



**Brenelaine Inv. (MA 15-3/ RA 15-2/ Z 15-7/ CA 16-1)
17-04-14-32/08600, 08900**



 Subject properties



GALLOWAY Zach A

From: Moore, Ed W <ed.w.moore@state.or.us>
Sent: Monday, February 22, 2016 9:59 AM
To: GALLOWAY Zach A
Cc: MOORE Ed (OR); Howard, Gordon; Hogue, Thomas
Subject: RE: MA 15-3, RA 15-2, Z 15-7

Follow Up Flag: Follow up
Flag Status: Flagged

Zach,

The department has completed its review of the above referenced plan and zone amendments for a site-specific Metro Plan change from Commercial to Medium Density Residential, with concurrent Refinement Plan change from Commercial to Medium Density Residential designation and complementary text amendment to one policy and a zone change from GO General Office to R-2 Medium Density Residential. Beginning on page 22 of the application, the applicant addresses statewide planning goal 9. In their finding they assert that the 1992 Eugene Commercial land Study found that the city had a surplus of 170 acres of commercial land. On the surface it would appear that the proposed plan and zone amendment would be inconsequential to the city's overall commercial land supply.

However, the department is concerned that the applicant is relying on a study that is over 23 years old that had a planning horizon of 2010. In approving a plan/zone amendment to change land from employment use (commercial or industrial) to a non-employment designation that is more than 2 acres, OAR 660-009-0010(4) which states:

For a post-acknowledgement plan amendment under OAR chapter 660, division 18, that changes the plan designation of land in excess of two acres within an existing urban growth boundary from an industrial use designation to a non-industrial use designation, or an other employment use designation to any other use designation, a city or county must address all applicable planning requirements, and:

- (a) Demonstrate that the proposed amendment is consistent with its most recent economic opportunities analysis and the parts of its acknowledged comprehensive plan which address the requirements of this division; or
- (b) Amend its comprehensive plan to incorporate the proposed amendment, consistent with the requirements of this division; or
- (c) Adopt a combination of the above, consistent with the requirements of this division.

The issue here for the city in approving this application is the age of Eugene Commercial Lands Study and whether it meets the requirement of an Economic Opportunities Analysis (EOA) as set forth in 660-009-0015. Consequently, if approved, the decision would be susceptible to appeal. The applicant and the city would be well served to delay any action on this request until the city has adopted Envision Eugene and its supporting documents, one of which is the Eugene Comprehensive Land Assessment that meets the requirement for an EOA.


Please feel free to contact me should you have any questions. Please enter this e-mail into the record of all proceedings.

Respectfully,

Ed

Ed Moore, AICP | Regional Representative
Community Services Division | Dept. Land Conservation and Development | South Valley Regional Solution
Center @ U of O
17 15 E. Franklin Blvd, Rm 221 | Eugene, OR 97403-1983
Voice: 971.239.9453 | Skype: ed.moore.dlcd
ed.w.moore@state.or.us | www.oregon.gov/LCD/

The urban forms that societies have produced through time, including our own, can be seen as records of distinct value systems; what does your city say about you?

Be GREEN; keep it on the screen. 

I, Holly C. Hartmann, submit the following regarding the pending land use action for Brenelaine Inv (City MA 15-3, RA 15-2, and Z 15-7).

Action Request: I request denial of the proposed actions based on the proposal not meeting the approval criteria of EC 9.7735: 1, 2 ~~or 3~~.

Note: All page numbers refer to the page number of the online PDF document at: <http://pdd.eugene-or.gov/LandUse/DocumentDetails?file=Z-15-0007&id=1408188> not the page numbers within the application.

Rationale for Request: The application for the proposed amendments to the Metro Plan, refinement plan, and zoning do not meet the criteria provided in EC 9.7735.

The information about housing represented under Goal 10 Housing is incomplete and misrepresents the situation. The Land Supply and Capacity Update of 2012 incorporated land use development from 2009-2012. Instead, they reference a 1997 draft document (referred to as the Draft Site Inventory on p. 19). Further, they acknowledge on p.22 that existing inventories show that there is not a shortage of MDR capacity, in contrast to their claims. On p. 29, the applicants refer to information from the Envision Eugene process related to commercial land, yet they completely ignore the Envision Eugene information and emerging policy direction related to housing. Recurring references to there being "no vacant residential of this size" have no importance; infill development is expected to occur on smaller parcels.

This proposal does not meet the Statewide Planning Goal 11. They pitch this proposal as providing "relatively affordable" single family structures, not affordable housing. The applicant states that the neighborhood association opposes multi-family use of the site. I disagree with the stated neighborhood association view. There is nothing wrong with providing multi-family housing on the General Office or commercial portion of this land that would be in character with the nearby multi-family development near Walnut Park (such as the Turtle Park Apartments and neighboring duplexes), and would better meet all policies addressed in this proposal. Only the applicant's desire for unconstrained development and lack of vision stand in the way of meeting Goal 11 under the current designations.

Unified commercial development encourages quality development like we have seen in other parts of town, rather than piecemeal, low-end strip mall development. The applicant's evaluation of the site reflects outdated planning perspectives, focusing on auto-centric access for the commercial development. Their argument on p.29 is nonsense; it is equivalent to saying vacant lots that don't currently have houses on them are unsuited for housing development.

State Goal #9

The proposal is inconsistent with Metro Plan policy A.13 because it reduces opportunities for mixed use development by reducing the diversity of land use classifications, eliminating the general office designation. The material presented on p. 34 related to policy A.13 does not address the impact of the increased residential density on existing neighborhoods. The text,

using obfuscating incorrect grammar, simply says that the development will consider the impact of higher residential density, without actually addressing the impact at all.

This proposal is also inconsistent with Metro Plan policies A.17 and A.20. The information stated in the application under Metro Plan policies A.17 and A. 20 are simply incorrect in the evaluation of the availability of MDR capacity in the River Road-Santa Clara area, and this project's role in providing affordable housing. The proposal mentions Envision Eugene related to commercial land, but not in relation to housing, such as the Updated 2012 Land Supply and Capacity Maps. This proposal acknowledges the housing stock will only be "relatively affordable" and disregards the affordability and desirability of well-planned attached housing, including the ability attached housing to provide home ownership.

The application is inconsistent with the Metro Plan that focuses on the use of transitional zoning to buffer commercial and residential development. The current General Office designation provides the transitional use that is part of the Metro Plan. The applicant acknowledges the need for transitional use, on pp.24-25, to screen the view of the existing commercial development from the low density houses that they, themselves, were responsible for developing. They are searching for a quick fix to a problem of their own making – they built speculative LDR stock, buyers don't want to look at the back of the existing commercial development, and they can't come up with a General Office development that fits their development timeline or community vision.

The material under section D, beginning pp.39, is simply a restatement of misleading and incomplete material. This proposal does not increase the diversity or affordability of housing stock in the River Road area; it only increases the diversity of development potential on this parcel, and in a direction that reduces affordability. I disagree with nearly every point in the application assertions that there have been changes in circumstances in a substantial manner that not anticipated at the time the refinement plan was adopted. Their application does not make the case needed to comply with approval criteria (2).

The proposal, as submitted, should be denied. Any further review should explicitly address the most recent housing and commercial land inventories undertaken as part of the Envision Eugene process, as well as principles and policies developed under that process.

The applicant bought land with a zoning for which they are ill-suited to develop on the timetable of current market forces. They built neighboring speculation housing stock for buyers that prefer a different landscape than currently exists, and they seek unconstrained development that will block that view. The applicant is free to develop under the General Office designation or to sell the parcel to others that have greater capacity and community vision. The current land designations are capable of increasing housing stock, increasing metropolitan and subregion diversity of housing stock, increasing affordability of housing stock, and doing all that while better maintaining the character of the neighborhood and the transition between housing and commercial development.



Memorandum

Date: April 20, 2016
To: Planning Commission
From: Anne C. Davies
Subject: Brenelaine Investments LLC (MA 15-3)

Background

This memorandum addresses the proposal by Brenelaine Investments, LLC to amend the Metro Plan designation for approximately 7 acres from Commercial to Medium Density Residential (MDR). One of the applicable criteria that must be addressed in a Metro Plan amendment of this kind is EC 9.7735(1): "The proposed amendment is consistent with the relevant Statewide Planning Goals."

Statewide Planning Goal 9 (Economic Development) is intended to ensure that there is an adequate supply of sites of suitable size, type, and location for anticipated industrial and commercial development. The proposed findings address Goal 9 and conclude that the proposed Brenelaine amendment is consistent with Goal 9. That conclusion is based on the adopted Commercial Lands Study (CLS), which is the City's acknowledged "economic opportunities analysis" with regard to the supply of commercial lands.

Ed Moore, with the Department of Land Conservation and Development, asserts that the City cannot rely on the CLS because the planning horizon for the study ended in 2010, approximately six years ago. He warns that an approval based on the existing CLS could be subject to appeal on that basis and recommends that any action on this application be delayed until the City's new economic opportunity analysis is adopted as part of the Envision Eugene package.

