

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

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3  
4 OPUS DEVELOPMENT CORPORATION, )  
5 THOMAS R. SLOCUM, CHARLES F. )  
6 LARSON, JR., DOWNTOWN MINI-STORAGE, )  
7 LYNN KLINGENSMITH, DONALD C. McRAE, )  
8 SAYLOR PAINTING, CO., RONALD D. )  
9 SAYLOR, JOHN P. HAMMER, BELL )  
10 HARDWARE, RODNEY L. BELL, JERRY )  
11 DAVIS, SCHARPF'S TWIN OAKS BUILDERS )  
12 SUPPLY CO., TAD SCHARPF, BUILDERS )  
13 ELECTRIC, FREDERICK WITTKOP, )  
14 STARWOOD PRODUCTS, GARY KAYSER, IVY )  
15 HI-LIFT, RONALD J. HOWARD, )  
16 ) LUBA No. 95-104  
17 Petitioners, )  
18 ) FINAL OPINION  
19 vs. ) AND ORDER  
20 )  
21 CITY OF EUGENE, )  
22 )  
23 Respondent, )  
24 )  
25 and )  
26 )  
27 JESSE SPRINGER and RAIMON FRANCK, )  
28 )  
29 Intervenors-Respondent. )  
30  
31

32 Appeal from City of Eugene.  
33

34 Allen L. Johnson, Eugene, filed the petition for review  
35 and argued on behalf of petitioners. With him on the brief  
36 was Johnson & Kloos.  
37

38 Anne C. Davies and Glenn Klein, City Attorneys, Eugene,  
39 filed the response brief and argued on behalf of respondent.  
40 With them on the brief was Harrang Long Gary Rudnick P.C.  
41

42 No appearance by intervenors-respondent.  
43

44 LIVINGSTON, Chief Referee; HANNA, Referee, participated  
45 in the decision.

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REMANDED

02/06/96

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the adoption by the city council of  
4 supplemental findings in response to this Board's remand  
5 order in Opus Development v. City of Eugene, 28 Or LUBA 670  
6 (1995) (Opus I).

7 **MOTIONS TO INTERVENE**

8 Raimon Franck moves to intervene on the side of the  
9 respondent. There is no objection to the motion, and it is  
10 allowed.

11 Jesse Springer moves to intervene on the side of the  
12 respondent. There is no objection to the motion, and it is  
13 allowed.

14 **FACTS**

15 In Opus I we outlined the history of comprehensive  
16 planning in the Eugene-Springfield metropolitan area,  
17 including the adoption of the Eugene-Springfield  
18 Metropolitan Area General Plan (Metro Plan), which was  
19 updated in 1978, and the adoption in 1978 of the Whiteaker  
20 Plan. See 28 Or LUBA at 674. The comprehensive update to  
21 the 1978 Whiteaker Plan was the subject of the appeal in  
22 Opus I and is the subject of this appeal.

23 We described petitioners' first appeal as follows:

24 "Petitioners challenge five ordinances and  
25 thirteen orders adopted by the Eugene City Council  
26 on August 1 or 3, 1994. Ordinance No. 19975 adds  
27 a new Historic (H) district for a particular area  
28 to the Eugene Code (EC). Ordinance No. 19976

1 amends provision of the EC related to rescue  
2 missions. Ordinance No. 19977 adopts five  
3 amendments to the Whiteaker neighborhood portion  
4 of the Eugene-Springfield Metropolitan Area  
5 General Plan Diagram (Metro Plan Diagram).  
6 Ordinance No. 19978 adopts an updated version of  
7 the Whiteaker Plan, which is a neighborhood  
8 refinement plan. Ordinance No. 19979 adds a new  
9 Mixed-Use Whiteaker (MU-W) district to the EC.  
10 Twelve of the thirteen challenged orders rezone  
11 various portions of the Whiteaker neighborhood,  
12 including changes to base zoning districts and  
13 applications or deletion of the Site Review (SR)  
14 subdistrict. The remaining order challenged by  
15 petitioners determines the existing Metro Plan  
16 Diagram designation for the West [Skinner] Butte  
17 portion of the Whiteaker neighborhood is Medium  
18 Density Residential and denies a change of that  
19 designation to High-Density Residential. 28 Or  
20 LUBA at 673.

21 We rejected most of petitioners' assignments of error,  
22 but remanded to the city for additional findings on the  
23 following: (1) compliance of Whiteaker Transportation  
24 Policies 1 and 2 with OAR 660-12-060; (2) compliance of the  
25 Whiteaker Plan update with Statewide Planning Goal 9,  
26 paragraph 3; (3) compliance of the Whiteaker Plan update  
27 with Goal 10; and (4) the basis for the city's conclusion  
28 that the existing Metro Plan Diagram designation for the  
29 West Skinner Butte area is Medium-Density Residential,  
30 rather than High-Density Residential. On May 8, 1995, the  
31 city council adopted supplemental findings.<sup>1</sup> This appeal

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<sup>1</sup>The city's actions are described as follows in the Notice of Council  
Land Use Actions:

1 followed.

