

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 FRIENDS OF FRENCH PRAIRIE and  
5 MARION COUNTY FARM BUREAU,

6 *Petitioners,*

7  
8 vs.

9  
10 MARION COUNTY,

11 *Respondent,*

12  
13 and

14  
15 SUTHERLAND DEVELOPMENT LLC

16 and CITY OF DONALD,

17 *Intervenors-Respondents.*

18  
19 LUBA No. 2008-186

20  
21 FINAL OPINION

22 AND ORDER

23  
24 Appeal from Marion County.

25  
26 James S. Coon, Portland, filed the petition for review and argued on behalf of  
27 petitioners. With him on the brief was Swanson, Thomas & Coon.

28  
29 Jane Ellen Stonecipher, Salem, filed a joint response brief and argued on behalf of  
30 respondent. With her on the brief were Dana L. Krawczuk, Megan D. Walseth, Ball Janik  
31 LLP, and Andrew M. Cole.

32  
33 Dana L. Krawczuk, Portland, filed a joint response brief and argued on behalf of  
34 intervenor-respondent Sutherland Development, LLC. With her on the brief were Megan D.  
35 Walseth, Ball Janik LLP, Jane Ellen Stonecipher and Andrew M. Cole.

36  
37 Andrew M. Cole, West Linn, filed a joint response brief and argued on behalf of  
38 intervenor-respondent City of Donald. With him on the brief were Jane Ellen Stonecipher,  
39 Dana L. Krawczuk, Megan D. Walseth and Ball Janik LLP,

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41 HOLSTUN, Board Member; RYAN, Board Member, participated in the decision.

42  
43 BASSHAM, Board Chair, did not participate in the decision.

44  
45 REMANDED

02/18/2009

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

**NATURE OF THE DECISION**

Petitioners appeal a county decision approving an expansion of the City of Donald urban growth boundary.

**MOTION TO INTERVENE**

The City of Donald and Sutherland Development, LLC move to intervene on the side of respondent in this appeal. There is no opposition to the motions, and they are granted.

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a reply brief to respond to new matters raised in the response brief. OAR 661-010-0039. We agree with petitioners that the reply brief responds to new matters in the response brief. Petitioners also request permission to exceed the five-page limit on reply briefs set by OAR 661-010-0039. Petitioners request permission to file a six-page reply brief. We grant the request.

Petitioners' motion to file a six-page reply brief is granted.

**FACTS**

In 2008, the City of Donald adopted a new population forecast and approved an expansion of its urban growth boundary (UGB) based on an expressed need for additional land for employment purposes. The county also adopted the UGB amendment. Land currently zoned for employment comprises approximately 30 acres in the city, and there are no large vacant or redevelopable properties zoned for employment uses. The city included four properties totaling approximately 38 acres into the UGB. While petitioners do not object to three of the added properties, petitioners do challenge the inclusion of a 27-acre parcel in the UGB expansion. The subject property is zoned exclusive farm use (EFU) and consists of high value farmlands. The city hopes to attract a warehouse and distribution center to the property to capitalize on the city's proximity to Interstate 5 and railroad lines. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners argue that the county violated Goal 14 (Urbanization) in expanding the  
3 UGB. The Land Conservation and Development Commission (LCDC) has adopted an  
4 administrative rule to interpret and elaborate on the requirements under Goal 14 to establish  
5 and amend UGBs. OAR 660-024-0040(1) provides:

6 “The UGB must be based on the adopted 20-year population forecast for the  
7 urban area described in OAR 660-024-0030, and must provide for needed  
8 housing, employment and other urban uses such as public facilities, streets  
9 and roads, schools, parks and open space over the 20-year planning period  
10 consistent with the land need requirements of Goal 14 and this rule. The 20-  
11 year need determinations are estimates which, although based on the best  
12 available information and methodologies, should not be held to an  
13 unreasonably high level of precision.”

