BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALAN MULFORD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 99-074
TOWN OF LAKEVIEW,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
ROY L. MATCHETT,	)	
	)	
Intervenor-Respondent.	)	

Appeal from Town of Lakeview.

Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Davis, Gilstrap, Hearn, Shaw & Saladoff, P.C.

No appearance by respondent.

Michael P. Rudd, Klamath Falls, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Brandsness, Brandsness & Rudd, P.C.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 09/28/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the city's decision to amend its comprehensive plan map and zoning map to rezone 40 acres of land from R-2 (Multi-Family Residential) to M-1 (General Industrial).

MOTION TO INTERVENE

Roy L. Matchett (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenor owns 122 acres of land located on a hillside within the eastern edge of the city limits. On November 23, 1998, intervenor filed an application with the city to rezone the 122 acres, later reduced to 40 acres, from R-2 to M-1. The rezoning would allow intervenor to seek city approval to conduct basalt mining to produce aggregate, and to operate a rock crusher and a hot asphalt batching plant. The area to be mined is partially within the 40 acres and partially outside the 40 acres, on adjacent property intervenor owns outside the city limits. Intervenor proposed that the rock crusher, stockpiles, and batching plant would be located on the subject 40 acres within city limits.

A hearing was held before the city planning commission on February 8, 1999, which recommended denial of the application. On March 16, 1999, the city council conducted a de novo hearing on the planning commission's recommendation. After reconvening March 30, 1999, a majority of the city council voted to approve the application.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city committed four procedural errors in violation of the requirements of ORS 197.763(3) and (5): (1) the notice of hearing failed to explain the nature of the application and the proposed use; (2) the notice failed to list the applicable

criteria from the city's plan and zoning ordinance; (3) the city failed to read the approval criteria at the commencement of the public hearing; and (4) the notice of hearing did not contain the required statement that the staff report is available for inspection. Petitioner does not argue that these procedural errors prejudiced his substantial rights or otherwise provide a basis to reverse or remand the challenged decision. However, petitioner contends that the city's violations of ORS 197.763 allow him to raise issues before LUBA, notwithstanding the requirement at ORS 197.763(1) that issues which may be the basis for an appeal to LUBA must be raised before the local government. ORS 197.835(4).[1] Therefore, we address the arguments under the first assignment of error only insofar as necessary to determine whether petitioner may raise new issues pursuant to ORS 197.835(4).

As amended in 1995, ORS 197.835(4) specifies two types of procedural errors under ORS 197.763 that allow petitioner to raise new issues. Under ORS 197.835(4)(a), a petitioner may raise new issues with respect to applicable criteria from the plan or code omitted from the notice of hearing, as required by ORS 197.763(3)(b). Under ORS 197.835(4)(b), petitioner may raise new issues where the proposal approved is different from the proposal described in the notice of hearing to such a degree that the notice did not reasonably describe the city's final action.

Petitioner does not specify under this assignment of error what new issues he raises in

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[1]ORS 197.835(4) provides that

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

"(a) The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 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; or

"(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

his petition for review under either ORS 197.835(4)(a) or (b). The response brief argues that petitioner failed to raise and has thus waived the issues addressed in the third assignment of error, involving the housing element of the city's comprehensive plan, and the fourth subassignment of the ninth assignment of error, involving Statewide Planning Goal 12 (Transportation). In his response to the first assignment of error, intervenor argues that petitioner appeared and testified in opposition at both the planning commission and city council hearings, and was well aware of the nature of the proposed use and the applicable criteria, and thus the city's violations of ORS 197.763(3) did not prejudice petitioner's substantial rights. However, ORS 197.835(4) does not require a showing of prejudice to a party's substantial rights in order to allow that party to raise new issues under that provision.