Analysis

Mr. Moore bases his comment on the administrative rule that implements Goal 9, OAR 660-009-0010(4). It provides:

"For a post-acknowledgement plan amendment under OAR chapter 660, division 18, that changes the plan designation of land in excess of two acres within an existing urban growth boundary from an industrial use designation to a non-industrial use designation, or another employment use designation to any other use designation, a city or county must address all applicable planning requirements, and:

- (a) Demonstrate that the proposed amendment is consistent with *its most recent economic opportunities analysis* and the parts of its acknowledged comprehensive plan which address the requirements of this division; or
- (b) Amend its comprehensive plan to incorporate the proposed amendment, consistent with the requirements of this division; or
- (c) Adopt a combination of the above, consistent with the requirements of this division.”

For purposes of subsection (a), the City’s “most recent economic opportunities analysis” refers to the commercial lands analysis that has been formally adopted and acknowledged as part of the Metro Plan – the CLS. The caselaw is clear that a city must make its land use decisions based on the acknowledged comprehensive plan. This means that when a city makes a decision that requires findings demonstrating compliance with Goal 9, such as the proposed plan amendment in this case, the Goal 9 findings must be based on a commercial lands inventory that is formally adopted and part of the acknowledged comprehensive plan.

There are no Court of Appeals cases that deal with the situation where an adopted, acknowledged buildable lands inventory has expired (*i.e.*, the planning horizon used for determining future need for commercial lands has passed). There is a LUBA case, however, that holds that “any local government that has a housing inventory with a housing needs projection that uses a planning period that has already passed is essentially operating without a useable housing needs analysis.” *Lengkeek v. City of Tangent (Lengkeek II)*. (The *Lengkeek* cases dealt with Statewide Planning Goal 10, which requires an adequate supply of land for residential, not commercial, needs. That said, the analysis in *Lengkeek* would apply equally to Goal 9 and commercial and industrial land inventories.) LUBA does suggest that, in certain circumstances (*i.e.*, where the acknowledged inventory itself anticipates and provides a methodology for updating the land inventory beyond the planning horizon), a city could potentially continue business as usual beyond the expiration of a lands inventory. The City of Tangent did not have that type of inventory, however. And the CLS is not that type of inventory, either.

Accordingly, under *Lengkeek*, DLCD is correct that “where a comprehensive plan is amended in a way that relies on an updated [Buildable Lands Inventory] BLI, that updated BLI must be incorporated into the city’s comprehensive plan.” *Lengkeek III*. In short, the City and applicant cannot rely on the expired Commercial Lands Study.

Before reviewing the options available to the Commission, it is worth discussing Commissioner Nicoletto’s question regarding a possible *de facto* moratorium. Commissioner Nicoletto asked whether a recommendation to deny the application based on the expired CLS would violate ORS 197.524(1)(b). The statute provides that if a city has a “pattern or practice of delaying or stopping the issuance of permits” for division of land or construction, it must adopt a moratorium following the required procedures for doing so. In addressing the moratorium issue in *Lengkeek*, LUBA acknowledged that a city is caught between a rock and a hard place in

Planning Commission
 April 20, 2016
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situations like this. On the one hand, a city risks violation of Goal 9 if it approves a comprehensive plan amendment based on an expired commercial lands inventory. On the other hand, it risks violating the moratorium statute if it denies the application because there is no useable acknowledged inventory. The solution provided by LUBA was to allow the applicant to apply concurrently to have the inventory updated. That solution is an option for the applicant in this case; however, as explained below, the current Envision Eugene information would not support approval of this request. That is, if the applicant were to attempt to seek to update the commercial lands inventory concurrently with its application, removal of the 7 acres of commercially designated land would likely violate Goal 9 because there is a deficit of commercial land.

Possible Actions

In reviewing a Metro Plan amendment, the Planning Commission only makes a recommendation to the City Council. The recommendation must contain “findings and conclusions on whether the proposal or a modified proposal meets the approval criteria.” It is the City Council that then must approve, modify and approve, or deny the proposed amendment based on the Planning Commission’s recommendation. A recommendation of approval would require findings that the proposal is consistent with Statewide Planning Goal 9, and a recommendation of denial would require findings that the proposal is not consistent with Goal 9.

OPTION #1: *Recommend approval of the application.* Under the expired Commercial Lands Study, there is a surplus of commercial land, and removal of the 7+ acres of commercially designated land would not leave the City with a deficit. The risk in recommending approval on this basis is that DLCD could appeal the approval as a violation of Goal 9 under the reasoning in *Lengkeek*.

OPTION #2: *Recommend denial of the application.* The information provided by the applicant is based on the Commercial Lands Study, which is expired. The studies conducted as part of Envision Eugene demonstrate a deficit of both MDR and commercial lands. Accordingly, if the studies were adopted as the acknowledged commercial lands inventory, the applicant would not likely be able to demonstrate compliance with Goal 9; *i.e.*, an applicant cannot remove 7 acres of commercially designated land from an inventory that already has a deficit of such lands. Further, the denial of this one application based on the expiration of the Commercial Lands Study would not constitute a *de facto* moratorium.

OPTION #3: *Delay action until the Envision Eugene inventory studies are adopted and acknowledged.* Mr. Moore proposes that the City delay action on the application. The City, however, is not authorized to delay action against the applicant’s wishes. That said, the applicant could choose to put the application on hold pending the Envision Eugene adoption process.

ACD:abm

Attachments: *Lengkeek* cases

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**MONDALEE LENGKEEK, MERVIN
"BILL" LENGKEEK, JAMES M. LONG,
STEPHEN P. NOFZIGER, JOANNE
McLENNAN, ARLEN SAMARD and
EILEEN SAMARD, Petitioners,**

v.

**CITY OF TANGENT, Respondent, and
MELVIN BRUSH, Intervenor-
Respondent.**

LUBA No. 2004-164.

Oregon Land Use Board of Appeals.

October 12, 2005.

Appeal from City of Tangent.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners.

With her on the brief was Johnson and Sherton, PC.

Anne Corcoran Briggs, Portland, filed the response brief and argued on behalf of respondent.

George B. Heilig, Corvallis, represented intervenor-respondent.

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

REMANDED.

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

FINAL OPINION AND ORDER

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Opinion by Davies.

Header ends here.

NATURE OF THE DECISION

Petitioners challenge a city decision that (1) approves a comprehensive plan map amendment that adds 84.26 acres to the city's urban growth boundary (UGB) and redesignates the property from Agricultural to Residential, (2) adopts exceptions to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), (3) adopts a zoning map amendment from Exclusive Farm Use (EFU) to Low Density Residential (R-1), and (4) approves a partition.

FACTS

The subject property is an 84.26-acre parcel within the city limits of Tangent, lying west of agricultural land lying outside the city's UGB.¹ The subject property lies east of Highway 99 and the Union Pacific Railroad tracks, and north of Tangent Drive. To the west across the railroad tracks are mixed commercial/residential uses. To the north is the Tangent Business Park. In 2004, the applicant below (intervenor) submitted an application seeking the land use approvals listed above. Petitioners appeal the city council's adoption of Ordinance No. 2004-012, approving those requests.

FIRST ASSIGNMENT OF ERROR

The Tangent Zoning Ordinance (TZO) and Goal 14, Factors 1 and 2, require a demonstration of public need in order to amend the UGB and comprehensive plan map.² OAR

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660-004-0022(1)(a) provides that reasons exceptions to goal requirements may be based on a "demonstrated need for the proposed use or activity."³ Relying on a population projection of 1,581 for the year 2020 and on a housing study submitted by intervenor, the city concluded that there is a demonstrated public need to include 90 additional acres of residentially designated land within the Tangent UGB.

Petitioners' first assignment of error provides:

"The City's determination that there is a demonstrated public need to add the subject 84.26-acre parcel to the Tangent UGB, and to change the Plan Map designation of the parcel to Residential, is inconsistent with the population projection and buildable lands inventory in the acknowledged Tangent Comprehensive Plan.

ORS 197.835(9)(a)(D)." Petition for Review 5. As presented by petitioners, this assignment of error raises a Statewide Planning Goal 2 (Land Use Planning) consistency argument. Goal 2 provides:

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"To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.

"City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268."

Petitioners argue that the challenged decision is inconsistent with the Tangent Comprehensive Plan (TCP) in two ways. First, they argue that the city erred in relying on housing data provided by intervenor that is inconsistent with the buildable lands inventory in the acknowledged TCP. Second, petitioners argue that the city's conclusion that there is a demonstrated public need for more residential land within the UGB is based on a population projection that is inconsistent with the population projection found in the TCP.