2 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

3 Our remand order in Opus I required the city to  
4 demonstrate that its adoption of the challenged ordinances  
5 and orders is consistent with the Goal 9 requirement for an  
6 adequate inventory of commercial and industrial sites.<sup>2</sup> We

- 
- "• **Adoption of interpretation explaining the denial of the Metro Plan Diagram amendment affecting the West Skinner Butte Residential Area (MA 94-4).** Essentially the council affirmed its August 1994 decision to retain the Metro Plan Diagram designation in this area as Medium-Density Residential. The council adopted an interpretation explaining its conclusion that the current designation is Medium-Density Residential and its denial of a Metro Plan Diagram amendment to High-Density Residential.
  - "• **Adoption of supplemental findings supporting approval of the Whiteaker Plan, approval of the Metro Plan Diagram amendments and adoption of all zoning orders except those affecting the Rose Garden Residential Area (Z 93-21, Z 93-22 and Z 93-23).** The council affirmed its August, 1994 decisions concerning the adoption of the Whiteaker Plan, related amendments to the Metro Plan (except the one for West Skinner Butte Residential Area), and the related zoning orders (except the one affecting the Rose Garden Residential Area). The supplemental findings address compliance with the Transportation Planning Rule (OAR 660-12-060), Goal 9 (Economy) and Goal 10 (Housing).
  - "• **Adoption of supplemental findings supporting adoption of the zoning order affecting the Rose Garden Residential Area (Z 93-21, Z 93-22 and Z 93-23).** The council affirmed its August, 1994 decision to adopt a zoning order affecting the Rose Garden Residential Area. The supplemental findings address compliance with the Transportation Planning Rule (OAR 660-12-060), Goal 9 (Economy) and Goal 10 (Housing)." Record 10010-10011. (Emphasis in original.)

<sup>2</sup>Goal 9 provides, in relevant part:

"Comprehensive plans for urban areas shall:

1 explained:

2 "The city does not identify, either in the  
3 decision or its argument, what land in the  
4 Whiteaker neighborhood is on the city's Goal 9  
5 inventory of commercial and industrial sites or  
6 explain how it believes industrial and commercial  
7 use of such land will be affected by the Whiteaker  
8 Plan and zone change orders. The city essentially  
9 argues the Whiteaker Plan and zone change orders  
10 can be presumed to comply with Goal 9, paragraph 3  
11 because the city's inventories of commercial and  
12 industrial land contain large surplus acreages  
13 above what is needed. However, Goal 9, paragraph  
14 3 requires that the city's inventory of suitable  
15 commercial and industrial sites be adequate not  
16 just with regard to total acreage, but also with  
17 regard to size, type, location and service levels,  
18 to provide for a 'variety of industrial and  
19 commercial uses consistent with plan policies.'  
20 The city must demonstrate that in view of the  
21 limitations and changes imposed by the challenged  
22 decisions, it still has an inventory of commercial  
23 and industrial sites that is adequate with regard  
24 to size, type, location and service levels,  
25 considering its plan policies for use of the  
26 Whiteaker neighborhood." 28 Or LUBA at 691.

27 Both the first and second assignments of error  
28 challenge the city's compliance with Goal 9. Petitioners  
29 contend the city's supplemental findings, which rely in part  
30 on the Metro Plan, violate both Goal 9 and the Metro Plan,

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"\* \* \* \* \*

"3. Provide for at least an adequate supply of sites of  
suitable sizes, types, locations, and service levels for  
a variety of industrial and commercial uses consistent  
with plan policies."

"\* \* \* \* \*"

The same language is found at ORS 197.712(2)(c).

1 and fail to satisfy our remand order. Petitioners challenge  
2 the city's determinations that (1) the affected commercial  
3 properties are not part of the city's Goal 9 inventory; (2)  
4 the affected industrial properties are not part of the  
5 city's Goal 9 inventory; and (3) the imposition of site  
6 review and the redesignation of certain property as mixed  
7 use do not effectively remove these properties from the  
8 Metro Plan's commercial and industrial land inventories.

9 **A. Commercial Lands**

10 The city made the following findings with respect to  
11 commercial lands:

12 "Buildable lands for purposes of the commercial  
13 buildable lands inventory includes 'undeveloped or  
14 partially developed land either in a commercial  
15 zoning district or designated in the Metropolitan  
16 Area Plan as commercial or mixed use.' Eugene  
17 Commercial Lands Study, Supply and Demand  
18 Analysis, p. 3. The Commercial Lands Study  
19 examined the supply and demand for commercial land  
20 in Eugene by subarea. The Whiteaker neighborhood  
21 fell within the Central/University Region.

