

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CONCERNED CITIZENS OF THE UPPER)

5 ROGUE and DON CARROLL,)

6)

7 Petitioners,)

8)

9 vs.)

10)

11 JACKSON COUNTY,)

LUBA No. 95-173

12)

13 Respondent,)

14)

15 and)

16)

17 ROBERT BELLAMY and CARL TAFT,)

18 dba ROGUE DEVELOPMENT GROUP,)

19)

20 Intervenors-Respondent.)

21 _____)

22)

FINAL OPINION
AND ORDER

23 EDITH CARROLL,)

24)

25 Petitioner,)

26)

27 vs.)

28)

29 JACKSON COUNTY,)

30)

31 Respondent,)

LUBA No. 95-174

32)

33 and)

34)

35 ROBERT BELLAMY and CARL TAFT,)

36 dba ROGUE DEVELOPMENT GROUP,)

37)

38 Intervenors-Respondent.)

39 _____)

40)

41 CONCERNED CITIZENS OF THE UPPER)

42 ROGUE and DON CARROLL,)

43)

44 Petitioners,)

45)

1 vs.) LUBA No. 95-205
2)
3 CITY OF SHADY COVE,)
4)
5 Respondent,)
6)
7 and)
8)
9 ROBERT BELLAMY and CARL TAFT,)
10 dba ROGUE DEVELOPMENT GROUP,)
11)
12 Intervenors-Respondent.)
13 _____)

14)
15 CONFEDERATED TRIBES OF SILETZ)
16 INDIANS OF OREGON and ROBERT)
17 KENTTA,)
18)
19 Petitioners,)
20)

21 vs.) LUBA No. 95-225
22)
23 CITY OF SHADY COVE,)
24)
25 Respondent,)
26)
27 and)
28)
29 ROBERT BELLAMY and CARL TAFT,)
30 dba ROGUE DEVELOPMENT GROUP,)
31)
32 Intervenors-Respondent.)
33)
34)

35 Appeal from Jackson County and City of Shady Cove.

36
37 Robert D. Van Brocklin, Portland, filed a petition for
38 review and argued on behalf of petitioners Concerned
39 Citizens of the Upper Rogue and Don Carroll. With him on
40 the brief was Stoel Rives.

41
42 Mark J. Greenfield and Craig J. Dorsay, Portland,
43 filed a petition for review on behalf of petitioners
44 Confederated Tribes of Siletz Indians and Robert Kentta, and
45 Mark J. Greenfield argued on their behalf.

46

1 Stephen Mountainspring, Roseburg, represented
2 petitioner Edith Carroll.

3
4 No appearance by respondent Jackson County.

5
6 No appearance by respondent City of Shady Cove.

7
8 John R. Hassen and Richard H. Berman, Medford, filed
9 the response brief. With them on the brief was Blackhurst,
10 Hornecker, Hassen & Ervin B. Hogan. John R. Hassen argued
11 on behalf of intervenors-respondent.

12
13 LIVINGSTON, Referee; GUSTAFSON, Referee, participated
14 in the decision.

15
16 REMANDED 04/08/97

17
18 You are entitled to judicial review of this Order.
19 Judicial review is governed by the provisions of ORS
20 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 In this consolidated appeal, petitioners appeal
4 decisions of the Jackson County Board of Commissioners
5 (county board) and the City of Shady Cove City Council (city
6 council) which amend the city urban growth boundary (UGB) to
7 include approximately 387 additional acres.¹

8 **MOTION TO INTERVENE**

9 Robert Bellamy and Carl Taft, doing business as Rogue
10 Development Group (intervenors), the applicants below, move
11 to intervene on the side of the respondents in this
12 consolidated proceeding. There is no opposition to the
13 motion, and it is allowed.

14 **FACTS**

15 On June 15, 1993, intervenors filed an application with
16 both the city and the county to amend the city's UGB to
17 include 387 acres of land immediately adjacent to the
18 southwestern boundary of the current UGB. At the time of
19 the application, the city limits included 1,272 acres.²

¹Two petitions for review were filed, the first by petitioners Concerned Citizens of the Upper Rogue and Don Carroll (Citizens), and the second by the Confederated Tribes of Siletz Indians of Oregon and Robert Kentta (Tribes). Tribes appeal only the city decision.

²Petitioner contends "the proposed UGB amendment would more than double the size of the City's UGB from 342 acres to 729 acres." Petition for Review 1. Petitioner's contention is based on a statement in the county planning department staff report. Record 1822. That statement is, in turn, apparently based on a statement in the Vacant and Buildable Lands Analysis (Lands Analysis) prepared by Curtis D. Weaver of Southern Oregon

1 The subject property is zoned Exclusive Farm Use and
2 Open Space Reserve. It is located between the Rogue River
3 to the east and south, Rogue River Drive to the west, and
4 Long Branch Road to the north. It has direct access to
5 Rogue River Drive, which is a county road.

6 Upon inclusion of the subject property within the UGB,
7 intervenors intend that there be a contract annexation to
8 the city. Intervenors plan then to develop a planned unit
9 development (PUD) which would include an 18-hole golf course
10 on 182 of the 387 acres. Intervenors anticipate that
11 eventually the remaining 205 acres will be used for 641
12 housing units, consisting of 429 single-family houses, 95
13 town houses, 117 multi-family dwellings and, possibly, a
14 hotel and resort complex. However, the decision does not
15 require that a particular quantity or type of housing be
16 built.³ Record 12, 128.⁴

Planning Services. Record 1955. However, the introduction to the Lands Analysis states it is "an analysis of land that is located in the official adopted City of Shady Cove UGB that lies between the existing City Limits and the UGB line." Record 1954. Thus we understand the proposed amendment to more than double the size of the area outside the present city limits but within the UGB, from 342 acres to 729 acres. Table F-1 of the city's comprehensive plan shows the area within the city limits to be 1,271.91 acres and the amount of urbanizable land (outside the city limits but within the urban growth boundary) to be 341.77 acres. The Lands Analysis uses these figures. Record 1961.

³Because the county and city decisions are essentially the same, we refer to them both as "the decision" except when it is important to distinguish between them.

⁴The record includes a "record" and a "confidential record." We cite to the record as "Record ____" and to the confidential record as "Confidential Record ____."

1 At least some of the 387 acres to be added to the UGB
2 contain archaeological remains and native American burial
3 remains. Some part of the subject property has been
4 designated by the Confederated Tribes of Siletz Indians
5 (Siletz Indians) and the Cow Creek Band of Umpqua Tribe of
6 Indians (Umpqua Tribe) as a "site of archaeological
7 significance," as that phrase is defined by
8 ORS 358.905(1)(b)(B) and used in ORS chapter 358.⁵
9 Confidential Record 314, 412. The designation by the Siletz
10 Indians speaks of the "Far Hills Site" and "Far Hills Ranch
11 (35JA25)" and refers to a site investigated by Wilbur Davis
12 (Davis), an archaeologist, in the 1970s, which Davis called
13 the "Far Hills Ranch (35JA25)." Davis described Site 35JA25
14 as being approximately 100 meters by 35 meters and "defined
15 by surface lithic debris which together with the burial
16 area, was thought to indicate a village complex."
17 Confidential Record 125.

18 The designation by the Siletz Indians also refers to a
19 map "with site boundaries." Confidential Record 314. That
20 map may be the one at Confidential Record 313; if it is, the
21 site boundaries are not clear. There is another map at

⁵ORS 358.905(1)(b) provides, in relevant part:

"'Site of archaeological significance' means:

** * * * *

"(B) Any archaeological site that has been determined
significant in writing by an Indian tribe."

1 Confidential Record 427, made by someone who once was
2 employed on the subject property. Confidential Record 424-
3 26. This map is identical to the map at Confidential Record
4 313, but has markings indicating graves in a larger area
5 than that indicated by the map at Confidential Record 313.
6 The Davis study was limited by available funds, and the
7 Siletz Indians believe the archaeological and burial sites
8 to be larger than shown on either map. Confidential Record
9 6.

10 The designation by the Umqua Tribe refers to "Indian
11 burial grounds on the old Espourteille Ranch South of Shady
12 Cove, Oregon." Confidential Record 412. It is unclear
13 whether this designation refers to a presently defined area
14 or to an area to be defined in the future by the location of
15 Indian burial grounds yet to be discovered.

16 The parties dispute the location of the burial remains
17 and the size of the area they occupy. The challenged
18 decision finds, based on comments in the Davis study, that
19 "most if not all of the burial remains [once on the subject
20 property] were moved from the site to Trail, Oregon" and
21 relies on an unidentified eye witness who "indicated that
22 the presence of remains was limited to approximately 15
23 acres of the 387 acre site." Record 17-18.

24 On January 19, February 16, and March 2, 1994, the city
25 planning commission and county planning commission held
26 joint public hearings at which public testimony was accepted

1 on the proposed UGB expansion. Public hearings for
2 deliberation only were held on March 14 and March 29, 1994,
3 after which the two planning commissions voted to recommend
4 approval of intervenors' application for the amendment of
5 the UGB. The two planning commissions jointly adopted
6 findings of fact in a document entitled "Recommendation for
7 Approval." Record 1281-99.

8 On January 12, January 26, and February 7, 1995, the
9 county board and city council held joint public hearings on
10 the proposed UGB expansion. The record was closed on
11 February 21, 1995. On July 26, 1995, the county board
12 adopted Ordinance No. 95-36, which, subject to two numbered
13 conditions,⁶ adopted the proposed amendment to the city's

⁶The two conditions are:

"Condition 1: The 387 acre subject area shall be used only for a Planned Unit Development containing an 18 hole golf course and housing. The P.U.D. may also contain a hotel and restaurant.

"Condition 2: The Contract of Annexation shall require demonstration of the following, at a duly noticed public hearing, prior to or pursuant to site plan approval:

"A. That sufficient water and sewage disposal capacity will be in place for any new construction prior to the inception of construction.

"B. That the Transportation System Plan for the area has been amended to provide adequate street capacity for the P.U.D., in compliance with OAR 660, ch. 12, and that Applicant provide a traffic impact and needs analysis in conjunction therewith at its own cost.

"C. That all applicable ordinances, statutes and regulations pertaining to Indian artifacts and remains have been or will be complied with, including any Goal 5 ESEE

1 UGB and amended the official county zoning map.⁷ The county
2 board based its approval on both the findings of fact
3 contained in the "Recommendation for Approval," which it
4 incorporated by reference, and on supplemental findings.

requirements, and that Applicant conduct an archaeological survey at its own cost.

"D. That development of the P.U.D. will not violate any federal or state clean air or clean water laws or regulation; and

"E. That Jackson [County's] standards for riparian buffers be followed for any development in the P.U.D." Record 128-29.

⁷The challenged decision of the county board states, in Section 1:

"The Shady Cove, Jackson County, Urban Growth Boundary is hereby amended consistent with the 'Proposed Urban Boundary Map' which is attached hereto as Exhibit '1'. The official Jackson County Zoning Map Number 6 is also hereby amended. * * *"

Neither the decision nor the parties' briefs explain how the "official Jackson County Zoning Map Number 6" was amended. We understand the amendment to the county zoning map to be limited to moving the UGB without changing the zoning of the subject property. That interpretation is supported by the preamble to Shady Cove Ordinance 41 (UGBMA), which is part of the city's comprehensive plan and describes the UGB management agreement between the city and the county; and by UGBMA Policy 2. The preamble provides, in relevant part:

"AN ORDINANCE TO AMEND THE COMPREHENSIVE PLAN FOR THE CITY OF SHADY COVE BY THE INCLUSION OF POLICIES RELATING TO URBANIZATION OF LANDS IN THE SHADY COVE AREA OF JACKSON COUNTY; ESTABLISHING AN URBAN GROWTH BOUNDARY LINE ON THE SHADY COVE COMPREHENSIVE PLAN MAP AND ON COPIES OF THE JACKSON COUNTY ZONING ORDINANCE MAPS; DESCRIBING PROCEDURES FOR REVISION OF THE POLICIES AND BOUNDARY LINE * * *." (Emphasis added.)

UGBMA Policy 2 states:

"A change in the use of urbanizable land from land uses designated on the Jackson County Comprehensive Plan to uses shown on the City Comprehensive Plan shall only occur upon annexation to the City."

1 Record 122-30.

2 On August 24, 1995, the city council adopted Ordinance
3 No. 141, which, subject to the same conditions (plus one
4 additional condition),⁸ (1) adopted the proposed UGB
5 amendment; (2) replaced the population projections in the
6 city comprehensive plan, pages B4-B5, with new population
7 projections, found at Record 2126-27; and (3) replaced the
8 vacant lands analysis in the city comprehensive plan with a
9 new vacant lands analysis.⁹ Like the county board, the city
10 council based its approval on both the findings of fact
11 contained in the "Recommendation for Approval," which it
12 incorporated by reference, and on supplemental findings
13 which are almost identical to the supplemental findings
14 adopted by the county in Ordinance No. 95-36. Record 12-21.

