August 7, 2017

City of Happy Valley Planning Commission
16000 SE Misty Drive
Happy Valley, Oregon 97086

Re: Abundant Life Church Comprehensive Plan/Zoning Map Amendment: Local File No. CPA-04-17/LDC-06-17

Dear Happy Valley Planning Commission:

Housing Land Advocates (HLA) and the Fair Housing Council of Oregon (FHCO) submit this letter regarding the above-entitled matter. Both HLA and FHCO are non-profit organizations that advocate for land use policies and practices that ensure an adequate and appropriate supply of affordable housing for all Oregonians. FHCO's interests relate to a jurisdiction's obligation to affirmatively further fair housing. Please include these comments in the record for the above-referenced proposed amendment.

HLA and FHCO object to the approval of the proposed plan/zone change on the grounds that it is unsupported by evidence, reasoning, and legal analysis demonstrating compliance with applicable criteria, including Statewide Housing Statutes, Goals, and Rules and provisions of the Metropolitan Functional Plan beginning with the findings provided in the staff report, as follows:
Proposed Finding:

> *GOAL 10: HOUSING*
> *To provide for the housing needs of the citizens of the State.*
>
> Staff Response:
>
> In the City of Happy Valley, compliance with Goal 10 is measured by compliance with OAR 660, Division 007, known as the "Metropolitan Housing Rule." Under the rule, the City is required to make a commitment through the findings associated with the amendment that the City will comply with the requirements of Division 007 through subsequent plan amendments. In this case, the application proposes applying the IPU zone to an approximately five-acre portion of the site. Because the IPU zone is an institutional zone, proposed to accommodate future expansion of the existing church on the site, residential uses are not allowed.
> Therefore, in conjunction with the proposed Comprehensive Plan/Zoning Map Amendment, the City has made a commitment through the findings under the Metropolitan Housing Rule that will comply with the requirements of Division 007 through subsequent plan amendments.
>
> For these reasons, the application complies with Goal 10 and the Metropolitan Housing Rule.

Objections:

The staff report, proposed findings, and record fail to establish compliance with Goal 10 or the cited provisions of the Metropolitan Housing rule. There is no commitment, only an unenforceable prediction based upon an unenforceable intention. Nor is there substantial evidence, sufficiently adequate to demonstrate compliance with an applicable approval criterion, including a state land use goal. (See *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55, 58-60 (1992), applying principle to reject unenforceable commitment to limit impact on school facilities under Statewide Goal 11). See also, *Culligan v. Washington County*, 57 Or LUBA 395, 401-02 (2008).

So read, any such commitment must be specific and enforceable as to timing and location, and must provide for any necessary plan/zone map or text changes to occur under clear and objective standards. That standard is not met here.

The findings must identify the replacement property and establish its substantial equivalency in all respects relevant to a Goal 10 analysis, including serviceability, readiness for development, proximity to transit, affordability, and the like. The findings may not simply point to large areas of recently annexed land still in rural county designations—land that includes not only acreage but also an unspecified addition to the city's population, which will change the baseline assumptions for the city's current housing needs analyses and buildable lands inventory, and which may eventually be converted from urbanizable lands to a variety of urban uses regulated by a range of plan and zoning designations and code provisions, only some of which may meet the requirements of the statewide housing goal, needed housing statutes, and LCDC interpretive rules. Further, any lands within the Metro urban growth boundary must also be shown to meet the above Goal 10 standards in order to be substituted for the loss of the subject site. Moreover, any condition imposed must be clear and objective and may not, individually or cumulatively, impose unreasonable costs and delays. ORS 197.307(4); OAR 660-015-000(10); OAR 660-007-0015, 0018, and 0020, set forth below:

> 197.307(4) 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. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.
>
> 660-007-0018
>
> Specific Plan Designations Required
>
> (1) Plan designations that allow or require residential uses shall be assigned to all buildable land. Such designations may allow nonresidential uses as well as residential uses. Such designations may be considered to be "residential plan designations" for the purposes of this division. The plan designations assigned to buildable land shall be specific so as to accommodate the varying housing types and densities identified in OAR 660-007-0030 through 660-007-0037.
>
> (2) A local government may defer the assignment of specific residential plan designations only when the following conditions have been met:
>
> > (a) Uncertainties concerning the funding, location and timing of public facilities have been identified in the local comprehensive plan;

(b) The decision not to assign specific residential plan designations is specifically related to identified public facilities constraints and is so justified in the plan; and

(c) The plan includes a time-specific strategy for resolution of identified public facilities uncertainties and a policy commitment to assign specific residential plan designations when identified public facilities uncertainties are resolved.

660-007-0020

The Rezoning Process

A local government may defer rezoning of land within the urban growth boundary to maximum planned residential density provided that the process for future rezoning is reasonably justified:

(1) The plan must contain a justification for the rezoning process and policies which explain how this process will be used to provide for needed housing.

