was set out in full earlier in this opinion, we repeat the operative language
10 of the MC 3.07.1330(A)(2) "no roll-back" provision's *de minimis* exception. A city may not
11 amend its upland habitat protection "provisions in a manner that would allow any more than
12 a *de minimis* increase in the amount of development that *could occur* in *areas identified as*
13 *upland wildlife habitat*[.]" (Emphases added.) The parties dispute the meaning of "*de*
14 *minimis*," "could occur, and "areas identified as upland wildlife habitat." This case
15 ultimately turns on the meaning of the terms "*de minimis*" and "could occur." But before
16 turning to those questions, we first address two other issues raised in the respondent's and
17 intervenors' briefs.

"[T]he city failed to adopt adequate findings supported by evidence regarding its conclusion that development would be unlikely 'given the adjacent development pattern.' The findings provide no description of the adjacent development pattern, other than to state that the parcel is similar in size to neighboring parcels. The findings provide no description of the development in the area, and cite to no evidence in the record regarding such development; therefore, the findings and evidence do not support the city's conclusion that adjacent development makes further division of 13783 Cameo Court 'unlikely.' Obviously, the mere fact that a parcel is similar in size to adjacent parcels does not necessarily prevent it from being divided. And again, 'unlikely' is not the correct standard. The city may not substitute a subjective guess that development *might* not occur for the required finding about what 'could occur' legally under its code." *Id.* at 7 (emphasis in original).

1 **B. The Meaning of "Areas Identified as Upland Wildlife Habitat"**

2 **1. Areas**

3 As we already explained in the introduction, Metro considered each tree grove
4 separately in applying the *de minimis* exception. In the decision on appeal, the city council
5 similarly appears to have applied the "no roll-back" provision's *de minimis* provision, tree
6 grove by tree grove. The city council and Metro staff simply disagreed about how much
7 additional development "could occur" by reason of the city's decision to remove the RC
8 overlay from TG-13 and whether that additional development was *de minimis*.

9 In its brief, the city suggests Metro's and the city council's approach is incorrect, and
10 that the focus should be on Metro's inventory of upland wildlife habitat for the entire city.
11 The city contends the area of upland wildlife habitat that is made developable by the disputed
12 decision is clearly *de minimis*, if compared to the large area of inventoried upland wildlife
13 habitat in the entire city.[7] Intervenor Citizens for Stewardship of Lake Oswego Lands takes
14 an even more expansive view and argues the *de minimis* exception comparison should
15 compare the area of upland wildlife habitat made developable by the decision with all of the
16 inventoried upland wildlife habitat within the entire Metro area, which includes portions of
17 three counties and a number of cities. Intervenors contend that "where as here, the upland
18 wildlife habitat map covers or touches hundreds if not a thousand or * * * more parcels, an
19 increase of development on somewhere from zero to six parcels is *de minimis* under any
20 test." Intervenor-Respondent Citizens for Stewardship of Lake Oswego Lands' Brief 4.

21 As we have already explained, the city council's analysis of the "no roll-back's" *de*
22 *minimis* exception in the decision that is before us in this appeal was tree grove by tree grove.
23 Although both respondent and intervenors question that approach, neither filed a cross-

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[7] The city may be taking a slightly more measured position and may be arguing that the relevant "area" is the area of the city shown on the portion of the Metro Upland Wildlife Area shown on the map on page 7 of its brief, which is larger than TG-13 but smaller than Metro's inventory of upland wildlife area for the entire city.

petition for review to assign error to that approach. And even if they had, we would conclude that that method of analysis is not erroneous in this case. We need not and do not consider here whether it might be possible for the city council to apply the *de minimis* exception in this case based on areas other than individual tree groves. We are extremely skeptical that the *de minimis* comparison must be Metro wide, as intervenor Citizens for Stewardship of Lake Oswego Lands argues, because it is almost certainly correct that almost any amendment would qualify under that application of the *de minimis* standard. We are only slightly less skeptical that the comparison under the *de minimis* exception must be with all the upland wildlife habitat in the city. Individual tree groves presumably have contiguous trees and perhaps other shared characteristics that make them an identifiable separate "area." There may be other identifiable "areas" of upland habitat that are larger than individual tree groves and have shared characteristics that would permit them to be used in applying the MC 3.07.1330(A)(2) "no roll-back" provision's *de minimis* exception. Nothing in this opinion should be read to foreclose the possibility of identifying such areas and using them in applying the MC 3.07.1330(A)(2) "no roll-back" provision's *de minimis* exception. But since the city council simply elected to consider the *de minimis* exception tree grove by tree grove and did not attempt to identify any such larger areas with shared characteristics, we do not consider this issue further.