15 **SECOND ASSIGNMENT OF ERROR (CITIZENS)**

16 **A. Applicability of ORS 197.763**

17 Employing the approach taken in Strawberry Hill
18 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 601 P2d

⁸Ordinance No. 141 adds a sixth condition:

"F. That applicant be required to perform any on or off site improvements specifically, voluntarily offered by it in writing in the Record [sic], at its own cost." Record 13.

⁹Ordinance No. 141 states, "The Section of the Shady Cove Comprehensive Plan shall be deleted and replaced by vacant lands analysis referenced at Exhibit 41 of the Planning Commission Record." Record 12. Exhibit 41 is at Record 1953-72. We are uncertain which part of the city's comprehensive plan is specified by "[t]he Section of the Shady Cove Comprehensive Plan." There is no section entitled "vacant lands analysis."

1 769 (1979) (Strawberry Hill), Citizens contend the UGB
2 amendment, the county zoning map amendment and the city
3 comprehensive plan text amendment are each quasi-judicial
4 decisions subject to the procedural requirements set forth
5 in ORS 197.763, including a duly noticed public hearing.
6 The three factors identified by the Oregon Supreme Court in
7 Strawberry Hill, 287 Or at 602-03, are summarized as
8 follows:

- 9 1. Is "the process bound to result in a
10 decision?"
- 11 2. Is "the decision bound to apply preexisting
12 criteria to concrete facts?"
- 13 3. Is the action "directed at a closely
14 circumscribed factual situation or a
15 relatively small number of persons?"

16 The more definitely these questions are answered in the
17 affirmative, the more likely the decision under
18 consideration is a quasi-judicial land use decision. Each
19 of the factors must be weighed, and no single factor is
20 determinative. Estate of Paul Gold v. City of Portland, 87
21 Or App 45, 740 P2d 812, rev den 304 Or 405 (1987).

22 1. Urban Growth Boundary Amendment

23 Intervenors' application to both the city and the
24 county requests an amendment to expand the city's urban
25 growth boundary by 390 acres in order to build an 18-hole
26 golf course, a residential planned unit development and a
27 hotel-resort complex. Record 2169. Once the application
28 was filed, a decision was bound to result. The first factor

1 was present.

2 The second factor is present to some extent in nearly
3 all land use decisions, which almost invariably apply
4 preexisting criteria to concrete facts. See Churchill v.
5 Tillamook County, 29 Or LUBA 68, 71 (1995); Friends of Cedar
6 Mill v. Washington County 28 Or LUBA 477, 482 (1995). The
7 Statewide Planning Goals, Oregon Administrative Rules and
8 the UGBMA apply to an amendment to the city's UGB.

9 Although the application involved an UGB amendment that
10 would double the size of the city's urbanizable land, the
11 amendment was prompted by one development proposal to be
12 accomplished in three phases and, at least as to
13 infrastructure, to be completed in approximately five years
14 from the date of final approval. Record 2154. The two
15 conditions imposed by the city and the county related to
16 that proposal. Thus the challenged decisions were "directed
17 at a closely circumscribed factual situation," even though
18 the specifics of the development proposal are not under
19 active consideration by either the city or the county.

20 Because all three Strawberry Hill factors are present,
21 the amendment of the UGB was a quasi-judicial decision.

22 **2. County Zoning Map Amendment**

23 We understand the county zoning map amendment to be
24 limited to reflecting the proposed change in the city's UGB.
25 The same analysis that applies to the UGB amendment applies
26 to the zoning map amendment. It is also quasi-judicial.

1 **3. City Comprehensive Plan Text Amendment**

2 The text amendment to the city's comprehensive plan to
3 replace the population projections and vacant lands analysis
4 in the city comprehensive plan with new population
5 projections and a new vacant lands analysis does not appear
6 to satisfy any of the three Strawberry Hill factors. The
7 process by which the text amendment was initiated is neither
8 explained by the parties nor readily apparent from the
9 record. Amending the text did not require the application
10 of preexisting criteria to concrete facts. Finally, the
11 effects of the text amendment are not limited to the
12 development proposal underlying the application for a UGB
13 amendment, and the amendment is thus neither directed at a
14 closely circumscribed factual situation nor at a relatively
15 small number of persons. Therefore, the decision to adopt
16 the text amendment to the city's comprehensive plan was
17 legislative, not quasi-judicial.

18 **B. Application of ORS 197.763**

19 **1. Finding Substantial Prejudice**

20 A finding that there has been a procedural violation
21 under ORS 197.763 does not, of itself, justify reversal or
22 remand. ORS 197.840(9)(a)(B) requires that to warrant
23 relief, the failure to follow applicable procedures
24 "[prejudice] the substantial rights of the petitioner." We
25 have described these "substantial rights" as the rights to
26 an adequate opportunity to prepare and submit one's case and

1 a full and fair hearing. Torgeson v. City of Canby, 19 Or
2 LUBA 511, 520 (1990); Muller v. Polk County, 16 Or LUBA 771,
3 775 (1988). ORS 197.840(9)(c) requires a "demonstration of
4 substantial prejudice to the petitioner for a violation of a
5 provision of ORS 197.763."

6 Citizens contend their substantial rights were
7 prejudiced by certain violations of ORS 197.763, which
8 describes required procedures for the conduct of quasi-
9 judicial hearings.¹⁰ Citizens states:

10 "Because the City and the County failed to comply
11 with these fundamental procedural protections,
12 [Citizens] were unable to adequately prepare for

¹⁰ORS 197.763(3) provides, in relevant part:

"The notice provided by the jurisdiction shall:

"(a) Explain the nature of the application and the proposed use or uses which could be authorized;

"(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

"* * * * *

"(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

"* * * * *

"(i) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and

"(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings."

1 the public hearings, were not notified of the
2 availability of and, thus, did not understand the
3 full scope of the application -- particularly as
4 it related to amendments to the City's
5 Comprehensive Plan provisions on population
6 projections and vacant lands, did not fully know
7 or understand the substantive review criteria, did
8 not understand that issues not raised at the local
9 hearings level are not preserved for argument on
10 appeal, did not receive the County staff report
11 soon enough to provide adequate time for review of
12 the report during the Planning Commissions'
13 proceedings, did not fully understand how
14 testimony, evidence and rebuttal testimony and
15 evidence would be received and considered by the
16 City and the County, and never received notice
17 about the procedure that would be used during the
18 local government proceedings which led to the
19 subject decisions. Voluminous evidentiary
20 submissions by the applicant called for responsive
21 written submissions for the Record. Without prior
22 notice of the nature of the application, the
23 applicable criteria, and the procedures to be
24 followed, and without access to important
25 documents, like the Staff Report, the petitioners
26 could not effectively respond on their own behalf
27 or retain consultants to do so." Citizens'
28 Petition for Review 23.

29 Intervenor's contend Citizens have failed to demonstrate
30 that any of the alleged procedural errors prejudiced their
31 substantial rights. Intervenor's point out that Citizens
32 were permitted to testify at several different public
33 hearings before the city and county planning commissions and
34 the city council and county board. Intervenor's observe that
35 Citizens were represented by experienced legal counsel and
36 submitted "several hundred pages of testimony with respect
37 to every applicable criteria." Response Brief 13.

38 In general, to demonstrate procedural error, a

1 petitioner must explain with some specificity what would
2 have been different or more complete had the correct
3 procedures been followed. As explained in Forest Park
4 Estate v. Multnomah County, 20 Or LUBA 319, 329-331 (1990),
5 we require more than general assertions that the
6 petitioner's case would have been better presented had there
7 been no procedural violations below.

8 **2. No Notice of City Comprehensive Plan and**
9 **County Zoning Map Amendment**

10 As stated above, we disagree with Citizens' contention
11 that the amendments to the city comprehensive plan and
12 county zoning map were quasi-judicial decisions. Because
13 the amendments to the city comprehensive plan were
14 legislative, the procedural requirements stated in ORS
15 197.763 do not apply. Since the amendment to the county
16 zoning map, a redrawing of the UGB, does no more than
17 reflect the amendment of the UGB, and since petitioner does
18 not contend the process of amending the UGB was not properly
19 noticed, ORS 197.763 was satisfied with respect to the
20 amendment to the county zoning map.

21 This subassignment of error is denied.

22 **3. No Listing of Applicable Review Criteria**

23 The city and county gave joint notices of the joint
24 hearings before the city council and county board and the
25 city and county planning commissions. Record 1171, 2059,
26 2062. Although the notice of the city/county planning
27 commissions' joint meeting, given on December 20, 1993,

1 states that "the criteria for approval of an Urban Growth
2 Boundary Amendment are attached," there is no attachment in
3 the record where the notices first appear. Record 2059,
4 2062. Citizens contend these notices did not, as required
5 by ORS 197.763(3)(b), list the applicable review criteria
6 "from the ordinance and the plan."¹¹

7 The staff report dated January 27, 1994 discusses the
8 applicable review criteria at length. It was introduced at
9 the February 8, 1994 hearing, after which Citizens and other
10 opponents of the proposal were given an opportunity to
11 speak. On February 23, 1994, Citizens submitted written
12 comments on the staff report. Record 1501-03. Citizens
13 have not demonstrated that they experienced substantial
14 prejudice as a result of any failure to list the applicable
15 review criteria on the notices of the joint planning
16 commission hearings.

17 This subassignment of error is denied.

18 **4. No Notice of Need to Raise Issues**

19 Citizens contend the notices of the joint planning
20 commission hearings failed to include the statements,
21 required by ORS 197.763(3)(e) and (h), that failure to raise
22 an issue at a hearing or provide the decision maker an
23 opportunity to respond precludes appeal to this Board based

¹¹The attachments do follow the notice provided the county building division, which bears the same date as the notice found at Record 2059 and which was returned with comments. Record 1997-2004.

1 on that issue; and that a copy of the application, all
2 documents and evidence submitted by or on behalf of the
3 applicant and applicable criteria are available for
4 inspection. However, petitioners have failed to demonstrate
5 substantial prejudice as a result of these alleged
6 deficiencies in the notices of hearings.

7 This subassignment of error is denied.

8 **5. No Notice of Staff Report's Availability**

9 Petitioners contend that none of the hearing notices
10 stated that a copy of the staff report was available for
11 inspection at least seven days prior to the hearing, as
12 required by ORS 197.763(3)(i), and that, in fact, that staff
13 report was "not made available to petitioners" until January
14 24, 1994, five days after the initial evidentiary hearing on
15 January 19, 1994.¹² Citizens' Petition for Review 20.

16 Citizens had more than two weeks to review the staff
17 report prior to the hearing at which they concluded their
18 testimony. They have not demonstrated that they were
19 substantially prejudiced by the failure of the notice of the
20 planning commission hearings to mention the staff report was
21 available or by the actual failure to make it available
22 prior to the initial evidentiary hearing.

23 This subassignment of error is denied.

¹²The reference to January 24, 1994 may be a typographical error. The staff report is dated January 27, 1994. Record 1835.

1 **6. No Explanation of Testimony and Hearings**
2 **Procedure**

3 Citizens contend the notices failed to include a
4 general explanation of the requirements for submission of
5 testimony and the procedure for conduct of the hearings, in
6 violation of ORS 197.763(3)(j). However, as noted above,
7 Citizens' attorney suggested the procedure that was followed
8 at the February 8, 1994 hearing. Citizens have not
9 demonstrated substantial prejudice.

10 This subassignment of error is denied.

11 **7. Applicant Submitted Application Materials**
12 **after Public Hearing Notices**

13 Citizens contend that, in violation of ORS
14 197.763(4)(a) (1993 Edition), certain documents and other
15 evidence were not provided until after the date of the
16 notice of the joint public hearings before the planning
17 commissions.¹³ However, petitioners do not contend they
18 were not given an adequate opportunity to respond to the

¹³ORS 197.763(4)(a) (1993 Edition) provides:

"All documents or evidence relied upon the applicant shall be submitted to the local government and made available to the public at the time notice provided in subsection (3) of this section is provided."

ORS 197.763(4)(a) was amended in 1995 to delete the requirement that the "documents or evidence" be made available to the public at the time of the notice. However, former ORS 197.763(4)(a) was in effect at the time of the county hearings.

1 documents and other evidence.¹⁴ They have not demonstrated
2 substantial prejudice.

3 This subassignment of error is denied.

4 **8. No Statement of Procedures at Public**
5 **Hearings**

6 Citizens contend the statement required by ORS
7 197.763(5) was not made at the commencement of the hearings
8 before the city and county planning commissions or governing
9 bodies.¹⁵ Respondents dispute the contention. The record
10 is of no assistance in resolving the dispute, because the
11 tape of the first portion of the January 19, 1994 hearing is
12 inaudible. Record 1873.