(2) Standards and procedures governing the process for future rezoning shall be based on the rezoning justification and policy statement, and must be clear and objective.

None of these requirements are even approached, much less met, by the plan-zone change or by the city's proposed "commitment."

Proposed Finding:

3. The following sections of the Metro Urban Growth Management Functional Plan are applicable to the subject request:

"3.07.120 Housing Capacity

A. A city or county may reduce the minimum zoned capacity of the Central City or a Regional Center, Town Center, Corridor, Station Community or Main Street under subsection D or E. A city or county may reduce its minimum zoned capacity in other locations under subsections C, D or E.

[…]
E. A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city's or county's overall minimum zoned residential capacity."

Staff Response:

City staff makes the following findings regarding MC 3.07.120:

1. The subject property is a single lot or parcel. The portion of the parcel subject to the proposed Comprehensive Plan/Zoning Map Amendment is approximately five acres in size.

2. The subject property is currently zoned SFA. Minimum density in the SFA zone is 10 dwelling units per acre; the maximum density is 15 dwelling units per acre.

3. The Application seeks to change the zoning for an approximately five-acre portion of the property to IPU. IPU is an institutional zoning designation that does not permit residential uses.

4. The proposed Map Amendment, if approved, would reduce the minimum zoned capacity of the subject property from 10 dwelling units per acre to zero dwelling units per acre. Because the portion of the subject property being rezoned is five acres, the proposed Map Amendment would reduce the minimum zoned capacity of the subject parcel by 50 dwelling units (5 x 10).

5. MC 3.07.120(a) allows the City to reduce the minimum zoned capacity of a lot or parcel, subject to the requirements of MC 3.07.120(e). Under MC 3.07.120(b), when a zone does not have a minimum density standard, the City is required to provide for minimum density that is at least 80 percent of the maximum density. The City has implemented this 80 percent via Section 16.63.020.F of the LDC.

6. MC 3.07.120(e) requires the City to compare the reduction in the "minimum *zoned* capacity" of the subject property if the Map Amendment is approved, to the City's overall minimum residential capacity to determine if the reduction will have a "negligible" effect on the City's "overall minimum zoned residential capacity". MC 3.07.120(e) does not require the City to determine the *net* or *actual* capacity of the subject property or the City overall. Actual capacity of a lot or parcel is determined under Section 16.63.020.F of the LDC based on constraints such as wetlands or steep slopes that may reduce the actual capacity of a parcel (and provides a density transfer when the actual density falls below the minimum zoned capacity). MC 3.07.120(e) expressly requires a comparison of the City's overall minimum "zoned" capacity and the effect of the proposed zone change on that capacity to determine if the effect will be "negligible".

7. The term "negligible" is not defined in the Metro Code. However, MC 1.01.050(d) states that words used in the Metro Code that are not defined shall be construed "according to the context and approved usage of the language".

8. The City relies on Webster's Third New International Dictionary of the English Language to determine the approved usage (Section 16.12.020 of the LDC). Webster's defines "negligible" to mean "so tiny or unimportant or otherwise of so little consequence as to require or deserve little or no attention". The text and context of "negligible" as used in MC 3.07.120 is consistent with this definition.

9. There are two types of residential zones in the City: those with a minimum lot size, and those with a minimum density. Residential zones that have a stated minimum density include: MUR-S, SFA, MUR-A, MUR-M1, MUR-M2, MUR-M3, MUR-X and VTH. Those zones and the minimum density for each are set forth on Exhibit M attached hereto.

10. Residential zones that are based on a minimum lot size include: R-40, R-20, R-15, R-10, R-8.5, R-7 and R-5. As noted above, Section 16.63.020.F of the LDC (specifically, Table 16.63.020-1) requires these areas to develop at 80 percent of their current zoned residential capacity based on the applicable minimum lot size.

11. The acreage of each residential zone in the City is shown on Exhibit M. Using that acreage and either the minimum density or the minimum lot size for each zone, the minimum zoned residential

capacity of each zone is calculated. The City's "overall" minimum zoned residential capacity is the cumulative total of the minimum zoned capacity of each zone.

12. As shown on Exhibit M, the City's current, overall minimum zoned residential capacity is 14,602.05 dwelling units. Dividing this capacity by the number of acres designated for residential use results in an overall minimum zoned residential density of 3.977 dwelling units per acre.

13. As noted above, the proposed Map Amendment would reduce the minimum zoned capacity of the subject property by 50 dwelling units. If these units are subtracted from the City's current minimum zoned residential capacity, the City's "overall" minimum zoned residential capacity after the Map Amendment would be 14,552.05 dwelling units. Again, dividing this capacity by the number of acres designated for residential use results in an overall minimum zoned residential capacity of 3.964 dwelling units per acre.

