BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANET MILNE, PAUL SATTER
and RIVERSIDE NEIGHBORHOOD
ASSOCIATION,
Petitioners,

and

1000 FRIENDS OF OREGON,
Intervenor-Petitioner,

vs.

CITY OF CANBY,
Respondent,

and

NORTHWOOD INVESTMENTS,
Intervenor-Respondent.

LUBA No. 2003-102

FINAL OPINION
AND ORDER

Appeal from City of Canby.

Edward J. Sullivan, Portland, filed a petition for review and argued on behalf of petitioners. With him on the brief was Carrie A. Richter, Portland, and Garvey Schubert Barer, LLP.

Andrew H. Stamp, Portland, filed a petition for review and argued on behalf of intervenor-petitioner. With him on the brief was Martin Bischoff Templeton Langslet and Hoffman, LLP.

No appearance by City of Canby.

Mark J. Greenfield, Portland, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 01/14/2004

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision amending its urban growth boundary (UGB) to include the subject property and changing the comprehensive plan and zoning map designations for the property.

MOTIONS TO INTERVENE

1000 Friends of Oregon, an opponent below, moves to intervene on the side of petitioners. There is no opposition to the motion, and it is allowed. Northwood Investment, the applicant below (intervenor), moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is approximately 30 acres in size and lies entirely within the City of Canby city limits. It is an island of land that is excluded from, but entirely encircled by the city's UGB. *See* Figure 1. To the east, west, and south of the property are developed residential subdivisions. A church adjoins the property to the south. To the north are larger residential lots that are developed with residences. There are public facility connections for water and sewer at numerous locations on all sides of the property. *See* Figure 1. The soils on the property are high-value class II soils. The property has been used for many different agricultural purposes over the years, and is currently used for production of row crops and flowers. Prior to the challenged decision, the property was designated Agricultural on both the city's comprehensive plan and zoning maps.[1] The challenged decision changes the comprehensive plan and zoning map designations from Agriculture to Low Density Residential.

[1] The city's Agriculture zone is not an Exclusive Farm Use (EFU) zone.

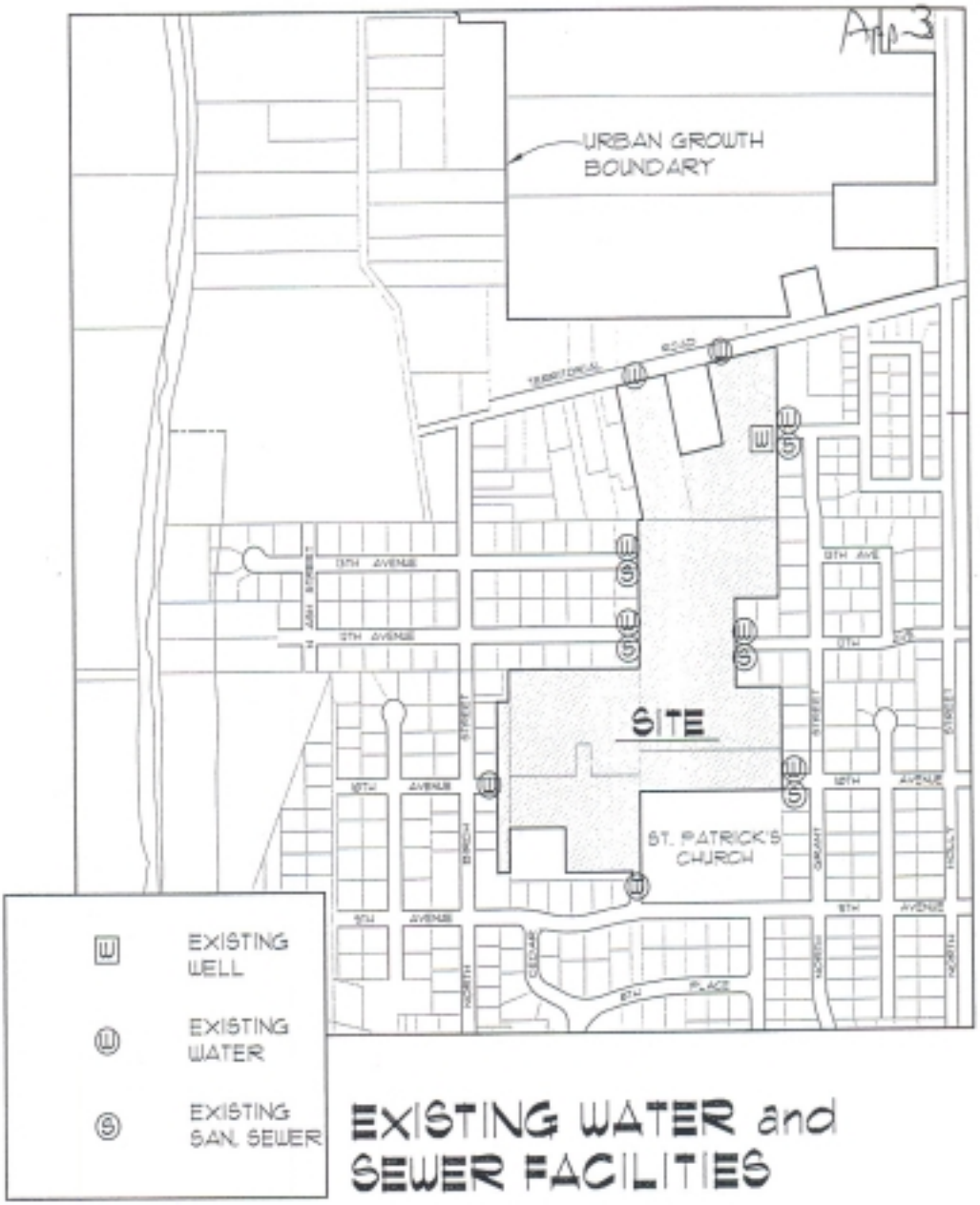
URBAN GROWTH BOUNDARY
SITE
ST. PATRICK'S CHURCH
EXISTING WELL
EXISTING WATER
EXISTING SAN. SEWER
EXISTING WATER and SEWER FACILITIES
CITY OF CANBY - U.G.B. AMENDMENT / COMPREHENSIVE PLAN AMENDMENT / ZONE CHANGE
NORTHWOOD INVESTMENTS
CANBY, OREGON 97103
JANUARY 2003
1"=600'±