A. Buildable Lands Inventory

Goal 10 (Housing) and its implementing administrative rules require local governments to inventory the buildable residential lands within their UGB's and to ensure that the supply of such buildable lands is adequate to meet the local government's anticipated housing needs. Goal 10; ORS 197.295-.314; OAR 660-008-0010. *See also Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 694-95 (1995) (when adopting post-acknowledgment plan and zone map amendments affecting residentially designated land within an urban growth boundary, a local government must demonstrate that it continues to satisfy its Goal 10 obligation to maintain an adequate inventory of buildable lands). In addressing compliance with Goal 10, the challenged decision concludes that there is a demonstrated need to add 90 acres of residentially-designated land to the Tangent UGB.⁴ Petitioners first argue that that conclusion is inconsistent with the TCP,

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in violation of Goal 2. Petitioners state "no one can dispute" that the 2002 TCP includes a buildable lands inventory that finds a need for only 75 acres of residential land "during the planning period." Petition for Review 7.⁵

The TCP was originally acknowledged in 1985, and was updated during periodic review in 1988 or 1989.⁶ In 2002, the city's transportation system plan (TSP) was adopted and the TCP was concurrently revised to reflect its adoption. However, the city did not adopt a new, updated buildable lands inventory (BLI) at that time. It is clear from the ordinance revising the TCP in 2002 and the language in the 2002 TCP that the BLI, including the table set out in n 5, was not updated in 2002 when the TSP was adopted.⁷ Petitioners do not contend otherwise.⁸ Further, the BLI found in the 2002 TCP provides a planning period that ends, at the latest, in 2005.⁹ Thus, the BLI

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projects the needed residential lands only to the year 2005. Perhaps for this reason, intervenor conducted its own buildable lands analysis. That analysis concluded that there was a need for 90 additional acres of residential land within the UGB to the year 2020.

Petitioners argue that the city's reliance on this information provided by intervenor is inconsistent with the BLI found in the TCP, which identifies a small surplus (15 acres) of land through 2005. Petitioners rely on cases interpreting the Goal 2 consistency requirement in the Goal 10 context. We briefly summarize those cases before addressing petitioners' arguments.

In *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 994 P2d 1205 (2000), Metro had relied upon a 1996 draft document, instead of on a 1995 update of the acknowledged plan, to determine the amount of land needed in an urban reserve area. The petitioners in that case argued that Metro violated Goal 2 in doing so. The Court of Appeals summarized the Goal 2 issue as follows:

"the question is whether the land use action itself, *i.e.*, the determination of the amount of needed land, is consistent with and based upon the applicable plan and 'related implementation measures.' The objective of the goal is to make the planning process and planning documents the 'basis for all decisions and actions related to use of land.' (Emphasis added.) The draft report is not a plan or a planning document of the kind that Goal 2 contemplates. It is an informal study that, by its own terms, is not related to the designation of urban reserves and, by its own terms, is not even a 'final' document for the purposes at which it is directed. Under Goal 2, the computation of need must be based upon the functional plan and/or Metro's other applicable planning documents. Metro

may, of course, amend those documents in the manner prescribed by law, if it chooses, but it cannot simply subordinate them to an informal study that is concerned with a remotely related matter." *Id.* at 22.

We recently explained our understanding of that ruling as follows:

"The Court of Appeals held that, in that circumstance, Metro could not 'subordinate' applicable acknowledged planning documents to 'an informal study.' In other words, it could not choose to rely on an unacknowledged draft study over an inventory completed a year earlier that was part of the acknowledged plan, where the results of those two studies were clearly contradictory. Metro's determination was not consistent with the acknowledged plan in that case, in violation of Goal 2." *1000 Friends of Oregon v. City of Dundee*, ___ Or LUBA

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___ (LUBA Nos. 2004-144 and 2004-145, July 21, 2005), slip op 10, *rev pending*.

In *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384, 395 (2001), we held that the City of Woodburn was entitled to rely on the buildable lands inventory in its acknowledged comprehensive plan, although that inventory was outdated. We most recently addressed this Goal 2 issue in *1000 Friends of Oregon v. City of Dundee*. In that case, the City of Dundee's acknowledged comprehensive plan contained a 1988 buildable lands inventory that was 15 years old when the local decision in that case was issued. Approximately two years before the challenged decision, the city updated its inventory pursuant to a comprehensive plan policy that required periodic re-examination of developable lands. We held that the city's reliance on that updated inventory, although it was not incorporated into the comprehensive plan, did not render the city's findings demonstrating the sufficiency of its

residential land supply inconsistent with the comprehensive plan or its implementing measures. *1000 Friends of Oregon v. City of Dundee*, slip op 11. Petitioners argue that this case is more like *D.S. Parklane* and less like the *City of Dundee* case.

Another case cited by neither party, *Benchmark Enterprises v. City of Stayton*, 36 Or LUBA 433 (1999), is potentially relevant here. In that case, the city denied the petitioner's request for annexation and subdivision approval because the city's buildable lands inventory had not been updated. We remanded, holding that the city's denial of the annexation and subdivision proposals based on a "lack of current buildable lands data and housing needs data" constituted a *de facto* moratorium pursuant to the moratorium statutes. See ORS 197.524.¹⁰

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1. Goal 2 Consistency

Again, petitioners argue that the city's conclusion that there is a demonstrated need to add 90 acres of residential land is inconsistent with the acknowledged inventory that finds a need for only 75 acres of residential land. The Goal 2 consistency requirement, however, assumes that there is something for the land use action to be consistent with. In *D.S. Parklane*, for instance, the court held that the challenged decision in that case was inconsistent with the functional plan because the land use action relied on a study that was itself inconsistent with the inventory in the functional plan. For all intents and purposes, the TCP in this case does not contain a useable BLI because it provides information for a planning period that ends in 2004 or 2005. Compare *Craig Realty Group v. City of Woodburn*, 39 Or LUBA at 389 (no indication that the planning period that applied to the acknowledged inventory had expired, only that the city's housing inventory was outdated).

The information submitted by intervenor to demonstrate a public need for the amendment uses an entirely different planning period. That data uses the population projection discussed below and projects the residential land need to the year 2020. Because the acknowledged BLI does not contain any information regarding the need for residential lands that is relevant to the challenged decision, we disagree with petitioners that the challenged decision is inconsistent with the BLI in the city's acknowledged comprehensive plan.

2. Goal 2 "Required Information"

Although not presented as a separate assignment of error, petitioners also include a Goal 2 argument that relies on a different Goal 2 requirement. Petitioners argue that intervenor's housing analysis cannot provide the basis for the needs analysis. We understand petitioners to argue that Goal 2 requires that where a local government relies on an applicant's housing needs analysis, instead of the housing needs analysis provided in the comprehensive plan, that housing analysis must

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first be incorporated into the comprehensive plan.¹¹ Petition for Review 8-9. Petitioners explain their rationale as follows:

"If Goal 2 does not prohibit the City from relying on this applicant's BLI without incorporating it into the Plan, then there is nothing to prevent the City from relying on another, different BLI submitted by another applicant trying to get his property into the UGB or have its plan designation/zoning changed, in a subsequent quasi-judicial proceeding. Under these circumstances, the adopted, acknowledged plan would become meaningless." Petition for Review 9 n 6.

At oral argument, petitioners further argued that Goal 2 and Goal 1 (Citizen

Involvement) require an opportunity for the public to review information contained in the comprehensive plan, which includes the buildable lands inventory.¹² The process followed in this case, they argue, included only one joint public evidentiary hearing before the planning commission and city council.

As stated in *D.S. Parklane*, the intent of Goal 2 is to require that the comprehensive plan provide the basis for land use actions. *D.S. Parklane*, 165 Or App at 22. Specifically, Goal 2 provides that land use plans shall include "inventories and factual information for each applicable statewide planning goal."¹³ We understand petitioners' argument to be directed at this Goal 2

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language that requires inventories and certain information for each goal, Goal 10 in this instance, to be included in the comprehensive plan. We agree with petitioners that Goal 10, Goal 2 and Goal 1 require that certain necessary information in the inventory appear in the comprehensive plan. Without that information in the plan, a land use decision that implicates Goal 10 is not based on the comprehensive plan. Further, to allow an applicant to provide that data in a proceeding that does not and cannot lead to a conforming amendment to the comprehensive plan denies the public the opportunity to provide input that is required by Goal 1.

The administrative rule implementing Goal 10 further supports petitioners' position that the needs analysis must be incorporated into the comprehensive plan. OAR 660-008-0010 provides that the mix and density of needed housing is determined in the "housing needs projection."¹⁴ OAR 660-008-0005(5) requires that the "housing needs projection" be "justified in the plan." It provides:

"(5) 'Housing Needs Projection' refers to a local determination, *justified in the plan*, of the mix of housing types and densities that will be:

"(a) Commensurate with the financial capabilities of present and future area residents of all income levels during the planning period;

"(b) Consistent with any adopted regional housing standards, state statutes and Land Conservation and Development Commission administrative rules; and

"(c) Consistent with Goal 14 requirements." (Emphasis added).