22 "The study identified only one commercial parcel  
23 within the Whiteaker Neighborhood that satisfied  
24 the definition of commercial buildable land. That  
25 parcel was .55 acres in size and was zoned C-1  
26 (Neighborhood Commercial), and the Whiteaker plan  
27 designated it as part of a mixed use district.  
28 The actions taken last August by the city council  
29 rezoned the property from C-1 to MU-W, mixed use.  
30 Because the mixed use district allows commercial  
31 uses and because commercial buildable lands  
32 include those properties designated mixed use, the  
33 property was not eliminated from the buildable  
34 lands inventory. The actions, therefore, had no  
35 impact on the commercial buildable lands inventory  
36 for the City of Eugene. Moreover, the Commercial  
37 Lands Study indicates the city has an excess of

1 approximately 170 acres of commercial land. The  
2 inventory continues to adequately provide for  
3 commercial sites with regard to size, type,  
4 location and service levels." Record 10028-10029.

5 Petitioners argue the city's reliance on the July, 1989  
6 Eugene Commercial Lands Study--Supply and Demand Analysis  
7 (Supply Analysis) is misplaced, since the Supply Analysis is  
8 only a background document to the October, 1992 Eugene  
9 Commercial Lands Study (1992 Commercial Lands Study).  
10 Petitioners maintain that the city's reliance on the Supply  
11 Analysis has caused it to limit improperly its evaluation of  
12 commercial land to vacant commercial land, to the exclusion  
13 of redevelopable commercial land.

14 The 1992 Commercial Lands Study is a refinement plan to  
15 the Metro Plan. See Graville Properties, Ltd. v. City of  
16 Eugene, 27 Or LUBA 583, 588 (1994). The 1992 Commercial  
17 Lands Study describes the Supply Analysis as follows:

18 "Published in July 1989 with minor revisions in  
19 January 1990, the report examines the supply of  
20 the vacant commercial land as of January 1989 and  
21 the demand for commercial land in the next 20  
22 years for the Eugene portion of the metropolitan  
23 area." 1992 Commercial Lands Study I-3.  
24 (Emphasis added.)

25 The Supply Analysis was but one of several background  
26 documents used in preparing the 1992 Commercial Lands Study.  
27 Id. The exclusive focus of the Supply Analysis on vacant  
28 commercial land does not, of itself, similarly limit the  
29 scope of the 1992 Commercial Lands Study.

30 The 1992 Commercial Lands Study states:

1 "For purposes of this study, commercial land is  
2 defined as parcels that are shown on the Metro  
3 Plan Diagram as appropriate for commercial  
4 development (designated commercial) or are  
5 regulated by the City of Eugene so as to allow  
6 commercial uses (zoned commercially). \* \* \* [Any  
7 tax lot or portion of a tax lot that was vacant  
8 and zoned or designated for commercial use was  
9 considered part of the commercial buildable land  
10 inventory." 1992 Commercial Lands Study II-1.

11 The city argues, based on the emphasized language, that  
12 the challenged decision properly limits its consideration to  
13 vacant land zoned or designated for commercial use. We  
14 disagree. We understand the 1992 Commercial Lands Study to  
15 distinguish between "commercial land" and "commercial  
16 buildable land." The inventory of commercial buildable  
17 (i.e. vacant, commercially zoned or designated) land is a  
18 subset of the totality of commercial land.

19 The city may be correct that in the subject area, there  
20 is just 0.55 acre of vacant, commercially zoned or  
21 designated land. However, our remand order in Opus I  
22 required the city to consider its inventory of all  
23 commercial sites, not just its inventory of vacant,  
24 buildable commercial sites. Goal 9, paragraph 3, upon which  
25 we relied, refers to "an adequate supply of sites of  
26 suitable sizes, types, locations, and service levels." It  
27 is not limited to vacant, buildable commercial sites.

28 The city argues that OAR 660-09-015(3) implements Goal  
29 9, paragraph 3, and forces the opposite conclusion.  
30 OAR-660-09-015(3) states, in relevant part:

1 "Inventory of Industrial and Commercial Lands.  
2 Comprehensive plans for all areas within urban  
3 growth boundaries shall include an inventory of  
4 vacant and significantly underutilized lands  
5 within the planning area which are designated for  
6 industrial or commercial use."

