

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 McDOUGAL BROS. INVESTMENTS and
5 FRONTIER RESOURCES, LLC,

6 *Petitioners,*

7
8 vs.

9
10 CITY OF VENETA,

11 *Respondent.*

12
13 LUBA Nos. 2008-207, 2008-208 and 2008-209

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from City of Veneta.

19
20 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.
21 With him on the brief was the Law Office of Bill Kloos, PC.

22
23 Anne C. Davies and Carolyn Connelly, Eugene, filed the response brief and argued
24 on behalf of respondent. With them on the brief was Speer Hoyt, LLC.

25
26 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
27 participated in the decision.

28
29 AFFIRMED

07/08/2009

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal two city ordinances and a city resolution. Ordinance 483 adopts new regulations governing removal of trees. Ordinance 484 adopts new regulations governing landscaping. Resolution 984 adopts tree permit fees, mitigation fees and a list of street trees.

INTRODUCTION

In 2000 the city adopted a Comprehensive Land Use Evaluation (CLUE). Among other things, the CLUE determined that the city had 40.2 acres of unconstrained commercial land in 1999, which the CLUE determined was sufficient to meet 2020 employment projections under a high jobs/acre density assumption. The CLUE also determined that the city had 93.9 acres of vacant unconstrained industrial land in 1999, while only 25.3 to 35.8 acres were needed to satisfy industrial employment growth forecasts for 2030. The CLUE was acknowledged by the Land Conservation and Development Commission (LCDC), and the CLUE is part of the city’s acknowledged comprehensive plan.

The challenged decision finds that the new tree removal regulations replace previously adopted tree removal regulations and that the new tree removal regulations add certainty and allow more commercial and industrial development than would be possible under the old tree removal regulations. Record 50. The new tree regulations expressly provide that the new tree regulations may not be applied to reduce commercial or industrial building square footage or density. Based on that limitation, the challenged decision finds that the new tree regulations will not reduce the development potential of the city’s supply of vacant and unconstrained commercial and industrial land.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Notwithstanding the just-described findings, which petitioners do not directly challenge, petitioners argue in their first assignment of error that the challenged decisions

1 violate Statewide Planning Goal 2 (Land Use Planning) because the city also relied on
2 recently developed data that is not part of the city’s acknowledged comprehensive plan to
3 bolster the city’s position that the city has more than a sufficient supply of vacant,
4 unconstrained land available for commercial and industrial development. In their second
5 assignment of error, petitioners contend that because the new tree regulations include
6 approval standards that are not clear and objective, the new tree regulations render the city’s
7 inventory of vacant, unconstrained commercial and industrial land inadequate under
8 Statewide Planning Goal 9 (Economic Development).

9 The city first adopted a tree removal ordinance in 1998. Ordinance 399. As defined
10 by Ordinance 399, a “tree” is a woody perennial plant “of six inches or more in diameter 4.5
11 feet above natural grade.”¹ Ordinance 399 prohibited removal of more than three trees in
12 one year without a tree removal permit. Section 8 of Ordinance 399 set out “Tree Removal
13 Standards.” One of the standards that the city applied under Ordinance 399 to determine
14 whether it would issue a tree removal permit is set out below:

15 “8.3 Whether it is necessary to remove trees in order to construct proposed
16 improvements, or to otherwise utilize the applicant’s property in a
17 reasonable manner.”

18 Ordinance 483 repeals Ordinance 399 and adopts an amended tree removal
19 ordinance. Ordinance 483 regulates “significant trees.” As defined by Ordinance 483, seven
20 species of trees qualify as significant trees if they are “6 [inches] or more dbh.”² Oregon ash
21 trees qualify as significant trees if they are “8 [inches] or more dbh.” Big leaf maple and
22 Cinquapin qualify as significant trees if they are “12 [inches] or more dbh.” Douglas fir
23 qualify as significant trees if they are “18 [inches] or more dbh.” All other trees qualify as

¹ The diameter of trees is typically measured at 4.5 feet above natural grade, sometime referred to as “diameter at breast height” or “dbh.”

² Those species are Dogwood, Madrone, Red Alder, Ponderosa Pine, Western red cedar, California black oak, and Oregon white oak.