14 Pursuant to OAR 660-024-0040(2)(a), the city’s 20-year population forecast  
15 commenced in 2008 and extended to 2028.<sup>1</sup> Although the city developed a population  
16 forecast through the year 2028, which we address in the second assignment of error, it is  
17 clear that the county did not amend the UGB based on that population forecast. Even though  
18 there are references in the challenged decision to meeting the need for population growth, the  
19 basis for expanding the UGB is the city’s desire to attract a particular type of employer to the  
20 city to create jobs rather than to satisfy an identified job growth or an increased population.  
21 As the findings state:

22 “Since the City of Donald is not basing its need for employment land on  
23 population growth but rather on the need for specific sites to accommodate  
24 target industries identified in its [Employment Opportunities Analysis

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<sup>1</sup> As relevant in this appeal, OAR 660-024-0040(2) provides:

“\* \* \* If the UGB analysis or amendment is conducted as a post-acknowledgement plan amendment under ORS 197.610 to 197.625, the 20-year planning period must commence \* \* \* :

“(a) On the date initially scheduled for final adoption of the amendment specified by the local government in the initial notice of the amendment required by OAR 660-018-0020[.]”

1 (EOA)], a 20-year population forecast to the year 2028 is not a crucial factor  
2 in the land need analysis under the UGB amendment proposal.” Record 32.

3 While OAR 660-024-0040(5) allows a city to expand its UGB for employment needs,  
4 and does not require that “job growth estimates necessarily be proportional to population  
5 growth,” the need for employment land must still “be based on an estimate of job growth  
6 over the planning period.”<sup>2</sup> OAR 660-024-0040(8) provides safe harbors for determining  
7 employment needs.<sup>3</sup> The city, however, did not use any of the safe harbor provisions  
8 available under OAR 660-024-0040(8). In fact, the city did not justify its need for increased  
9 employment lands on any estimate of job growth at all, let alone over the planning period.

10 The city explains that that approximately 80% of its residents work outside of the  
11 city. The city hopes to attract new jobs to the city that would allow more of its residents to

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<sup>2</sup> OAR 660-024-0040(5) provides:

“Except for a metropolitan service district described in ORS 197.015(14), the determination of 20-year employment land need for an urban area must comply with applicable requirements of Goal 9 and OAR 660, division 9, and must include a determination of the need for a short-term supply of land for employment uses consistent with OAR 660-009-0025. *Employment land need may be based on an estimate of job growth over the planning period; local government must provide a reasonable justification for the job growth estimate but Goal 14 does not require that job growth estimates necessarily be proportional to population growth.*” (Emphasis added.)

<sup>3</sup> OAR 660-024-0040(8) provides:

“The following safe harbors may be applied in determining employment needs:

“(a) The local government may estimate that the current number of jobs in the urban area will grow during the 20-year planning period at a rate equal to either:

“(A) The county or regional job growth rate provided in the most recent forecast published by the Oregon Employment Department; or

“(B) The population growth rate for the urban area in the adopted 20-year coordinated population forecast specified in OAR 660-024-0030.

“(b) A local government with a population of 10,000 or less may assume that retail and service commercial land needs will grow in direct proportion to the forecasted urban area population growth over the 20-year planning period. This safe harbor may not be used to determine employment land needs for sectors other than retail and service commercial.”

1 work in the city. The city developed its EOA pursuant to Goal 9 (Economic Development),  
2 and that EOA identified potential employers that could be attracted to the area. The EOA  
3 identified warehouse and distribution employment as a potential industry that could be  
4 attracted to the city. The city then identified potential sites near the city that could be  
5 brought within the UGB to attract such warehouse and distribution employers. The 27-acre  
6 site that petitioners challenge was chosen as the best opportunity for attracting a warehouse  
7 and distribution employer.