7 The city contends that the "inventory of vacant and  
8 significantly underutilized lands" is the same as the  
9 "inventory of commercial \* \* \* sites" to which we referred  
10 in our remand order. However, OAR 660-09-015(2), which also  
11 implements Goal 9, paragraph 3, has a broader focus than OAR  
12 660-09-015(3).<sup>3</sup> Our remand order was not limited to the  
13 "inventory of vacant and significantly underutilized lands"  
14 mentioned in OAR 660-09-015(3). The use of the word  
15 "inventory" in different contexts, with different meanings,  
16 is initially confusing, but it provides no support for the  
17 city's position.

18 Moreover, the city's position ignores the fundamental  
19 relationship between developed and undeveloped land and the  
20 contribution each makes to satisfying the overall need for

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<sup>3</sup>OAR 660-09-015(2) states:

"Site Requirements. The economic opportunities analysis shall identify the types of sites that are likely to be needed by industrial and commercial uses which might expand or locate in the planning area. Types of sites shall be identified based on the site requirements of expected uses. Local governments should survey existing firms in the planning area to identify the types of sites which may be needed for expansion. Industrial and commercial uses with compatible site requirements should be grouped together into common site categories to simplify identification of site needs and subsequent planning."

1 commercial (and industrial) land. Developed land was  
2 considered at the time the city determined its inventory of  
3 vacant, buildable commercial land was adequate. If  
4 developed land is now left out of the equation, the pressure  
5 on vacant, buildable commercial land will increase. In its  
6 demonstration, required by our remand order in Opus I, that  
7 its inventory of commercial sites is adequate with regard to  
8 size, type, location and service levels, the city cannot  
9 ignore the connection between restricting uses on existing  
10 commercial lands and the pressure that places on its  
11 inventory of vacant, buildable commercial land.

12 As a final point, we note that the 1992 Commercial  
13 Lands Study specifically addresses downtown commercial land.  
14 It states:

15 "To encourage downtown development, the Commercial  
16 Lands Study recommends maintaining a relatively  
17 close match between the supply of and demand for  
18 commercial land. \* \* \* ([The 1992 Commercial Lands  
19 Study] assumes that 25 acres will be available  
20 through redevelopment and infill in the  
21 downtown.)" Id. at II-14

22 Policies 6.0, 6.1 and 6.2 of the 1992 Commercial Lands Study  
23 encourage redevelopment of existing commercial areas within  
24 the city generally and discourage "identification of new  
25 large vacant commercial sites."<sup>4</sup> Id. at III-7. Policies

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<sup>4</sup>These policies state:

"6.0 Promote redevelopment of existing commercial areas and compact, dense growth by encouraging businesses to revitalize and reuse existing commercial sites.

1 17.0 and 17.1 specifically encourage redevelopment of  
2 existing commercial sites in the downtown area.<sup>5</sup> Id. at  
3 III-15. The city's decision to limit its consideration of  
4 impacts on commercial land to vacant, buildable commercial  
5 land is inconsistent with the emphasis in the 1992  
6 Commercial Lands Study on redevelopment and the policies  
7 that encourage redevelopment.

8 **B. Industrial Lands**

9 The city made the following findings with respect to  
10 industrial lands:

11 "The Metropolitan Industrial Lands Inventory  
12 Report provides the inventory on which the  
13 Metropolitan Industrial Lands Policy Report was  
14 based. Under that inventory report, 'vacant  
15 industrial lands', which are defined as vacant and  
16 underdeveloped lands, are parcels one acre or  
17 larger that are zoned or designated in the Metro  
18 Plan for industrial use. The mixed use district  
19 is a zoning district that allows industrial use,  
20 and mixed use properties are included in the

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"6.1 Limit identification of new large vacant commercial sites  
as one method to encourage redevelopment and reuse of  
existing sites. Prohibit creation of a new regional  
retail center or a regional large-scale office center.

"6.2 Identify and remove disincentives to the relocation or  
expansion of businesses in the downtown."

<sup>5</sup>These policies state:

"17.0 Recognize that additional commercial development will  
occur primarily through redevelopment of existing  
commercial sites.

"17.1 Continue existing City programs aimed at encouraging  
redevelopment of existing commercial areas, especially  
those in the downtown area."

1 inventory.

2 "As with the Commercial Lands Study, the  
3 Industrial Lands Policy Report examined the  
4 inventoried lands by subarea. Again, the  
5 Whiteaker Neighborhood is located within the  
6 Central/University of Oregon Region. This region,  
7 prior to the actions taken in August, had 48 acres  
8 of vacant industrial land on two sites, which  
9 provides only 1 percent of the metro area's vacant  
10 industrial land inventory. One of the sites, the  
11 Riverfront Research Park, contains 46 of the 48  
12 total acres in the Central/University region.