FIGURE 1

Due to the nature of the parties' arguments, some discussion of the property's planning and zoning history is warranted. In 1982, the subject 30 acres were leased by the Industrial Forestry Association (IFA) as part of a larger 104-acre tree farm operation.[2] When the City of Canby originally requested acknowledgement of its UGB in 1982, the subject property was included within the proposed UGB. The Land Conservation and Development Commission (LCDC) found that the city's proposed UGB included more land than was needed. In response to LCDC's concerns, the city removed all IFA-operated properties from the proposed UGB. IFA did not object to having the property removed from the proposed UGB. Intervenor purchased the property in 1990 and at that time submitted an application to have the property included within the UGB. That application was denied because the city found that there was no need for additional residential land within the UGB at that time. In 1993, the city approved an application to expand the UGB to include the property, finding that there was a demonstrated need for additional residential land. The city's decision was appealed to LUBA and we remanded the decision, finding that the city failed to demonstrate that there was a need for additional residential land. *Simnitt Nurseries v. City of Canby*, 27 Or LUBA 468 (1994). After that decision was issued, intervenor abandoned its attempt to include the property within the UGB. In 2003, intervenor once again applied to have the property included within the UGB. The 2003 application makes no attempt to demonstrate that the 30 acres are needed land for residential use. Instead, the 2003 application takes the position that the 30 acres should be included in the UGB because they are "committed" to urban uses. The city approved the application, and this appeal followed.

MOTION TO STRIKE

Intervenor moves to strike certain documents attached to and addressed in petitioners' briefs. Specifically, intervenor moves to strike: (1) a 1979 LCDC Continuance Order; (2)

[2] The other part of the 104-acre tree farm was located north of the subject property and north of Territorial Road on land that was, and is, outside the UGB.

portions of 1000 Friends of Oregon's brief in an unrelated appeal to the Court of Appeals; and (3) portions of a Lincoln County brief in an unrelated appeal to the Court of Appeals.

We regularly take official notice of official agency orders. *See DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000) (DLCD continuance orders); *Doty v. Coos County*, 42 Or LUBA 103 (2002) (acknowledgement documents); *Schatz v. City of Jacksonville*, 22 Or LUBA 799, 801 (1992) (DLCD enforcement orders). We see no reason to depart from that practice.

Petitioners provide copies of portions of briefs that were filed with the Court of Appeals in appeals that presented legal issues that are also presented in this appeal. The included excerpts and discussion are offered in support of petitioners' legal arguments in this appeal. There is nothing that would prevent us from considering such material in our own research in resolving this appeal.[3] We see no reason that parties cannot facilitate our legal research by providing copies of cases, briefs, or other research materials to LUBA.

Intervenor's motion to strike is denied.

MOTION TO FILE REPLY BRIEF

Intervenor filed its respondent's brief on November 21, 2003. On November 26, petitioners Milne *et al* (hereafter Milne) filed a reply brief. On November 28, 2003, petitioner 1000 Friends of Oregon (hereafter 1000 Friends of Oregon) also filed a reply brief. On December 2, 2003, Milne filed an amended reply brief. Oral argument was held on December 4, 2003. Intervenor objects to Milne's amended reply brief. Intervenor does not object to 1000 Friends of Oregon's reply brief or Milne's original reply brief. The two original reply briefs properly respond to "new matters raised in the response brief," and are allowed. OAR 661-010-0039.

[3] As petitioners note, the state's major law libraries keep copies of such briefs for legal research purposes.

The amended reply brief is essentially identical to the original reply brief, but it adds a new section arguing that the city failed to comply with ORS 197.615(1) regarding notice to the Department of Land Conservation and Development (DLCD). The parties devote a great deal of their argument to disputing whether the amended reply brief was filed too close to the date of oral argument and whether intervenor's substantial rights were thereby prejudiced. We need not decide that question because we conclude that it would be inappropriate to consider the amended reply brief in any event.

As noted, the amended reply brief adds a section that argues that the challenged decision must be remanded because the city did not provide DLCD with proper notice as required by ORS 197.615(1).[4] This is an issue that was not raised in either the petition for review or intervenor-respondent's brief. A reply brief must be "confined solely to new matters raised in the respondent's brief." OAR 661-010-0039. New assignments of error may not be raised for the first time in a reply brief. We therefore consider Milne's reply brief, but we do not consider Milne's amended reply brief.