8 We see no error in the city's identification of warehouse and distribution employment  
9 as an industry that the city is well-positioned to attract to the city, and petitioners do not  
10 challenge the EOA that reached that conclusion. We also see no error in the city's desire to  
11 increase the number of residents who work in the city as opposed to commuting to other  
12 locales. We see no reason why the city could not factor that desire into its estimate of job  
13 growth over the relevant planning period. The problem with the approach adopted by the  
14 city is that the city did not identify an estimate of job growth over the planning period and  
15 then determine how much additional employment land is needed to meet that estimated job  
16 growth. Instead, the city identified a type of employer that it hopes to attract to the city by  
17 adding the amount of land it believes that employer will require. That approach might be  
18 permissible if the relevant law governing UGB amendments permitted adding land to recruit  
19 employers, without regard to whether those employers are needed to meet population or job  
20 growth needs. While OAR 660-024-0040 could be clearer, we do not believe a decision to  
21 add land to the UGB to attract a particular type of employer can be totally divorced from the  
22 population projections and job growth estimates required by OAR 660-024-0040(1) and (5).

23 The response brief attempts to provide justifications for the decision that are not  
24 contained in the findings that the county adopted in support of its decision. Respondents are  
25 correct that a legislative land use decision that is not supported by adequate findings may in  
26 some cases nevertheless be sustained on appeal if the respondent and other parties provide

1 argument and citations to the record in their briefs that demonstrate compliance with the  
2 applicable approval criteria. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or  
3 LUBA 560, 564-65 (1994). But while respondent and intervenor-respondent may supply  
4 argument and record citations in support of the county's decision, they cannot recharacterize  
5 the county's rationale for its decision and argue the county based its decision on reasoning  
6 that the county clearly did not adopt. The decision clearly states that the UGB amendment is  
7 not based on projected population growth or a job growth estimate, and respondents cannot  
8 argue the decision should be affirmed because the amendment actually is based on that  
9 rationale.<sup>4</sup> Perhaps respondents are correct that the disputed UGB amendment can easily be  
10 justified based on population projections and job growth and all the city will need to do on  
11 remand is supply that rationale. But under OAR 660-024-0040(5) there must be "an estimate  
12 of job growth over the planning period" that the employment land to be added to the UGB is  
13 needed to meet. As we have already determined, that estimate is missing.

14 Finally, respondents argue that if the decision is remanded, petitioners' ultimate goals  
15 will be thwarted because even more high value farmland will need to be added to the UGB if  
16 formal population growth and employment need projections are made. Even if that is true,  
17 that does not provide an alternate basis for affirming the decision.

18 The first assignment of error is sustained.

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<sup>4</sup> Petitioners argue that the county's decision is a quasi-judicial decision, not a legislative decision, and the county's findings must be adequate to support the decision, without help from respondent and intervenor-respondent by way of argument and record citations to establish compliance with relevant approval standards. We need not decide whether the challenged decision is legislative or quasi-judicial. As petitioners correctly argue, under the principle articulated in *Redland/Viola/Fischer's Mill CPO*, on appeal a respondent cannot recharacterize or change a legislative decision's stated decision making rationale to be something that is at odds with the decision making rationale that is expressed in the legislative decision itself. Therefore, even if the challenged decision is a legislative decision, respondent's and intervenor-respondent's attempt to recharacterize the county's rationale for its decision is improper.

1 **SECOND ASSIGNMENT OF ERROR**

2 Although the county did not approve its UGB expansion based on a population  
3 forecast, the city did adopt a population projection for 2028. Petitioners argue that the city  
4 did not comply with Goal 14 in adopting the population projection.