13 "The remaining 2-acre site falls within the  
14 Whiteaker Neighborhood and is constraint-free.  
15 Prior to last August, this site was zoned MU-  
16 IC/SR, Mixed Use Industrial Commercial with Site  
17 Review, and was designated medium density  
18 residential. In August, the property was rezoned  
19 MU-W/SR, Mixed Use Whiteaker District with Site  
20 Review. This new mixed use zone continues to  
21 allow all industrial uses allowed in the I-2 zone.  
22 Because mixed use properties are part of the  
23 industrial lands inventory, the land was not  
24 eliminated from the inventory. And because the  
25 only property in the Whiteaker neighborhood that  
26 was part of the inventory has not been removed  
27 from the inventory, the inventory remains  
28 unaffected. Moreover, the inventory of industrial  
29 lands in the City of Eugene indicates an excess of  
30 approximately 2500 acres.

31 "The actions taken by the city council did nothing  
32 that affected the city's industrial buildable  
33 lands inventory. The inventory, therefore,  
34 continues to adequately provide for industrial  
35 sites with regard to size, type, location and  
36 service levels." Record 10029.

37 Petitioners argue that the city has improperly limited  
38 its consideration to its inventory of vacant, buildable  
39 land. Petitioners contend the city must consider all  
40 industrial land, not just vacant industrial land.

1           We agree.    The impact of the challenged site review  
2 requirements and mixed use zoning is not limited to just  
3 vacant industrial sites.    The refinement plans related to  
4 industrial land, including the 1993 Metropolitan Industrial  
5 Lands Inventory Report, cited in the challenged decision,  
6 and the 1993 Metropolitan Industrial Lands Policy Report,  
7 acknowledge the importance of existing, developed industrial  
8 sites.    For example, the 1993 Metropolitan Industrial Lands  
9 Inventory Report states at page 44 that while land that is  
10 available for redevelopment and vacant industrial parcels  
11 under one acre are not included in the "supply inventory,"  
12 they do provide "alternative development opportunities."  
13 Reference is made on page 18 to Metro Plan, page III-B-5,  
14 policy 5 (to "[p]rovide existing industrial activities  
15 sufficient land for future expansion").

16           In addition, as explained above in connection with  
17 commercial lands, Goal 9, paragraph 3 and our remand order  
18 require the city to consider all industrial land within the  
19 affected area.

20           **C.    Impacts of New Regulations**

21           With respect to the impact of the challenged site  
22 review requirements on commercial and industrial properties  
23 within the Whiteaker neighborhood, the city made the  
24 following finding:

25           "The application of site review criteria does  
26 impose some limitations on the future development  
27 of some industrial and commercial properties in

1 the Whiteaker neighborhood. However, those  
2 limitations do not rise to the level of  
3 eliminating those affected properties from the  
4 commercial or industrial lands inventory. Site  
5 review cannot eliminate a right to develop a  
6 commercial or industrial site for uses that are  
7 otherwise allowed on the property; it can only  
8 affect the manner in which that property is  
9 developed. The re-designation of a property as  
10 mixed use also does not eliminate the property  
11 from the commercial or industrial lands inventory  
12 if it is already part of that inventory." Record  
13 10028.

14 In Opus I we stated:

15 "Petitioners have demonstrated the challenged  
16 decisions include zone changes from an industrial  
17 zone to a mixed use zone allowing a variety of  
18 residential uses. Petitioners have also  
19 demonstrated the site review requirements imposed  
20 by the challenged decisions on numerous  
21 industrial, commercial and mixed use zoned  
22 properties may impose limitations on future  
23 industrial and commercial use of those properties.  
24 This is sufficient to require the city to  
25 demonstrate that it remains in compliance with the  
26 Goal 9 requirement for an adequate inventory of  
27 commercial and industrial sites." 28 Or LUBA at  
28 691.

29 We agree with petitioners that the challenged decision  
30 provides a conclusory finding, not the demonstration  
31 required by our remand order in Opus I that it remains in  
32 compliance with Goal 9.

33 The city has two options. First, it may demonstrate  
34 that, notwithstanding the possible limitations demonstrated  
35 by petitioners that result from the new ordinances and  
36 orders, including limitations on expansion, the commercial  
37 and industrial lands in the Whiteaker neighborhood are not

1 negatively impacted to such an extent that they effectively  
2 become unavailable or impractical for the full range of  
3 commercial and industrial uses allowed by existing  
4 regulations. Second, it may demonstrate that it still has  
5 an inventory of commercial and industrial sites outside the  
6 Whiteaker neighborhood that is adequate with regard to size,  
7 type, location and service levels. If it chooses the second  
8 option, the city must also demonstrate continuing compliance  
9 with the policies of the applicable planning documents,  
10 including the Metro Plan, the 1992 Commercial Lands Study,  
11 the 1993 Metropolitan Industrial Lands Policy Report and the  
12 1993 Metropolitan Industrial Lands Inventory Report.