FIRST ASSIGNMENT OF ERROR, FIRST SUBASSIGNMENT OF ERROR (MILNE); FIRST ASSIGNMENT OF ERROR (1000 FRIENDS OF OREGON)

Goal 14 provides that "establishment and change" of a UGB is to be based upon consideration of seven factors.[5] The seven factors are collectively referred to as the

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[4] ORS 197.615(1) provides:

> "A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to [DLCD] a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. * * * "

[5] Goal 14 provides in pertinent 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 considerations of the following factors:

"establishment" factors. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 455, 724 P2d 268 (1986). The first two factors are known as the "need" factors, while the third through seventh factors are known as the "locational" factors. *Residents of Rosemont v. Metro*, 173 Or App 321, 327, 21 P3d 1108 (2001). Generally, a local government must apply the "need" factors and establish a need for land before it may amend its UGB to include that land. *Baker v. Marion County*, 120 Or App 50, 54, 852 P2d 254, *rev den* 317 Or 485 (1993). In the present case, however, the city utilized a narrow exception to that general rule for "unneeded but committed" lands. Under that exception, in certain limited circumstances, a local government does not have to demonstrate that land is needed under the Goal 14 "need" factors to include that land within a UGB. Petitioners, among other things, challenge the continuing validity of the exception for "unneeded but committed" lands and its application in the present case.[6]

The exception for "unneeded but committed" lands appears to have been first articulated in an LCDC continuance order. That continuance order was recognized and discussed by the Court of Appeals in *City of Salem v. Families for Responsible Government*,

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> "(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
>
> "(2) Need for housing, employment opportunities, and livability;
>
> "(3) Orderly and economic provision for public facilities and services;
>
> "(4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
>
> "(5) Environmental, energy, economic and social consequences;
>
> "(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and
>
> "(7) Compatibility of the proposed urban uses with nearby agricultural activities."

[6] Intervenor argues that petitioners are precluded from arguing that the "unneeded but committed" exception has been wrongly extended to UGB amendments because they did not raise that argument below. While it is true that petitioners did not make the precise legal arguments below that they advance on appeal, they did make the argument that the property could not be included within the UGB under the exception. That is sufficient to preserve the issue for our review.

64 Or App 238, 668 P2d 395 (1983), *rev'd and rem'd on other grounds*, 298 Or 574, 694 P2d 965 (1985). In that case, 1000 Friends of Oregon and others appealed LCDC's acknowledgement of the Salem Area Comprehensive Plan, which included the City of Salem's UGB. The Court of Appeals rejected LCDC's approval of several areas for which need had not been demonstrated, but affirmed LCDC's approval of one area of "unneeded but committed" lands. The court described the exception for "unneeded but committed" land as follows:

> "As a general rule, a local government is not permitted to establish an urban growth boundary containing more land than the locality 'needs' for future growth. However, in certain limited circumstances, an urban growth boundary may contain extra land. When existing urban development or existing public facilities have 'committed' an 'unnecessary' piece of land to urban use, the local government may include that land in the boundary in order to avoid illogical development or service patterns. * * * To justify such a boundary, the local government must demonstrate, through the application of Goal 14's locational factors, that the land in question is in fact 'committed' to urban use." 64 Or App at 243.

The next case to discuss "unneeded but committed" lands was *Collins v. LCDC*, 75 Or App 517, 707 P2d 599 (1985). In that case, the court considered an appeal of LCDC's approval of the City of Jacksonville's UGB. The city included additional lands in the UGB under the "unneeded but committed" exception. Although the court reversed and remanded the decision for inadequate findings, it did recognize the exception for "unneeded but committed" lands.[7]

The first two cases to consider "unneeded but committed" lands both involved the initial *establishment* of a city's UGB. The first case to extend that exception to a UGB *amendment* was *Halvorson v. Lincoln County*, 14 Or LUBA 26 (1985). In that case, while holding that the county's findings were inadequate to demonstrate the subject lands were committed to urban uses so that they could be included within the UGB of the City of Depoe

[7] The court found that some areas of committed lands within the area sought to be included did not justify inclusion of the entire area under the exception. 75 Or App at 528.

Bay, LUBA recognized that such a showing would obviate any requirement to consider the "need" factors of Goal 14.

> "While these facts may illustrate the property is not available for resource uses, they fall short of an adequate demonstration the property is committed by 'existing urban development or existing public facilities' to urban use, i.e. uses of a kind and intensity characteristic of urban development in the City of Depoe Bay. *City of Salem* * * *. Without such a demonstration, the predicate for adjusting the UGB without consideration of [Goal 14] factors 1 and 2 has not been established." 14 Or LUBA at 32 (emphasis in original deleted).

After we remanded the decision, the county once again approved the UGB amendment, the petitioners once again appealed the decision to LUBA, we once again remanded the decision for failing to establish that the subject lands were committed to urban uses, and the petitioners appealed LUBA's decision to the Court of Appeals.[8] While not finding it necessary to address all of the parties' arguments, the court nonetheless recognized that the "unneeded but committed" policy could serve to allow an *amendment* of an existing UGB.

> "If an area does not qualify for inclusion in an UGB because it does not satisfy the first two – 'need' – factors of Goal 14, it may still be included if an examination of the remaining five – 'locational' – factors shows that it is committed to urban uses. * * * The local government must balance those factors in order to determine whether, on the whole, the area is committed. The process is not a mechanical one of adding so many for points for one factor and subtracting so many for another. Rather, the overall picture must show commitment." *Halvorson v. Lincoln County*, 82 Or App 302, 305, 728 P2d 77 (1986).

In the years since the *Halvorson* opinions, neither the Court of Appeals nor we have discussed the exception for "unneeded but committed" lands in great detail. One Court of Appeals case and one LUBA case, however, have noted the existence and apparent continued validity of the exception. *See Baker*, 120 Or App at 56 (recognizing the exception but noting that petitioner had not raised that issue below); *Friends of Linn County v. Linn County*, 41 Or

[8] Our decision remanding the county's decision may be found at *Halvorson v. Lincoln County*, 14 Or LUBA 730 (1986).

LUBA 342, 346-47 (2002) (recognizing the exception but finding that commitment to urban use was not shown).