5 OAR 660-024-0030(1) provides that counties must adopt coordinated 20-year  
6 population forecasts for the county and each of its urban areas, consistent with specified  
7 statutory standards.<sup>5</sup> Cities must adopt 20-year population forecasts consistent with statutory  
8 requirements. OAR 660-024-0030(2) provides that the “forecast must be developed using  
9 commonly accepted practices and standards.”<sup>6</sup> OAR 660-024-0030(3) provides a safe harbor  
10 for extending a preexisting population forecast if proper notice and procedures are followed  
11 and “by using the same growth trend for the urban area assumed in the county’s current  
12 adopted forecast.”<sup>7</sup>

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<sup>5</sup> OAR 660-024-0030(1) provides:

“Counties must adopt and maintain a coordinated 20-year population forecast for the county and for each urban area within the county consistent with statutory requirements for such forecasts under ORS 195.025 and 195.036. Cities must adopt a 20-year population forecast for the urban area consistent with the coordinated county forecast, except that a metropolitan service district must adopt and maintain a 20-year population forecast for the area within its jurisdiction. In adopting the coordinated forecast, local governments must follow applicable procedures and requirements in ORS 197.610 to 197.650 and must provide notice to all other local governments in the county. The adopted forecast must be included in the comprehensive plan or in a document referenced by the plan.”

<sup>6</sup> OAR 660-024-0030(2) provides:

“The forecast must be developed using commonly accepted practices and standards for population forecasting used by professional practitioners in the field of demography or economics, and must be based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA). The forecast must take into account documented long-term demographic trends as well as recent events that have a reasonable likelihood of changing historical trends. The population forecast is an estimate which, although based on the best available information and methodology, should not be held to an unreasonably high level of precision.”

<sup>7</sup> OAR 660-024-0030(3) provides:

1 The city and county have a coordinated population forecast. That coordinated  
2 population forecast projects a population of 1050 in 2020 based on an annual growth rate of  
3 2.25 percent. Extending that projected population and population growth rate results in a  
4 projected population of 1255 in 2028. If the city used the safe harbor provisions of OAR  
5 660-024-0030(3), the projected population for 2028 would be 1255. The city’s 2007  
6 population, according to a Portland State University study, was 995 – only 55 people short of  
7 the 2020 population projection. Rather than rely on a safe harbor provision that the city  
8 believed would be inaccurate, the city instead applied the projected annual growth rate from  
9 the coordinated population forecast and applied it to the most recent existing population  
10 study. Thus, instead of a population forecast of 1255 for 2028 using the safe harbor  
11 provision, the city adopted a population forecast of 1588 for 2028.

12 Although portions of the decision refer to the population forecast as a “safe harbor”  
13 estimate, it is clear that the city did not follow the safe harbor provisions of OAR 660-024-  
14 0030(3).<sup>8</sup> Just because a population forecast is not made under the safe harbor provisions  
15 does not mean that it is invalid. In fact, the city’s population forecast, based on the  
16 preexisting adopted growth rate being applied to the current population may well be  
17 reasonable and permissible, if consistent with the requirements of OAR 660-024-0030(1).

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“As a safe harbor, if a coordinated population forecast was adopted by a county within the previous 10 years but does not provide a 20-year forecast for an urban area at the time a city initiates an evaluation or amendment of the UGB, a city and county may adopt an updated forecast for the urban area consistent with this section. The updated forecast is deemed to comply with applicable goals and laws regarding population forecasts for purposes of the current UGB evaluation or amendment provided the forecast:

- “(a) Is adopted by the city and county in accordance with the notice, procedures and requirements described in section (1) of this rule; and
- “(b) Extends the current urban area forecast to a 20-year period commencing on the date determined under OAR 660-024-0040(2) by using the same growth trend for the urban area assumed in the county’s current adopted forecast.”

<sup>8</sup> The response brief states that “arguably” the safe harbor provisions could be read to allow the city to apply the adopted growth rate to a more recent population figure, but the brief does not develop that argument further and we therefore do not consider the argument further.

1 See n 5. When making updated forecasts, however, the city “must provide notice to all other  
2 local governments in the county.” OAR 660-024-0030(1). While the city provided other  
3 cities notice of the proposed UGB expansion, that notice did not state that the city was  
4 adopting a revised population forecast. Record 602-04. While respondents argue that other  
5 local governments should have realized that a UGB amendment would naturally also include  
6 a revised population forecast, that is not sufficient to comply with the requirement that notice  
7 of the revised population forecast be provided. The city did not comply with the OAR 660-  
8 024-0030 revised population forecast requirements.