2. Tree Groves vs. Areas Identified as Upland Wildlife Habitat

It is fair to say that in applying the "no roll-back provision's" *de minimis* exception the city analyzed each tree grove as though the tree grove and the inventoried upland wildlife habitat on the lots and parcels in each tree grove were co-terminus. While there is a great deal of overlap between the area included in TG-13 and Metro's inventoried upland wildlife habitat on the lots included in TG-13, they are not exactly the same. Once again respondent and intervenors suggest the city council probably erred, this time by assuming tree groves and upland wildlife habitat are the same thing.

1 Based on a comparison of the boundary of TG-13 and the upland wildlife habitat area
2 shown on the two maps reproduced on page 11 of the city's brief, it seems questionable that
3 the relatively minor deviations between the boundaries of TG-13 and the inventoried upland
4 wildlife habitat would have made any difference in the city's decision.[8] And again, no party
5 has assigned error to Metro's and the city council's apparent working assumption that the
6 area within tree groves, and specifically within TG-13, is all inventoried upland wildlife
7 habitat. That said, we remand the city council's decision for other reasons, and if the city
8 council again considers this matter following our remand it will be free to more accurately
9 identify the portion of TG-13 that is inventoried upland wildlife habitat, in applying the *de*
10 *minimis* exception.

11 **C. The Meaning of *De Minimis***

12 Turning to the meaning of *de minimis*, as the parties have pointed out, the MC does
13 not define the term. *De minimis* is a shortened form of the Latin phrase *de minimis non curat*
14 *lex*:

15 "The law does not concern itself with trifles. – Often shortened to *de*
16 *minimis*." Black's Law Dictionary 464 (8th ed. 2004).

17 Black's defines *de minimis* as follows:

18 "**1**. Trifling; minimal **2**. (Of a fact or thing) so insignificant that a court may
19 overlook it in deciding an issue or case." *Id.*

20 While there are probably a number of ways the above definition could be restated or
21 characterized, we think in this context if the additional development of Metro's inventoried

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[8] The difference between the TG-13 boundary and Metro's mapped upland wildlife habitat is more substantial on the unnumbered lot. The area of that lot included in TG-13 appears to be somewhat larger than the area of the lot shown on Metro's Upland Wildlife Area map as upland wildlife habitat. Therefore the city council may have believed that more upland wildlife habitat was affected by removal of TG-13 from the unnumbered lot than is the case. But the city found that removing TG-13 from the unnumbered lot would have no effect on possible development of upland wildlife habitat on the unnumbered lot, since at the time of the disputed decision the unnumbered lot was located outside the city and was not subject to the city's RC overlay zone. The city council's possible misunderstanding of the amount of upland wildlife habitat on the unnumbered lot therefore had no impact on the challenged decision.

upland wildlife habitat that is made possible by removing the RC overlay from TG-13 is "trifling" or "so insignificant that [it] may be overlooked" that additional development is *de minimis*. That meaning is consistent with the approach Metro staff took in this case, as described in the introduction above, and we believe it accurately captures the meaning that was likely intended by the Metro Council when it enacted the "no roll-back" provision's *de minimis* exception. That meaning of the term *de minimis* is admittedly somewhat subjective, but the "too small to matter" concept is one that is commonly understood, even if it is imprecise and somewhat subjective.

D. The Meaning of "Could Occur"

Once again, the *de minimis* exception applies only if an amendment would not allow "any more than a *de minimis* increase in the amount of development that *could occur* in areas identified as upland wildlife habitat." (Emphasis added.) As explained above, petitioner contends that the city council determined only that a more than *de minimis* level of development is "unlikely" as a result of the amendment, which is not what the *de minimis* exception requires. For the reasons set out in section E of our discussion of this assignment of error, we agree with petitioner that the city council misconstrued MC 3.07.1330(A)(2).