The city in this case, and any local government that has a housing inventory with a housing needs projection that uses a planning period that has already passed, is essentially operating without a useable acknowledged housing needs analysis. If a local government were to deny an application

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because there is no applicable housing needs analysis in the comprehensive plan, however, it risks remand for the reasons we remanded in *Benchmark Enterprises*; *i.e.*, it could be enacting a *de facto* moratorium. On the other hand, if it relies on a housing study provided by the applicant without incorporating that analysis into its comprehensive plan, it risks violating Goal 2 for the reasons provided by petitioners.

Goal 10 requires local governments to inventory buildable lands, and Goal 2 requires that those inventories be part of the comprehensive plan. Where local governments do not have a useable inventory, they may rely on an applicant to provide that information. However, if they do so, the comprehensive plan must be amended concurrently to incorporate that inventory.¹⁵

In this case, the projection of housing need in the comprehensive plan only provides estimates to year 2005. As discussed above, Goal 10, Goal 2 and Goal 1 require that intervenor's buildable lands analysis, which is the only basis for determining public need for the proposed UGB expansion, be incorporated into the comprehensive plan.

B. Population Projection

The BLI in the city's acknowledged comprehensive plan includes a population projection of 1,000 for the year 2005. In 1999, Linn County adopted a year 2020 official population projection for the county and for the cities located within the county, including the City of Tangent. The county's estimated 2020 population for the City of Tangent was 1,581.¹⁶ In 2002, the city adopted its TSP, which was referred to and approved by the voters. The TSP, which was incorporated into the TCP, contains a reference to an estimated population that ranges from 1,684 to 2,010 for the year 2020. Record 518.

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Petitioners allege that the city used three separate methods in reaching its conclusion that there is a demonstrated need to add 90 acres of residentially-designated land to the Tangent UGB. According to petitioners, all three methods are based on a year 2020 population projection of 1,581. Petitioners allege that the TCP contains a projection of 1,000 by the year 2020 and that the projection the city relied upon is therefore inconsistent with the population projection in the acknowledged comprehensive plan.¹⁷

The city alleges that any TCP reference to a population projection of 1,000 population is to the year 2005, and that any reference to a 1,000 estimate as a projection for 2020, instead of for 2005, is a typographical error. We agree. Linn County's population projection, the population projection in the

TSP and all of the data included in the BLI support the city's explanation on this point.¹⁸ If petitioners are correct that the city did not adopt Linn County's population projection of 1,581, then the population projection adopted in the TSP provides the only population projection upon which the city could rely. That population projection range (1,684 — 2,010) is *higher* than the 1,581 population projection that the city relied upon in concluding the public need for 90 additional acres of residential land. Accordingly, if the city had used the TSP population projection, it would have concluded that it needed more, not less, residential land. In any event, the question petitioners seek to answer is whether the challenged decision is consistent with the TCP. Again, because the population projection in the acknowledged BLI only estimates population figures to 2005, the challenged decision, which relies upon data based on a population projection for 2020 and, in any event, which is lower than the population projection included in the TSP, is *not inconsistent* with the TCP.

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Although petitioners frame the question as whether the challenged decision is inconsistent with the comprehensive plan, they also appear to argue that the city failed to render a decision that was based on its comprehensive plan. For the same reasons discussed above, we agree with petitioners that Goal 2 requires that the population projection that forms the basis of the needs analysis be incorporated into the comprehensive plan.¹⁹ Accordingly, this subassignment of error is sustained.

Petitioners' first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the city's findings addressing certain Statewide Planning Goal 14 (Urbanization) considerations are

inadequate because they rely on tables and figures that are not incorporated into the decision. Consequently, it is impossible to determine, without the tables and figures, whether the findings demonstrate compliance with the applicable approval criteria.

The challenged decision refers to two figures and two tables in support of its Goal 14 findings. The tables and figures are part of the record. However, apparently as a result of an oversight involving a computer formatting problem, those tables and figures were not included, attached or incorporated as part of the final order. Petitioners argue that the challenged decision merely refers to the figures and tables "without indicating any intent to incorporate such documents by reference * * *," Petition for Review 11.

Petitioners are wrong, however, that the figures and tables are not incorporated by reference in the challenged findings. The findings state: "The information and analyses on pages 8 through 12 and Attachment A of the application are adopted as Findings of Fact by the City." Record 18. Attachment A includes intervenor's housing needs analysis, which in turn includes the tables and figures at issue. Accordingly, the tables and figures in fact were incorporated as findings

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of fact. We therefore agree with the city that although the tables and figures did not appear in the findings document itself, they were specifically adopted as findings. The findings are therefore adequate to demonstrate compliance with the criteria identified by petitioners, and the clerical error in omitting the tables and figures does not require remand.

Petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The uses proposed are low-density residential uses. OAR 660-004-0020(2)(d) requires a demonstration that the "proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."²⁰ Petitioners argue that the city's findings are inadequate because they rely on development features, *i.e.*, a park and a landscaped trail, that are not required by the challenged decision.

In addressing OAR 660-004-0020(2)(d), the city found that the proposed low-density residential development will be compatible with adjacent residential and commercial uses.²¹

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Petitioners argue that while the challenged decision relies on the development of a park on the south part of the subject property and a landscaped perimeter trail on the west and north sides of the subject property, to support its conclusion regarding compatibility, the challenged decision does not require those features as conditions of approval. Petition for Review 12 (citing *Collins v. Klamath County*, 26 Or LUBA 434, 437 (1994) (where local government relies on particular features to assure compliance with approval standards, local government must "assure that there is an adequate reason to assume" that such features will be part of the authorized use)). The findings are therefore inadequate, petitioners assert.

The city concedes that the identified features are referenced, but argues, with regard to the park:

"the findings rely primarily on the fact that low density residential uses allowed in the R-1 zone will be compatible with the low density residential uses located to the south, rather than the existence of the park itself, to conclude that uses of the subject property will

be compatible with uses located on adjacent properties." Response Brief 13-14.

Although the park is mentioned in the findings, the city concluded that the proposed use, low-density residential, "will be completely compatible with existing [low-density] residential development to the south." That finding relies in no way upon the park. Rather, it simply takes the position that low-density residential uses are compatible with other low-density residential uses. Petitioners offer no reason to question that position.

The findings regarding compatibility with the adjacent commercial uses to the west and north, on the other hand, appear to rely primarily on the landscaped perimeter trail:

"The City finds that low density residential development will be compatible with existing planned uses to the west and north, due to the general compatibility of the types of uses *and the extensive separation and landscape buffering.*" Record 32 (emphasis added).

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We cannot say that the city would have arrived at the same conclusion regarding compatibility if the trail were not anticipated. We therefore agree with petitioners that the city's reliance on that feature to support its conclusion regarding compatibility requires that it be required as a condition of approval. On remand, the city must either (1) impose a condition of approval assuring that the perimeter trail will be required or (2) adopt findings clarifying that it does not rely on that feature as a basis for its conclusion that the proposed use will be compatible with uses on adjacent properties.

Petitioners' third assignment of error is denied in part and sustained in part.

FOURTH ASSIGNMENT OF ERROR



Petitioners argue that the challenged findings addressing Goal 14, factors 1 through 7, were not adopted as part of the TCP, as required by Goal 14.²²

The city responds:

"Ordinance 2004-012 includes text amendments to the TCP to incorporate 'Exhibit C' of the Final Order into the TCP by reference. Exhibit C includes findings addressing the seven Goal 14 factors. R. 11-24." Response Brief 14.

Ordinance No. 2004-012 provides, in pertinent part:

"The Comprehensive Plan Text of Tangent is Amended to include the Exceptions to

Statewide Planning Goals 3 and 14 as shown in Exhibit C." Record 3. Exhibit C includes the findings of fact supporting the challenged decision. Those findings include findings addressing the reasons justifying an exception to Goal 14. As part of justifying that

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exception, the city adopted findings addressing the seven Goal 14 factors.²³ Those findings were adopted as part of the TCP per the language in Ordinance 2004-012 quoted above, as required by Goal 14.

Petitioners' fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners challenge the city's findings demonstrating that the zone change complies with Goal 11 (Public Facilities and Services) and TCP Goal 11, Policy 1.²⁴

The challenged findings conclude that it is feasible for all public facilities to be made available prior to or concurrent with the proposed development. Record 41.²⁵

Petitioners argue, however, that the findings do not rely on a condition of approval, and that even if they did, the conditions of approval are not adequate to ensure that the capacity of the city's community sanitary sewer system will be adequate to serve the development of the subject property.²⁶ It appears to be

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undisputed that the city's sewer system does not currently have the capacity to serve the proposed development over the planning period.²⁷ Petitioners argue:

"First, it is not clear that the Conditions of Approval will be applicable to future development of the property, since they were not made a part of the City's land use regulations by Ordinance No. 2004-12. Under ORS 197.015(11) and 197.195(1) subdivisions within a UGB are 'limited land use decisions' that are subject only to standards in a city's land use regulations. Further, Condition 11 requires only that the applicant 'provide verification of adequate water and sanitary sewer capacity **on-site** to serve the proposed use.' (Emphasis added.) Beyond that, Condition 11 requires only that the applicant 'identify the capacity of the STEP system and treatment facilities **needed** to support the proposed development.' The conditions do not require a demonstration that the City STEP system has adequate treatment capacity to serve proposed development of the subject property." Petition for Review 15 n 12 (citations omitted; emphasis added by petitioners).