9 The second assignment of error is sustained.

### 10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioners argue that the city failed to properly apply the alternative sites analysis  
12 required by the Goal 14 locational factors. Goal 14 provides:

13 “The location of the urban growth boundary and changes to the boundary  
14 shall be determined by evaluating alternative boundary locations consistent  
15 with ORS 197.298 and with consideration of the following factors:

16 “(1) Efficient accommodation of identified land needs;

17 “(2) Orderly and economic provision of public facilities and services;

18 “(3) Comparative environmental, energy, economic and social  
19 consequences; and

20 “(4) Compatibility of the proposed urban uses with nearby agricultural and  
21 forest activities occurring on farm and forest land outside the UGB.”

22 According to petitioners, the city did not adequately consider the fourth locational  
23 factor regarding the compatibility of proposed urban uses with nearby agricultural land. The  
24 city’s findings state:

25 “The City recognizes that with few exceptions, Donald is located within an  
26 area of significant agricultural production. Expansion of the City limits will  
27 likely have similar impacts regardless which direction the City expands. It is  
28 anticipated that the industrial designation will not create traffic impacts or  
29 uses (as compared to residential activities) thereby somewhat mitigating  
30 impacts on these adjacent farm lands.” Record 71.

1           While the findings are not particularly detailed, the Goal 14 locational factors are not  
2 properly viewed as separate approval criteria. The factors must only be considered and  
3 balanced in deciding where to expand a UGB.<sup>9</sup> Petitioners do not argue that the city failed to  
4 consider the other locational factors or that the city did not balance the locational factors in  
5 adopting the challenged decision. Petitioners merely argue that the city did not adequately  
6 address the compatibility of the proposed warehouse and distribution uses with nearby farm  
7 uses. The locational factors, however, only require a comparison of alternative sites and  
8 consideration of which of the alternatives will be more compatible with farm and forest uses.  
9 The locational factors do not require that UGB expansion areas must be compatible with  
10 farm and forest uses.

11           In the present case, the city explains that all properties adjacent to the city limits were  
12 considered as alternative locations for the UGB amendment. Five alternative sites meeting  
13 the size and transportation access demands identified by the EOA were identified.<sup>10</sup> All of  
14 the properties surrounding the alternatives have primarily class II soils, and the city  
15 concluded that the impact on all the surrounding properties would be the same. Importantly,  
16 petitioners do not dispute that all the alternative locations are surrounded by similar farmland  
17 or that the impacts on those farmlands would essentially be the same regardless of which  
18 alternative location was chosen. The locational factors merely require the city to consider

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<sup>9</sup> OAR 661-024-0060(3) provides:

“The boundary location factors of Goal 14 are not independent criteria. When the factors are applied to compare alternative boundary locations and to determine the UGB location, a local government must show that all the factors were considered and balanced.”

<sup>10</sup> OAR 660-024-0060(5) allows the city to narrow the number of alternative sites based on certain characteristics:

“If a local government has specified characteristics such as parcel size, topography, or proximity that are necessary for land to be suitable for an identified need, the local government may limit its consideration to land that has the specified characteristics when it conducts the boundary location alternatives analysis and applies ORS 197.298.”

1 those factors in deciding between alternative locations. Once the city determined that  
2 compatibility with nearby farm uses provided no distinction between the alternative  
3 locations, the city properly relied on the other factors to choose the properties to be included  
4 in the expanded UGB. The city considered the locational factors and balanced them in  
5 making its decision. The fact that compatibility with nearby farm uses did not distinguish the  
6 alternative locations does not mean the city violated Goal 14.

7 The third assignment of error is denied.

8 The city's decision is remanded.