1 significant trees if they are “18 [inches] or more dbh.” Since Ordinance 399 applied to all
2 trees that were six inches or more in diameter, and Ordinance 483 does not apply to some
3 trees until they are greater than six inches or more in diameter, the new tree removal
4 regulations presumably apply to fewer trees than the old tree removal regulations.

5 Under Ordinance 483, four types of permits are authorized, Types A through D.
6 Petitioners are particularly concerned about Type C Permits, which are required where more
7 than three trees will be removed as part of site plan, subdivision or partition review. The
8 approval standards for Type C Permits provide two options, Options A and B. Option A
9 (with clear and objective approval standards) applies to residential development; Option B
10 (with discretionary approval standards) applies to commercial and industrial development
11 and residential development that elects not to proceed under the clear and objective standards
12 set out at Option A. Under Option B, while the city may not apply the new tree regulations
13 to require a reduction in density or building square footage, the city may require the applicant
14 to demonstrate that removal of trees is necessary and mitigation is required where more than
15 three trees are removed.³

³ Option B provides as follows:

“Option B – Commercial/Industrial and Alternative Residential Design Review. Tree preservation and conservation as a design principle shall be equal in concern and importance to other design principles. *Application of the standards of this section shall not result in a reduction of overall building square footage or loss of density*, but may require an applicant to modify plans to allow for buildings of greater height, different design, or alternate location. Tree removal or transplanting pursuant to a Type C permit shall be limited to instances where the applicant has provided complete and accurate information as required by this chapter and where the reviewing authority determines that the following criteria have been met.

- “(i) The proposal includes provisions for mitigation and tree protection in accordance with VMC 8.10.120 and 8.10.130.
- “(ii) The proposed removal is necessary for the construction of roads, structures, or other site improvements and the applicant has demonstrated that there are no feasible and reasonable location alternatives and/or design options which would better preserve significant trees on the site while providing the same overall level of density and design functionality.

1 **A. The City’s Findings**

2 As we have already noted, the city found that the new tree removal and landscaping
3 regulations adopted by Ordinances 483 and 484 will allow more commercial and industrial
4 development than was allowed under Ordinance 399. Record 50. Petitioners neither
5 acknowledge nor specifically assign error to those findings.⁴ The city also specifically relied
6 on the language in VMC 8.10.090(5)(b) that is italicized in footnote 3 to reject petitioners’
7 contention that the new tree regulations could have the effect of reducing the development
8 potential of the city’s supply of vacant, unconstrained commercial lands:

9 “The proposed tree preservation standards do not affect the City’s commercial
10 or industrial land supply. Section 8.10.0[90(5)(b)] which provides the
11 approval standards for tree removals pursuant to site plans or land divisions
12 specifically states that:

13 *“Application of the standards of this section shall not result in*
14 *a reduction of overall building square footage or loss of*
15 *density, but may require an applicant to modify plans to allow*
16 *for buildings of greater height, different design, or alternate*
17 *location.*

18 “Therefore, tree preservation conditions for any site plan or land division will
19 not reduce the employment density of development and therefore, does not
20 remove commercial lands from the inventory.

21 “Opponents may argue that the proposed preservation standards are
22 ambiguous and may be used to limit development in spite of the above

“(iii) Other. Where the applicant shows that tree removal or transplanting is reasonable and necessary under the circumstances.” Veneta Municipal Code (VMC) 8.10.090(5)(b) (italics added).

⁴ Those findings are set out below:

“The proposed regulations allow more development than possible under the existing code. The wording of the existing regulations * * * may prevent or limit development due to requirements to retain wooded areas, buffers, and views to an undefined degree. Because forested areas were not subtracted from the City’s buildable lands supply during the CLUE process, tree preservation under the existing codes substantially reduces buildable lands to an unknown extent. The proposed changes create certainty for applicants and have definable impacts on the buildable lands inventory which can be determined and accounted for as a whole, rather than undetermined impacts which vary based on a case by case application of the current subjective standards.” Record 50.