Petitioners urge us to overrule or limit the previously discussed cases and hold that the exception for "unneeded but committed" lands does not apply to UGB *amendments*. According to petitioners, both LUBA and the Court of Appeals "took a wrong turn" in extending the exception for "unneeded but committed" lands to decisions to amend a UGB as opposed to decisions to initially establish a UGB. Petitioners are correct that the *City of Salem* and *Collins* cases involved decisions that initially established UGBs. Petitioners are also correct that the extension of the exception for "unneeded but committed" lands to UGB amendments appears to have occurred without the Court of Appeals or LUBA ever considering the arguments currently made by petitioners.

While the Court of Appeals may not have considered the precise arguments presented by petitioners in the present case, we do not agree that the language in the court's *Halvorson* opinion recognizing the exception was mere *dicta*. The court clearly believed that the exception for "unneeded but committed" lands was a valid method of amending a UGB, without regard to the Goal 14 "need" factors. If it had not so believed, the court would have had no reason to consider whether the property was committed to urban uses. We also note that the seven Goal 14 factors apply to both "establishment and change" of UGBs. *See* n 5. We see no reason why the exception for "unneeded but committed" lands should apply only to decisions that establish a UGB.[9] If the exception for "unneeded but committed" lands is to be declared invalid or limited, the Court of Appeals is the appropriate body to do so.

Milne's first assignment of error (first subassignment of error) and 1000 Friends of Oregon's first assignment of error are denied.

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[9] Petitioners also attempt to distinguish *Halvorson* on the basis of the commitment to urban lands being created by pre-Goal development. While that may be factually accurate, we find nothing in our opinions or those of the Court of Appeals that draws that distinction. We decline to distinguish the cases on such a basis.

FIRST ASSIGNMENT OF ERROR, SECOND SUBASSIGNMENT OF ERROR (MILNE)

Milne argues that the city misconstrued the applicable law and made a decision not supported by substantial evidence in finding that the proposed UGB amendment met Goal 14 factor 6. *See* n 5. The city did not decide that factor 6 was *met*. The city considered all 5 of the "locational factors" and decided that the overall picture of the area, when considered in context of all of the "locational factors," demonstrated a commitment to urban uses. The city did not find, and did not need to find, that factor 6 was *met*. Establishing compliance with factor 6, as a discrete criterion or consideration, is not a prerequisite to determining that the property is committed to urban uses. As intervenor points out, the Court of Appeals in *Halvorson* expressly stated that a determination of commitment to urban uses is not based on any one factor:

> "The process is not a mechanical one of adding so many points for one factor and subtracting so many for another. Rather, the overall picture must show commitment." 82 Or App at 305.

The city considered all five of the locational factors and determined that the overall picture, considering *all* of the factors, demonstrated a commitment to urban uses. Whether or not the city demonstrated that factor 6 is independently satisfied is not critical to the city's decision.

The city adopted extensive findings regarding the "locational factors" and factor 6 in particular. Record 9-16, 780-785. Regarding factor 6, the city's findings state:

> "The City Council agrees with the applicant * * * that the City's Agricultural zone is not an EFU zone of the nature required by Goal 3 and OAR 660, Division 33 for agricultural lands. Accordingly, it finds that the subject property is no longer subject to Goal 3, despite its agricultural designation and zoning. The City Council further finds, as noted in the staff report, that the subject property has more restrictions on it [than] either the obviously agricultural EFU zoning or the nearby exception land in Clackamas County zoned Rural Residential-Farm Forest 5, a rural residential zone with a five acre minimum lot size. Consequently, with respect to Goal 14 factor 6, the City Council concludes that the subject property is not 'agricultural land as defined' by Goal 3 and thus not subject to this factor. It has excellent agricultural soils, but it is not 'agricultural land as defined' given the full

> context of Goal 3 and its implementing rules. However, even if it were agricultural land, the City Council finds that the level of development surrounding this property and the extension of urban services to many locations along the property renders the property appropriate for inclusion inside the urban growth boundary based on commitment to urban uses. It also finds that under the applicable caselaw, *it must consider the Goal 14 locational factors as a whole, not just individually as 1000 Friends suggests*." Record 15 (emphasis added).

Milne does not respond to or even acknowledge the city's findings. Milne merely argues that the city did not demonstrate that factor 6 is satisfied. Even if that were the case, it would not, in and of itself, serve as a basis to reverse or remand the decision. Furthermore, Milne does not challenge in this subassignment of error either of the alternative findings the city did make, determining that considering all of the locational factors the land is committed to urban uses.[10]

Although Milne asserts that nothing has changed in 20 years, we do not find that to be the case. The subject 30-acre property was originally utilized as part of a larger 104-acre commercial tree farming operation. The property is no longer part of a larger farming operation. Additional development has occurred along the edges of the subject property, particularly along its northeastern boundary near Territorial Road. There is evidence in the record that development along the periphery of the property presents more conflicts with continued efforts to put the property to farm use than was the case 20 years ago. Those conflicts with adjoining residentially developed properties include increased complaints, threats, farming restrictions, and vandalism. Just as importantly, a circumstance that appears to have been an important factor and perhaps the determinative factor in the city's 1984 decision to exclude the subject 30 acres from the UGB no longer is present. As we noted

[10] There are undeveloped portions of petitioners' briefs that could possibly be construed to raise such a challenge under different, unrelated assignments of error. To the extent that challenge is raised, it is not sufficiently developed for our review. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218 (1982). It is not sufficient for petitioners to express disagreement with the city findings; petitioners must demonstrate that the city's findings are legally inadequate. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993).

earlier, the subject 30 acres were nearly surrounded by residential development in 1984. *See* figure 1. While that development might have gone a long way toward supporting a conclusion that the 30 acres should be among the vacant lands the city included in 1984 to meet its identified needs, in 1984 the subject property was part of a larger successful 104-acre tree farm. The manager of that farm, IFA, wished to continue farming the property and did not oppose excluding the property from the UGB. After the subject property was excluded from the UGB, IFA managed the property as part of its 104-acre tree farm for many years, but subsequently terminated its lease of the subject property prematurely in 1998. Although IFA apparently has expressed interest in leasing the property again, the fact remains that the subject 30 acres is no longer part of that 1984 operation.[11]

