

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 GUNDERSON, LLC
5 *Petitioner,*

6
7 vs.

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9 CITY OF PORTLAND,
10 *Respondent,*

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12 and

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14 FRIENDS OF CATHEDRAL PARK NEIGHBORHOOD
15 ASSOCIATION, UNIVERSITY OF PORTLAND,
16 AUDUBON SOCIETY OF PORTLAND,
17 and WILLAMETTE RIVERKEEPER,
18 *Intervenors-Respondents.*

19
20 LUBA No. 2010-039

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22 WORKING WATERFRONT COALITION,
23 *Petitioner,*

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25 vs.

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27 CITY OF PORTLAND,
28 *Respondent,*

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30 and

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32 FRIENDS OF CATHEDRAL PARK NEIGHBORHOOD
33 ASSOCIATION, UNIVERSITY OF PORTLAND,
34 AUDUBON SOCIETY OF PORTLAND,
35 and WILLAMETTE RIVERKEEPER,
36 *Intervenors-Respondents.*

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38 LUBA No. 2010-040

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40 SCHNITZER STEEL INDUSTRIES, INC.,
41 *Petitioner,*

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43 vs.

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45 CITY OF PORTLAND,

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BACKGROUND

This matter is before us on remand from the Court of Appeals. In 2009, the city adopted the North Reach River Plan (NRRP) as an amendment to the city’s comprehensive plan. The NRRP amends the city’s previously adopted and acknowledged Willamette River Greenway Plan that is required by Statewide Planning Goal 15 (Willamette River Greenway).¹ As relevant here, the NRRP amends the greenway boundary to add property owned by Schnitzer Steel Industries (Schnitzer) and other property that had not previously been included within the boundary. The NRRP also creates and applies a new River Environmental (RE) overlay zone to approximately 423 acres within the greenway boundary and requires that development within the new overlay zone must comply with a “River Review” process. The NRRP also imposes vegetation enhancement standards (VES) on all property within the new overlay zone and within previously existing greenway overlay zones.

Petitioners, who are industrial users and property owners within the area covered by the NRRP, appealed the decision and challenged the NRRP’s compliance with applicable statewide planning goals and provisions of the Portland Comprehensive Plan. In *Gunderson v. City of Portland*, 62 Or LUBA 403 (2011) (*Gunderson I*), LUBA sustained several of the petitioners’ assignments of error, and denied others.

Petitioners appealed LUBA’s decision to the Court of Appeals. The Court of Appeals held that LUBA erred in failing to consider petitioners’ challenges to the adequacy of the

¹ Goal 15, Paragraph A(1) provides that “[t]he qualities of the Willamette River Greenway shall be protected, conserved, enhanced and maintained consistent with the lawful uses present on December 6, 1975. Intensification of uses, changes in use or developments may be permitted after this date only when they are consistent with the Willamette Greenway Statute [ORS 390.310 to 390.368], this goal * * * and when such changes have been approved as provided in * * * the completed [Willamette River Greenway Plan] * * *.”

Goal 15, Paragraph F(3)(b) requires local governments to adopt review provisions for the review of “intensifications, changes of use or developments to insure their compatibility with the Willamette River Greenway.” The NRRP provides such review provisions.

1 city’s inventory of “lands currently committed to industrial, commercial and residential uses”
2 that is required by Goal 15, Paragraph B(9). We set out and discuss Goal 15, Paragraph B(9)
3 more fully below. The Court remanded the issue of petitioners’ challenges to the adequacy of
4 the city’s Goal 15 inventory, for LUBA to consider in the first instance. *Gunderson, LLC v.*
5 *City of Portland*, 243 Or App 612, 625-26, 259 P3d 1007 (2011) (*Gunderson II*). Petitioners
6 appealed the Court of Appeals’ decision rejecting their other assignments of error to the
7 Supreme Court, which affirmed the Court of Appeals’ decision. *Gunderson, LLC v. City of*
8 *Portland*, 352 Or 648, 290 P3d 803 (2012) (*Gunderson III*).

9 Thereafter, the parties provided additional briefing on the issue that the Court of
10 Appeals remanded to LUBA. We address that issue in this opinion.