The notice of hearing in the present case described the application as a plan and zoning map amendment from R-2 to M-1, but contains no explanation of the proposed use or uses that could be authorized by that zone change. The notice states that the city's decision will be based on "Section 8 of the amended Town of Lakeview zoning regulations." Record 70. We agree with petitioner that the notice of hearing violates ORS 197.763(3)(a) and (b) because it does not "[e]xplain * * * the proposed use or uses which could be authorized", nor "[l]ist the applicable criteria from the ordinance and the plan[.]" Tucker v. City of Adair Village, 31 Or LUBA 382, 386 (1996); Eppich v. Clackamas County, 26 Or LUBA 498, 503 (1994). The notice of hearing fails to describe any proposed uses which could be authorized by the decision, and therefore the decision is "different from the proposal described in the notice to such a degree" that the notice does not "reasonably describe the local government's final action." Accordingly, petitioner may raise new issues pursuant to ORS 197.835(4)(b) without regard to the waiver provisions of ORS 197.763(1). Tucker, 31 Or LUBA at 387. Similarly, we conclude that listing "Section 8" of the city's zoning ordinance is insufficient to "list the applicable criteria" as required by ORS 197.763(3)(b). Eppich, 26 Or LUBA at 503 (listing entire chapters of the zoning ordinance as applicable criteria does not satisfy ORS

197.763(3)(b)). Consequently, petitioner may raise new issues regarding criteria omitted from the notice. ORS 197.835(4)(a).[2]

The first assignment of error is sustained insofar as it allows petitioner to raise new issues under either ORS 197.835(4)(a) or (b).

SECOND ASSIGNMENT OF ERROR

Petitioner argues that one of the city council members, Radtke, failed to disclose the substance of extensive *ex parte* communications with intervenor, in violation of ORS 227.180(3), and thus deprived petitioner of the opportunity to rebut those communications.[3]

Petitioner explains that at the start of the city council's March 16, 1999 evidentiary hearing, councilor Radtke

> "reported that he has had extensive contacts with [intervenor] in Mr. Radkte's position as [county] economic development director, and wrote a [March 8, 1999] letter responding to a request concerning the use of the [county] industrial park. Councilor Radkte did not declare a conflict and stated that he believed he could make an impartial judgment regarding this zone change operation." Record 23.

Later during the evidentiary proceeding someone asked councilor Radkte to clarify his position in regards to the March 8, 1999 letter he had written to intervenor as county director of economic development. Councilor Radkte read the letter to the audience, which

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[2]Intervenor does not suggest that there is any basis in this case to conclude that issues regarding criteria omitted from the notice "could have been raised before the local government." ORS 197.835(4)(a).

[3]ORS 227.180(3) provides:

> "No decision or action of a planning commission or city governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
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> "(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

states that Radkte "would recommend that the County Commissioners reject any proposal" to establish an asphalt batch plan in the county's industrial park, but that Radkte "support[s] the concept and intent of [intervenor's] operation if it can be located on a suitable site." Record 26-27, 58. At the conclusion of testimony, the mayor closed the public hearing, and announced the council would deliberate at its next meeting, March 30, 1999.

At the March 30, 1999 deliberations, the mayor challenged Radkte's impartiality on the issue, based on Radkte's contacts with intervenor and the March 8, 1999 letter from Radkte to intervenor in his capacity as county director of economic development. After discussion, the council voted 3-1 to permit Radkte to participate in the decision, based on Radtke's statement that he was able to make an impartial decision. Record 15. After deliberating on the merits of intervenor's application, the council voted 3-2 to approve the proposed amendments, with Radkte voting in the majority.

Petitioner does not dispute that Councilor Radkte fully disclosed the substance of the communications involved in his March 8, 1999 letter to intervenor. However, petitioner argues that Councilor Radkte failed to disclose the substance of his other "extensive" contacts with intervenor, in violation of ORS 227.180(3). Petitioner argues that merely disclosing the existence of *ex parte* communications without also disclosing the substance of those communications violates ORS 227.180, and effectively deprives petitioner of the opportunity to rebut the substance of those communications.

Intervenor responds that petitioner failed to object during the proceedings below to the adequacy of Radkte's disclosure regarding contacts other than the March 8, 1999 letter, and thus the insufficiency of that disclosure cannot be assigned as a basis for reversal or remand. Wicks v. City of Reedsport, 29 Or LUBA 8, 13 (1995). In Wicks, two planning commission members disclosed that they had conducted a site visit, but did not disclose what they observed or their impressions of the site. Despite opportunity to do so, petitioners did not object to the adequacy of the commissioners' disclosure. We held that where a party has

an opportunity to object to a procedural error, such as insufficiency of disclosure mandated by ORS 227.180(3), but fails to do so, that error cannot be assigned as grounds for reversal or remand. Id.