14. As shown on Exhibit M, The Map Amendment would reduce the City's current "overall minimum zoned residential capacity" of 14,602.05 dwelling units by 50 units. In terms of density, the Map Amendment would reduce the current minimum density by 0.014 dwelling unitper acre (3.977 du/acre – 3.964 du/ac = 0.014 du/acre).

15. In percentage terms, as shown on Exhibit M, the Map Amendment would reduce the City's "overall minimum zoned residential capacity" by three tenths of a percent (50 du /14,602.05 du = 0.00342).

For these reasons, the City finds that reducing the City's overall minimum zoned residential density by less than one percent is an amount "so small or unimportant or of so little consequence as to warrant little or no attention". Consequently, if approved, the proposed Map Amendment will have a negligible effect on the City's overall minimum zoned residential capacity, and MC 3.07.120(e) has been satisfied.

Objections:

The staff report, proposed findings, and record fail to establish compliance with 307.120.E of the Metro Urban Growth Functional Plan because they fail to establish that the proposed plan amendment is only a "zone change" within the meaning of the rule, and because they fail to establish that the proposed change has only a "negligible effect" on the city's "overall minimum zoned residential capacity."

As the staff report says, Section 307.120.E provides that

> *E. A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city's or county's overall minimum zoned residential capacity."*

The staff report also notes that the term "negligible" is not defined and that MC 1.01.050(d) states that words used in the Metro Code that are not defined shall be construed "according to the context and approved usage of the language." However, the proposed findings fail to address all of the relevant context, which also informs the meaning of other key language, including "minimum zoned residential capacity." Moreover, this language was adopted by Metro, to implement state and housing policy, and its meaning is a matter of law as to which a local governing body's interpretation is not entitled to deference on review by LUBA and Oregon's appellate courts. ORS 197.829(1); *Gage v. City of Portland*, 319 Or 308, 316-18, 877 P2d 1186 (1994).

Read in the context of the state land use goals, rules, and statutes that the Functional Plan implements, as well as other language in the Functional Plan itself, negligibility requires a city to establish that the land it is counting as "zoned residential" is "zoned residential" within the meaning of the needed housing statutes, Goal 10, and the Goal 10 interpretive rules, which require that lands relied upon to meeting housing needs must be buildable lands that can reasonably be expected to be available to meet identified needs for such lands within the relevant planning period.

The term "zoned capacity" must also mean actual capacity, excluding lands that have no remaining zoned capacity because they are already developed. Otherwise, there is no way of knowing whether those lands are currently part of the city's acknowledged residential lands inventory. Without that knowledge, there is no way to tell whether a downzoning is negligible or not.

The rule speaks of decisions that "reduce the minimum zoned capacity." It does not say "reduce the minimum planned or zoned capacity." In so doing, the rule expressly limits the applicability of the rule to downzonings that do not also require a plan amendment, such as a redesignation from a zone allowing 15 units per acre to one allowing 10 units per acre under a "Medium Density" plan designation, which authorizes a range of densities. It does not apply to downplannings, which, as in this case, can do more than just "reduce" a parcel's minimum zoned capacity; they can completely eliminate it.

In this case, the loss of 50 urban lots is not "negligible" in the context of its housing obligations. The use of "capacity" in the findings is illusory, given that the City has a history of not meeting its density obligations and has replanned and rezoned property from multifamily to single-family, an act that resulted in previous litigation with the City. There is no showing the City will ever live up to its obligations and, by failing to bind itself to meet OAR 660-007-0060(2)(b), it further reduces the land available to meet its needed housing obligations.

Finally, it is important to understand that compliance with a local or regional housing policy or rule such as Metro's does not, in the case of a post-acknowledgement plan or zone change, establish compliance with the state land use statutes, goals, and rules cited herein. Opus Dev. Corp. v. City of Eugene, 28 Or LUBA 670 (1995); Volny v. City of Bend, 47 Or LUBA 493, 509 (2000); DLCD v. Klamath County, __ Or LUBA ___ (LUBA No. 2001-029, 2001). The city has made no findings that the subject downplanning and downzoning comply with the requirement, established throughout the State of Oregon, cities impairing or eliminating parts of buildable land supplies provide a meaningful accounting to demonstrate that they retain sufficient lands properly planned, zoned, serviced and located to maintain the qualitative and quantitative sufficiency of their buildable lands inventories. *Id.*

For these reasons, HLA and FHCO object to the proposed amendment unless and until findings and conditions meeting the above standards are adopted by the City.

Our organizations also request a copy of the final order in this matter.

Sincerely,

Louise Dix

FAIR HOUSING COUNCIL OF OREGON
Louise Dix

Mary Kyle McCurdy

HOUSING LAND ADVOCATES
Mary Kyle McCurdy