13 However, as noted above, Citizens had more than two

¹⁴The one example Citizens do give of a document to which they were denied access is one entitled "Resort Hotel, Golf Course and Residential Market Analysis," which Citizens contend was entered into the record on February 22, 1995. Citizens are mistaken. A date stamp on the analysis indicates it was entered into the record on January 11, 1994. Record 2161.

¹⁵ORS 197.763(5) states:

"At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:

"(a) Lists the applicable substantive criteria;

"(b) States that testimony and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision; and

"(c) States that failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal to the board based on that issue."

1 weeks to review the staff report listing the relevant
2 criteria prior to the hearing at which they concluded their
3 testimony. They do not specify a single issue they wish to
4 raise at LUBA that they did not raise below. They have
5 failed to demonstrate substantial prejudice.

6 This subassignment of error is denied.

7 **9. Waiver**

8 Citizens' final point is that because of the city and
9 county "failed to follow the requirements of ORS 197.763,
10 they are entitled to raise any issue on appeal to LUBA under
11 former ORS 197.835(2)(a), notwithstanding their failure to
12 raise the issue below. See Wuester v. Clackamas County, 25
13 Or LUBA 425 (1993). Intervenors respond that ORS
14 197.835(4)(b) (1995 Edition), rather than former ORS
15 197.835(2)(a), applies to this appeal.¹⁶

16 Because Citizens' notice of intent to appeal was filed
17 with the Board on September 28, 1995, their appeal is
18 governed by ORS 197.835(4)(b) (1995 Edition), which became

¹⁶ORS 197.835(4) (1995 Edition) provides, in relevant part:

"A petitioner may raise new issues to the board if:

"* * * * *

"(b) The local government failed to follow the requirements of
ORS 197.763(3)(b), in which case a petitioner may raise
new issues based upon applicable criteria that were
omitted from the notice. However, the board may refuse
to allow new issues to be raised if it finds that the
issue could have been raised before the local government;

"* * * * *"

1 effective on September 9, 1995. Ramsay v. Linn County, 30
2 Or LUBA 283, 285-87 (1996). To raise an issue before the
3 Board that was not raised below, Citizens must show the
4 issues are based on criteria that were omitted from the
5 notice required by ORS 197.763(3)(b). Even if that showing
6 is made, we may refuse to allow new issues to be raised if
7 we find the issue could have been raised below. However,
8 since Citizens do not raise an issue on appeal to LUBA that
9 was not raised below, the point is moot.

10 This subassignment of error is denied.

11 The second assignment of error is denied.

12 **FIRST ASSIGNMENT OF ERROR (CITIZENS)**

13 Citizens contend the city violated Shady Cove Zoning
14 Ordinance (SCZO) Section 264 by adopting, without following
15 the proper procedures, comprehensive plan text amendments
16 that incorporated new population projections and a new
17 vacant lands analysis.¹⁷ Citizens contend specifically (1)

¹⁷SCZO 26.4 states:

"MAJOR OR LEGISLATIVE AMENDMENTS:

"A. Major or legislative amendments are those which may have widespread and/or significant impact on the neighborhood or community beyond the limits of the specific property. A major amendment may also involve a qualitative change of land use or a spatial change affecting a large area or a large number of properties.

"B. Major or legislative amendments require at least one public hearing before the Planning Commission. If approved by the Commission, the City Council will also conduct at least one hearing prior to making the final decision."

"C. The following criteria shall be addressed by the Planning Commission and City Council, along with any other considerations that may be unique or appropriate to the application being processed."

SCZO 26.5 states:

MINOR AMENDMENTS

"A. Minor or quasi-judicial amendments to the Comprehensive Plan or Zoning Map are those which involve one parcel or a small group of parcels and which will not have any significant impact on other lands.

"B. Minor amendments require at least one public hearing before the Planning Commission. If approved by the Commission, the City Council will also conduct at least one hearing prior to making the final decision. If denied by the Planning Commission, the applicant may appeal that decision to the City Council in accordance with the City's appeal procedures.

"C. The following criteria shall be addressed by the Planning Commission and City Council, along with any other considerations that may be unique or appropriate to the application being processed:

"1. The proposal shall be consistent with the City's adopted goals and policies pertaining to land use, growth and development.

"2. The proposal shall be consistent with all applicable statewide planning goals.

"3. A conceptual or specific development plan shall accompany that application to show how the site will be developed and to show that proper facilities, services and utilities can be provided by the developer or other provider to serve the site needs."

SCZO 26.7 states:

"NOTIFICATION OF AMENDMENTS

"A. All major or legislative amendments shall be submitted to the Land Conservation and Development Commission at least forty-five (45) days prior to the final public hearing.

1 the city violated SCZO 26.4(B) and 26.5(B) by failing to
2 provide at least one public hearing before the city planning
3 commission and the city council; (2) the city violated
4 SCZO 26.7(A) and ORS 197.610(1) by failing to submit the
5 amendments to the Land Conservation and Development
6 Commission at least 45 days prior to the final public
7 hearing on the proposed amendments;¹⁸ (3) the city violated
8 SCZO 26.7(B) by failing to give Jackson County 45 days'
9 notice of the final hearing for the amendments; and (4) the

Any comments received from LCDC or other agencies shall be considered at the final hearing.

"B. Jackson County shall also be given 45 days notice of the final hearing for a major or legislative amendment.

"C. Following approval of any major or legislative amendments, copies of the final order or ordinance, along with maps showing the location of the change, shall be forwarded to both Jackson County and LCDC, and similar official notification shall be given to the applicant(s), surrounding property owners, and other parties to the proceedings.

"D. Notice of approval of all minor amendments shall be given in writing to the applicant(s), surrounding property owners, and other parties to the proceedings."

¹⁸Citizens incorrectly states that notice must be given to the Land Conservation and Development Commission (LCDC). ORS 197.610(1) provides:

"A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the director at least 45 days before the final hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The director shall notify persons who have requested notice that the proposal is pending."

ORS 197.015(7) defines "Director" as "the Director of the Department of Land Conservation and Development."

1 city violated ORS 197.615(1) in failing to give DLCD proper
2 notice of the amendments following adoption.¹⁹

3 **A. Public Hearing Requirement**

4 SCZO 26.4(B) requires a public hearing before the
5 planning commission and a hearing before the city council
6 prior to the adoption of a legislative amendment to the
7 city's comprehensive plan.²⁰ Citizens contend the city did
8 not give notice that it was considering amendments to the
9 comprehensive plan text until after the close of the public
10 hearings on the proposed UGB amendment. According to
11 Citizens, it was not clear until the city council's and
12 county board's final deliberations prior to the adoption of
13 their decisions that amendments to the city plan text were
14 contemplated.

15 Intervenors do not dispute Citizens' contention that

¹⁹ORS 197.615(1) provides:

"A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the director a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. If the proposed amendment or new regulation that the director received under ORS 197.610 has been substantially amended, the local government shall specify the changes that have been made in the notice provided to the director."

²⁰As discussed above, the text amendments to the city's comprehensive plan were legislative amendments. Therefore, SCZO 26.4(B), rather than 26.5(B), applies.

1 the city did not hold separately noticed hearings for
2 consideration of the text amendments, but they argue:

3 "[A]s these two issues were the central issues to
4 the UGB amendment, were argued by [Citizens]
5 repeatedly over a two year period and were the
6 subject of hundreds of pages of written testimony
7 and documentation, [Citizens] cannot seriously
8 contend they were deprived of the right to contest
9 these amendments." Response Brief 11.

10 In short, intervenors concede the city violated the
11 applicable procedures for the adoption of a legislative
12 amendment to its comprehensive plan, but argue Citizens have
13 not shown prejudice to their substantial rights, and have
14 therefore provided no basis for reversal or remand.

15 Citizens responded at oral argument that while they
16 were allowed to review the evidence that was ultimately used
17 to justify the text amendments in the context of the
18 proposed UGB expansion, they were not provided an
19 opportunity to comment on the actual text of the amendments.

20 The SCZO does not set forth particular notice
21 requirements which must be satisfied prior to the adoption
22 of a legislative amendment to the city's plan. However,
23 SCZO 26.4(B) requires public hearings before the planning
24 commission and the city council prior to the adoption of a
25 legislative amendment. The failure to hold hearings in this
26 case on the proposed text amendments was a substantive
27 violation of the city code, which affected not only the
28 rights of Citizens but also of anyone else who might have
29 appeared and commented.

1 This subassignment of error is sustained.

2 **B. Notice to DLCD/LCDC**

3 Citizens contend the city violated SCZO 26.7(A) and ORS
4 197.610(1) by failing to submit the amendments to the Land
5 Conservation and Development Commission (LCDC) or DLCD at
6 least 45 days prior to the final public hearing on the
7 proposed amendments. Intervenors respond that both the
8 director and a field representative from DLCD were mailed
9 the ordinance containing the text amendments on or about the
10 same day it was adopted.²¹ Intervenors point out that DLCD
11 has not appealed the challenged decision.

12 ORS 197.610(1) and SCZO 26.7(A), the local code
13 provision which implements ORS 197.610(1), require notice of
14 a proposed plan amendment be given to DLCD at least 45 days
15 prior to the final public hearing.^{22,23} In Oregon City
16 Leasing, Inc. v. Columbia County, 121 Or App 173, 177, 854

²¹SCZO 26.7(A) requires notice to LCDC, while ORS 197.610(1) requires notice to the director of DLCD. We understand notice to the director of DLCD to constitute notice to LCDC.

²²OAR 660-18-020 states the procedure to be followed in giving notice to DLCD. OAR 660-18-021 describes additional procedures for the submission of jointly proposed amendments.

²³Even if Citizens were given adequate notice of the proposal prior to its adoption, ORS 197.610(1) requires the director of DLCD, upon receipt of "the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal," to "notify persons who have requested notice that the proposal is pending." It is clear the director did not receive the proposed text of the amendment prior to its adoption and that the director did not have an opportunity to notify persons who had requested notice.

1 P2d 495 (1993), the court stated,

2 "We do not agree [with LUBA] that the failure to
3 comply with ORS 197.610(1) and ORS 197.615(1), if
4 compliance was required is only a procedural
5 error. * * * ORS 197.610 et seq contain procedures
6 for assuring that amendments to acknowledged local
7 land use legislation and enactments of new
8 legislation comply with the statewide planning
9 goals. That is a substantive matter." (Emphasis
10 added.)

11 Because the failure of the city to comply with ORS
12 197.610(1) is substantive error, it requires remand. This
13 subassignment of error is sustained.

14 **C. Notice to County**

15 Intervenors do not respond to Citizens' contention the
16 city violated SCZO 26.7(B) by failing to give Jackson County
17 45 days' notice of the final hearing for the amendments.
18 However, the county was a co-decision maker throughout the
19 proceedings. It is a respondent in this appeal and has not
20 chosen to cross-appeal the city's decision. Under the
21 circumstances, failure to give the county notice of the
22 final hearing for the amendments was neither a substantive
23 error nor a procedural error that violated the substantial
24 rights of Citizens.

25 This subassignment of error is denied.

26 **D. Notice to DLCD/LCDC of Adoption of Amendments**

27 The record shows that a copy of the city's decision was
28 served on the director and a field representative of DLCD on
29 October 23, 1995. Record 13, 28. Therefore, we reject
30 Citizens' contention the city violated ORS 197.615(1) in

1 failing to give DLCD proper notice of the amendments
2 following adoption.

3 This subassignment of error is denied.

4 The first assignment of error is sustained, in part.

5 **NINTH ASSIGNMENT OF ERROR (CITIZENS)**

6 Citizens note that neither the city nor the county
7 zoning ordinances permit an applicant to initiate a
8 legislative amendment.²⁴ They argue that because the
9 amendments to the county's zoning map and the city's
10 comprehensive plan text are legislative, these amendments
11 were illegally initiated, and a remand is required for new
12 proceedings. We concluded above that the amendment to the
13 county's zoning map was incidental to the quasi-judicial
14 process resulting in approval of the UGB amendment.

15 Perhaps because it can't be done, none of the parties
16 identifies where in the record it is explained precisely
17 when or how the amendments to the text of the city's

²⁴SCZO 26.2 provides:

"INITIATION OF ACTION

"A. A 'legislative' amendment to the text of the comprehensive Plan or a land use regulation may be initiated by the City Council or the Planning Commission.

"B. A 'quasi-judicial' amendment to the Comprehensive Plan Map or Zoning Map, as it affects a specific property or area, may be initiated by the Planning Commission, City Council, or by a property owner or his authorized agent."