13 **D. Conclusion**

14 The first and second assignments of error are  
15 sustained. We remand to give the city an opportunity to  
16 demonstrate, as we stated in Opus I, that "it still has an  
17 inventory of commercial and industrial sites [not just  
18 vacant commercial and industrial sites] that is adequate  
19 with regard to size, type, location and service levels,  
20 considering its plan policies for use of the Whiteaker  
21 neighborhood." 28 Or LUBA at 691.

22 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

23 In Opus I petitioners challenged the Metro Plan Diagram  
24 amendments and corresponding zone change orders because  
25 Medium-Density Residential designations and zones were  
26 changed to Low-Density Residential, Mixed Use or non-

1 residential designations and zones and Low-Density  
2 Residential designations and zones were changed to Mixed Use  
3 or non-residential designations and zones. Petitioners  
4 argued the decisions were not supported by findings or  
5 evidence showing that after the redesignations, the  
6 inventory of buildable lands required by Goal 10 would  
7 remain adequate to meet the city's identified housing needs.

8 **A. LUBA's Remand Order**

9 We relied on the definitions of "suitable and available  
10 land," found in OAR 660-08-005(13), and "redevelopable  
11 land," found in OAR 660-08-005(12), as well as on OAR 660-  
12 08-020(1), to find:<sup>6</sup>

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<sup>6</sup>OAR 660-08-005(13) states:

"'Suitable and available land' means residentially designated vacant and redevelopable land within an urban growth boundary that is not constrained by natural hazards, or subject to natural resource protection measures, and for which public facilities are planned or to which public facilities can be made available. Publicly owned land generally is not considered available for residential use."

OAR 660-08-005(12) states:

"'Redevelopable land' means land zoned for residential use on which development has already occurred but on which, due to present or expected market forces, there exists the strong likelihood that existing development will be converted to more intensive residential uses during the planning period."

OAR 660-08-020(1) states:

"Residential plan designations shall be assigned to all buildable land, and shall be specific so as to accommodate the varying housing types and densities identified in the local housing needs projection."

1            "[I]t cannot be assumed that already developed  
2            residentially designated land is not included on a  
3            buildable lands inventory. \* \* \* [L]and which has  
4            a Mixed Use plan designation, rather than a  
5            residential plan designation, cannot be considered  
6            part of a buildable lands inventory. Therefore,  
7            the city's reasons for determining that the  
8            challenged Metro Plan Diagram amendments do not  
9            affect its acknowledged buildable lands inventory  
10           are based on incorrect assumptions. Opus I, 20 Or  
11           LUBA at 695.

12           In the decision challenged in Opus I, the city  
13           concluded that the changes in the Metro Plan designations  
14           would not "result in a significant or substantive impact on  
15           the overall quantity of land available for low- and medium-  
16           density use. Record 49. Our Opus I remand order required  
17           the city to make a two-step finding: first, "determine  
18           whether the challenged plan amendments and zone changes  
19           involve land included in its acknowledged buildable lands  
20           inventory"; and, second, if so, "determine whether and  
21           explain why its buildable lands inventory remains adequate  
22           to satisfy Goal 10." 28 Or LUBA at 670.

23           **B. Technical Supplement to Metro Plan**

24           The challenged decision states that "[t]he Technical  
25           Supplement to the Metro Plan contains the buildable lands  
26           inventory."<sup>7</sup> Petitioners contend that the Technical

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<sup>7</sup>After oral argument, the city furnished a copy of the city's 1982 Metropolitan Area General Plan Draft Technical Supplement" (Technical Supplement) to LUBA. We understand this is the "Technical Supplement to the Metro Plan" mentioned in the challenged decision and in the Metro Plan at II-E-2.

1 Supplement is not in the record and conflicts with the June,  
2 1991, Eugene-Springfield Metropolitan Area Supply and Demand  
3 Analysis. The city responds that the Technical Supplement  
4 contains the buildable lands inventory for the Metro Plan,  
5 and is therefore a part of the city's acknowledged  
6 comprehensive plan. See Urquhart v. Lane Council of  
7 Governments, 80 Or App 176, 179 n2, 721 P2d 870 (1986).

8 The Metro Plan lists the Technical Supplement as a  
9 "major influence" on the Metro Plan Diagram. Metro  
10 Plan II-E-1. It states that the Technical Supplement is  
11 printed and available under separate cover and that it  
12 includes the most significant provisions of working papers  
13 (1978 and 1981) used in the Metro Plan update process. Id.  
14 at II-E-2. We accept the city's representation that the  
15 Technical Supplement contains the buildable lands inventory  
16 that was acknowledged as part of the Metro Plan. We also  
17 accept the city's representation that the June, 1991,  
18 Eugene-Springfield Metropolitan Area Supply and Demand  
19 Analysis was never acknowledged. Under Oregon Evidence Code  
20 202(7), we take official notice of the Technical  
21 Supplement.<sup>8</sup>

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<sup>8</sup>Petitioners make a substantial evidence challenge to the city's determination that there is an excess of 38 acres of high density residential land in its acknowledged inventory. That determination is based on demand projections contained in the Technical Supplement. Because we conclude, as discussed below, that the city cannot modify the assumptions underlying the demand projections without considering the actual impact on demand, we do not consider petitioners' substantial evidence challenge to the projections themselves.