We agree with intervenor that Wicks controls the present case. As in Wicks, one of the decision-makers disclosed the existence of *ex parte* communications but not the substance of those communications, as ORS 227.180(3) requires. Petitioner and other participants clearly had an opportunity to object to the inadequacy of the disclosure regarding the "extensive contacts" with intervenor, as evidenced by the fact that a participant questioned the adequacy of Councilor Radkte's disclosure regarding the March 8, 1999 letter, to which Radkte appropriately responded.[4] Although Radkte's failure to disclose the substance of other contacts violated ORS 227.180(3), petitioner has not established that he lacked opportunity to object to the inadequate disclosure, and thus may not raise that inadequate disclosure as a basis to reverse or remand the challenged decision.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city violated Lakeview Zoning Ordinance (LZO) 9.105 by allowing intervenor to modify his original application to encompass only 40 acres of the 122-acre tract owned by intervenor.

LZO 9.105 provides: "[p]etitions, applications and appeals provided for in this Document shall be made on forms provided for such purpose or as otherwise prescribed by the Town in order to assure the fullest practical presentation of pertinent facts and to maintain a permanent record." Petitioner argues that intervenor's modification of his application should have come in the form of a new application on a new form, as required by

[4]It is not clear from the record that, other than the March 8, 1999 letter, Radkte's "extensive contacts" with intervenor in his capacity of economic development director were contacts "concerning the decision or action" before the city council, and thus contacts that must be disclosed pursuant to ORS 227.180(3). Nonetheless, we assume for purposes of this appeal that they were.

LZO 9.105.

Intervenor responds, and we agree, that to the extent LZO 9.105 requires that modifications to applications be made on forms provided for that purpose, the city's failure to require intervenor to submit his modification on new forms or in a new application is a procedural error for which petitioner has not demonstrated prejudice to his substantial rights.[5] ORS 197.835(9)(a)(B).

The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that the challenged decision violates the housing element of the city's comprehensive plan by dramatically reducing the inventory of land zoned for multi-family residential uses.

Petitioner explains that the 1982 inventory of residential land in the city's comprehensive plan indicates that the supply of vacant residential land in the city is limited. Specifically, the 1982 inventory shows that only 143.5 acres within the city were zoned R-2, of which 142 acres were already developed. Lakeview Comprehensive Plan (LCP) Tables 6 and 7. The text accompanying Tables 6 and 7 states that the R-2 land use category has only eight vacant lots within the city, and the supply of lands zoned for other land use categories is similarly limited, and concludes that "any future growth in the Lakeview area will, of necessity, occur outside the present corporate limits of the Town." LCP 43.

LCP Table 13 describes the city's projected housing needs for the year 2008, and indicates that the city will require 329 manufactured housing units and 156 multi-family units allowed by the R-2 zone. Taking into account the limited amount of vacant R-2 zoned land within the city, LCP Table 13 calculates that 70.57 acres from lands within the city's

[5]Petitioner does not explain and it is not otherwise apparent why the text of LZO 9.105 requires that modifications to applications be submitted on forms prepared for that purpose or in the form of a new application.

urban growth boundary (UGB) will be needed to meet the need for manufactured and multi-family dwelling units. Table 13 also indicates that in 1982 the area outside the city limits but within the UGB contained 135 acres of land designated R-2.[6]

Petitioner argues that the challenged decision fails to explain how removing 40 acres from the supply of R-2 land is consistent with the LCP housing element and the city's obligation to maintain a sufficient inventory of needed housing, including multi-family housing allowed in the R-2 zone.

Intervenor first responds that petitioner failed to raise the issue of compliance with the housing element or housing inventory before the city, and has waived those issues. ORS 197.763(1). However, as discussed in the first assignment of error, the city's failure to describe the proposed use in the notice of hearing and list the housing element as an applicable criteria as required by ORS 197.763(3)(a) and (b) allows petitioner to raise new issues before this Board without regard to ORS 197.763(1). ORS 197.835(4)(a) and (b).

Intervenor does not dispute that the city must demonstrate that the challenged amendments are consistent with the LCP housing element, but argues that the city effectively ensured compliance with the LCP housing element and inventory by adopting findings of compliance with Statewide Planning Goal 10 (Housing). As discussed in the ninth assignment of error, the city found compliance with Goal 10 based on a finding that "there are other available lands within the Urban Growth Boundary that would satisfy residential use inventory." Record 8.