We review the city's council's interpretation of the "no rollback" provision to determine whether it is correct. The city council's interpretation is not entitled to deference under ORS 197.829(1). *See Trademark Construction, Inc. v. Marion County*, 34 Or LUBA, 202, 211 (1998) (a county is not entitled to deference under *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994) when interpreting another jurisdiction's land use laws). The correct inquiry is whether the "increase in the amount of development" that "could occur" in areas identified as upland wildlife habitat is more than *de minimis*, not whether the increase in the amount of development that is "likely to occur" in areas identified as upland wildlife habitat is more than *de minimis*. We agree with petitioner that the city's rephrasing of the

actual standard from "could occur" to "likely to occur" represents a misconstruction of MC 3.07.1330(A)(2).

E. Conclusion

As explained above, we believe that under MC 3.07.1330(A)(2) the additional development of Metro's inventoried upland wildlife habitat that is made possible by removing the RC overlay from TG-13 is *de minimis* if it is "trifling" or "so insignificant that [it] may be overlooked." 14062 Goodall Road is a lot with 45,000 square feet in a zone that permits 7,500 square foot lots. 13783 Cameo Court apparently is large enough to be divided into two lots with at least 7,500 square feet. If 14062 Goodall Road were divided into six lots and each of those lots was developed with a house and 13783 Cameo Court were divided into two lots and each of those lots was developed with a house there is no question that such development could not be characterized as "trifling" or "so insignificant that [it] may be overlooked." And we do not understand the city council to have concluded that such development could be characterized as *de minimis*.

Before the city, Metro took the position that 14062 Goodall Road could be divided into four lots. In its brief, Metro takes the position that it could be divided into six lots. We agree with the city that a reasonable decision maker could conclude on this record that the 5,500 square foot house located somewhere on the western one-third of the lot means the lot could no longer be divided into six lots and developed with six houses. It may be that the location of the large dwelling on the western one-third of 14062 Goodall Road lot could prevent a four lot division of that lot as well. But there is nothing in this record that we can see that would prevent 14062 Goodall Road from easily being divided into two or three lots, which would permit development of up to two additional houses in upland wildlife habitat that has been designated a RC protection area and otherwise could not be developed. Similarly, there is nothing in this record to prevent 13783 Cameo Court from being divided to make a second house possible, which would increase the probability of development in

1 upland wildlife habitat. We agree with petitioner that such development is more than
2 "trifling" or "so insignificant that [it] may be overlooked," and therefore not accurately
3 characterized as *de minimis*.

4 The city's only real explanation for why that level of additional development on
5 14062 Goodall Road and 13783 Cameo Court could not occur is that the owner of the new
6 5,500 square foot house will most likely wish to retain the roughly one-acre lot that the newly
7 constructed house now sits on and will not want to take advantage of the 7,500 minimum lot
8 size to create additional lots. A reasonable decision maker could not conclude, based on this
9 record, that a reasonable property owner in the future would not be satisfied with a one-fourth
10 acre, one-third acre, or one-half acre lot for his 5,500 square foot house and decide to take
11 advantage of the 7,500 square foot minimum lot size to create one or more additional lots.
12 Any such lots could easily be worth hundreds of thousands of dollars, providing a financial
13 incentive for such a division in the future. Although a closer question, we also conclude a
14 reasonable decision maker could not conclude on this record that 13783 Cameo Court will
15 not be divided and developed in a way that has more than a *de minimis* impact on the upland
16 wildlife habitat area.

17 The city council's findings that the amendment will not result in more than a *de*
18 *minimis* increase in the amount of development that could occur in areas identified as upland
19 wildlife habitat are inadequate and are not supported by substantial evidence.

20 Finally, we view petitioner's suggestion that on remand the city should differently
21 analyze the potential impact of removing the RC overlay from the unnumbered lot, now that
22 it has been annexed, as exactly that—a suggestion. Metro is free to advance that suggestion
23 on remand if it wishes and, if it does so, the city will be free to respond. We express no view
24 on the merits of the parties' suggestions in that regard.