1           **C.    Impacts on Buildable Lands Inventory**

2           After establishing that the city's buildable lands  
3 inventory is contained in the Technical Supplement, the  
4 challenged decision continues:

5           "LUBA, in its [Opus I] opinion, explained that it  
6 cannot be assumed that already developed  
7 residentially designated lands are not part of the  
8 buildable lands inventory. However, the buildable  
9 lands inventory for the Eugene/Springfield area  
10 assumed no major redevelopment and listed only  
11 vacant properties on the inventory. (An exception  
12 to this assumption is the assumption of  
13 redevelopment for 2400 multiple family units  
14 within a mile of downtown.)" Record 10030.

15          Petitioners contend that almost the entire Whiteaker  
16 neighborhood is within a mile of downtown, and argues that  
17 the parenthetical language quoted above acknowledges an  
18 exception to the assumption in the buildable lands inventory  
19 that no major redevelopment would occur.<sup>9</sup>    Petitioners

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<sup>9</sup>That assumption is apparently based on the following statement in the Technical Supplement:

"The 230 acres of high density residential designated land closely approximates the 192 acres of demand. The problems associated with allocating demand to quality locations which met locational criteria were greater than problems with medium density allocations. Not only were sites limited but compatability [sic] with surrounding existing residential developments was a problem.

"It was assumed 2,400 multiple-family dwelling units would be constructed within 1 mile of downtown Eugene through in-filling and redevelopment. This redevelopment assumption was the major exception to the general allocation assumption regarding redevelopment. The 2,400 units may occur through a variety of techniques, and it should not be assumed that they will all occur in high rise structures. They may occur at densities less than medium or high (i.e., less than ten dwelling units

1 maintain that the "2400 multiple family units" are included  
2 in the buildable lands inventory, and argue that plan  
3 amendments that inhibit or block the assumed redevelopment  
4 effectively remove land from the inventory.

5 The city responds that the 2,400 multiple family units  
6 are not part of the city's Goal 10 inventory. The city  
7 acknowledges that the assumption of redevelopment within a  
8 mile of downtown was "part of the analysis in determining  
9 supply and demand for housing" and "impacted the number of  
10 excess acres of available buildable land." Respondent's  
11 Brief 15. The city maintains, however, that once the  
12 inventory was completed, the change in the underlying  
13 assumption "could not impact that final document." Id. The  
14 city reasons that while the rezoning may restrict high-  
15 density development in the Whiteaker neighborhood, it does  
16 not "involve" land included in its acknowledged buildable  
17 lands inventory, and therefore, there is no need to consider  
18 the rezoning impacts in taking the second step, described in  
19 our remand order, of determining whether and explaining why  
20 its buildable lands inventory remains adequate to satisfy  
21 Goal 10.<sup>10</sup>

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per acre). For the 23-year planning period, this assumption would result in an average of about 105 units annually, which is approximately the annual rate of development which occurred between 1976 and 1979." Technical Supplement 33.

<sup>10</sup>The challenged decision does consider a small number of residentially designated tax lots, totaling about 10 acres, that were actually rezoned. It concludes that because the buildable lands inventory includes a large

1           As the challenged decision states and the Technical  
2 Supplement confirms, the size of the city's buildable lands  
3 inventory was calculated, deemed adequate and acknowledged  
4 on the assumption there would be redevelopment that would  
5 result in 2,400 multiple family units within a mile of  
6 downtown. If that assumption is incorrect, the calculations  
7 that resulted in the buildable lands inventory and the  
8 acknowledgment process itself are effectively undermined.  
9 If the construction of 2,400 multiple family units cannot be  
10 achieved through redevelopment downtown, those units will  
11 have to go somewhere else. Although the city may be correct  
12 that there will be excess land available for high density  
13 residential development after the adoption of the challenged  
14 ordinances and orders, it cannot make that determination  
15 without expressly considering their impact on the number of  
16 high-density residential units that can be constructed  
17 downtown.

18           The third and fourth assignments of error are  
19 sustained.

20           **FIFTH ASSIGNMENT OF ERROR**

21           The fifth assignment of error arises out of a dispute  
22 over the existing Metro Plan designation for the 6.84-acre  
23 West Skinner Butte area. As we explained in Opus I:

24           "The challenged order entitled 'Denying Metro Plan  
25           Amendment for Area #4 (MA-94-4)' (1) determines

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excess of land in various residential categories, it remains adequate notwithstanding the impacts of the rezoning. Record 10030-31.