11 **ADEQUACY OF THE CITY’S GOAL 15 INVENTORY**

12 **A. Goal 15, Paragraph B**

13 Goal 15, Paragraph B requires the city to collect and maintain “[i]nformation and data
14 * * * to determine the nature and extent of the resources, uses, and rights associated directly
15 with the Willamette River Greenway.”² The inventories are “for the purpose of determining

² Goal 15, Paragraph B provides:

“B. INVENTORIES AND DATA

“Information and data shall be collected to determine the nature and extent of the resources, uses and rights associated directly with the Willamette River Greenway. These inventories are for the purpose of determining which lands are suitable or necessary for inclusion within the Willamette River Greenway Boundaries and to develop the plans and management and acquisition programs.

“Each of the following items shall be inventoried¹ as it relates to the Greenway objectives:

“9. Land currently committed to industrial, commercial and residential uses;

“10. The ownership of property, including riparian rights[.]”

¹ When information on such items is not available through previous studies, information will be maintained by the agencies for those portions of the plan for which they are responsible.

1 which lands are suitable or necessary for inclusion within the * * * Greenway Boundaries and
2 to develop the plans and management and acquisition programs.” Goal 15, Paragraph B lists
3 the items that “shall be inventoried as it relates to the Greenway objectives,” and includes in
4 relevant part “9. [l]and currently committed to industrial, commercial and residential uses”
5 and “10. [t]he ownership of property, including riparian rights[.]”³

6 The city adopted its initial Goal 15 inventory in 1984, and adopted an update to the
7 existing Goal 15 inventory in 1987. Respondent’s Supplemental Response Brief App. 11.

8 **B. Inventory of Lands Added to the Greenway**

9 In its second assignment of error in *Gunderson I*, Schnitzer argued that the city’s
10 amendment of the greenway boundary to include additional land triggered a requirement to
11 revise or update its Goal 15 inventory to add that land, and that “[t]he City failed to
12 adequately inventory lands when amending the Greenway boundary.” Schnitzer argued that
13 “[w]ithout these required inventories, the city cannot properly determine which lands are
14 suitable or necessary for inclusion within the Greenway boundary.” Schnitzer Petition for
15 Review 15-16.

16 Goal 15, Paragraph B provides in relevant part that one of the purposes of the
17 inventory is to “* * * determin[e] which lands are suitable or necessary for inclusion within
18 the * * * Greenway Boundaries * * *.” If the city determines that land is suitable for
19 inclusion within the greenway boundary, it follows that the land should be included in the
20 city’s Goal 15 inventory. Accordingly, we agree with Schnitzer that the city must amend its

This requirement shall not limit units of government from collecting information on other items.”

³ In their pleadings, petitioners state that their arguments focus on Goal 15, Paragraph B(9) and (10) but develop their arguments based only on the text of paragraph B(9), and fail to develop any argument regarding Goal 15, Paragraph B(10). Absent any developed argument from petitioners, we do not consider the issue of whether the text of Goal 15, Paragraph B(10) requires the city to update its inventory of “ownership of property, including riparian rights” when amending its greenway program.

1 existing Goal 15 Paragraph B inventory to include the land that the city added to the
2 Willamette River Greenway.

3 A portion of Schnitzer’s second assignment of error is sustained.

4 **C. Updated Inventory of Lands Already Within the Greenway**

5 Goal 15, Paragraph B provides in relevant part that another purpose of the inventory
6 is “* * * to develop the plans and management and acquisition programs.” As noted, the
7 NRRP creates and applies a new RE overlay zone to approximately 423 acres of property
8 within the greenway boundary. The NRRP also requires vegetation enhancement for all
9 properties in the RE zone and in the other environmental overlay zones within the greenway.
10 In *Gunderson I*, Schnitzer argued that the city’s amendment of its greenway regulatory
11 program to require River Review and VES triggered a requirement to revise or update its
12 existing Goal 15 inventory:

13 “* * * In addition, as discussed more fully below, the city cannot properly
14 determine if the Goal 15 protections required for all lands committed to urban
15 uses within the Greenway have been met if no inventory of such lands has
16 been completed * * * Without an inventory, it is unable to demonstrate that
17 such lands will be permitted to continue as urban uses.” Schnitzer Petition for
18 Review 16-17.