25 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 In its second assignment of error, petitioner challenges the adequacy of the city's
3 findings regarding Goal 5 and the Goal 5 administrative rule. Petitioner contends that under
4 OAR 660-023-0040 an economic, social, environmental and energy (ESEE) analysis was
5 required to remove the RC overlay protection from the city's inventoried tree groves.
6 Petitioner contends the city's decision was ineffective to adopt the ESEE analysis that is
7 included in the record at Record 229-35. Moreover, petitioner contends that even if the city
8 had adopted that ESEE analysis, it is inadequate because it adopts a single analysis for all six
9 tree groves, which have different characteristics. Petitioner also contends the findings are
10 inadequate to explain why the city believes isolated tree groves are no more valuable than
11 scattered trees and offer no explanation for why fully allowing conflicting uses on these tree
12 groves is justified.

13 The city's only response is that under OAR 660-023-0080(3) and MC 3.07.1330(A),
14 Metro's acknowledged Title 13 makes it unnecessary for the city to separately address Goal
15 5.[9] The city apparently reads OAR 660-023-0080(3) together with MC 3.07.1330(A) to make

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[9] As relevant, OAR 660-023-0080(3) provides:

> "Metro may adopt one or more regional functional plans to address all applicable requirements of Goal 5 and this division for one or more resource categories and to provide time limits for local governments to implement the plan. Such functional plans shall be submitted for acknowledgment under the provisions of ORS 197.251 and 197.274. Upon acknowledgment of Metro's regional resource functional plan, local governments within Metro's jurisdiction shall apply the requirements of the functional plan for regional resources rather than the requirements of this division.

Metro Title 13, which is codified at MC 3.07.131 *et seq*, is one of the "functional plans" referenced in OAR 660-023-0080(3). As relevant , MC 3.07.1330(A) provides:

> "Under Oregon law, upon acknowledgment of this program by the Oregon Land Conservation and Development Commission (LCDC), cities and counties wholly or partly within the Metro boundary shall apply the requirements of this title with respect to areas identified as riparian habitat on the Inventory Map and areas identified as upland wildlife habitat on the Inventory Map, according to the compliance deadlines established in Metro Code Section 3.07.810, rather than applying the requirements of division 23 of chapter 660 of the Oregon Administrative Rules ('OAR'), promulgated by LCDC, *except that* * * *" (Emphasis added.)

1 it unnecessary for the city to directly apply Goal 5 when amending city riparian area
2 comprehensive plan and land use regulations adopted to comply with Goal 5, so long as the
3 amendment is consistent with Title 13.

4 For purposes of this opinion, we do not question the city's reading of OAR 660-023-
5 0080(3) and MC 3.07.1330(A).[10] There are exceptions to the requirement in MC
6 3.07.1330(A) that cities apply Title 13 rather than OAR chapter 660, division 23 when
7 adopting and amending plans and regulations with regard to riparian habitat. *See* n 9. One of
8 those exceptions is the "no roll back" provision. MC 3.07.1330(A)(2). Under that exception
9 to MC 3.07.1330(A), even though a city might not otherwise be required by Title 13 to adopt
10 or retain previously adopted comprehensive plan or land use protections for riparian areas
11 under Goal 5, Title 13 prohibits "roll back" of those protections. The "no roll-back"
12 exception to MC 3.07.1330(A) has the legal effect of making the city's tree grove
13 designations and RC overlay a Title 13 requirement, subject to the *de minimis* exception.

14 The city appears to be correct that the city would not have to directly apply Goal 5 to
15 remove a city RC overlay that was imposed to protect habitat values, if such action qualified
16 for the *de minimis* exception and the RC overlay was not otherwise required by Title 13.
17 However, as we concluded in our resolution of the first assignment of error, the city has not
18 shown that the challenged decision qualifies for the *de minimis* exception. In that
19 circumstance, the city has pointed to nothing that would allow it to amend its Goal 5 program
20 without addressing the requirements of Goal 5 and OAR chapter 660, division 23.

21 The second assignment of error is sustained.

22 The city's decision is remanded.

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[10] However, as petitioner points out, that understanding of OAR 660-023-0080(3) and MC 3.07.1330(A) is at least questionable, where a tree grove was designated and protected for reasons other than its value as a habitat. Apparently two of the tree groves were designated and protected for their scenic value.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2012-062 on August 21, 2013, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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