1 the existing Metro Plan designation for the 6.84  
2 'West [Skinner] Butte' area is Medium-Density  
3 Residential and (2) denies an amendment of that  
4 designation to High-Density Residential.  
5 Petitioners challenge on the former aspect of the  
6 decision, contending the existing Metro Plan  
7 designation for the West [Skinner] Butte area is  
8 High-Density Residential

9 "Petitioners' arguments \* \* \* are based on complex  
10 interpretations of a 1975 amendment to the [city's  
11 initial comprehensive plan, adopted in 1972], the  
12 1978 "Whiteaker Plan, the 1980 ordinance initially  
13 adopting the Metro Plan, the 1980 Metro Plan text  
14 and diagram, and the relationships between the  
15 Metro Plan text and diagram and between the Metro  
16 Plan and refinement plans, as established by those  
17 documents. However, the challenged order simply  
18 states the city council's conclusion that 'the  
19 existing Metro Plan designation of West [Skinner]  
20 Butte [is] medium density residential,' without  
21 explanation." 28 Or LUBA at 697. (Footnotes  
22 omitted.)

23 We remanded to the city for an interpretation of the plan  
24 provisions cited by petitioners.

25 The challenged decision explains that the city's  
26 initial comprehensive plan (1990 Plan) and subsequent  
27 amendments to it were superseded by adoption of the Metro  
28 Plan, including the Metro Plan Diagram. Notwithstanding a  
29 1975 amendment to the 1990 Plan that specifically designated  
30 the West Skinner Butte area as high-density residential, the  
31 Metro Plan Diagram shows it to be medium-density  
32 residential. The 1978 Whiteaker Plan designates the West  
33 Skinner Butte area for medium-density and high-density use.  
34 However, the Metro Plan explicitly provides that it prevails  
35 over refinement plans, such as the 1978 Whiteaker Plan, when

1 there are inconsistencies between them.

2       Petitioners point to a statement in the Metro Plan that  
3 the Metro Plan Diagram must yield to the Metro Plan text, of  
4 which the 1978 Whiteaker Plan is a refinement, and argue  
5 that, at the very least, the West Skinner Butte area is  
6 zoned for high-density and medium-density residential use.  
7 Petitioners also quote a statement in the Metro Plan that  
8 the Metro Plan Diagram "is a generalized map which is  
9 intended to graphically reflect the broad goals, objectives,  
10 and policies." Metro Plan I-4. Petitioners contend the  
11 city's interpretation is contrary to Goals 10, 12 and 14,  
12 and is owed no deference by LUBA.

13       ORS 197.829(1) requires that LUBA affirm a local  
14 government's interpretation of its comprehensive plan and  
15 land use regulation unless we determine that its  
16 interpretation:

17       "(a) Is inconsistent with the express language of  
18       the comprehensive plan or land use  
19       regulation;

20       "(b) Is inconsistent with the purpose for the  
21       comprehensive plan or land use regulation;

22       "(c) Is inconsistent with the underlying policy  
23       that provides the basis for the comprehensive  
24       plan or land use regulation; or

25       "(d) Is contrary to a state statute, land use goal  
26       or rule that the comprehensive plan provision  
27       or land use regulation implements."

28 Under ORS 197.829(1)(d), while the Statewide Planning Goals  
29 (goals) do not directly apply to a land use decision that

1 applies acknowledged plan and land use regulation  
2 provisions, the goals are relevant to such decisions. A  
3 local government may not interpret its plan or regulations  
4 in a manner inconsistent with the goals they implement. See  
5 DLCD v. City of Donald, 27 Or LUBA 208, 213 (1994); DLCD v.  
6 Fargo Interchange Service District, 27 Or LUBA 150, 157  
7 (1994). However, petitioners' arguments are not  
8 sufficiently developed to establish that the city's  
9 interpretation is contrary to the goals.

10 The relationship between the Metro Plan, Metro Plan  
11 diagram and 1978 Whiteaker Plan is, at best, confused. Two  
12 interpretive rules collide: on the one hand, the Metro Plan  
13 Diagram, which is part of the Metro Plan, takes precedence  
14 over inconsistent refinement plans; on the other hand, the  
15 text of the Whiteaker Plan, which is incorporated into the  
16 Metro Plan, takes precedence over inconsistencies in the  
17 Metro Plan Diagram. The city's interpretation is within its  
18 discretion under ORS 197.829 and Clark v. Jackson County,  
19 313 Or 508, 836 P2d 710 (1992).

20 The fifth assignment of error is denied.

21 The city's decision is remanded.