1 comprehensive plan were initiated.²⁵ However, SCZO 26.2
2 does not describe a particular procedure that must be
3 followed by the city council or city planning commission,
4 and the failure to follow a formal procedure does not
5 violate these provisions of the city code.

6 The ninth assignment of error is denied.

7 **THIRD ASSIGNMENT OF ERROR (CITIZENS)**

8 Citizens contend, and intervenors concede, the city and
9 county violated ORS 197.763(4)(b) (1993 Edition), which
10 provides:

11 "Any staff report used at the hearing shall be
12 available at least seven days prior to the
13 hearing. If additional documents or evidence is
14 [sic] provided in support of the application, any
15 party shall be entitled to a continuance of the
16 hearing. Such a continuance shall not be subject
17 to the limitations of ORS 215.428 or 227.178."²⁶
18 (Emphasis added.)

19 This procedural violation occurred when, on March 2, 1994,
20 more than one week after the record was closed, intervenors
21 submitted new evidence in support of their application to
22 the joint planning commissions, and Citizens requested a
23 continuance that was not granted. Record 1338, 1408, 1489-

²⁵The text amendments were not expressly initiated by intervenors' application.

²⁶ORS 197.763(4)(b) was amended in 1995 to state that "[i]f additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond." However, former ORS 197.763(4)(b) was in effect at the time of the county hearings.

1 1500.

2 Because the parties agree a procedural violation
3 occurred, the question we must answer is whether Citizens'
4 substantial rights were prejudiced. Citizens argue:

5 "This new evidence was used to justify changes in
6 the city's population projections and to attempt
7 to demonstrate need for more land for housing
8 within the UGB. This procedural error prejudiced
9 [Citizens] because it precluded them from
10 responding to the new evidence. * * * Had a
11 continuance been granted and [Citizens been]
12 allowed to respond to [intervenors'] new evidence,
13 the Planning Commissions may have altered their
14 recommendation to the City Council and Board of
15 Commissioners. In turn, the City Council/Board of
16 Commissioners decisions may have been modified."
17 Citizens' Petition for Review 25.

18 Intervenors answer that because Citizens submitted a
19 detailed rebuttal during the year-long interim between the
20 date of the planning commissions' Recommendation for
21 Approval and the city council/county board proceedings, and
22 because the planning commissions made only recommendations
23 to the governing bodies, which considered additional
24 evidence and testimony as part of a de novo review of the
25 applications, Citizens have not demonstrated the procedural
26 violation prejudiced their substantial rights.

27 We agree with intervenors. The third assignment of
28 error is denied.

29 **FOURTH ASSIGNMENT OF ERROR (CITIZENS)**

30 **A. Introduction**

31 Goal 14 lists seven factors upon which decisions

1 concerning the establishment and change of urban growth
2 boundaries must be based.²⁷ Goal 14, factors 1 and 2, the
3 so-called "need factors," overlap. BenjFran Development v.
4 Metro Service Dist., 95 Or App 22, 27, 767 P2d 467 (1989).
5 The failure to establish need successfully on the basis of
6 one factor or one criterion mentioned in one factor does not
7 preclude the establishment of need based on other factors or
8 criteria. The need factors in Goal 14 will be satisfied if,
9 on the basis of a livability analysis that considers the
10 need factors and is supported by substantial evidence, the
11 city and county determine that the proposed use is needed.
12 1000 Friends of Oregon v. Metro Service Dist., 18 Or LUBA
13 311, 319 (1989) (Metro Service Dist.).

²⁷The seven factors are:

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

1 Citizens contend the city and county "violated and
2 misconstrued the applicable law, failed to make adequate
3 findings and made a decision not supported by substantial
4 evidence" in determining the UGB amendment satisfies Goal 14
5 factors 1 and 2. Citizens' Petition for Review 25.

6 **B. Goal 14, Factor 1**

7 Goal 14, factor 1 is "Demonstrated need to accommodate
8 long-range urban population growth requirements consistent
9 with LCDC goals." Citizens contend the city's and county's
10 findings are inadequate because they do not address specific
11 issues raised by Citizens in connection with factor 1. We
12 understand Citizens to base this contention on the
13 established principle that when a relevant issue is raised
14 in the local proceedings, the decision maker must address
15 the issue in its findings. City of Wood Village v. Portland
16 Metro Area LGBC, 48 Or App 79, 97, 616 P2d 528 (1980);
17 Norvell v. Portland Metro Area LGBC, 43 Or App 849, 853, 604
18 P2d 896 (1979); Eckis v. Linn County, 19 Or LUBA 15, 29
19 (1990). Citizens also contend the findings are not
20 supported by substantial evidence in the whole record.²⁸

21 **1. Findings**

22 Citizens contested at the local level the bases for the

²⁸Whether the modification of the comprehensive plan projections is legislative or quasi-judicial, the requirement for evidentiary support is the same. 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372, 377-78, aff'd 130 Or App 406 (1994) (North Plains).

1 population projections which the city and county ultimately
2 adopted to justify an expansion of the UGB. In their brief
3 they repeat many of the arguments they made below. They do
4 not challenge the adequacy of the findings by identifying
5 specific issues the findings do not address, but instead
6 discuss reasons why the evidence does not support the
7 findings that were adopted. We therefore reject Citizens'
8 contention that the findings with respect to Goal 14, factor
9 1 are inadequate because they do not address specific issues
10 raised by petitioners below.²⁹

11 **2. Substantial Evidence**

12 In making findings concerning the city's past and
13 projected population growth, the city and county planning
14 commissions relied upon the evidence and analysis of Curt
15 Weaver (Weaver), a "professional planning consultant," who
16 testified that "his population estimate is based upon
17 analysis of the 1980 and 1990 federal census, Portland State
18 University's estimates, building permits issued, and the
19 Shady Cove Comprehensive Plan projections." Record 1201.
20 Weaver also "presented evidence that sewer hook-ups, power
21 hook-ups and voter registration support his calculation of
22 1,880 persons. Exhibit No. 138, Page 520 of the Record

²⁹Citizens may be contending that the city and county did not respond adequately in the findings to the evidence they presented. We reject that contention. A decision maker is not required to demonstrate in its findings that it considered all of the evidence in the record. Angel v. City of Portland, 22 Or LUBA 649, aff'd 113 Or App 169 (1992).

1 [Record 1490-1500]." Id.

2 The Recommendation for Approval explains that Citizens
3 and other opponents

4 "submitted population estimates prepared by the
5 Center for Population Research and Census at
6 Portland State University * * * Portland State
7 estimates that the population of Shady Cove has
8 increased by 3.83% over the last eight years.
9 Portland State estimates that 1,555 persons
10 currently reside in Shady Cove. The basis for the
11 Portland State University estimates is not
12 included in the record.

13 "Furthermore, the opponents [sic] submitted and
14 relied upon a table of estimated population growth
15 for the past four years calculated by Applicant. *
16 * * The information in this table was based on the
17 issuance of new building permits in Shady Cove for
18 the past four years. Applicant used a 'persons
19 per household' factor of 2.2. This figure is a
20 conservative estimate given that a factor of 2.4
21 was used in the Comprehensive Plan. By these
22 calculations, the population of Shady Cove has
23 increased by 73 persons in 1990, 141 persons in
24 1991, 150 persons in 1992, and 176 persons in
25 1993.

26 "Portland State estimates a population growth of
27 25 people in 1990, 25 in 1991, 80 in 1992, and 90
28 in 1993. Exhibit 92, Page 355 [Record 1663].
29 Because these figures for the past four years work
30 out to less than one person per new dwelling, the
31 Commissions find that the population figures
32 presented by Mr. Weaver more accurately reflect
33 population growth in Shady Cove than the estimates
34 prepared by Portland State University.

35 "The Commissions find the information submitted by
36 opponents and prepared by applicants to be more
37 persuasive." Id.

38 After the city and county planning commissions'
39 hearings, Citizens submitted a study prepared by Richard

1 Stevens (Stevens), a "professional land use consultant," in
2 rebuttal. Intervenors then submitted an additional study
3 prepared by Jim Shields (Shields). The challenged decision
4 includes the following additional finding with respect to
5 population growth:

6 "We have considered the critical analysis of the
7 joint commissions' findings upon population
8 growth, including the analysis presented by
9 Richard Stevens as Exhibit No. 81 of the City
10 Council Record. [Record 878-912] We note that
11 since the joint commissions' findings were
12 submitted, Portland State has reported its
13 estimated population growth from 1993 to 1994 in
14 the amount of 160 persons.^[30] * * * This equates
15 to a nine to ten percent growth rate in the last
16 year, depending upon which population figure is
17 relied upon as a base. We have also considered
18 the rebuttal argument made by Jim Shields in his
19 memorandum at Page 583 of the City Council Record
20 [Record 223-37], and have concluded that the
21 population projections presented by applicant are
22 more realistic. We therefore adopt and ratify the
23 joint commissions' finding in Section 2.2(A)
24 [Record 1200-01] and adopt the population
25 projections at pages 76-77 of the Planning
26 Commission Record [Record 2127]." Record 123.

27 As a review body, LUBA is authorized to reverse or
28 remand the challenged decision if it is "not supported by
29 substantial evidence in the whole record."
30 ORS 197.835(9)(a)(C). Substantial evidence exists to
31 support a finding of fact when the record, viewed as a

³⁰, The PSU estimate for July 1, 1993 is 1,555 persons, and is found in a letter from Edward Schafer, Director of the Population Research Center at PSU. Record 1587. The PSU estimate for July 1, 1994 is 1,715 persons and is found in a letter from Howard Wineburg, Ph.D., Estimates Program Manager of the Population Research Center at PSU. Record 490, 1587.

1 whole, would permit a reasonable person to make that
2 finding. Dodd v. Hood River County, 317 Or 172, 179, 855
3 P2d 608 (1993). In reviewing the evidence, we may not
4 substitute our judgment for that of the local decision
5 maker. Rather, we must consider and weigh all the evidence
6 in the record to which we are directed. Younger v. City of
7 Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000
8 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842
9 P2d 441 (1992). Where the evidence is conflicting, if a
10 reasonable person could reach the decision the county made,
11 in view of all the evidence in the record, we will defer to
12 the county's choice between conflicting evidence. Mazeski
13 v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or
14 App 258, 890 P2d 455 (1995).

15 As the Court of Appeals observed, "[t]he line between
16 reweighing evidence and determining substantiality in the
17 light of supporting and countervailing evidence is either
18 razor thin or invisible to tribunals that must locate it."
19 1000 Friends of Oregon v. Marion County, 116 Or App at 588.
20 That task is particularly difficult when the record is as
21 voluminous as it is in this case.³¹

22 We begin by noting that, as Citizens point out, ORS

³¹The record has more than 2,000 pages. We limit our review to those documents either cited by the parties in their briefs or specified in the planning commissions' and governing bodies' findings. Eckis v. Linn County, 110 Or App 309, 313, 821 P2d 1127 (1991) (LUBA is not required to search the record looking for evidence with which the parties are presumably already familiar).

1 190.510 to 190.610 delegate state census responsibilities to
2 the State Board of Higher Education (State Board).³² The
3 State Board in turn has delegated these responsibilities to
4 the Center for Population Research and Census (CPRC),
5 established in 1965 at Portland State University (PSU).
6 OAR 577-50-005.

7 ORS 190.520 requires the State Board (i.e., CPRC) to
8 estimate annually the population as of July of each city and
9 county in the state and by December 15 to prepare a
10 certificate of population showing that estimate. If
11 requested, any city must "furnish such available information
12 as may be required by the [State Board] in securing accurate
13 data and information upon which to base its estimates." ORS
14 190.590. Each city may on its own initiative supply
15 additional data, including housing data, group quarters
16 data, annexation data, and utility data, that can be used to
17 evaluate the population estimate. OAR 577-50-020(4).³³ If

³²Although these census responsibilities include counties as well as cities, our discussion is limited to cities.

³³OAR 577-50-020(4) provides:

"(a) Housing Data:

"(A) Since incorporated cities provide the CPRC with annual building and demolition data by type of unit, these annual data may be reviewed by the city and by the CPRC. If the city has originally submitted incorrect building and demolition data, it must resubmit all building and demolition data broken down by month from the date of its last official census (either Federal or CPRC). The CPRC

will then reevaluate the city's estimate and determine if an adjustment is to be made;

"(B) Mobile home inventories may be reexamined and resubmitted for the estimate year in question if errors are found in city submitted data. The CPRC will reevaluate the city's estimate based on corrected mobile home input as of March 31 of the estimate year in question.