Petitioners appear to be arguing that where the city concludes that capacity is not currently available, but that it is feasible for all public facilities to be made available prior to or concurrent with the proposed development, the city must adopt a condition of approval that ensures that such public facilities will actually be available prior to the development. See *Rhyne v. Multnomah*

County, 23 Or LUBA 442, 447-48 (1992) (local government may find that it is feasible to comply with an approval criterion and impose conditions of approval to assure compliance with that criterion); *Paterson v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2004-155, April 5, 2005), *rev'd and remanded on other grounds* ___ Or App ___ (August 31, 2005, slip op 4) ("Generally, where there is conflicting evidence regarding whether compliance with an approval criterion is feasible, the local government may determine that compliance is feasible and impose conditions of approval as

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necessary to ensure compliance."). We understand petitioners to argue that the city's findings are inadequate because the finding of feasibility does not rely on a condition of approval that ensures that adequate sewage disposal facilities will be available.

The city responds that the condition of approval requiring submittal of a Master Development Plan that addresses, among other things, proposed sanitary sewer improvements is sufficient to "assure that adequate public facilities will be planned for and developed over the planning period to serve not only the subject property but other property within the UGB, consistent with Goal 11 and TCP Goal 11, Policy 1."²⁸ Response Brief 16.²⁹

As petitioners point out, however, condition 1 relating to a Master Development Plan merely requires that the sanitary sewer improvements be reflected in the Master Development Plan; it does not require any demonstration of capacity or adequacy of that system. We also agree with petitioners that the city's explanation of how it plans to fund the necessary improvements is insufficient to demonstrate compliance with Goal 11 and Plan Goal 11, Policy 1. The city's finding of feasibility, unaccompanied by a condition of

approval that ensures compliance with the applicable approval criteria, requires remand.

Petitioners' fifth assignment of error is sustained.

The city's decision is remanded.

Notes:

1. As the city explains in its response brief, the city has unusual boundaries — approximately two-thirds of the land lying within the city limits lies outside its UGB. Response Brief 1.

2. TZO 36.8 requires that specific findings be made for quasi-judicial proposals to amend the comprehensive plan:

"A. Such amendments shall be approved only when the following findings are made:

"1. There is a public need for the change.

"* * *"

Goal 14 provides, in relevant part:

"Urban growth boundaries shall be established to identify and separate urbanizable land from rural land. Establishment and change of the boundaries shall be based upon consideration of the following factors:

"(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;

"(2) Need for housing, employment opportunities, and livability[.]"

3. OAR 660-004-0022 provides, in pertinent part:

"An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands

are set forth in the following sections of this rule:

"(1) For uses not specifically provided for in subsequent sections of this rule or OAR 660, Division 014, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

"(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Statewide Goals 3 to 19; * * *

"* * * *"

4. The city's Goal 10 findings are extensive. Following its extensive analysis of the city's housing needs, the challenged decision finds:

"The City finds that, based on the evidence in Findings 10-30, there is a demonstrated public need to add 90 acres of land with a Residential Comprehensive Plan Designation to the Urban Growth Boundary in order to provide adequate land to meet anticipated future demands for urban development in a logical and orderly manner and to provide, within the UGB, adequate amounts of buildable land to meet the projected needs for residential land from 2000 to 2020, in compliance with Tangent Comprehensive Plan Purpose Statement D and Urbanization Policy 5 and Goal 10. Residentially designated land is needed for housing to accommodate long-range population growth in the City. Therefore, the City finds that the applications comply with TZO 36.8.A.1, OAR 660-004-022(1)(a) and Goal 14 Factors 1 and 2." Record 21.

5. The TCP contains the following table:

"COMPARISON OF AVAILABLE AND NEEDED BUILDABLE LAND

Planned and



"Type Needed Acres Zoned Acres

"Single Family 47.5 44.0

"Multi-Family 4.0 18.0

"Mobile Home 23.5 28.0

"TOTAL 75.0 90.0"

6. It is unclear whether the comprehensive plan's BLI was updated during periodic review.

7. The BLI in the 2002 comprehensive plan references data from the late 1970's or early 1980's.

8. Petitioners only argue that the BLI was "re-adopted" when the comprehensive plan was revised in 2002.

9. The TCP provides: "Using the year 2005 population projection of 1,000, * * * it can be determined that a total of 420 housing units will be needed." TCP 99-100. The plan also provides: "By allowing for mobile homes and multi-family housing in the forms described above, the City has provided sufficient buildable land to meet its housing needs to the year 2004." TCP 99:

10. The moratorium statutes were substantially rewritten in 1999. ORS 197.524 currently provides:

"(1) When a local government engages in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for the subdivision or partitioning of, or construction on, any land, including delaying or stopping issuance based on a shortage of public facilities, the local government shall:

"(a) Adopt a public facilities strategy under ORS 197.768; or

"(b) Adopt a moratorium on construction or land development under ORS 197.505 to 197.540."

11. At oral argument, we understood the city to argue that intervenor's housing analysis in fact was incorporated into the comprehensive plan. It is unclear whether the city's position is simply that the analysis was part of the record and formed the basis for the decision. Whatever its argument, incorporation of that information into the comprehensive plan would have required a legislative comprehensive plan amendment, as explained below. That process clearly was not followed.

12. Goal 2 provides, in pertinent part:

"All land-use plans and implementation ordinances shall be adopted by the governing body after public hearing and shall be reviewed and, as needed, revised on a periodic cycle to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan. Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances."

13. Goal 2 provides, in pertinent part:

"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. * * *"

14. OAR 660-008-0010 provides:

"The mix and density of needed housing is determined in the housing needs projection. Sufficient buildable land shall be designated on the comprehensive plan map to satisfy housing needs by type and density range as determined in the housing needs projection. The local buildable lands

inventory must document the amount of buildable land in each residential plan designation."

15. While the obligation to inventory buildable land is intended to be that of the local government, where a local government has not satisfied its obligation to periodically update its inventory, and where the acknowledged inventory is essentially useless, the applicant's burden to demonstrate compliance with Goal 10, Goal 14 and the showing of public need may, in some instances, require the applicant to supply the background, technical information that Goal 2 mandates be made part of the comprehensive plan.

16. The city alleges that it adopted that population projection. Petitioners allege that that assertion by the city relies on minutes reflecting that adoption, and that those minutes are not part of the record.

17. The sole reference to the figure relied upon by petitioners appears in Goal 10 of the TCP: "CITY GOAL 1: TO PROVIDE FOR THE HOUSING NEEDS OF THE COMMUNITY WITH AN ANTICIPATED POPULATION OF APPROXIMATELY 1,000 BY THE YEAR 2020." TCP 20.

18. The city's actual population in the year 2000 was 933. Record 84. It is doubtful that the city adopted a population projection of 1,000 for the year 2020, when it adopted the TSP in 2002, knowing that the actual population in the year 2000 was 933.

19. If the city, on remand, adopts a legislative plan amendment incorporating the housing needs analysis into its comprehensive plan, whatever population projection the city uses for that needs analysis will presumably become part of the comprehensive plan.

20. Petitioners also cite to Goal 14, factor 7, which requires consideration of: "Compatibility of the proposed urban uses with nearby agricultural activities" when

establishing or changing urban growth boundaries." While the findings identify agricultural uses to the east of the subject property, petitioners challenge only the city's reliance on the park and landscaped trail to demonstrate compatibility with surrounding residential and commercial uses.

21. The findings state:

"The City finds the proposed use of the subject property is residential with a 10,000 minimum square foot minimum lot size. The City finds the subject property borders urban uses on three sides and agricultural use to the east. Seventy percent of its perimeter borders urban uses. The property borders large-lot, residential development to the south, across Tangent Drive. A 6.0 acre park will be developed on the north side of Tangent Drive, further separating development on the subject property from existing residences. The low density residential development that will occur in this part of the property will be completely compatible with existing residential development to the south.

"The City finds the subject property borders mixed commercial/residential uses to the west, across the Union Pacific Railroad right-of-way, and Tangent Business Park to the north. A 30-foot wide, landscaped perimeter trail will be built along the west and northern boundaries. This will provide a buffer between the uses. The City finds that low density residential development will be compatible with existing planned uses to the west and north, due to the general compatibility of the types of uses and the extensive separation and landscape buffering.

"* * * * *" Record 32.