1 language. One hypothetical example of this brought up during public
2 comment was the City requiring a shopping center or sawmill to build a multi-
3 story development in order to lessen the footprint and preserve trees. * * *

4 “The City finds that [VMC 8.10.090(5)(b)(ii)] adequately protects applicants
5 from required tree preservation which would adversely affect the overall
6 functionality of the development to any significant degree.⁵ Given these
7 protections, the City could not find that a multi-floor sawmill provides the
8 same level of design functionality as a single level sawmill.” Record 57
9 (*italics in original*).⁶

10 **B. Petitioners’ Arguments**

11 **1. First Assignment of Error**

12 Petitioners first argue that the city erred by relying on data regarding the need and
13 availability of vacant commercial and industrial land that was compiled in support of the
14 disputed ordinances and resolution, rather than data in its acknowledged CLUE. Based on
15 that newly developed data, the city found that it needs fewer acres for commercial and
16 industrial development than stated in the CLUE. Record 56, 61. Because that newly
17 developed data is inconsistent with the buildable lands inventory in the CLUE, petitioners
18 argue the city violated Goal 2 by relying on that data instead of the data in its acknowledged
19 CLUE. *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249
20 (2005); *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 Or App 1205
21 (2000).

22 The city does not dispute that under the Court of Appeals’ reasoning in *Dundee* and
23 *D.S. Parklane* it likely would have been error for the city to ignore the commercial and
24 industrial land data set out in the CLUE and rely exclusively on different data that is not part
25 of its acknowledged comprehensive plan to conclude that after adopting the new tree removal

⁵ VMC 8.10.090(5)(b)(ii) is set out at footnote 3.

⁶ By reference, the city adopted the same commercial lands findings in support of its conclusion that the new tree removal regulations would not reduce the development potential of vacant, unconstrained industrial lands. Record 61.

1 and landscaping regulations the city will still have an adequate supply of vacant,
2 unconstrained land for commercial and industrial development. However, the city argues
3 that is not what the city did in this case. In the findings quoted above, the city first relied on
4 the commercial and industrial land supply and need estimates in the CLUE and the text of the
5 disputed regulations. If those findings are adequate to establish that the new regulations will
6 not leave the city with an inadequate supply of vacant, unconstrained land for commercial
7 and industrial development, the city argues, the fact that the city went further and developed
8 more recent data and assumptions to further support those findings would not provide a basis
9 for reversal or remand. We agree with the city. Because we conclude below that the above-
10 quoted city findings are adequate, the first assignment of error provides no basis for reversal
11 or remand.

12 The first assignment of error is denied.

13 **2. Second Assignment of Error**

14 As relevant, Goal 9 requires that the city ensure that it has a variety of sites for
15 industrial and commercial development.⁷ LCDC’s Goal 9 administrative rule elaborates on
16 this requirement:

17 “Cities and counties must review and, as necessary, amend their
18 comprehensive plans to provide economic opportunities analyses containing
19 the information described in sections (1) to (4) of this rule. This analysis will
20 compare the demand for land for industrial and other employment uses to the
21 existing supply of such land.

22 “* * * * *

⁷ Goal 9 provides in part:

- “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;
- “4. Limit uses on or near sites zoned for specific industrial and commercial uses to those which are compatible with proposed uses.”

1 “(2) Identification of Required Site Types. The economic opportunities
2 analysis must identify the number of sites by type reasonably expected
3 to be needed to accommodate the expected employment growth based
4 on the site characteristics typical of expected uses. Cities and counties
5 are encouraged to examine existing firms in the planning area to
6 identify the types of sites that may be needed for expansion. Industrial
7 or other employment uses with compatible site characteristics may be
8 grouped together into common site categories.

9 “(3) Inventory of Industrial and Other Employment Lands. Comprehensive
10 plans for all areas within urban growth boundaries must include an
11 inventory of vacant and developed lands within the planning area
12 designated for industrial or other employment use. * * *

13 “* * * * *.” OAR 660-009-0015.

14 There is also a statutory obligation for local governments to plan for commercial and
15 industrial development. ORS 197.707 through 197.719.