"(b) Group Quarters Data: If a city has originally submitted incorrect data on group quarters population, it may resubmit a detailed summary of all group quarters facilities within the incorporated limits of the city, and their respective populations as of March 31 of the estimate year in question;

"(c) Annexation Data: Since cities provide annexation data to the CPRC on a quarterly basis, these data may be reviewed by the city and the CPRC. If city-submitted annexation data are incomplete, the city may submit annexation questionnaires for each omitted annexation and schedules for each housing unit involved in each annexation. If there are more than 125 housing units in any single annexation, the CPRC must conduct the census of the annexation area at the city's expense. This additional population data will be used to reevaluate the city's estimate;

"(d) Utility Data: If a city chooses to supplement housing data with utility data, the following criteria apply:

"(A) The utility boundaries must be entirely comparable to the corporate limits of the city;

"(B) The coverage of the population by the utility must be evaluated against the last decennial census household count, i.e., the number of housing units serviced by the utility in the last decennial census year should be in general agreement with the number of occupied housing units enumerated in the last decennial census year;

"(C) Master meters must be accounted for. One meter in use for an entire building misrepresents the number of residential units' in addition, conversions from master meters to individual meters must be checked;

"(D) Care must be taken not to count vacant rental units that do not disconnect power between occupants."

1 officially requested, the State Board will conduct at a
2 city's expense, an actual count of the population of a
3 particular area and prepare a certificate of population
4 based upon such a count. Under ORS 190.530, a city may
5 petition for reconsideration.

6 The population shown in the certificate of population
7 becomes the "official population" of the city, and is "the
8 official and exclusive basis for determining per capita
9 allocation and payment of funds to such city * * *."
10 ORS 190.540(2). The U.S. Bureau of Census recognizes CPRC
11 conducted censuses and surveys and accepts CPRC figures for
12 federal revenue sharing estimates. OAR 577-50-020(5).

13 The official CPRC population figures for the city as of
14 July 1 of each year are 1,190 in 1985, 1,195 in 1986, 1,235
15 in 1987, 1,305 in 1988, 1,335 in 1989, 1,360 in 1990, 1,385
16 in 1991, 1,465 in 1992, 1,555 in 1993 and 1,715 in 1994.
17 Record 490, 1587-88. The U.S. Census Bureau figure for the
18 city's population as of April 1, 1990 is 1,351, which is
19 consistent with the CPRC figure of 1,360 as of July 1, 1990.
20 Record 1588. Using Weaver's method of calculating low,
21 medium and high growth projections based on the city's
22 population growth during specified periods, the figures
23 become 2.72 percent (based on the city's population growth
24 from 1980 to 1993), 3.44 percent (based on the city's
25 population growth from 1985 to 1993), and 6.0 percent (based
26 on the city's population growth from 1989 to 1993).

1 The challenged decision relies on the population
2 figures and analysis in the Weaver and Shields studies.
3 Weaver's population figures as of an unspecified date in
4 each year are 1,190 in 1985, 1,195 in 1986, 1,235 in 1987,
5 1,305 in 1988, 1,335 in 1989, 1,415 in 1990, 1,555 in 1991,
6 1,705 in 1992, 1,880 in 1993. Record 2126. Thus Weaver's
7 figures are identical to the CPRC figures through 1989,
8 after which Weaver's figures increase much more rapidly: by
9 6.0 percent between 1989 and 1990, 9.9 percent between 1990
10 and 1991, 9.6 percent between 1991 and 1992 and 10.3 percent
11 between 1992 and 1993. Id. Weaver's low, medium and high
12 growth projections are based on, respectively, his figures
13 for the city's population growth from 1980 to 1993 (4.3
14 percent); the city's population growth from 1985 to 1993
15 (6.0 percent); and the city's population growth from 1989 to
16 1993 (7.7 percent).³⁴ Id.

17 Citizens contend the findings adopting Weaver's
18 population figures and population projections are not
19 supported by substantial evidence both because Weaver has no
20 established qualifications to estimate present and future
21 urban populations and because his methods and assumptions
22 were not shown to be consistent with standard practices

³⁴The growth projections in the city's comprehensive plan at Table B-2, prior to amendment, are 1.2 percent (low), 3.0 percent (medium) and 4.6 percent (high).

1 employed by population forecasting experts.³⁵ We agree with
2 Citizens that testimony from a witness who is not shown to
3 be qualified by education or experience to evaluate evidence
4 and draw conclusions concerning a highly technical and
5 complex subject raises substantial evidence concerns,
6 particularly when it is contradicted by evidence such as the
7 official population estimates prepared by CPRC and letters
8 from CPRC experts. See Record 480, 990. The CPRC estimates
9 are rendered more credible by the opportunity provided to
10 the city to challenge them and the incentive (higher tax
11 distributions) for the city to do so. However, the U.S.
12 Census Bureau and the CPRC figures are presumably not
13 infallible. If the figures used and the analysis found in
14 the Weaver and Shields studies would permit a reasonable
15 person to make the challenged findings in light of the U.S.
16 Census Bureau and the CPRC figures, we must find the
17 disputed population projections are supported by substantial
18 evidence in the whole record.

19 The Weaver population study states the population
20 estimates found in the city's 1985 comprehensive plan and
21 then states "actual" populations which are substantially
22 higher. Record 2105. It then lists four "planning
23 assumptions" which are not supported by any evidence, but

³⁵Citizens do not question the qualifications of Shields, who prepared his study for Southern Oregon Planning Services. Intervenors do not provide evidence of the qualifications of either Weaver or Shields.

1 which, if true, would support the conclusion that "the
2 city's population is growing more quickly than anticipated
3 in 1985." Record 2106. A table containing population
4 estimates and projections follows, apparently based in part
5 on the planning assumptions. The study then concludes that
6 the city "for the past 8 years has experienced a 6% average
7 increase in population." Record 2106. Relevant attachments
8 to the study include (1) a table entitled "Population
9 Growth," portions of which are quoted above; (2) a table
10 entitled "Population Projection," which projects population
11 increases from 1993 based on Weaver's low, medium and high
12 growth rates and which contains calculations of houses
13 required for the projected increased population, based on
14 2.2 persons per house; and (3) a table showing city building
15 permits issued in the years from 1989 to 1993. Record 2126-
16 27, 2130. The table shows that in 1989 there were 18 stick
17 built house permits issued; in 1990 there were 20 stick
18 built house permits and 13 mobile home permits issued; in
19 1991 there were 21 stick built house permits and 43 mobile
20 home permits issued; in 1992 there were 13 stick built house
21 permits and 55 mobile home permits issued; and in 1993 there
22 were 20 stick built house permits and 60 mobile home permits
23 issued. Record 2130. Multiplying the number of permits in
24 each year by 2.2 persons, the table shows 73 new persons in
25 1990, 141 new persons in 1991, 150 new persons in 1992 and
26 (estimated) 176 new persons in 1993. These figures are

1 employed in the population growth table found at Record
2 2126.

3 In addition to the permit information, Weaver
4 considered utility data in the form of (1) an increased
5 number of accounts billed for use of the city sewer system;
6 and (2) Pacific Power accounts. The utility data shows a 29
7 percent increase in accounts from 480 in 1990 to 620 in
8 1993. Some of these accounts -- those for mobile home parks
9 -- represent multiple connections to the sewer system. By
10 multiplying the 1990 population figure of 1,415 and
11 obtaining 1,825 and then adding the population (85 persons)
12 represented by the multiple connections, Weaver obtains a
13 population figure of 1,910 persons for 1993, which is
14 consistent with his estimate of 1,880 persons. Record 1497.

15 In 1993, Pacific Power had 843 residential accounts
16 within the city limits. Multiplying that number by 2.2
17 persons per account, Weaver obtains a 1993 population figure
18 of 1,855. Id.

19 Finally, Weaver contacted a Jackson County clerk
20 "to determine if there was [a] correlation between
21 the number of registered voters in [a] precinct
22 and the population of the same. She indicated
23 that a factor of 1.7 times the number of
24 registered voters gives a very close approximation
25 of the population. As of 1/31/94 there were 1,110
26 registered voters in Shady Cove. This equates to
27 1,887 population using the 1.7 factor." Record
28 1497.

29 The Shields study notes that Goal 14, factor 1 focuses
30 on a demonstrated need "to accommodate long-range urban

1 population growth requirements," rather than on evidence of
2 past populations. It explains that the 1980 U.S. Census and
3 the CPRC estimates for 1981 to 1990 provided "a historical
4 base from which to start." Record 223. It describes the
5 basis for the CPRC estimates:

6 "These 'estimates' are compiled from City
7 Population Questionnaires (see attached Shady Cove
8 1992 questionnaire) and are based on statistics
9 compiled from April 1 of the previous year to
10 March 31 of the current year. The following is
11 from the instructions on the questionnaire. **'This**
12 **report will advise the Center of the changes in**
13 **the total number of housing units in your city**
14 **(annexed units are added in from the Center's**
15 **records). These figures will be used to produce**
16 **the annual estimate of the city's population which**
17 **is used by the State of Oregon to distribute**
18 **certain state revenue.'** The information on the
19 permit comes almost exclusively from the city's
20 building permit log. It is from these same
21 questionnaires and the city's building permit log
22 that the applicant[']s population projections were
23 developed. The 1990 population figure of 1415
24 used by the applicant was the [CPRC] July 1, 1990
25 'estimate' * * * ." (Bold in original.)
26 Record 223a.³⁶

27 The Shields study also contains a table which shows the
28 city's population growth since 1990 calculated in four
29 different ways.³⁷ Record 225. Depending on the approach
30 taken, the average annual increase in those four years
31 ranges between 5.9 percent (if the CPRC figures are used)

³⁶This page of the record is not numbered. It follows Record 223 and precedes Record 224.

³⁷Although the figures in column 2 are wrong, the growth rate of 5.9 percent is the same when the correct figures are used.

1 and 7.7 percent (if the U.S. Census Bureau figure for 1990
2 is used and the Shields "housing permit" figures are used
3 thereafter).

4 We agree with the Shields study that the question posed
5 by Goal 14, factor 1 is not necessarily what the city
6 population has been in the past, but what it will be in the
7 future. However, both Citizens and intervenors, as well as
8 the city and county decision makers, focus exclusively on
9 historical data of various kinds to justify their population
10 projections. Therefore, we do the same.

11 By the time the challenged decision was made, the
12 record did contain some information about how the CPRC
13 estimates population. As the Shields study explains, the
14 estimates are based, at least in part, on a consideration of
15 the same data that provided the primary basis for the
16 Weaver/Shields estimates: new construction as represented
17 by building permits. In its annual questionnaire, the CPRC
18 requests additional data the Weaver/Shields estimates do not
19 consider.³⁸ A December 27, 1994 letter from the CPRC

³⁸The CPRC questionnaire requests information concerning added single units, subtracted single units, added multiple units and subtracted multiple units. It explains:

"TYPES OF HOUSING UNITS include new construction as represented by building permits, housing units moved into the city, conversions from non-residential use, conversions from another type of housing (e.g., a single unit converted to a duplex is TWO added multiple units and one subtracted single unit).

"TYPES OF SUBTRACTED UNITS include demolitions, conversions to non-residential use, condemnations, abandonments, destruction

1 estimates program manager explains:

2 "The 1994 population estimate considers the
3 housing starts in Shady Cove from 1990-1994.
4 Further, the 1994 population estimate is
5 consistent with the current number of housing
6 units in Shady Cove as reported to me by the city
7 recorder in August, 1994." Record 894.

8 The Weaver study purports to be based on "analysis of
9 the 1980 and 1990 federal census, [the CPRC] estimates,
10 building permits issued, and the Shady Cove Comprehensive
11 Plan projections." Record 1201. However, the study
12 includes no analysis of the 1980 and 1990 federal census;
13 the CPRC estimates are accepted until 1989 and then rejected
14 without an explanation of why they could be believed until
15 1989 and not thereafter; the CPRC considers the same
16 building permits data as Weaver; and the comprehensive plan
17 projections are based on the 1980 census rather than on more
18 recent data.

19 Weaver's collection of utility information appears to
20 be an effort to emulate what the CPRC would do if it had
21 utility information, but there is no demonstration that
22 Weaver employed the safeguards used by CPRC, which are
23 described in OAR 577-50-020(c). The sewer hookup
24 information makes no distinction between residential and

by fire or other non-intentional destruction, housing units
moved out of the city and conversions to other types of
housing." Record 228.

Information concerning mobile homes and group quarters facilities (where
unrelated persons reside) is requested separately.

1 other accounts. The resident-to-voter ratio of 1.7 is not
2 based on an authoritative source. See Record 875. Finally,
3 the multiplier of 2.2 persons per household is ultimately
4 abandoned in the Shields analysis.

5 The Shields analysis also relies on building permits
6 issued from 1991 to 1994 and on Weaver's utility data. As
7 Citizens point out, no consideration is given to the strong
8 possibility that some building permits did not result in
9 actual construction, that demolition may have offset new
10 construction, or that some construction was not immediately
11 occupied.