22. Goal 14 provides, in relevant part:

"Urban growth boundaries shall be established to identify and separate urbanizable land from rural land. Establishment and change of the boundaries

shall be based upon consideration of the following factors:

"* * * * *

"The results of the above considerations shall be included in the comprehensive plan. *
* *

"* * * * *"

23. The findings state: "The reasons justifying an exception to Goal 14 are presented under the seven factors of Goal 14 in Findings 33-39." Record 22.

24. Goal 11 requires the city to "plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." "Urban facilities and services" is defined to include "appropriate types and levels of * * * sanitary facilities."

Plan Goal 11, Policy 1 states: "[t]he City of Tangent shall ensure that a full range of services are available for the citizens of Tangent at levels appropriate for the planned development during the planning period."

25. The findings state:

"The City finds that the information presented in the application and reviewed in Findings 76-84 demonstrates that it is physically and economically feasible for all public facilities, services and improvements necessary for residential development to be made available prior to or concurrent with the development. The City finds that the cost of utility services for any new development or proposed land division can and shall be paid by the developer. The City finds that, at the time of subdivision of the property, the developer can and shall be responsible for providing and paying for the services required, and for upgrading and improving impacted public facilities and services as necessary." Record 41.

26. Condition 11 provides:



"Prior to proposed development on the property, the applicant shall provide verification of adequate water and sanitary sewer capacity on-site to serve the proposed use. Calculations prepared by a Registered Professional Engineer shall certify sanitary sewer flows for the proposed development, and shall clearly identify the capacity of the STEP system and

treatment facilities needed to support the proposed development. All new STEP system facilities shall be designed and constructed in conformance with the Tangent Public Work's Design Standards." Record 102.

27. The findings state:

"The City of Tangent uses a STEP community sanitary sewer system. The capacity of the current system is approximately 1,369 individuals based on the City Engineering Firm's (Westech Engineering, Inc.) memo dated Jan. 8, 2004, which is hereby incorporated into these Findings. The City finds that this is an increase of about 350 to 400 over the current population. The projected 20-year increase in population is 648 individuals. Improvements will need to be made to the system within the City's 20-year planning period." Record 42.

28. Condition 1 provides, in pertinent part:

"No development of the property or further land division of the property shall occur until a Master Development Plan is presented to the City and approved by the City Council. The Development Plan may be submitted as part of a Subdivision request or a Planned Development request. Elements of the Development Plan shall include:

"* * *

"Sanitary Sewer Improvements

"* * *" Record 101.

29. The city also argues that the recently adopted land use regulations require

adequate sewage disposal prior to development. Both parties concede, however, that those regulations were not in existence when the challenged decision was adopted. Accordingly, they cannot be relied upon as a basis for determining compliance with Goal 11 and TCP Goal 11, Policy 1.

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MONDALEE LENGKEEK, MERVIN LENGKEEK, EILEEN SAMARD, ARLEN SAMARD, JOANNE McLENNAN, and SEATON McLENNAN, Petitioners,

v.

CITY OF TANGENT, Respondent, and MELVIN M. BRUSH, Intervenor-Respondent.

LUBA No. 2006-076.

**Oregon Land Use Board of Appeals.
September 11, 2006.**

Appeal from City of Tangent.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson and Sherton, PC.

No appearance by City of Tangent.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Andrew J. Bean and Weatherford, Thompson, Cowgill, Black and Schultz, PC.

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

REMANDED.

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

FINAL OPINION AND ORDER

Opinion by Holstun.

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Header ends here.

NATURE OF THE DECISION

Petitioners appeal a city decision that expands its urban growth boundary (UGB).

MOTION TO INTERVENE

Melvin Brush (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief. The reply brief properly responds to new matters raised in the intervenor-respondent's brief. The motion to file a reply brief is granted.

FACTS

Intervenor owns an 84.26-acre parcel within the city limits, but outside the UGB, of the City of Tangent. In 2004, intervenor applied for a UGB amendment, comprehensive plan map amendment, and zoning map amendment to bring the parcel within the UGB. The city approved the application, and the decision was appealed to LUBA. We remanded the city's decision in *Lengkeek v. City of Talent*, 50 Or LUBA 367 (2005) (*Lengkeek I*). On remand, intervenor amended his application to seek an expansion of the UGB to include approximately 50 acres, as well as a comprehensive plan map amendment, a zoning map amendment, and an exception to Goals 3 (Agricultural Lands) and 14 (Urbanization). The city approved the application and this appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Seaton McLennan

All of the petitioners except Seaton McLennan were petitioners in *Lengkeek I*. On remand, the city conducted a purported public hearing but limited participation solely to parties to *Lengkeek I*. Petitioner Seaton McLennan attempted to participate at the hearing and submit written testimony, but the city refused to accept his written materials or allow his

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participation. Petitioners argue the city erred by refusing to allow petitioner Seaton McLennan to participate in the hearing on remand.¹

When LUBA remands a decision, a local government has considerable discretion in determining the procedure on remand. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36 (1996) (absent instructions from LUBA or local provisions to the contrary, a local government is not required on remand to repeat the procedures that were followed in the initial proceedings). Depending on the nature of the remand from LUBA, a local government may proceed in a number of different ways. There is no absolute requirement that a local government hold a public hearing to accept additional evidence on remand. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 208 (2001); *Washington Co. Farm Bureau v. Washington County*, 22 Or LUBA 540 (1992). For instance, where a decision is remanded for defective findings, a local government may simply need to rewrite the findings. In other circumstances, the local government may conduct additional hearings and accept additional evidence into the record. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

As the parties note, in *Crowley v. City of Bandon*, 43 Or LUBA 79, 96 (2002), we stated that whether a local government "may limit participation in the proceedings on remand to the parties in the original appeal * * * is an open question."² We now answer that question, at least as it applies to the present circumstances. In this case, as we have already noted, the applicant modified his proposal and submitted additional documentation in support of that amended application. In such a case, while the city may limit legal argument and any

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evidentiary submittals on remand to argument and evidence that is relevant to the issues that must be resolved on remand, we do not believe the city may limit participation to the parties who participated in the first appeal.

Neither the parties to the first appeal nor other persons who for whatever reason did not participate in the first appeal have had an opportunity to comment on the modified application. As petitioners correctly point out, the city's own plan guarantees its citizens a right to do so. The city erred in limiting participation below to the parties in *Lengkeek I*.³

This subassignment of error is sustained.

B. DLCD

Petitioners also argue that the city erred by preventing the Department of Land Conservation and Development (DLCD) from participating. Given the special role that is assigned to DLCD regarding post-acknowledgment plan amendments, we agree with petitioners. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993).

This subassignment of error is sustained.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

A. Buildable Lands Analysis

The City of Tangent Zoning Ordinance (TZO) and Goal 14, Factors 1 and 2, require a demonstration of public need in order to amend the UGB. In *Lengkeek I*, we determined that the buildable lands inventory analysis (BLI) contained in the Tangent Comprehensive Plan (TCP) only provides analysis to 2005 and could not be relied upon to expand the UGB. Intervenor attempted to demonstrate the public need for additional

residential housing by submitting his own BLI. After discussing the relevant caselaw, we remanded the city's

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decision because the housing analysis was not contained in the comprehensive plan or proposed as an amendment to the comprehensive plan.

"Goal 10 requires local governments to inventory buildable lands, and Goal 2 requires that those inventories be part of the comprehensive plan. Where local governments do not have a useable inventory, they may rely on an applicant to provide that information. However, if they do so, the comprehensive plan must be amended concurrently to incorporate that inventory." 50 Or LUBA at 378-79.

Petitioners argue the city failed to respond to LUBA's remand:

"In *Lengkeek I*, 50 Or LUBA at 372, LUBA determined that the buildable lands analysis contained in the TCP covers 'a planning period that ends, at the latest, in 2005' and, therefore, 'projects needed residential lands only to the year 2005.' LUBA also found that any local government 'with a housing needs projection that uses a planning period that has already passed, is essentially operating without a useable acknowledged housing needs analysis.' *Lengkeek I*, 50 Or LUBA at 378. LUBA stated that if a local government does not have a useable housing needs analysis, it 'may rely on an applicant to provide that information,' but 'the comprehensive plan must be amended concurrently' to incorporate that analysis. *Id.* LUBA concluded by holding that Statewide Planning Goals 10 (Housing), 2 (Land Use Planning) and 1 (Citizen Involvement) require that a buildable lands analysis upon which a determination of public need for a UGB amendment is based must be incorporated into the comprehensive plan."

"The legal determinations by LUBA were not appealed to the Court of Appeals and, therefore, cannot be challenged now. The only way the applicable law has changed since LUBA's decision in *Lengkeek I*, is that the Court of Appeals has made it even more definite that Goal 2 requires that a UGB amendment must be based on a city's acknowledged comprehensive plan and land use regulations. *See 1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, ___ P3d ___ (2005) (comprehensive plan amendment).