19 Schnitzer continued by arguing that the NRRP’s River Review and VES requirements so
20 limited the ability of “lands committed to urban uses” to continue as urban uses that the
21 requirements violated Goal 15. *Id.* at 16-18. In *Gunderson I*, petitioner Working Waterfront
22 Coalition (WWC) similarly argued that Goal 15 requires the city to “* * * prepare an
23 inventory of all ‘land currently committed to industrial, commercial, and residential uses’ and
24 ‘the ownership of [that] property including riparian rights[.]’” WWC Petition for Review 28.
25 WWC argued:

26 “[a]s explained more fully below, the city’s failure to properly inventory
27 [‘lands currently committed to industrial, commercial, and residential uses’]
28 under Goal 15 has led to other substantive violations of Goal 15 with regard to
29 improper regulation of [these lands] and ‘water-related and water-dependent
30 uses’ * * *” *Id.*

1 In *Gunderson III*, the Supreme Court agreed with the Court of Appeals’ conclusion
2 that Goal 15 allows the city to regulate development in the greenway, including development
3 of “lands committed to urban uses” and that absent a showing by petitioners that the NRRP’s
4 provisions “will not permit urban uses,” the NRRP’s regulation of development of “lands
5 committed to urban uses” through River Review and VES requirements is not inconsistent
6 with Goal 15, Paragraph C(3)(j).⁴

7 Schnitzer’s and WWC’s arguments in *Gunderson I*—that the city is required to revise
8 and update its Goal 15 inventory of “lands currently committed to industrial, commercial and
9 residential uses” when it amends its Goal 15 regulatory program to require River Review and
10 VES—could be understood to be intertwined with their arguments (that were ultimately
11 rejected by the Supreme Court) that the NRRP’s requirements for River Review and VES
12 violate what petitioners characterized as Goal 15’s protections of existing urban uses within
13 the greenway. However, the Court of Appeals treated the two arguments as separate and
14 distinct arguments. *Gunderson II*, 243 Or App at 626 n 14 (“petitioners do not * * * explain
15 how our resolution of their inventory argument affects our resolution of the issues raised in

⁴ Goal 15, Paragraph C(3)(j) requires that greenway plans and implementation measures shall direct developments away from the Willamette River “to the greatest degree possible,” but provides that “lands committed to urban uses within the Greenway shall be permitted to continue as urban uses * * *.”

Goal 15, Paragraph K(2) provides that “lands committed to urban use” means

“* * * those lands upon which the economic, developmental and locational factors have, when considered together, made the use of the property for other than urban purposes inappropriate. Economic, developmental and locational factors include such matters as ports, industrial, commercial, residential or recreational uses of property; the effect these existing uses have on properties in their vicinity, previous public decisions regarding the land in question, as contained in ordinances and such plans as the Lower Willamette River Management Plan, the city or county comprehensive plans and similar public actions.”

No party takes the position that Goal 15, Paragraph B(9)’s reference to “land currently committed to industrial, commercial and residential uses,” Goal 15, Paragraph C(3)(j)’s reference to “lands committed to urban uses,” and the Goal 15, Paragraph K(2) definition of “lands committed to urban use” do not refer to the same lands, and we do not otherwise address the differing wording of the various provisions.

1 any of the other assignments; thus, we treat the assignments separately.”) Accordingly, we
2 address what we understand to be petitioners’ remaining, unaddressed argument that the city
3 erred in failing to update its entire Goal 15, Paragraph B inventory or, at a minimum its
4 Paragraph B(9) and (10) inventories, when it amended its Goal 15 regulatory program to
5 require River Review and VES.

6 In additional briefing, petitioners point to one of the purposes of the inventory
7 requirement “* * * to develop the plans and management and acquisition programs,” and
8 argue that the inventory must be updated because the NRRP further develops and changes the
9 city’s greenway management program. Specifically with regard to Goal 15, Paragraph B(9),
10 petitioners also point to the requirement to inventory “lands *currently* committed to
11 industrial, commercial and residential uses” (emphasis added), and argue that the word
12 “currently” triggers a requirement that the city update its inventory whenever the city amends
13 its Goal 15 regulatory program. Petitioners argue that the city’s current Goal 15 inventory
14 was adopted in 1987 and argue that it is not a “current” inventory within the meaning of Goal
15 15, Paragraph B(9). Petitioners’ Joint Reply to Respondent’s Supplemental Response Brief
16 2.