12 The finding in the supplemental findings of the city
13 and county governing bodies that the CPRC estimate of
14 population growth from 1993 to 1994 "equates to a nine to
15 ten percent growth rate in the last year, depending upon
16 which population figure is relied upon as a base," Record
17 123, highlights the methodological confusion that pervades
18 the population analysis of intervenors' consultants, who
19 have no demonstrated expertise, and makes its way into the
20 challenged decision.³⁹ The consultants' unquestioning
21 reliance on the CPRC population figures from 1980 to 1989
22 indicates they consider the figures authoritative. Then,
23 without any explanation of why the data used or the methods

³⁹The finding itself does not explain the significance of a "nine to ten percent growth rate" in one year. If the CPRC figures from 1990 to 1994 are used, the growth rate is about six percent per year.

1 that generated the CPRC figures are deficient, they abandon
2 the CPRC figures for the years after 1989 in favor of an
3 analysis that relies on incomplete data and changing and
4 unsupported assumptions.

5 Accepting the reasoning of the parties and the city and
6 county that past population growth forms the best basis for
7 population projections based on need, we conclude the
8 evidence in the whole record would not permit a reasonable
9 person to adopt the population projections presented by
10 intervenors' consultants and relied upon in the challenged
11 decision. This subassignment of error is sustained.

12 **C. Goal 14, Factor 2**

13 Goal 14, factor 2 is "need for housing, employment
14 opportunities, and livability." Citizens challenge the
15 city/county decisions with respect to each of these needs.

16 **1. Housing Need**

17 Citizens first argue that to the extent the city's
18 findings as to housing need are based on erroneous
19 population projections, those findings are erroneous. We
20 agree.

21 Citizens next argue that the type of development
22 proposed does not meet the city's historic housing needs.
23 Citizens point out that between 1990 and 1993, the city
24 issued 74 stick-built home building permits and 171 mobile
25 home building permits. Record 2130. Citizens cite various
26 statements in the record that support the conclusion the

1 proposed housing will not be aimed at satisfying the needs
2 of the present population, but will instead attract
3 wealthier people from outside the area. Record 1818, 1202,
4 2107.

5 Intervenor's respond:

6 "[Citizens] argue that 70% of the building permits
7 issued in the last several years in Shady Cove
8 have been for mobile homes. They extrapolate from
9 this fact that Shady Cove needs more mobile homes.
10 According to [Citizens'] logic, every Oregon city
11 will be locked into the same pattern of
12 development it has encountered in the past several
13 years. Poor cities will have to remain poor and
14 rich cities will have to remain rich. Clearly,
15 this type of economic apartheid was not intended
16 by LCDC in enacting Goal 14." Response Brief 25.

17 The challenged decision states:

18 "This proceeding is merely an expansion of the UGB
19 and not a site plan approval. The only limitation
20 on the use of the subject 387 acre area, is that
21 it be used approximately one half for housing and
22 one half for an 18 hole golf course. Although the
23 applicant has stated that it intends to place more
24 expensive homes in the area, the cost of the
25 housing to be provided is not an element of the
26 application nor is it an element of the
27 restrictions being placed on development of the
28 area by the Council. It remains to be seen what
29 type of housing will be built in the area."⁴⁰
30 Record 123-24.

31 While the city and county are correct that the proposal
32 calls first for an expansion of the UGB, it is impossible to
33 determine housing need without considering whose needs are

⁴⁰This finding is in the Recommendation for Approval. It was adopted by the decision of the governing bodies. Record 124.

1 being addressed. By relying on historical data concerning
2 the city's population to justify population projections, the
3 city and county have confined their analysis to the housing
4 needs of the existing population. A development aimed at a
5 different population will not address these housing needs.
6 Assuming a development of \$200,000 to \$300,000 stick-built
7 houses surrounding a golf course with a hotel and restaurant
8 will not satisfy the historic demand for less expensive
9 housing, the question we must answer is whether the UGB
10 should be amended to accommodate a type of development that
11 arguably will not occur without it.

12 This question is similar to the one posed in BenjFran
13 Development v. Metro Service Dist., 17 Or LUBA 30 (1988),
14 aff'd 95 Or App 22 (1989), in which we concluded Metro could
15 find that a UGB amendment adding land was needed to allow a
16 particular type of industrial park, provided it first
17 demonstrated the need for such land by (1) increasing
18 projected populations; (2) amending the economic, employment
19 and other assumptions applied to those population figures in
20 originally justifying the UGB; or (3) doing both. Id. at
21 42.

22 We reject Citizens' contention that to justify a UGB
23 expansion on the basis of housing need, the city must
24 demonstrate the need is for the same type of housing as has
25 been most popular in the past. As the county board and city
26 council findings remark, a development which will attract

1 tourists and retirees is shown to be needed by various
2 existing Shady Cove Comprehensive Plan (SCCP) plan
3 provisions, including the assessment of local economic
4 opportunities and two land use policies. Record 124, SCCP
5 C-7, F-12, F-13.⁴¹

⁴¹The section discussing local economic opportunities states:

"Among the potential ways to build upon Oregon's economic base identified by the Oregon Economic Development Department, two are particularly appropriate for consideration in Shady Cove: 1) marketing package tours for different classes of tourists; and 2) attracting retirement communities. Travel and tourism is already one of Oregon's leading industries and Shady Cove is well located to provide tourist services including retail businesses of several types and overnight accommodations. These types of businesses are therefore given primary emphasis in the community's economic development plans and strategies. A secondary emphasis is the provision of goods and services to local people.

"The strength of the Shady Cove area is its ability to attract tourists and retirees. * * *

"Reliance on the tourist trade results, however, in a depressed local economy during the off-season. Therefore, the city should work over the long term for a balance of tourist and non-tourist businesses. The growing number of retired persons could help to provide some stability by bringing money into the community year-round. * * *" SCCP C-7.

Land Use Policy 4 states:

"Planned Unit Developments shall be allowed in all zones, except the public uses district, in order to encourage better use of large and unique sites through density transfer, clustering of utilities and retention of open space." SCCP F-12.

Land Use Policy 12 states:

"In order to encourage the development of commercial enterprises oriented to tourists at the most appropriate locations, the site plan review approval of commercial uses on parcels fronting on the Rogue River shall include a finding

1 However, if the city wishes to recognize a housing need
2 for a different population, it must amend its population
3 projections to recognize both the natural growth of the
4 present population and the addition of a new population
5 group. Furthermore, as discussed below, the city must
6 describe the project that is intended to attract the new
7 population group with enough specificity that it is
8 reasonably clear the UGB amendment will accomplish the
9 desired objective.

10 **2. Livability**

11 Citizens contend the findings regarding livability are
12 inadequate because they neither identify a significant
13 livability problem or problems nor evaluate the probable
14 positive and negative livability impacts that may occur if
15 the UGB is amended. See Metro Service Dist., 18 Or LUBA at
16 320. The only finding that expressly addresses livability
17 states:

18 "The Commissions find that this project will

that either: A) the proposed use will be or will promote
commerce with the [traveling] public; or B) the proposed use
will not interfere with nor preempt said commerce on that or
adjacent parcels." SCCP F-13.

The decision does not mention Population Policy 2, which also may be
relevant:

"To strive for a balance of population characteristics,
including age and economic levels. The objective of this
policy is to establish a community with opportunities for all
residents, regardless of age, racial/ethnic background, or
economic status. Efforts should be made to attract more
families as well as providing for the needs of the elderly and
retired population." (Emphasis added.) SCCP B-6.

1 create an attractive golf course and restaurant
2 with river views which is open to the public. It
3 will give the residents of Shady Cove new and
4 additional access to the Rogue River and provide
5 new recreation and entertainment opportunities and
6 an increased customer base for Shady Cove
7 businesses." Record 1203.

8 While this finding describes certain anticipated positive
9 impacts, it does not identify an existing significant
10 livability problem justifying a UGB expansion, and it does
11 not evaluate potential negative impacts. As we pointed out
12 in Metro Service Dist.,

13 "once the issue of potential negative livability
14 impacts due to the proposed UGB amendment is
15 raised, [the decision maker] is obligated to
16 consider whether any probable negative livability
17 impacts are such that the expected net livability
18 gain does not support a finding of Goal 14
19 'need.'" 18 Or LUBA at 320 n8.

20 Intervenors contend the necessary livability findings
21 are made elsewhere in the challenged decision. To the
22 extent intervenors specify such findings, we do not find
23 them an adequate substitute for a livability analysis under
24 Goal 14, factors 1 and 2.

25 **3. Planning Designations, Housing Density and**
26 **Type, and Needed Public Facilities and**
27 **Services.**

28 Citizens observe that the decision to expand the UGB is
29 based on the desire to improve the housing mix in the city,
30 and complain that the decision does not require the
31 development occur in a way that will provide the desired
32 housing mix. In a statement quoted in context above,

1 Citizens point out the challenged decisions expressly note,
2 "It remains to be seen what type of housing will be built in
3 the area." Record 124. Finally, Citizens contend that
4 without clearer direction about the planning designations
5 and zoning districts that can ultimately be applied to the
6 subject property, the city's ability to provide public
7 facilities and services to the property is uncertain.

8 Intervenors respond that Citizens' contention
9 "belies a lack of understanding of real world
10 economics. Housing need translates to housing
11 demand. Any rational developer will create
12 development for which there is a market and will
13 develop to the maximum intensity allowed."
14 Response Brief 28.

15 Intervenors also remark that the city will eventually have
16 site plan review over the PUD design, and while "the
17 intensity of development is not a condition of the approval,
18 a clear expectation has been created by Applicants and the
19 City as to the general type of development that will be
20 created." Id.

21 Neither "real world economics" nor "clear
22 expectation[s]" are sufficient to ensure that if the UGB
23 amendment is granted, the type of housing being proposed to
24 justify it will actually be built. See DLCD v. City of St.
25 Helens, 29 Or LUBA 485, 498, aff'd 138 Or App 322 (1995)
26 (UGB amendment to accommodate a Wal-Mart store must be
27 conditioned on construction of the store); 1000 Friends of
28 Oregon v. City of North Plains, 27 Or LUBA 372, 383-84,

1 aff'd 130 Or App 406 (1994) (North Plains). We agree with
2 Citizens that the UGB expansion must be conditioned on
3 zoning and developing the subject property to achieve the
4 result that the city deems necessary to provide the needed
5 housing, recreation and population mix.⁴²

6 The fourth assignment of error is sustained.

7 **FIFTH ASSIGNMENT OF ERROR (CITIZENS)**

8 Citizens contend the challenged decision errs in
9 determining the UGB amendment satisfies Goal 14, factors 3-
10 7.

11 **A. Goal 14, Factor 3**

12 This factor requires that expansion of the UGB be based
13 on consideration of "[o]rderly and economic provision of
14 public facilities and services[.]" In other words, there
15 must be adequate plans in place or at least an adequate
16 factual basis to demonstrate that water and sewer service
17 can reasonably be provided to the UGB expansion area over
18 the planning period, without leaving the area already
19 included within the UGB with inadequate facilities and
20 services. North Plains, 27 Or LUBA at 389-90; City of
21 LaGrande v. Union County, 25 Or LUBA 52, 60 (1993). The
22 Recommendation for Approval finds the "medium projected
23 population" for the year 2010, which is when the decision

⁴²DLCD provided suggestions in its January 24, 1994 letter to the county as to how this might be accomplished. Record 1850-51.

1 assumes the proposed development will be complete, will be
2 4,949 persons. Record 1202.

3 The second condition of the decision addresses water,
4 sewer and transportation issues. It provides that the
5 contract of annexation between the city and county shall
6 require a demonstration at a public hearing prior to or
7 pursuant to site plan approval that "sufficient water and
8 sewage disposal capacity will be in place for any new
9 construction prior to the inception of construction" and
10 that "the Transportation System for the area has been
11 amended to provide adequate street capacity for the P.U.D."
12 Record 128. Citizens maintain that the required
13 demonstration cannot be deferred to the date of site plan
14 approval. They argue that either (1) a determination that
15 all standards requiring discretion in their application are
16 satisfied must be made prior to the amendment of the UGB
17 itself; or (2) the UGB amendment must be conditioned on
18 making the necessary determination at a time subsequent when
19 the statutory notice and public hearing requirements are
20 observed. See Rhyne v. Multnomah County, 23 Or LUBA 442,
21 447-48 (1992). We agree with Citizens. To defer making a
22 necessary discretionary determination beyond the date that
23 the UGB amendment becomes final creates a possibility the
24 UGB will be amended before Goal 14 is satisfied.

25 This possibility is not eliminated by the requirement
26 in the second condition of approval that the contract of

1 annexation require specific demonstrations be made at a duly
2 noticed public hearing prior to site plan approval. As the
3 second condition is stated, the UGB will have been amended
4 even if site plan approval is not granted.