"The challenged decision relies on a new residential land need analysis that apparently purports to cover the period 1985 – 2022. This analysis has been adopted as part of the findings supporting the challenged decision, but has not been incorporated into the comprehensive plan. * * *

"What the city appears to have done is adopt an analysis proposed by the applicant, in which isolated data and assumptions taken from the TCP's expired housing needs analysis, and a population projection from the TSP * * *, have been used, to extend the expired housing needs analysis for an additional 17 years. * * * [S]ome of the parameters used in the analysis (*e.g.*, 4.0 dwellings per net buildable acre, 25% of gross buildable acres being used

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for streets or other public infrastructure) are not found in the TCP." Petition for Review 9-10 (footnotes and some citations omitted).

We leave open the possibility that a comprehensive plan BLI might be structured so that it can be extended past its nominal expiration date without amending the comprehensive plan, although the permissibility of such an option seems highly questionable given the Court of Appeals' decision in *Dundee*.⁴ But whatever may be the case in other circumstances, the City of

Tangent's BLI is not structured in that way. As petitioners point out, intervenor was required to apply assumptions that are not included in the comprehensive plan's BLI. Extrapolation of the BLI based on assumptions not in the comprehensive plan is not consistent with the Goal 2 requirement that decisions be "based on" the comprehensive plan. While all of the assumptions that underlie intervenor's extrapolation of the now expired BLI may be valid, extrapolation of the BLI based on those assumptions must be adopted as part of the city's comprehensive plan, if the city intends to rely on that extrapolation or assumptions as a basis for the challenged UGB amendment. As part of the comprehensive plan amendment process, the validity of those assumptions can be challenged and defended.

This subassignment of error is sustained.

B. Population Projections

In *Lengkeek I*, the city relied on a population projection that was not contained in the TCP. We held that the city could only rely on a population projection that had been incorporated into the TCP. The TCP does include a population projection that was produced in the city's transportation system plan (TSP), which is part of the city's comprehensive plan. Although the city did not rely on the population projection contained in the TSP (which is higher than the population projection used in *Lengkeek D*), we stated that the population projection contained in the TSP "provides the only population projection upon which the city

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could rely." 50 Or LUBA at 380. On remand, the city relied upon the population projection in the TSP. Petitioners argue that using the TSP population projection was error.

While we agree with petitioners that our statement regarding the TSP population

projection was *dictum*, we also see no reason to depart from that *dictum* here. As we discussed in *Lengkeek I*, what is important about population projections and BLIs is that they must be included in the comprehensive plan. The particular part of the comprehensive plan where a population projection is included is not critical. Petitioners argue that the TSP population figures were adopted for purely transportation purposes and constitute worst case scenarios that are inappropriate for BLIs. While the city was presumably not bound to use the TSP population projections, the fact that they were developed for transportation planning purposes rather than for housing purposes is not critical unless there is some reason to suspect that those population projections are so tailored for a specific planning purpose that they cannot be used for other purposes. While the TSP population projections may constitute "worst case scenarios," the city is presumably entitled to assume worst case scenarios when estimating its need for buildable lands. The city did not error by using the TSP population projections.

This subassignment of error is denied.

The second assignment of error is sustained in part and denied in part.

DE FACTO MORATORIUM

Intervenor argues that "failure to allow any development because of the lack of buildable lands data in the [TCP] and related planning documents results in a de facto moratorium." Response Brief 11. We are not sure what significance to assign to that argument. Intervenor did not file a cross-petition for review as allowed by OAR 661-010-0030(7), and we do not see that he could, since he concurred with the city's decision. Intervenor does not style his argument as a cross-assignment of error, and we do not see that it is, since a cross-assignment of error is

typically used to request LUBA's review of alleged

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errors in the decision only if the decision is remanded for reasons set out in the petition for review. Intervenor does not argue the city erred in any way.

If intervenor is arguing that the result of sustaining petitioners' assignments of error would force the city into a de facto moratorium, we do not agree. The city did not deny intervenor's application — the city approved the UGB amendment. The city's error was in not concurrently amending its comprehensive plan to include the BLI that the UGB amendment depends on. On remand, there is nothing that would prevent the city from including the updated BLI in its comprehensive plan (and the city may already be in the process of doing so). If on remand the city denies intervenor's application, intervenor could then make the argument that such denial constitutes a de facto moratorium.⁵ Any consideration of the issue at this point would be premature and speculative.

However intervenor's argument is categorized, it is rejected.

The city's decision is remanded.

Notes:

1. Intervenor suggested at oral argument that Seaton McClennan did not attempt to appear below. Even though this argument was not raised in the response brief as required by OAR 661-010-0040(1), we nonetheless reject it. Seaton McLennon attempted to give oral testimony and to submit a letter into the record. The juncture of the public hearing at which this attempt was made is immaterial.

2. In *Crowley*, the city purported to limit participation in a public hearing to the parties in the original appeal, but at the hearing allowed other parties to participate.

3. A local government is of course still free to exercise its inherent gatekeeping authority and to enforce any local exhaustion of remedies requirements.

4. For example an acknowledged comprehensive plan BLI might both provide estimates for a specific planning period and expressly provide a methodology for updating that estimate after that planning period expires in a manner that does not require that the comprehensive plan to be amended.

5. We express no opinion here on the merits of such an argument.

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MONDALEE LENGKEEK, MERVIN LENGKEEK, EILEEN SAMARD, ARLEN SAMARD and JOANNE McLENNAN, Petitioners,

v.

CITY OF TANGENT, Respondent, and MELVIN M. BRUSH, Intervenor-Respondent.

LUBA No. 2007-007.

Oregon Land Use Board of Appeals.

April 25, 2007.

Appeal from City of Tangent.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson & Sherton, PC.

No appearance by City of Tangent.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Andrew J. Bean and Weatherford Thompson Cowgill Black & Schultz, PC.

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

REVERSED.

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

FINAL OPINION AND ORDER

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Opinion by Holstun.

Header ends here.

NATURE OF THE DECISION

Petitioners appeal a city decision approving an urban growth boundary (UGB) amendment, a comprehensive plan amendment, a zoning map amendment, and exceptions to Goals 3 (Agricultural Lands) and Goal 14 (Urbanization).

MOTION TO INTERVENE

Melvin M. Brush (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

This is the third time this matter has been appealed to LUBA. In *Lengkeek v. City of Tangent*, 50 Or LUBA 367 2005 (*Lengkeek I*), we remanded a city decision that amended the city's UGB to add 84 acres.¹ We set out the facts in *Lengkeek I*:

"The subject property is an 84.26-acre parcel within the city limits of Tangent, lying west of agricultural land lying outside the city's UGB. The subject property lies east of Highway 99 and the Union Pacific Railroad tracks, and north of Tangent Drive. To the west across the railroad tracks are mixed commercial/residential uses. To the north is the Tangent Business Park. In 2004, the applicant below (intervenor) submitted an application seeking the land use approvals listed above. Petitioners appeal the city council's adoption * * * approving those requests. 50 Or LUBA at 368-69 (footnote omitted).

After our remand in *Lengkeek I*, intervenor amended the application to request that only approximately 50 acres of the subject property be included inside the UGB. We remanded the city's first remand decision in *Lengkeek v. City of Talent*, 52 Or LUBA 509 (2006) (*Lengkeek II*). On remand from our decision in *Lengkeek II*, the city approved a second remand decision to



approve the original 84-acre parcel into the UGB. This appeal followed.

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ASSIGNMENT OF ERROR

To understand petitioners' assignment of error, some background discussion of the prior cases is warranted. In order to amend the UGB to include the subject property as residential land, the city must demonstrate that there is a need for additional residential land. To demonstrate a need for additional residential land, a city generally relies on its buildable lands inventory (BLI). The Tangent BLI, however, only projects residential land needs through the year 2005, and shows that the city has a surplus of residential land. Because the Tangent BLI is outdated and does not show a need for additional residential land, intervenor submitted his own BLI purporting to demonstrate that there is a need for the additional land for residential purposes. The city relied on intervenor's BLI to approve the UGB amendments, but did not adopt intervenor's BLI as part of the Tangent Comprehensive Plan (TCP). The only BLI that is part of the TCP continues to be the expired BLI that shows a surplus of residential land through the year 2005.

A. *Lengkeek I*

In *Lengkeek I*, we explained that the BLI contained in the TCP only addresses residential land needs through 2005 and could not be relied upon to approve the UGB amendment. We also held that the city could not rely on intervenor's updated BLI because it had not been adopted as part of the TCP.

"Goal 10 requires local governments to inventory buildable lands, and Goal 2 requires that those inventories be part of the comprehensive plan. Where local governments do not have a useable inventory, they may rely on an applicant to provide that information. However, if they do so, the

comprehensive plan must be amended concurrently to incorporate that inventory." 50 Or LUBA at 378-79.

We therefore remanded the city's decision.