We recognize the important underlying concern that appears to form the basis for Milne's subassignment of error. It is certainly possible that where "unneeded but committed lands" are vacant or largely vacant the exception that allows including such lands in the UGB without regard to need could be used improperly to justify an urban area that is much larger than is actually needed. For example, the city apparently decided in 1984 to *exclude* the subject 30 acres of vacant land from the UGB so that it could *include* other vacant lands to meet its need for urban lands. If those other included vacant lands were (1) vacant agricultural land located at the periphery of the urban area; (2) less impacted by existing and planned urban development; and (3) could have been excluded from the UGB consistently with the Goal 14 locational factors, we question whether the city could have immediately turned around in 1984 and sought to include the subject property in the UGB through the "unneeded but committed" exception. Stated differently, we do not believe the city could use

[11] We also tend to agree with intervenor that IFA's decision to prematurely terminate its lease in 1998 certainly raises some question concerning the prospects for successful farm use of the subject property. That premature termination of the lease along with other testimony concerning the problems that must be overcome to continue farming the property support the city's determination that it is unreasonable to expect that the subject property can be successfully used for farm purposes in view of the conflicting urban uses that surround the property.

the "unneeded but committed" lands exception to achieve by indirection in 1984 what it could not achieve directly in the initial acknowledgment process. However, 19 years have passed since the original acknowledgment of the city's UGB. While the UGB apparently continues to include more land than is needed, the circumstances that led the city to exclude the subject 30 acres in favor of other lands have changed. Given those changes in circumstances and the relatively unique situation posed by these 30 acres of land that are surrounded by urban and urbanizable land, we do not see the same precedential significance in the city's decision that Milne fears it may have.

Milne's first assignment of error (second subassignment of error) is denied.

FIRST ASSIGNMENT OF ERROR, THIRD SUBASSIGNMENT OF ERROR (MILNE) AND THIRD ASSIGNMENT OF ERROR (1000 FRIENDS OF OREGON)

ORS 197.298 establishes a priority system for including land within a UGB.[12] Petitioners argue that the city's decision violates ORS 197.298 because the inclusion of the

[12] ORS 197.298 provides:

> (1) In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities:
>
> "(a) First priority is land that is designated urban reserve land under ORS 195.145, rule or metropolitan service district action plan.
>
> "(b) If land under paragraph (a) of this subsection is inadequate to accommodate the amount of land needed, second priority is land adjacent to an urban growth boundary that is identified in an acknowledged comprehensive plan as an exception area or nonresource land. Second priority may include resource land that is completely surrounded by exception areas unless such resource land is high-value farmland as described in ORS 215.710.
>
> "(c) If land under paragraphs (a) and (b) of this subsection is inadequate to accommodate the amount of land needed, third priority is land designated as marginal land pursuant to ORS 197.247 (1991 Edition).
>
> "(d) If land under paragraphs (a) to (c) of this subsection is inadequate to accommodate the amount of land needed, fourth priority is land designated in an acknowledged comprehensive plan for agriculture or forestry, or both.

subject property within the UGB does not comply with the established priority system. The city found that ORS 197.298 did not apply because the property is being included within the UGB under the "unneeded but committed" policy. According to the city, the statute only applies where land is included within a UGB to meet a demonstrated need for the land. Because the challenged amendment was not adopted to meet an identified need, the city argues the statute does not apply.[13]

We previously considered the scope of ORS 197.298 in *Malinowski Farm v. Metro*, 38 Or LUBA 633, 652-55 (2000). In that case, we concluded that the text and context of the statute "indicate that it is intended to be applied, and can only be applied, to UGB amendments based on a demonstration of need under Goal 14, factors 1 and 2." *Id*. at 655. We held that the statute does not apply where a UGB amendment is not based on need. *Id*. *Malinowski Farm* is directly on point on this issue. Where a UGB amendment is not based on a showing of need, as in the present appeal, ORS 197.298 simply does not apply. Petitioners attempt to distinguish *Malinowski Farm* on the basis that the UGB amendment was conducted under a unique Metro Code provision that allows for a UGB "locational

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> "(2) Higher priority shall be given to land of lower capability as measured by the capability classification system or by cubic foot site class, whichever is appropriate for the current use.
>
> "(3) Land of lower priority under subsection (1) of this section may be included in an urban growth boundary if land of higher priority is found to be inadequate to accommodate the amount of land estimated in subsection (1) of this section for one or more of the following reasons:
>
> > "(a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands;
> >
> > "(b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints; or
> >
> > "(c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.

[13] The city also makes alternative findings purporting to include the property under the priority system as well.

adjustment" that had been acknowledged by LCDC as consistent with Goal 14. While that is true, that fact was in no way critical, or even particularly relevant, to our disposition of this issue. The present case is merely another example, like the Metro locational adjustment, that allows expansion of a UGB without regard to need for the land included within the UGB. In such situations, ORS 197.298 simply does not apply. Petitioners also argue that *Malinowski Farm* was wrongly decided and urge us to overrule that opinion. We decline to do so.

Milne's first assignment of error (third subassignment of error) and 1000 Friends of Oregon's third assignment of error are denied.

Milne's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (MILNE) AND SECOND ASSIGNMENT OF ERROR (1000 FRIENDS OF OREGON)

In these assignments of error, petitioners argue that the city violated Goals 2 and 3 by not adopting a Goal 2 exception to Goal 3 to bring agricultural land into the UGB. Petitioners also argue that the city was required to justify an irrevocably committed exception to Goal 3 under OAR 660-004-0028.