5 **1. Sewer Capacity**

6 Intervenor's contend the necessary showing has already
7 been made with respect to sewer capacity. Intervenor's focus
8 on a consultant's statement which is based on the SCCP.
9 Record 125, 2075, SCCP E-6. The SCCP, the consultant and
10 the challenged decision all find that "the plant site and
11 piping and equipment are sized so that an additional
12 [amount] can be added when the City approaches a population
13 of 2,000 for a total design capacity of 4,500."⁴³ Record
14 125, SCCP E-6. Citizens do not challenge that conclusion,
15 but they contend it pertains only to hydraulic capacity and
16 not solid waste capacity. They also argue the sewer system
17 is in urgent need of repairs, which affects its capacity
18 during wet months. Finally, they argue the challenged
19 decision does not take into account the out-of-town visitors
20 the proposed golf course, hotel and restaurant would draw.

21 The issues of solid waste capacity and the need for
22 sewer repairs are relevant to a determination that adequate
23 public facilities and services either exist or will exist.

⁴³The briefs do not address the discrepancy between the design capacity of 4,500 and the medium projected population of 4,949 persons when the proposed development is complete.

1 These issues were raised below, Record 465-66, and should
2 have been addressed in the findings. See Wood Village;
3 Norvell; Eckis. Citizens do not cite to a point in the
4 record where the issue of the impacts of out-of-town
5 visitors on sewer capacity was raised, but since intervenors
6 do not contend the issue was waived, we consider it.

7 Intervenor argue that the evidence in the record
8 demonstrates out-of-town visitors are unlikely to produce
9 enough sewage to overwhelm the system and urge us to so
10 find. Under ORS 197.835(11)(b) we may overlook the absence
11 or inadequacy of findings if "the parties identify relevant
12 evidence in the record which clearly supports the decision
13 or a part of the decision." The "clearly supports" standard
14 is considerably more demanding than the substantial evidence
15 standard. Waugh v. Coos County, 26 Or LUBA 300, 306-08
16 (1993). Because we must remand in any event for additional
17 findings on sewer capacity, we decline to evaluate the
18 evidence on the impacts of out-of-town visitors.

19 **2. Transportation Facilities**

20 Petitioners argue the only road access to the subject
21 property is inadequate to handle the thousands of additional
22 trips per day that the proposed development will generate.
23 Intervenor respond that transportation facilities are not
24 included in the term "public facilities," as it is used in
25 Goal 14, factor 3.

26 We disagree with intervenors. The implementation

1 guidelines of Goal 14 include transportation facilities,
2 indicating transportation facilities are covered by Goal
3 14.⁴⁴ Factor 3 is the only Goal 14 factor which appears to
4 address them. Goal 11, which concerns "public facilities
5 and services," requires a public facilities plan that

6 "describes the water, sewer and transportation
7 facilities which are to support the land uses
8 designated in the appropriate acknowledged
9 comprehensive plan or plans within an urban growth
10 boundary containing a population greater than
11 2,500." (Emphasis added.)

12 The only indication that transportation facilities might not
13 be included under the rubric of public facilities is the
14 fact the implementation guidelines address public facilities
15 and transportation facilities separately. Notwithstanding,
16 we conclude that "public facilities" in Goal 14, as in
17 Goal 11, include transportation facilities. However,
18 because the transportation issues raised here are also
19 raised, but in greater detail, in Citizens' seventh
20 assignment of error, we discuss them there.

⁴⁴The first two implementation guidelines provide:

- "1. The type, location and phasing of public facilities and services are factors which should be utilized to direct urban expansion.
- "2. The type, design, phasing and location of major public transportation facilities (i.e., all modes: air, marine, rail mass transit, highways, bicycle and pedestrian) and improvements thereto are factors which should be utilized to support urban expansion into urbanizable areas and restrict it from rural areas."

1 **3. Services within the UGB**

2 Citizens contend the challenged decision lacks findings
3 to show that providing public facilities and services to the
4 subject property will not leave the city unable to provide
5 police, fire, water, storm sewer, sanitary sewer,
6 transportation or other essential municipal services to land
7 already included within the UGB. We have discussed sewer
8 and transportation issues. The challenged decision finds
9 there is an adequate water supply available to service both
10 the city and the projected development. Record 1203.
11 Citizens do not challenge that finding.

12 With respect to police and fire service, the challenged
13 decision finds the subject parcel is

14 "currently served by Jackson County Fire District
15 No. 4. Upon amendment of the UGB, these services
16 would be provided by the City of Shady Cove. Fire
17 hydrants will be installed by the developer as
18 part of the water system. In addition, Rogue
19 River Estates will have trained security personnel
20 as part of their permanent staff." Record 1204.

21 Intervenors respond to petitioner's challenge to the
22 findings by explaining "there is ample evidence in the
23 record that the expanded tax base" will permit adequately
24 funded police and fire departments. Response Brief 35.
25 Intervenors do not cite to evidence in the record, however,
26 and the finding itself does not identify supporting
27 evidence.

28 This subassignment of error is sustained.

1 **B. Goal 14, Factor 4**

2 A finding that a UGB will maximize "efficiency of land
3 uses within and on the fringe of the existing urban areas"
4 must be predicated on findings that public facilities and
5 services can be extended to the subject property without
6 depriving the area already within the UGB. City of LaGrande
7 v. Union County, 25 Or LUBA 52, 61 (1993). As noted above,
8 the challenged decision does not establish that such is the
9 case.

10 In addressing factor 4, the challenged decision finds
11 only that because the proposed project will have its own
12 municipal water system, it can be built to a higher density
13 than the land within the city, and if the city chooses to
14 develop its own water system in conjunction with the
15 project, it will be able to increase densities within the
16 city as well. Record 1204-05. Citizens contend factor 4
17 requires the city to examine the comparative costs of
18 providing services to existing vacant lands within the UGB
19 before it is amended to include additional commercial,
20 residential and recreational land for development. We
21 agree with Citizens that cost of services is an important
22 consideration in evaluating the efficiency of land uses,
23 because measuring costs is one way to measure efficiency.
24 We also agree with Citizens that Goal 14, factor 4 requires
25 the city to encourage development within urban areas before
26 the expansion of a UGB. See North Plains, 27 Or LUBA at 390

1 (Goal 14, factor 4 requires the city to encourage
2 development within urban areas before the conversion of
3 urbanizable areas).

4 We agree with intervenors that the city may satisfy
5 Goal 14, factor 4 by carefully evaluating the availability
6 of land within the UGB before reaching a conclusion that
7 none will accommodate the proposed development. See Turner
8 v. Washington County, 8 Or LUBA 234, 257 (1983). However,
9 that evaluation must include consideration of (1) changing
10 planning designations within the existing UGB to allow for
11 greater densities; (2) assembling lots within the existing
12 UGB; and (3) reconfiguring the proposed use to maximize the
13 use of land within the existing UGB. See City of LaGrande
14 v. Union County, 25 Or LUBA at 64; BenjFran Development v.
15 Metro Service Dist., 17 Or LUBA at 49. The findings do not
16 show any such consideration.

17 This subassignment of error is sustained.

18 **C. Goal 14, Factor 5**

19 Citizens contend the analysis in the challenged
20 decision of the environmental, energy, economic and social
21 (ESEE) consequences of the proposed UGB expansion is
22 inadequate because the analysis does not clearly identify
23 the type or amount of housing to be built.⁴⁵ Citizens rely
24 on our opinion in Halvorson et al v. Lincoln County

⁴⁵This issue is addressed further below under Tribes' first assignment of error.

1 (Halvorson), 14 Or LUBA 730, 738-39, aff'd 82 Or App 302
2 (1986).⁴⁶

3 Intervenor's respond that Halvorson requires no more
4 than consideration of the "level of development" likely to
5 result from inclusion of the land within the UGB and the
6 ESEE consequences of allowing that level of development. We
7 agree with intervenors the challenged decision adequately
8 describes the level of development that is projected.^{47,48}

9 This subassignment of error is denied.

10 **D. Goal 14, Factor 7**

11 We address this factor under Citizens' sixth assignment
12 of error.

13 The fifth assignment of error is sustained, in part.

14 **SIXTH ASSIGNMENT OF ERROR (CITIZENS)**

15 **A. Alternative Sites**

16 Goal 14 includes a requirement that in approving an
17 amendment to an acknowledged UGB, a local government must
18 follow the procedures and requirements for a statewide
19 planning goal exception. Those procedures and requirements

⁴⁶Halvorson addresses the establishment of a UGB under a "commitment determination." See City of Salem v. Families for Responsible Government, 64 Or App 238, 668 P2d 395 (1983) rev'd on other grounds 298 Or 574, on remand 73 Or App 620 (1985). However, the "level of development" analysis applies equally to a proposed expansion of a UGB.

⁴⁷As noted under the fourth assignment of error, however, expansion of the UGB must be conditioned on attaining that level of development.

⁴⁸We address above the consequences of not requiring that level of development.

1 are set out at ORS 197.732, Goal 2, Part II, and OAR 660-04-
2 000 through 660-04-035, and include a consideration of
3 alternative sites both inside and outside the UGB. Because
4 we conclude above the Goal 14 need factors have not been
5 satisfied, a consideration of alternative sites would be
6 meaningless, and we do not review this subassignment of
7 error. See BenjFran Development v. Metro Service Dist., 17
8 Or LUBA at 48.

9 **B. Compatibility with Adjacent Land Uses**

10 To satisfy ORS 197.732(1)(c)(D), Goal 2, Part II(c)(4)
11 and OAR 660-04-020(2)(d), the proposed use must be
12 compatible with other adjacent uses or rendered so through
13 measures designed to reduce adverse impacts. OAR 660-04-
14 020(2)(d) explains:

15 "The exception shall describe how the proposed use
16 will be rendered compatible with adjacent land
17 uses. The exception shall demonstrate that the
18 proposed use is situated in such a manner as to be
19 compatible with surrounding natural resources and
20 resource management or production practices.
21 'Compatible' is not intended as an absolute term
22 meaning no interference or adverse impacts of any
23 type with adjacent uses."

24 The challenged decision states:

25 "The subject property is adjacent to the current
26 urban growth boundary and is fairly isolated from
27 surrounding properties by the Rogue River, Long
28 Branch Creek, and Rogue River Drive. The
29 applicant has expressed willingness to comply with
30 necessary setbacks and other mitigation
31 requirements." Record 1200.

32 Citizens object that this finding is not adequate

1 because it does not identify adjacent land uses, natural
2 resources and resource management or production practices;
3 and it does not explain what is meant by "setbacks and other
4 mitigation requirements." We agree with Citizens. The
5 findings must explain what the adjacent uses, natural
6 resources, and management or production practices are, and
7 then explain why the proposed use is compatible with them.
8 If setbacks and other mitigation requirements are necessary,
9 these should be stated, and approval should be conditioned
10 upon compliance.

11 This subassignment of error is sustained.

12 The sixth assignment of error is sustained, in part.

13 **SEVENTH ASSIGNMENT OF ERROR (CITIZENS)**

14 Citizens contend the challenged decision does not
15 comply with Goal 12 and the Goal 12 implementing rule, OAR
16 chapter 660, division 12 (TPR). Transportation planning
17 under the TPR is divided into three parts: (1) preparation
18 of transportation system plans (TSPs); (2) transportation
19 project development; and (3) comprehensive plan and land use
20 regulation amendments which "significantly affect a
21 transportation facility." Citizens assign error to the
22 implementation of OAR 660-12-060, the rule addressing
23 comprehensive plan and land use regulation amendments which
24 significantly affect a transportation facility.

25 OAR 660-12-060 provides, in relevant part:

26 "(1) Amendments to functional plans, acknowledged

1 comprehensive plans, and land use regulations
2 which significantly affect a transportation
3 facility shall assure that allowed land uses
4 are consistent with the identified function,
5 capacity, and level of service of the
6 facility. This shall be accomplished by
7 either:

8 * * * * *

9 "(b) Amending the TSP to provide
10 transportation facilities adequate to
11 support the proposed land uses
12 consistent with the requirements of this
13 division; or

14 * * * * *

15 "(2) A plan or land use regulation amendment
16 significantly affects a transportation
17 facility if it:

18 * * * * *

19 "(c) Allows types or levels of land uses
20 which would result in levels of travel
21 or access which are inconsistent with
22 the functional classification of a
23 transportation facility.

24 * * * * *

25 The subject property is served by a single road, Rogue
26 River Drive. The Recommendation for Approval finds that it
27 appears likely Rogue River Drive will have to be improved to
28 accommodate the proposed development. Record 1204. The
29 Recommendation for Approval finds that the applicant has
30 pledged to pay its fair share of the cost of any
31 improvements and that there is a sufficient right-of-way to
32 widen the street to accommodate the additional traffic. Id.