B. *Lengkeek II*

On remand, intervenor modified his application to propose to add approximately 50 acres to the UGB. In approving the smaller UGB amendment, the city argued that it was

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permissible to use the year 2020 population projections that are included in the city's transportation system plan to update the BLI, because the transportation system plan is adopted as part of the TCP. While we concluded in *Lengkeek II* that the year 2020 population projections could be used to update the BLI, because those population projections are included in the TCP, we also concluded that the city again erred by relying on an updated BLI that had not been adopted as part of the TCP. We left open the possibility that there might be circumstances where a city could approve a UGB amendment without first adopting any necessary update to its BLI as part of its comprehensive plan. However, we observed that a recent Court of Appeals decision rendered that possibility "highly questionable." We also held that the city could not rely on the updated BLI in *Lengkeek II*, which was not adopted as part of the TCP, because it relied on assumptions that were not adopted in the TCP.

"We leave open the possibility that a comprehensive plan BLI might be structured so that it can be extended past its nominal expiration date without amending the comprehensive plan, although the permissibility of such an option seems highly questionable given the Court of Appeals' decision in [*1000 Friends of Oregon v. City of*

Dundee, 203 Or App 207, 124 P3d 1249 (2005) (*Dundee*)]. But whatever may be the case in other circumstances, the City of Tangent's BLI is not structured in that way. As petitioners point out, intervenor was required to apply assumptions that are not included in the comprehensive plan's BLI. Extrapolation of the BLI based on assumptions not in the comprehensive plan is not consistent with the Goal 2 requirement that decisions be 'based on' the comprehensive plan. While all of the assumptions that underlie intervenor's extrapolation of the now expired BLI may be valid, extrapolation of the BLI based on those assumptions must be adopted as part of the city's comprehensive plan, if the city intends to rely on that extrapolation or assumptions as a basis for the challenged UGB amendment. As part of the comprehensive plan amendment process, the validity of those assumptions can be challenged and defended." 52 Or LUBA at 514-15 (footnote omitted).

Because the city relied on a BLI that was not adopted as part of the TCP and relied on assumptions that were not included in the TCP, we again remanded the city's decision.

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C. 1000 Friends of Oregon v. City of Dundee

In the above quoted portion of *Lengkeek II*, we stated that the Court of Appeals' decision in *Dundee* makes the proposition that an expired or outdated BLI may be updated and relied on to approve a UGB amendment, without first adopting that updated BLI as part of the TCP, "highly questionable." In *Dundee*, LUBA affirmed a city decision that amended the city's comprehensive plan to allow a proposed highway through the city that opponents alleged would occupy needed residential land. *1000 Friends of Oregon v. City of Dundee*, 49 Or LUBA 601 (2005). In concluding that the

plan amendment would leave the city with sufficient residential land, the city relied on an updated BLI. The comprehensive plan expressly recognized the need for BLI updates and anticipated that such BLI updates would be adopted in the future, but the update the city relied on had not yet been adopted as part of the city's comprehensive plan. In affirming that city's decision in *Dundee*, LUBA concluded that the express requirement in the city's comprehensive plan for BLI updates allowed the city to rely on such updates even though they had not yet been adopted as part of the city's comprehensive plan. The Court of Appeals reversed our decision.

"In sum, a planning decision based on a study contemplated by a comprehensive plan but not incorporated into the comprehensive plan after the study is carried out is not a planning decision that is made on the basis of the comprehensive plan and acknowledged planning documents * * *. That is not a matter of mere abstract concern. Rather, it goes to the heart of the practical application of the land use laws: The comprehensive plan is the fundamental document that governs land use planning. Citizens must be able to rely on the fact that the acknowledged comprehensive plan and information integrated in that plan will serve as the basis for land use decisions, rather than running the risk of being 'sandbagged' by government's reliance on new data that is inconsistent with the information on which the comprehensive plan was based. LUBA erred in concluding otherwise." 203 Or App at 216.

Although the Court of Appeals' decision in *Dundee* may be limited to its facts, it stands for the general proposition that where a comprehensive plan is amended in a way that relies on an updated BLI, that updated BLI must be incorporated into the city's comprehensive plan.

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D. The Current Appeal

After our remand in *Lengkeek II*, the city apparently focused on the following portion of our opinion, which we also quoted earlier:

"We leave open the possibility that a comprehensive plan BLI might be structured so that it can be extended past its nominal expiration date without amending the comprehensive plan, although the permissibility of such an option seems highly questionable given the Court of Appeals' decision in *Dundee*." 52 Or LUBA at 514.

In the footnote omitted above, we described what such a permissible BLI and update might look like:

"For example an acknowledged comprehensive plan BLI might both provide estimates for a specific planning period *and expressly provide a methodology for updating that estimate after that planning period expires in a manner that does not require that the comprehensive plan to be amended.*" 52 Or LUBA at 514 n 4 (emphasis added).

Intervenor argues that on remand, the updated BLI was based completely on extrapolations "made solely on valid assumptions that are contained within the TCP." Response Brief 4. Intervenor focuses on the proper paragraph from *Lengkeek II*, but appears to ignore the emphasized language in footnote four in *Lengkeek II* and the remainder of that paragraph that explains that while in theory a BLI might be structured to alleviate the need for adoption of a new BLI into the comprehensive plan, the BLI in the TCP is not such a BLI. We quote the rest of that paragraph again.

"*But whatever may be the case in other circumstances, the City of Tangent's BLI is not structured in that way.* As petitioners point out, intervenor was required to apply assumptions that are not included in the

comprehensive plan's BLI. Extrapolation of the BLI based on assumptions not in the comprehensive plan is not consistent with the Goal 2 requirement that decisions be 'based on' the comprehensive plan. While all of the assumptions that underlie intervenor's extrapolation of the now expired BLI may be valid, extrapolation of the BLI based on those assumptions must be adopted as part of the city's comprehensive plan, if the city intends to rely on that extrapolation or assumptions as a basis for the challenged UGB amendment. As part of the comprehensive plan amendment process, the validity of those assumptions can be challenged and defended." 52 Or LUBA at 514 (emphasis added).

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Even if there is some way to read the Court of Appeals' *Dundee* decision to allow a comprehensive plan BLI to be structured in a way that would permit it to be updated and relied on without amending the comprehensive plan, and assuming that our decision in *Lengkeek II* does not authoritatively decide that the BLI in the TCP is not one of those theoretically possible BLIs, intervenor's latest attempt does not demonstrate that the city may rely on the updated BLI without first amending the TCP to replace the expired BLI with the updated BLI. As we noted in *Lengkeek II*, such a BLI would need to provide estimates for a specific planning period *and "expressly provide a methodology for updating that estimate."* 52 Or LUBA at 514 n 4. The BLI in the TCP provides a residential land needs estimate for a specific planning period (through the year 2005), but it is completely silent on the subject of updating the BLI. It certainly does not "*expressly provide a methodology for updating*" the BLI to estimate residential land needs after the year 2005. It appears that the updated BLI that the city relied on in the decision that is before us in this appeal merely took the 20-year old assumptions that were used to produce the expired BLI that is

adopted as part of the TCP and applied those old assumptions to the year 2020 population projection that is included in the city's transportation system plan. That is certainly not the type of updated BLI we gave as an example in *Lengkeek II* that might be relied upon without adopting that updated BLI as part of the comprehensive plan, in the unlikely event that *Dundee* does not foreclose such an exercise altogether. We reach the same conclusion we reached in *Lengkeek I* and *Lengkeek II*: the city may not rely upon intervenor's updated BLI without incorporating it into the TCP. Finally, intervenor argues that even though the BLI may have expired in 2005, under the "fixed goal post rule" of ORS 227.178(3), the city can rely on the earlier BLI to approve the UGB amendment. If intervenor is arguing that the UGB amendment can be approved based *solely* on the expired BLI because it had not yet expired when the applications were filed, we reject that argument. The expired BLI does not show a demonstrated need for additional residential lands; it shows a surplus of vacant residential land inside the UGB.

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Petitioners' assignment of error is sustained.

CONCLUSION

Petitioners request that we reverse the city's decision rather than remand the decision for the city to attempt to approve the UGB amendment without first updating its BLI again. OAR 661-010-0071(1)(c) provides that LUBA shall reverse a decision if "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." In *Lengkeek I*, we held the city could not rely on a BLI update that is not included in the TCP. In *Lengkeek II*, we held that the city could not rely on a BLI that was not expressly structured to allow updates without the necessity of a TCP amendment and that the

TCP was not so structured. In the present appeal, we again hold that the BLI in the TCP is not structured in a way that allows that outdated BLI to be updated and relied upon to amend the UGB, without first incorporating the amended BLI into the TCP, and that the city cannot rely on intervenor's updated BLI without incorporating it into the TCP. It is clear that the proposed UGB amendment is prohibited as a matter of law, unless the city first amends its TCP to include an updated BLI.

The city's decision is reversed.

Notes:

1. The subject property is already within city limits, but not within the UGB. The city has unusual boundaries; approximately two-thirds of the city lies outside its UGB.