The city found that the Goal 14 requirement to follow the Goal 2 exception "procedural requirements" was satisfied for the reasons set out in intervenor's application, which the city incorporated by reference.[14] Record 14, 785-87. Petitioners do not challenge these findings.

Under OAR 660-004-0010(1)(c)(B), when a local government amends a UGB, exceptions to any applicable goals are justified by complying with the seven factors of Goal 14 and by addressing the reasons exception criteria that are set out in the rule.[15] Petitioners

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[14] Goal 14 imposes the following requirement on local governments when they amend an established UGB:

> "* * * In the case of a change of a [UGB], a governing body proposing such change in the boundary separating urbanizable lands from rural land, shall follow the procedures and requirements as set forth in [Goal 2] for goal exceptions."

[15] OAR 660-004-0010(1)(c)(B) provides:

and the city dispute whether the subject property is properly viewed as agricultural land subject to protection under Goal 3.[16] Petitioners believe it is and that the city was therefore obligated to adopt an exception to Goal 3. Intervenor contends in its brief that OAR 660-004-0010(1)(c)(B)(i) renders the question irrelevant because the city is not obligated to consider individual applicable goals specifically in applying the four reasons exception criteria under that rule. Rather, OAR 660-004-0010(1)(c)(B)(i) provides that the obligation to demonstrate why "the applicable goals should not apply" is met by demonstrating "compliance with the seven factors of Goal 14." *See* n 15. We agree with intervenor.

We note one possible problem with the approach the city took in this matter is that the city did not apply all seven of the Goal 14 factors, as is nominally required by OAR 660-004-0010(1)(c)(B)(i). However, the exception for "unneeded but committed" lands applies in this context as well and the city demonstrates compliance with OAR 660-004-0010(1)(c)(B)(i) by demonstrating commitment to urban use under the five "locational" factors. The city was not required to take an exception to Goal 3 specifically.

> "When a local government changes an established urban growth boundary it shall follow the procedures and requirements set forth in Goal 2 'Land Use Planning,' Part II, Exceptions. An established urban growth boundary is one which has been acknowledged by [LCDC] under ORS 197.251. Revised findings and reasons in support of an amendment to an established urban growth boundary shall demonstrate compliance with the seven factors of Goal 14 and demonstrate that the following standards are met:
>
> "(i) Reasons justify why the state policy embodied in the applicable goals should not apply (*This factor can be satisfied by compliance with the seven factors of Goal 14*);
>
> "(ii) Areas which do not require a new exception cannot reasonably accommodate the use;
>
> "(iii) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
>
> "(iv) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." (Emphasis added.)

[16] There is no dispute that the subject property's soils are of the type and quality that require protection under Goal 3. However, when the city's comprehensive plan was acknowledged in 1984, the subject property was not protected by applying EFU zoning to the property, as Goal 3 requires in the absence of an exception.

Finally, petitioners argue that in attempting to demonstrate that the subject property is committed to urban uses, the city was obligated to apply OAR 660-004-0028.[17] Although it might be possible to interpret parts of OAR 660-004-0028 to apply in determining whether land should be included within the UGB because it is committed to urban use, it is reasonably clear from the Court of Appeals' decision in *City of Salem* that it is the Goal 14 locational factors that are applied to make that determination. As the Court explained: "the local government must demonstrate, through the application of Goal 14's locational factors, that the land in question is in fact 'committed' to urban use." 64 Or App at 243.

Milne's and 1000 Friends of Oregon's second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR (MILNE)

Milne argues that the city's decision violates Part 1 of Goal 2 (Land Use Planning), Goal 4 (Forest Lands), Goal 10 (Housing), Goal 11 (Public Facilities and Services), and Goal 12 (Transportation). Intervenor first responds that Milne waived these issues because they were not raised below. ORS 197.763(1). According to intervenor, Goals 2, 4, 10, and 12 were not raised at all below, and the only issue Milne raised below regarding Goal 11 is substantially different than the Goal 11 issue that is raised in the petition for review.

Among other things, Part 1 of Goal 2 requires that comprehensive plans and land use regulations be internally consistent and coordinated. Milne did argue below that the decision violated various local comprehensive plan policies, and those arguments are advanced on appeal in the fourth assignment of error. Arguments that a challenged decision violates the local comprehensive plan are not sufficient to put a local government on notice that an independent Goal 2 argument is being raised. Therefore, arguments relating to Part 1 of Goal 2 are waived.

[17] OAR 660-004-0028 sets out detailed requirements for adopting a statewide planning goal exception for land that are "irrevocably committed to other uses."

Goal 4 requires protection of forest lands. Milne did point out below that the subject property has been used for commercial tree farming. However, as was the case with Part 1 of Goal 2, petitioners did not articulate a separately cognizable Goal 4 argument and therefore waived the right to do so at LUBA. In any event, the property is not forest land; it is planned and zoned for agriculture. Even if Goal 4 were applicable, Milne does not explain how that would be relevant when the city followed the process required by OAR 660-004-0010(1)(c)(B).

Goal 10 requires a local government to maintain an adequate supply of buildable lands for residential use. Milne argued below that the challenged decision adds residentially planned and zoned land that is not needed to meet expected demand, however, Goal 10 was not mentioned. Therefore, Milne's arguments under Goal 10 are waived. Even if Milne's observation were sufficient to raise a Goal 10 issue, Milne does not explain how *adding* residentially planned and zoned land to the UGB could render the city's Goal 10 buildable lands inventory inadequate or otherwise violate Goal 10.