33 The challenged decision states:

1 "For the reasons stated in the joint commissions'
2 findings [in the Recommendation for Approval], we
3 find that the City and County will reasonably be
4 able to meet the transportation needs of the city
5 together with the new development along Rogue
6 River Drive. We recognize that the County
7 Transportation System Plan will need to be amended
8 pursuant to OAR 660-12-060(1)](b)], in order to
9 service the proposed new use. We therefore
10 condition our approval herein on the requirement
11 that the Contract of Annexation between the City
12 of Shady Cove, Jackson County and the applicant
13 contain a provision requiring amendment of the TSP
14 consistent with OAR 660-12-060 at or prior to site
15 plan approval, and for Applicant to provide a
16 traffic impact and needs analysis in conjunction
17 therewith at its own cost." Record 17.

18 The condition is restated in the second condition of
19 approval.

20 Citizens argue the traffic analysis cannot be deferred
21 until after approval of the UGB amendment. Citizens rely on
22 our opinion in North Plains, 27 Or LUBA at 401, where we
23 concluded the city's findings were inconsistent with the
24 findings relied on to establish a need for the proposed UGB
25 amendment.

26 Intervenors respond that the traffic analysis can be
27 deferred, as part of a multi-step approval process. We
28 agree with intervenors that a multi-step approval process is
29 possible. However, as Citizens point out, the challenged
30 decision would allow the UGB amendment to become final
31 before compliance with Goal 12 was assured.

32 The seventh assignment of error is sustained.

1 **EIGHTH ASSIGNMENT OF ERROR (CITIZENS)**

2 Citizens contend the challenged decision does not
3 comply with Goal 6, which provides, in relevant part:

4 "All waste and process discharges from future
5 development, when combined with such discharges
6 from existing developments shall not threaten to
7 violate, or violate applicable state or federal
8 environmental quality statutes, rules and
9 standards. * * *"

10 Citizens argue the decision does not identify the applicable
11 statutes and standards and it therefore cannot evaluate
12 whether the proposed uses can comply with them. Intervenors
13 acknowledge the decision does not contain a Goal 6 analysis,
14 but maintain the analysis has properly been deferred to a
15 later step of a multi-step approval process.

16 We disagree, for the reason stated in the seventh
17 assignment of error with respect to the city's TSP.

18 The eighth assignment of error is sustained.

19 **FIRST ASSIGNMENT OF ERROR (TRIBES)**

20 The city's decision addresses the issue of Indian
21 burial grounds and archaeological remains as follows:

22 FINDING: Indian burial grounds and Indian
23 archaeological remains. Conflicting evidence was
24 presented regarding the presence of Indian burial
25 grounds and Indian archaeological remains on
26 portions of the subject property. An
27 archaeological study conducted in 1973 indicated
28 that most if not all of the burial remains were
29 moved from the site to Trail, Oregon. The oral
30 testimony of an eye witness who stated that he
31 himself dug up Indian burial remains and
32 archaeological remains while working on the
33 subject property, indicated that the presence of

1 remains was limited to approximately 15 acres of
2 the 387 acre site.

3 "Conflicting testimony was given regarding the
4 presence and location of any Indian archaeological
5 remains. Applicant has indicated that it will be
6 necessary to conduct an archaeological evaluation
7 of the property prior to any development being
8 done. OAR 660-16-000(5)(B) provides that it is
9 acceptable to delay the Goal 5 ESEE analysis of a
10 particular Goal 5 resource if information is not
11 adequate to identify with particularity the
12 location, quality and quantity of the resource
13 site.

14 "Since the action of allowing an amendment to the
15 Urban Growth Boundary does not in itself allow for
16 any development of the property, it would be
17 premature to require the process called for by
18 Goal 5. The more appropriate time for such an
19 analysis will be at the time of development
20 approval.

21 "We find that there is not adequate information at
22 this time to identify with particularity the
23 location quality and quantity of the resource
24 site. We condition our approval herein on the
25 requirement that the Contract of Annexation
26 between the City of Shady Cove, Jackson County and
27 the applicant contain a provision requiring that
28 an archaeological survey be performed at
29 Applicant's expense, and a Goal 5 ESEE analysis of
30 any archaeological remains found be conducted at
31 or prior to site plan approval." Record 18.⁴⁹

32 Tribes contend the city's decision violates Goal 14,
33 factor 5 and OAR 660-04-010(1)(c)(B).⁵⁰

⁴⁹The county's decision contains a section, not in the city's decision, addressing JCLDO 280.110(J), which establishes a procedure intended to minimize or mitigate damage to a significant archaeological resource. Record 126. The parties do not address JCLDO 280.110(J).

⁵⁰OAR 660-04-010(1)(c)(B) provides:

1 **A. Goal 14, Factor 5**

2 The parties agree a Goal 5 ESEE analysis is not the
3 same as a Goal 14, factor 5 ESEE analysis. As we explained
4 in Knapp v. City of Jacksonville, 20 Or LUBA 189, 202
5 (1990):

6 "Both Goals 5 and 14 require consideration of ESEE
7 consequences. Under Goal 14, the establishment of
8 a UGB must be based on consideration of the ESEE
9 consequences of designating land for urban, rather
10 than rural, uses. Goal 5 protects resources both
11 inside and outside UGBs. It requires
12 determination of ESEE consequences of conflicts
13 between urban uses and identified resources, and
14 resolution of those conflicts in a way that
15 adequately protects urban Goal 5 resources."

"When a local government changes an established urban growth boundary it shall follow the procedures and requirements set forth in Goal 2 'Land Use Planning', Part II, Exceptions. An established urban growth boundary is one which has been acknowledged by the Commission under ORS 197.251. Revised findings and reasons in support of an amendment to an established urban growth boundary shall demonstrate compliance with the seven factors of Goal 14 and demonstrate that the following standards are met:

"(i) Reasons justify why the state policy embodied in the applicable goals should not apply (This factor can be satisfied by compliance with the seven factors of Goal 14.);

"(ii) Areas which do not require a new exception cannot reasonably accommodate the use;

"(iii)The long-term environmental, economic, social and energy consequences resulting from the use at the proposed sites with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

"(iv) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

1 See also ODOT v. City of Newport, 23 Or LUBA 408, 413 n5.

2 Tribes maintain the city must complete a Goal 14,
3 factor 5 ESEE analysis before approval of the UGB amendment,
4 because the presence of a major archaeological site may mean
5 some or all of the subject property is not suitable or
6 available for urban development in general or the proposed
7 PUD in particular. Tribes argue further that until the Goal
8 14, factor 5 ESEE analysis is complete, OAR 660-04-
9 010(1)(c)(B)(i), which requires compliance with all seven
10 Goal 14 factors, is not satisfied.

11 Intervenors respond that a Goal 14, factor 5 ESEE
12 analysis need not consider the presence of a Goal 5
13 resource, and therefore, the delay of the Goal 5 ESEE
14 analysis, which intervenors contend is permitted by OAR 660-
15 16-000(5)(b), is "irrelevant" to Goal 14, factor 5.⁵¹

⁵¹The parties agree that to the extent any version of the Goal 5 Rule applies to the proposed development, that version is stated in OAR chapter 660, division 16. OAR 660-16-000(5)(b), which addresses so-called "1b resource sites" provides:

"Delay Goal 5 Process: When some information is available, indicating the possible existence of a resource site, but that information is not adequate to identify with particularity the location, quality and quantity of the resource site, the local government should only include the site on the comprehensive plan inventory as a special category. The local government must express its intent relative to the resource site through a plan policy to address that resource site and proceed through the Goal 5 process in the future. The plan should include a time-frame for this review. Special implementing measures are not appropriate or required for Goal 5 compliance purposes until adequate information is available to enable further review and adoption of such measures. The statement in the plan commits the local government to address the resource site

1 Response Brief 54.

2 We accept as correct the position taken by the
3 challenged decision (at Record 127) and the parties that a
4 Goal 5 ESEE analysis is appropriate in the future, and from
5 that we infer the subject property is presently included on
6 the county's Goal 5 resource inventory.⁵² Assuming it is,
7 OAR 660-16-000(5)(b) does not allow the county to defer the
8 Goal 5 ESEE process to a point beyond the final approval (or
9 the last step in a multi-step approval) of a comprehensive
10 plan or UGB amendment that would permit or require a form of
11 development that conflicts with the resource.⁵³ The delay
12 mentioned in OAR 660-16-000(5)(b) is a delay beyond the
13 acknowledgment of an original comprehensive plan or the
14 completion of periodic review, not a delay beyond the
15 approval of development which might conflict with a Goal 5
16 resource. The inclusion of the resource within the UGB,
17 although it is not the final step in development approval,
18 is based on a particular development proposal. Unless that

through the Goal 5 process in the post-acknowledgment period.
Such future actions could require a plan amendment."

⁵²If it is not included on the Goal 5 resource inventory, we could not remand on that basis when considering a quasi-judicial plan or UGB amendment. Urquhart v. Lane Council of Governments, 80 Or App 176, 721 P2d 780 (1986). See also Oregonians in Action v. Land Conservation and Development Comm'n., 121 Or App 497, 501, 854 P2d 1010 (1993) (a local government need not consider uninventoried Goal 5 resources in making a post-acknowledgment land use decision).

⁵³The first condition of the challenged decision specifically requires that the "387 subject area * * * be used only for a Planned Unit Development containing an 18 hole golf course and housing. * * *"

1 proposal is carried out, there would be no purpose in the
2 UGB expansion. See Halvorson, 14 Or LUBA at 738-39.
3 Therefore, we disagree with the challenged decision that
4 since amending the UGB does not, of itself, allow for any
5 development of the property, it does not require a Goal 5
6 ESEE analysis.

7 We disagree with intervenors that the possibility some
8 or all of the land may be precluded from development under
9 ORS 358.910 et seq and applicable federal law need not be
10 considered as part of the Goal 14, factor 5 ESEE analysis.
11 The need for available land for urban development is the
12 basis for approving the UGB amendment. If that basis is
13 invalid because the land cannot become available for urban
14 development, the amendment should not be approved.

15 Finally, we agree with Tribes that until the Goal 14,
16 factor 5 ESEE analysis is satisfactorily completed, OAR 660-
17 04-010(1)(c)(B)(i), which requires compliance with all seven
18 Goal 14 factors, is not satisfied.

19 **B. OAR 660-04-010(1)(c)(B)(iv)**

20 Tribes next argue the decision violates OAR 660-04-
21 010(1)(c)(B)(iv), because the findings do not explain how
22 the proposed urban uses are compatible or would be rendered
23 compatible with the protection and preservation of the
24 identified Indian burial sites and archaeological artifacts.
25 Intervenors contend this argument was waived because it was
26 not raised below. Because Tribes do not demonstrate the

1 argument was raised below, and we conclude it could have
2 been raised below, we agree with intervenors the argument
3 has been waived.⁵⁴ ORS 197.835(4)(b).

4 The first assignment of error is sustained, in part.

5 **SECOND ASSIGNMENT OF ERROR (TRIBES)**

6 Tribes contend the city's decision violates ORS 358.910
7 in permitting a UGB amendment. ORS 358.910 states:

8 "The Legislative Assembly hereby declares that:

9 "(1) Archaeological sites are acknowledged to be a
10 finite, irreplaceable and nonrenewable
11 cultural resource, and are an intrinsic part
12 of the cultural heritage of the people of
13 Oregon. As such, archaeological sites and
14 their contents located on public land are
15 under the stewardship of the people of Oregon
16 to be protected and managed in perpetuity by
17 the state as a public trust.

18 "(2) The State of Oregon shall preserve and
19 protect the cultural heritage of this state
20 embodied in objects and sites that are of
21 archaeological significance."

22 Intervenor respond ORS 358.910 is a non-mandatory
23 policy statement that is implemented by other provisions of
24 ORS chapter 358. We agree with intervenors that ORS 358.910
25 does not, of itself, provide a basis for remand.

26 The second assignment of error is denied.

⁵⁴OAR 660-04-010(1)(c)(B)(iv) addresses the compatibility of proposed uses with adjacent uses. In their argument, Tribes do not identify a use adjacent to the subject property but instead speak of the incompatibility of a use on the property.

1 **THIRD ASSIGNMENT OF ERROR (TRIBES)**

2 Tribes attack the evidentiary basis for the city's
3 findings that the challenged decision complies with Goal 14.
4 Because the findings themselves are inadequate, no purpose
5 would be served by addressing Tribes' additional allegation
6 that the findings are not supported by substantial evidence.
7 DLCD v. Coos County, 29 Or LUBA 415 (1995); McNulty v. City
8 of Lake Oswego, 14 Or LUBA 366, 373 (1986).

9 The city's and county's decisions are remanded.