We agree with intervenor that the issue of compliance with the LCP housing element and inventory corresponds closely, if not precisely, with the issue of compliance with Goal 10, discussed in the ninth assignment of error. However, we disagree that the city's finding that "there are other available lands within the Urban Growth Boundary that would satisfy

[6]Nothing in the record drawn to our attention explains how the inventory of R-2 zoned land within city limits expanded from the 1.56 vacant acres in 1982 to include the subject 40 acres.

residential use inventory" is sufficient to demonstrate that the proposed removal of 40 acres of R-2 zoned land from the city's inventory is consistent with the LCP housing element.

The challenged decision does not address the LCP housing element or inventory, and contains no evaluation of the city's inventory of buildable lands, compared with the city's current housing situation and projected and foreseeable housing needs. We agree with petitioner that the city's findings must address the LCP housing element, and explain why the city's inventory of land zoned R-2 remains adequate to meet the city's housing needs notwithstanding the loss of 40 acres of land from that inventory.

The third assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision should be reversed or remanded because intervenor's application failed to address whether the proposed amendments were consistent with Goal 10 (Housing).

Intervenor responds, and we agree, that the failure of an application to address applicable criteria is not, in itself, a basis to reverse or remand the challenged amendment. As intervenor points out, the plan and code amendment decision, must address compliance with applicable statewide planning goals, but no authority cited by petitioner authorizes LUBA to reverse or remand a decision based on the applicant's failure to address the goals in the application. In the present case, the challenged decision adopts findings of compliance with Goal 10, which we address below in discussing the ninth assignment of error.

The fifth assignment of error is denied.

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

LZO 8.102 allows amendment to plan and zoning maps upon a sufficient showing of facts indicating that the zone change will be in substantial compliance with the goals, objectives and policies of the city's comprehensive plan. LCP Policy II(B)(5) provides:

> "That as a condition of making Plan changes, it will be determined that community attitudes and/or physical, social, economic or environmental changes have occurred in the area or related areas since Plan adoption (and revision) and that a public need supports the change, or that the original Plan (as revised) was incorrect."

Petitioner argues that the city's findings with respect to LCP Policy II(B)(5) are not supported by substantial evidence. The city adopted the following findings of compliance with LCP Policy II(B)(5):

> "The Town Council finds that the property, although residentially zoned, is not ideal for residential development due to its terrain and topography and that no efforts have been made to residentially develop the property over the past several years. Accordingly, if the property can be utilized for industrial purposes thereby generating economic benefit, sufficient economic changes have occurred which warrant a Plan change."
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> "* * * * *
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> "That the purpose of the proposed Plan change is to accommodate the location of an asphalt plant. An asphalt plant within the Town of Lakeview would provide an economic stimulus and economic benefits. Based upon Lakeview's current economic situation, there is a public need for the Plan change based upon economic needs." Record 7.

Petitioner argues that the foregoing findings fail to cite any evidentiary basis for its conclusions. Petitioner states that there is evidence in the record that the city "wants to develop tourism and maintain its beautiful scenery and status as a scenic byway." Petition for Review 31. Petitioner submits that a hot asphalt plant overlooking the city does not promote those public concerns. Further, petitioner argues that there is evidence in the record that an asphalt batch plant could be located at other locations in or around town, and thus there is no "public need" for the amendment.

Intervenor responds by citing to evidence in the record to the effect that the current economic slump in the town is an economic change warranting the amendment, because it causes reduced demand for residential land and increased need for industrial land on which job-creating projects such as the proposed asphalt plant can be located. With respect to the public need requirement, intervenor cites to evidence that the county would not allow the

asphalt plant in the county industrial park. Further, intervenor notes that the proposed use is not just for an asphalt plant, but also for a quarry, and there is evidence that the quality of rock at the site is superior to other quarries in the area. Finally, intervenor cites to evidence that a number of road projects requiring aggregate and asphalt are planned for the Lakeview area in coming years, indicating a greater need for those products.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. Dodd v. Hood River County, 317 Or 172, 179, 855 P2d 608 (1993). Where a reasonable person could reach the same conclusion as the local government in view of all the evidence in the record, LUBA will defer to the local government's choice between conflicting evidence. Stewart v. City of Brookings, 31 Or LUBA 325, 330 (1996). In the present case, there is substantial evidence supporting the city's conclusions regarding the economic benefits of and need for the asphalt plant and quarry authorized by the challenged amendments. Petitioner's disagreement with the city's choice between conflicting evidence does not warrant reversal or remand.