17 In its additional briefing, the city agrees that one of the stated purposes for the
18 inventory requirement, “* * * to develop the plans and management * * * programs,” can be
19 read to require the city to amend its Goal 15 inventory “when revising code and map
20 designations applicable to land within the greenway boundary.” Respondent City of
21 Portland’s Supplemental Response Brief 2. However, the city argues that the city committed
22 no error in not revising its entire existing Goal 15, Paragraph B inventory or in not revising
23 its Paragraph B(9) and (10) inventories when it adopted the NRRP, for several reasons.

24 First, the city argues that the express language of Goal 15, Paragraph B requires the
25 inventory to be updated only when the Paragraph B information “is not available through
26 previous studies[.] * * *” Goal 15, Paragraph B, n 1. The city maintains that the information

1 necessary to satisfy the inventory requirement in Goal 15, Paragraph B, and in particular
2 Paragraphs B(9) and (10), is already available in previous studies that have been adopted by
3 the city as support documents, or that are contained in the record. Second, the city argues,
4 even if the amendments to the greenway regulatory program require the existing inventory to
5 be updated, the only inventories that must be updated are those to which the regulatory
6 program amendments are relevant.

7 Goal 15 is silent regarding whether amendments to the greenway regulations trigger
8 an obligation to update the greenway inventory, and if so whether the entire inventory must
9 be updated or only the parts of the inventory that are affected by the amendments. However,
10 the phrase “develop the plans and * * * programs” can be fairly read to encompass not only
11 the initial development of the plans and programs but continued development and evolution
12 of the plans and programs through changes to them.

13 To the extent petitioners argue that *any* amendment to the greenway regulations
14 automatically triggers the obligation to update all or part the inventory, we disagree with
15 petitioners. But we also disagree with the city that the decision or the record on review
16 establish that no inventory update was required to adopt the River Review and VES
17 requirements, or if an update is required, that there is sufficient information in the record to
18 satisfy the requirement.⁵ Again, the relevant purpose of the inventory requirement in this
19 context is “* * * to develop the [Greenway] plans and management and acquisition
20 programs.” We conclude that purpose applies equally to amendments to the Greenway
21 boundary and to amendments to Greenway “plans and management and acquisition

⁵ We disagree with the city that the information required to be inventoried is available through previously adopted support documents or information in the record and thus no update is required. The support documents that the city refers to were adopted 26 years ago, and it is not at all obvious that those support documents contain the information that Goal 15, Paragraph B requires, or were intended to be adopted as part of the city’s acknowledged Goal 15 inventory. In addition, we have reviewed the studies and reports the city points to that are contained in the record of this appeal, and we do not think those studies and reports provide the information that the inventory requirement seeks, nor does it appear that those studies and reports were adopted as part of the city’s Goal 15 inventory.

1 programs.” That purpose is admittedly a very subjective and imperfect guideline for
2 determining whether the existing Goal 15 inventories have any bearing on particular
3 Greenway program amendments and, if so, whether the existing inventories or some part of
4 them must be updated before they can be relied on to adopt the Greenway program
5 amendments. But until LCDC elaborates on the Goal 15 inventory requirement, it is all the
6 guidance the city or LUBA have.

7 In the present case, we cannot tell from the text of the Greenway program
8 amendments whether the current inventory or portions of that inventory were used in
9 developing the new River Review and VES requirements. If so, any portion of the inventory
10 that was used must be updated first. And without regard to whether the inventory or some
11 part of the inventory was used in developing the amended regulations, it may be that the
12 regulation is of such a nature that the inventory or some part of the inventory must be
13 updated. Whatever the case, if the city determines that no part of the inventory was or should
14 have been used to “develop” the amendments, and that the amended Greenway regulations
15 are not worded or structured in a way that implicates the inventory, the city must adopt
16 findings explaining why no update to its Goal 15 inventory is required. *Citizens Against*
17 *Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002) (“there must be
18 enough in the way of findings or accessible material in the record of the legislative act to
19 show that applicable criteria were applied and that required considerations were indeed
20 considered.”)

21 A portion of Schnitzer’s second assignment of error is sustained. We do not reach the
22 remaining portion of Schnitzer’s second assignment of error and WWC’s fourth assignment
23 of error.

24 The city’s decision is remanded.