Milne's petition for review states that the city's decision violates Goal 12 as "this amendment will impact transportation facilities." Petition for Review 21. That, however, is the only mention of Goal 12 in the assignment of error. There is no discussion of Goal 12 or any explanation of what traffic facility is impacted or how. To the extent this statement is sufficient to raise a Goal 12 issue, it is not sufficiently developed for review. *Deschutes Development*, 5 Or LUBA at 220.

Petitioners below raised an issue concerning the adequacy of the city's infrastructure to support new development under Goal 11. However, Milne's argument under this assignment of error is that Goal 11 prohibits expansion of public facilities when that expansion is not needed to support the area. An argument that existing infrastructure is inadequate to support new development (the argument Milne raised below) is not the argument now advanced by Milne in the petition for review. The Goal 11 issue raised below

was not sufficient to put the city on notice of the very different argument made in the petition for review. Therefore, Milne's Goal 11 argument under this assignment of error is waived.

Milne's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (MILNE)

Milne argues that the city misconstrued its comprehensive plan by conducting a balancing test regarding conflicting policies. The city's findings state:

> " * * * the City Council finds that the Canby Comprehensive Plan includes a number of policies that appear to be in conflict. However, it finds that this situation is expressly recognized and addressed in the Comprehensive Plan. The Introduction to the Comprehensive Plan states at page 2: 'It is recognized that there will arise unavoidable situations where one Policy appears to conflict with another. An obvious example is found in the City's seemingly conflicting intentions to preserve agricultural land and also to allow for outward growth. The Statewide Planning Goals contain essentially the same conflict, and the justification appears to be the same: either Policy could prevail, depending upon the unique circumstances of the particular situation. For instance, a proposed annexation of farmland may be justified if the evidence presented in favor of such annexation clearly out weighs the merit of retaining the land in agricultural use.' The City Council concludes from this language that an apparent conflict with one portion of the Plan does not mean that a proposal necessarily violates the Plan, particularly when the proposal supports other policies in the Plan. The City Council also finds that the Northwood application falls into the circumstance where either of the conflicting policies could prevail. The City Council interprets its Plan as authorizing approval of an application when such circumstances arise, where it concludes that the evidence in favor of the proposal outweighs the evidence against it. Here, for the reasons expressed below, the City Council finds that the evidence in favor of this UGB amendment clearly outweighs the evidence against the amendment." Record 16.

When an applicable comprehensive plan has overlapping or conflicting policies, it is permissible for a local government to interpret and apply them in a manner that balances those policies. *See Walker Associates Inc. v. Clackamas Co.*, 111 Or App 189, 194-95, 826 P2d 20 (1992) ("a balancing process that takes account of relative impacts of particular uses on particular goals and of the logical relevancy of particular goals to particular uses is a decisional necessity"). The city's interpretation that it is appropriate to recognize that plan policies may conflict and that the city should consider whether the evidence on balance

favors a finding of compliance with the comprehensive plan is not inconsistent with the comprehensive plan. *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). We turn to Milne's specific challenges under this assignment of error.

A. First Subassignment of Error

Urban Growth Goal 1 requires the city to "preserve and maintain designated agricultural and forest lands by protecting them from urbanization." Milne argues that the city's findings regarding this comprehensive plan goal are not supported by substantial evidence. The city's findings state:

> "The City Council finds that it has protected and maintained agricultural land at the Northwood property for nearly 20 years. However, as noted above, the discussion under this policy reveals that residential uses can conflict with farming practices. For the reasons provided above, the City Council finds that such conflicts have grown to the point where it would not be reasonable for the City to require the property owners to engage in continued agricultural use of this land. In this regard, the City Council cites Urban Growth Goal 2, which is to provide adequate urbanizable land for growth of the City, within the framework of an efficient system for the transition from rural to urban use. Because this property has urban services already available, it is the most efficient land in Canby to develop and urbanize. Indeed, the City Council finds that this conclusion was reached even by those Planning Commissioners who recommended denial of this application. On balance, the City Council finds that the evidence weighs more strongly in favor of allowing efficient development on this land rather than keeping it in agricultural use. Further, the City Council finds that by allowing this land to develop, other farm lands inside the UGB can remain in farm use for a longer time. This matters because those other farm lands, consisting of equally good or better agricultural soils, do not have anywhere near the level of conflict associated with the Northwood site. Accordingly, allowing this land to develop first is consistent with the overall intent of Urban Growth Goal 1 because other agricultural lands will be protected longer." Record 17-18.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). Where LUBA concludes that a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government. *Younger v. City of Portland*, 305 Or 346, 360, 752

P2d 262 (1988). That a petitioner may disagree with the local government's conclusions provides no basis for reversal or remand. *McGowan*, 24 Or LUBA at 546.

Milne challenges the city's conclusion that residential conflicts with agricultural uses have increased. While there is conflicting evidence in the record regarding this issue, there is evidence a reasonable person could rely on to reach the decision the city made. Instances of trespass and vandalism occurred in 2003. Record 150. A farmer was fired upon "several years ago." Record 151. There was testimony that new federal regulations will soon prohibit the use of some agricultural chemicals within 300 feet of a residence, which would make it difficult to apply agricultural chemicals to the property. Record 11, 79. The city's decision is supported by substantial evidence.

The first subassignment of error is denied.

B. Second Subassignment of Error

Urban Growth Policy 2 requires the city to "provide adequate urbanizable area for the growth of the city." Milne's entire argument under this subassignment of error is that the city violates this policy by including unneeded land. Unlike Goal 14 and related statutes, the comprehensive plan policy contains no express or implied requirement that lands set aside for future city growth must be limited to lands for which there is a demonstrated need. Petitioners do not explain how including additional land for growth prevents the city from providing adequate urbanizable areas. Milne's argument does not provide a basis for reversal or remand.

The second subassignment of error is denied.