The sixth and seventh assignments of error are denied.

EIGHTH ASSIGNMENT OF ERROR

LCP Policy II(B)(6) provides:

> "That in considering Plan revisions, alternative sites for the proposed use(s) will be considered, and it will be determined that the area proposed to be changed [for the proposed use] compares favorably with other areas which might be available for the use(s) proposed."

The city council made the following finding of compliance with LCP Policy II(B)(6):

> "In considering alternative sites for the proposed use, there are no favorable comparisons with other areas which may be available for the proposed use. This finding was primarily based upon the fact that the quarry rock to be utilized by the asphalt plant is adjacent to the subject property." Record 7.

Petitioner argues that the city's finding is not responsive to the requirements of LCP Policy II(B)(6), which require that alternative sites "will be considered." According to petitioner, the challenged finding is inadequate because it fails to consider any alternative

sites and thus makes no comparisons, favorable or otherwise, between those sites and the proposed site.

Intervenor responds that there is evidence in the record that the proposed site contains superior rock to other potential or existing quarries, and that the city council relied upon that evidence to find, implicitly, that the proposed site was superior, and thus compares favorably to, all other potential sites.

While the city council may have intended the challenged finding to state what intervenor infers from it, that intent is not evident in the finding itself. The only rationale expressed in the challenged finding does not rely on the quality of rock in the quarry, but instead on the proximity of the proposed asphalt plant to the quarry rock that the plant will use. Proximity of asphalt plant and quarry may be an appropriate consideration in determining whether the proposed site "compares favorably" with alternative sites, but it cannot obviate the city's obligation to conduct the alternatives analysis required by LCP Policy II(B)(6).[7] We agree with petitioner that the city's finding with respect to LCP Policy (II)(6) is inadequate.

The eighth assignment of error is sustained.

NINTH ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision does not comply with applicable statewide planning goals.

A. Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources)

Petitioner argues that the challenged decision is inconsistent with Goal 5 because placing an asphalt plant visible from town and from a "scenic byway" reduces the "scenic attributes" of the city.

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[7]If the city intends to take the position that alternative sites need not be considered because proximity of the asphalt plant to a quarry is essential and the subject 40 acres is the only property on which an asphalt plant could be located that is proximate to a quarry, it must explain and justify that position. The city's findings do not do so.

However, petitioner does not identify the "scenic byway," or contend that the byway or the "scenic attributes" of the city are Goal 5 resources identified and protected in the city's comprehensive plan. Where challenged comprehensive plan and land use regulation amendments do not directly affect a local government's acknowledged Goal 5 inventory, and the petitioner does not identify any inventoried Goal 5 resources affected by the challenged amendments, petitioner provides no basis for reversal or remand. Churchill v. Tillamook County, 29 Or LUBA 68, 74 (1995).

This subassignment of error is denied.

B. Goal 6 (Air, Water and Land Resource Quality)

Goal 6 requires that

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources."

Petitioner does not argue that the challenged decision is inconsistent with Goal 6 itself, but instead argues that it is inconsistent with Goal 6 Guideline A(3), which recommends that comprehensive plans "should buffer and separate those land uses which create or lead to conflicting requirements and impacts upon the air, water and land resources." Petitioner argues that the challenged amendments allow industrial uses such as an asphalt plant in close proximity to existing and future residential uses without any buffer, in violation of Goal 6 Guideline A(3). However, petitioner's argument fails to recognize that guidelines to statewide planning goals are merely advisory and do not constitute requirements with which local governments must comply. ORS 197.015(9); Churchill, 29 Or LUBA at 73.

Petitioner's argument under this subassignment of error does not demonstrate a basis for reversal or remand.[8]

This subassignment of error is denied.

C. Goal 10 (Housing)

Goal 10 is "[t]o provide for the housing needs of citizens of the state," and further requires that

> "Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

The city adopted the following findings regarding Goal 10:

> "[T]he subject property from an historical standpoint of being residentially zoned, has not been the subject of any residential development and because of the property's terrain and topography would probably not be suitable for residential development in the foreseeable future. Additionally, there are other available lands within the Urban Growth Boundary that would satisfy residential use inventory." Record 8.