16 In arguing that the new tree and landscaping ordinances will have the effect of
17 reducing commercial and industrial development potential of vacant lands that are planned
18 and zoned for commercial and industrial use, and leave the city in violation of its obligations
19 under Goal 9, petitioners rely on LUBA’s decisions in *Home Builders Assoc. v. City of*
20 *Eugene*, 41 Or LUBA 370, 444 (2002) and *Opus Development Corp. v. City of Eugene*, 28
21 Or LUBA 670, 691 (1995). We understand petitioners to read *Home Builders Assoc.* and
22 *Opus* categorically to preclude a local government from relying on any vacant land to
23 comply with its Goal 9 commercial and industrial land inventory requirements if that vacant
24 land is subject to discretionary development approval criteria. Applying that principle here,
25 petitioners argue that a one-acre debit is required for every acre of land that is included on
26 the CLUE’s Goal 9 inventory of vacant, unconstrained land for commercial or industrial
27 development that is subject to the new tree removal ordinance, because that ordinance
28 imposes discretionary review criteria.⁸ Since all of the city’s vacant, unconstrained land for

⁸ Petitioners are correct that at least some of the standards imposed on Class C permits under Option B are not clear and objective. See n 3. For example under VMC 8.10.090(5)(b)(ii) an applicant must demonstrate that tree removal is “necessary for the construction of roads, structures, or other site improvements” and that

1 commercial or industrial development is subject to the new tree removal ordinance, and the
2 new tree removal ordinance imposes discretionary approval standards, we understand
3 petitioners to argue that none of those acres may be counted toward the city obligation to
4 plan for commercial and industrial development under Goal 9. In fact, petitioners argue that
5 even before the disputed tree removal regulations were adopted, the city’s inventory of
6 commercial and industrial land was inadequate to comply with Goal 9 because the city
7 applied discretionary approval standards to development of such lands:

8 “In summary, the baseline situation in Veneta is that 100% of the city’s
9 inventory of Goal 9 land is a phantom inventory that does not meet the Goal 9
10 standard. None of the land meets the requirement of Goal 9 because, under
11 the city’s regulations, development of any such land is subject to discretionary
12 review process found objectionable in the *Opus* line of cases. The new tree
13 regulations add just one more layer of discretionary review for one new
14 subject area – trees.” Petition for Review 18.

15 Petitioners seriously misread *Home Builders Assoc.* and *Opus*. While it is true that
16 under ORS 197.307(6), Statewide Planning Goal 10 (Housing) and OAR 660-008-015 any
17 approval standards that are applied to needed housing must be clear and objective, there is no
18 corresponding statutory, goal or rule requirement that commercial and industrial
19 development may only be subject to clear and objective standards. *Home Builders Assoc.*
20 and *Opus* do not stand for the principle that lands that are included in a local government’s
21 Goal 9 inventory of buildable lands for commercial and industrial development may not be
22 subject to discretionary permit approval standards. Those cases simply hold that where a
23 local government amends its comprehensive plan and land use regulations in ways that may
24 call the assumptions that underlie its Goal 9 inventory into question, the local government
25 must consider whether its Goal 9 inventory will remain adequate after the amendments are
26 adopted.

“there are no feasible and reasonable location alternatives and/or design options which would better preserve significant trees on the site while providing the same overall level of density and design functionality.” Under VMC 8.10.090(5)(b)(iii) an applicant must show “that tree removal or transplanting is reasonable and necessary under the circumstances.”

1 A number of factors must come together before vacant land that is included on a local
2 government's Goal 9 inventory for commercial and industrial development is actually
3 developed for such uses. Some of those factors are economic, and while local governments
4 do not have a great deal of control over those economic factors, local governments typically
5 adopt assumptions about expected future economic trends in determining what kinds of
6 development are likely and how much buildable land will be needed for future commercial
7 and industrial development. Other factors are regulatory and are largely within the control of
8 local governments. For example, a local government's land use regulations may limit the
9 types of commercial and industrial development that are allowed in particular zones, require
10 setbacks, impose maximum floor area ratios, limit the percentage of lot area that may be
11 developed and impose a variety of other restrictions that can affect the types of commercial
12 and industrial development possible and limit the square footage of commercial and
13 industrial development that can be developed on land that is inventoried for future
14 commercial and industrial development. Because these regulations will directly influence
15 the types of commercial and industrial development and the square footage and density of
16 development that will be possible on each acre of land that is inventoried for such purposes,
17 when a local government amends the land use regulations that apply to land that has already
18 been inventoried for future commercial and industrial development, there is the possibility
19 that the amendment will affect the assumptions that underlie a local government's Goal 9
20 inventory of commercial and industrial land. If the amendment lowers the permissible
21 density of commercial or industrial development, reduces the square footage of development
22 that is permissible on each acre of commercial or industrial land, or allows new non-
23 commercial or non-industrial uses that will compete with commercial or industrial
24 development on lands that are inventoried under Goal 9 for industrial or commercial use, the
25 Goal 9 inventory that was adequate before the amendment may no longer be adequate. All
26 that *Home Builders Assoc.* and *Opus* hold is that where a petitioner shows that the Goal 9