C. Third Subassignment of Error

Land Use Policy 1 requires the city to guide the course of development "to separate conflicting or incompatible uses while grouping compatible uses." The city's findings state:

> "Based on the evidence provided by the farmers identified above, guiding the course of growth and development so as to separate conflicting uses supports a decision to use the Northwood property for urban development while

> protecting for farm use other agricultural lands that are not so constrained. As noted above, the background section of the Urban Growth element recognizes how difficult it is to avoid conflicts between residential developments and nearby agricultural operations. It states that 'distance' is one of the only real buffers which averts such conflicts. With virtually no 'distance' separating it from residential uses, the Northwood property has been experiencing more and more conflicts. Despite testimony of area neighbors to the contrary, the City Council believes these conflicts will continue to occur and would be even more pronounced if Northwood Investments, as is their right, began engaging in the full range of accepted farming practices rather than utilizing 'good neighbor' policies that place the needs of the farm enterprise below the needs of the surrounding residential development." Record 19.

Again, Milne disagrees with the evidence relied upon by the city and cites evidence in support of a contrary position. However, the choice between conflicting believable evidence belongs to the city. As noted earlier, the record supports the city's conclusion that increasing conflicts are occurring between agricultural and residential uses. That is substantial evidence the city may rely upon to find the proposal complies with Land Use Policy 1.

The third subassignment of error is denied.

D. Fourth Subassignment of Error

Land Use Policy 5 directs the city to use its land use map as the basis for planning and zoning decisions. We are not sure we understand Milne's argument under this subassignment of error. It appears to be that once a land use map is adopted it should not be changed. Intervenor applied for a comprehensive plan and zoning map amendment. The city found that Land Use Policy 5 did not prevent such an action:

> "* * * the Plan and Zoning Ordinance permit such amendments. Here, the issue is whether the proposed Plan map and zoning map amendments comply with the applicable standards. For the reasons set out in these findings, the City Council finds that they do." Record 20.

We agree with intervenor and the city that the fact that the zoning map currently designates the subject property Agriculture in no way prevents the city from amending the comprehensive plan and zoning map designations for the property if the amendment meets the applicable map amendment criteria.

The fourth subassignment of error is denied.

E. Fifth Subassignment of Error

Environmental Policy 1-R-A requires the city to "direct urban growth such that viable agricultural uses *within the urban growth boundary* can continue for as long as it is economically feasible for them to do so." (Emphasis added.) Milne argues that it is still economically feasible to farm the subject property. While that appears to be true, that is also irrelevant to Environmental Policy 1-R-A, which requires the protection of agricultural property *within the UGB*. The subject property is outside the UGB. Furthermore, the city's finding that developing the committed subject property will reduce pressure on agricultural property inside the UGB that is not yet committed to urban use is unchallenged.

The fifth subassignment of error is denied.

F. Sixth Subassignment of Error

Environmental Policy 8-R directs the city to "seek to preserve and maintain open space where appropriate and where compatible with other land uses." Milne argues that this policy must be interpreted to deny the application because the open space provided at the Northwood site is appropriate and compatible for preservation. While that is perhaps a permissible interpretation of Environmental Policy 8-R, it is not the interpretation the city adopted. Record 21. Milne does not address or even acknowledge the city's interpretation, which we conclude is not reversible under ORS 197.829(1) and *Church*.

The sixth subassignment of error is denied.

G. Seventh Subassignment of Error

Transportation Policies 1 and 3 direct the city to "provide necessary improvements to city streets" and to "improve problem intersections, in keeping with its policies for upgrading or new construction of roads." According to Milne, the street improvement the city references regarding NW 12th is not necessary because it is not included in the transportation

system plan (TSP) and the other referenced street improvement to NW 10th is not necessary under the city's TSP for three to seven years. The city's findings state:

> "Policy 1 requires the City to provide necessary improvements to City streets. The City Council finds that NW 10th is a neighborhood connector and that approval of this application will provide for the connection of NW 10th and also NW 12th. This will improve circulation and connectivity in this area of Canby, consistent with Policy 1. Policy 3 requires the city to 'attempt to improve its problem intersections.' Problems with the intersection of 99E at Territorial have been identified. The City Council finds that its transportation plan provides for improvements to occur at this intersection within the next few years. Because the City is 'attempting to improve' that intersection, Policy 3 is satisfied. The City Council also notes that this policy is directory to the City and does not apply in the context of a UGB amendment application." Record 21.

Intervenor responds that the need for the 10th Street connection is established because it is included in the TSP. Although intervenor does not respond to Milne's timing argument, we do not understand the argument. With regard to the city's finding concerning the possibility of a future 12th Street extension, it may be that the TSP would have to be amended to actually construct that extension, but we fail to see how that finding is inconsistent with Policy 1.

The seventh subassignment of error is denied.

H. Eighth Subassignment of Error

Economic Policy 4 directs the city to "consider agricultural operations which will lead to an increase in local employment opportunities." Milne argues that the city violated this policy by sacrificing agricultural jobs on the subject property. The city found that this policy is one of those plan policies that conflicts with other plan policies, as noted earlier in this opinion. The city found that this policy applied to all agricultural lands surrounding the city, including EFU-zoned lands within the UGB. Record 21. The city also found that residential development had encroached on intervenor's property to a much greater extent than other agricultural lands, and concluded that it made more sense to develop the subject property before other less impacted lands. Record 21-22.

Economic Policy 4 only requires the city to *consider* agricultural operations and how they apply to local employment. It is clear from the city's findings that the city considered the continued viability of agricultural production of the subject property. The fact that the city reached a different conclusion than Milne after such consideration is not a basis for reversal or remand.

The eighth subaassignment of error is denied.

Milne's fourth assignment of error is denied.

The city's decision is affirmed.