Petitioner contends that the challenged decision violates Goal 10 because it removes 40 acres of land designated for multi-family residential use from the city's inventory of buildable lands, without determining whether the city's inventory of R-2 lands is adequate to meet the city's projected needs. Further, petitioner argues that the decision effectively blights the remaining 82 acres of R-2 zoned land owned by intervenor, because it authorizes location of an asphalt plant adjacent to those lands without any buffer. Petitioner argues that the city's

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[8]The city made the following finding of compliance with Goal 6:

> "That the environmental quality of the air, water and land in the subject area can be adequately addressed and protected in the conditional use application process regarding the location of the asphalt plant." Record 8.

While we question the adequacy of a finding of compliance with Goal 6 that defers the inquiry it demands until a conditional use application is considered, petitioner has not challenged the city's finding on that ground or any other ground warranting reversal or remand. Petitioner confines his argument to the assertion that the challenged decision is inconsistent with Goal 6 Guideline A(3), and we confine our analysis similarly.

findings fail to demonstrate that redesignating the subject 40 acres is consistent with the city's Goal 10 obligation to maintain an adequate inventory of buildable lands. Opus Development Corp. v. City of Eugene, 28 Or LUBA 670, 694-95 (1995).

Petitioner's argument under this subassignment of error is essentially a restatement of his argument regarding the LCP housing element, discussed in the third assignment of error. In our discussion, we agreed with petitioner that the city's findings must address the LCP housing element, and explain why the city's inventory of land zoned R-2 remains adequate to meet the city's housing needs notwithstanding the loss of 40 acres of land from that inventory. For similar reasons, we agree with petitioner that the city's findings regarding Goal 10 fail to demonstrate compliance with that goal.

The city's findings of compliance with Goal 10 rely mostly on the alleged unsuitability of the subject 40-acres for residential uses, without explaining why that alleged unsuitability is relevant to whether the city's inventory of R-2 lands remains adequate to meet the city's projected housing needs. The only language in the finding that addresses the city's inventory is the statement that "there are other available lands within the Urban Growth Boundary that would satisfy residential use inventory." Record 8. However, that statement fails to explain what other lands it refers to and why the availability of those lands "satisfy" the city's need for land zoned R-2. Without some evaluation of the amount of buildable lands available for multi-family housing within the urban growth boundary, compared with the city's current housing situation and projected housing needs, the city is no position to determine whether removal of 40 acres from the city's buildable lands inventory is consistent with its Goal 10 obligations.

This subassignment of error is sustained.

D. Goal 12 (Transportation)

Petitioner argues that the challenged decision will allow uses (the quarry and asphalt plant) that generate heavy truck traffic, and that as many as 120 trucks per day will pass

through nearby residential areas. Petitioner contends that the decision is inconsistent with Goal 12 requirement that amendments to the comprehensive plan provide and encourage safe, convenient and economic transportation system.

The city did not address and made no findings of compliance with Goal 12. Intervenor responds, first, that petitioner failed to raise any issue regarding compliance with Goal 12 below, and thus the issue raised under this subassignment of error is waived. However, as discussed in the first assignment of error, the city's failure to describe the proposed use in the notice of hearing as required by ORS 197.763(3)(a) allows petitioner to raise new issues before this Board without regard to ORS 197.763(1). ORS 197.835(4).

Intervenor next argues that, notwithstanding the absence of findings directed at Goal 12, the record demonstrates compliance with that provision. Intervenor notes that the application proposes a new access road from the site to Highway 395 that will avoid all existing residential areas. We understand intervenor to argue that this evidence "clearly supports" a finding of compliance with Goal 12, and LUBA should make its own determination that the challenged decision is consistent with Goal 12, pursuant to ORS 197.835(11)(b).[9]

We decline to do so. In Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122 (1995), we interpreted ORS 197.835(11)(b) as allowing LUBA to affirm a decision notwithstanding inadequate findings only where the relevant evidence is such that it is "obvious" or "inevitable" that the decision is consistent with applicable law. Even if we could assume that the application requires intervenor to construct the access road or the

[9]ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

decision were conditioned on construction of the access road, the fact that the access road will avoid existing residential areas does not make it "obvious" or "inevitable" that the decision is consistent with Goal 12. Intervenor cites to no traffic studies or other evidence that the proposed access road or the truck traffic that will access onto Highway 395 is consistent with Goal 12's requirement for "a safe, convenient and economic transportation system."

The ninth assignment of error is sustained, in part.

The city's decision is remanded.