1 inventory may have been rendered inadequate by comprehensive plan or land use regulation
2 amendments, a local government is required to consider that possibility and to adopt findings
3 to demonstrate that the Goal 9 inventory remains adequate after the amendment.⁹

4 Aside from their argument that lands that are subject to discretionary approval criteria
5 cannot be counted for Goal 9 inventory purposes, petitioners make no attempt to explain why
6 they believe that the challenged amendments render the city’s Goal 9 inventory inadequate.
7 As we have already noted, the city adopted unchallenged findings that the amendments will
8 bring certainty and actually *increase* commercial and industrial development potential, when
9 compared with the old tree removal regulations. In addition, the city explains in the
10 previously quoted findings that the express prohibition in VMC 8.10.090(5)(b) against
11 applying the tree removal standards in a way that would reduce density or an applicant’s
12 proposed commercial or industrial building square footage is sufficient to answer any Goal 9
13 concerns. Absent a more developed argument from petitioners, that finding seems entirely
14 adequate to dispose of petitioners’ Goal 9 concerns. The challenged ordinance makes no
15 changes in the uses that are allowed in the city’s commercial and industrial zones. If VMC
16 8.10.090(5)(b) precludes the city from reducing the density or square footage that an
17 applicant for commercial or industrial development proposes, it is hard to see how the tree

⁹ As we explained in *Opus*:

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

Similarly, in *Home Builders Assoc.*, we explained:

“* * * Petitioners have made a facially plausible showing that the disputed provisions are likely to reduce the supply of buildable lands. Under such circumstances, the city has an obligation to demonstrate that despite any such reductions in development potential for industrial, commercial and residential lands the city’s inventories continue to comply with Goals 9 and 10.” 41 Or LUBA at 447.

1 removal ordinance could possibly reduce the commercial and industrial development
2 potential that existed before the disputed tree removal ordinance was adopted. The new tree
3 removal ordinance imposes discretionary approval standards, but so did the old tree removal
4 ordinance. As far as we can tell, the new tree removal regulation standards are no more
5 discretionary than the old tree removal regulation standards, and petitioners make no attempt
6 to argue otherwise. Petitioners’ speculation that the city will use the discretionary approval
7 standards in the new tree removal regulations to deny applications arbitrarily is simply that—
8 speculation. While we see no reason why the city could not deny an application for
9 commercial or industrial development that made no serious attempt to save trees that could
10 be saved, we also see no reason to question the city’s findings that it will simply use VMC
11 8.10.090(5)(b)(ii) to require changes in applications for approval of commercial or industrial
12 development site plans that would allow additional trees to be saved, where the required
13 changes would not require a reduction in square footage or density and would leave the
14 applicant with the “same overall level of * * * design functionality.”

15 The city’s findings are adequate to demonstrate that the new tree removal and
16 landscaping regulations do not render the city’s inventory of commercial and industrial land
17 inadequate under Goal 9.

18 Finally, most of petitioners’ arguments are directed at what petitioners characterize as
19 a problem with the “quantity” of vacant commercial and industrial lands. However,
20 petitioners also suggest that the disputed tree protection ordinance may impact the “sizes,
21 types, location and service levels” of the city’s inventory of vacant commercial and industrial
22 sites. Petition for Review 22. Beyond making that suggestion, petitioners do not explain
23 why they think the new tree removal regulations will have any impact whatsoever on the
24 “sizes, types, location and service levels” of the city’s inventory of commercial and industrial
25 sites. Petitioners’ arguments in this regard are not adequately developed to merit review.
26 *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Even if petitioners’

1 arguments were sufficiently developed for review, the city’s findings are adequate to
2 demonstrate that the new tree removal regulations will not have any impact on the “sizes,
3 types, location and service levels” of the city’s inventory of vacant commercial and industrial
4 sites.

5 The second assignment of error is denied.

6 The city’s decisions are affirmed.