

NATURE OF THE DECISION

Petitioners appeal a county comprehensive plan amendment that adopts an updated population forecast.

FACTS

ORS 195.036 requires the county to establish and maintain a population forecast for the areas within its boundaries. The county first adopted a population forecast in 1998. During the late 1990s and early 2000s, the county experienced an above-anticipated population growth. Due to the increased growth, the county developed a process to update the 1998 population forecast. The county and intervenors retained consultants and developed a new population forecast for the county and incorporated cities within the county. Petitioners challenged this forecast before the county, arguing that the forecasts for the county, the City of Bend, and the City of Redmond were too high. The county adopted the population forecast as an amendment to its comprehensive plan over petitioners' objections. This appeal followed.

MOTIONS TO STRIKE

A. The County's Motion to Strike

The county moves to strike the first four paragraphs of petitioners' summary of arguments. According to the county, the paragraphs are not a summary of the arguments in the assignments of error, but rather are arguments in addition to the assignments of error. Further, the county argues, the four paragraphs consist primarily of policy and political arguments that are irrelevant to LUBA's review.

We may consider arguments in the petition for review that are not framed as assignments of error, to the extent we are able to discern them. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999). The fact that the summary of arguments includes arguments in addition to those stated in the assignments of error is not in itself a basis to ignore or strike those additional arguments. Nor do we agree with the county that it is impermissible to include "policy and political

1 arguments” within the petition for review. However, if such arguments have no bearing on some
2 basis for reversal or remand under our scope of review, then they assist neither the petitioner nor
3 our review.

4 We tend to agree with the county that at least some of the arguments in the challenged
5 paragraphs have little bearing on any asserted basis for reversal or remand. While it is appropriate
6 for the county to point that out to us, we do not believe that filing a motion to strike the challenged
7 paragraphs is an appropriate vehicle to do so. Moving to strike an argument that a party believes to
8 be irrelevant to any basis for reversal or remand (as opposed to simply responding that the
9 argument is irrelevant) requires that the Board explicitly address the motion, and may prompt a reply
10 brief or a response from other parties, resulting in a waste of time and resources.

11 The county’s motion to strike is denied.

12 **B. Petitioners’ Motion to Strike**

13 ORS 197.835(2)(a) confines our review to the local record, absent circumstances not
14 present here. Petitioners move to strike three appendices from the City of Redmond’s response
15 brief, on the ground that the appendices include documents that are not in the record. Those
16 appendices include (1) a table of city annexations from 1980 to 2002, (2) an unsigned city
17 resolution from 2005, and (3) population estimates from Portland State University (PSU).

18 After oral argument, the City of Redmond provided the actual city resolutions for the
19 annexations that are summarized in Appendix 1. The city asks that we take official notice of these
20 documents under Oregon Evidence Code (OEC) 202.¹

21 The table summarizing the city annexations in Appendix 1 and the PSU population estimates
22 in Appendix 3 clearly do not fall within materials subject to official notice, and we do not consider
23 them or arguments based upon them.

¹ OEC 202(7) provides that law subject to official notice includes:

“An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom * * *”

1 The resolution in Appendix 2 and the resolutions submitted by the city after oral argument
2 are potentially the types of law subject to judicial notice under OEC 202. However, we may only
3 take notice of the resolutions in order to recognize the appropriate applicable laws. LUBA does
4 not have authority to take official notice of adjudicative facts. *See Home Builders Assoc. v. City*
5 *of Wilsonville*, 29 Or LUBA 604, 606 (1995) (a resolution subject to official notice does not
6 thereby become part of the local record which may provide evidentiary support for the challenged
7 decision). As far as we can tell, the only reason for which the city requests we take official notice of
8 the resolutions submitted after oral argument is so that we may consider certain facts included in
9 documents attached to those resolutions (*i.e.*, the number of persons residing in the annexed areas)
10 as evidentiary support for the challenged decision. We lack authority to do so. With that
11 understanding, we grant the city’s request to take official notice of the resolution in Appendix 2 and
12 the resolutions submitted after oral argument.

13 Petitioners’ motion to strike is granted, in part.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners argue that the county violated Statewide Planning Goal 2 (Land Use Planning) by
16 failing to adequately assess and address limitations on growth due to limitations on water and
17 restrictions on its use.

18 **A. First and Third Subassignments of Error**

19 In its first and third subassignments of error, petitioners argue that the county’s population
20 forecasts violate Goal 2 because they are not supported by an adequate factual base. In order to
21 meet the Goal 2 adequate factual base, the county’s legislative decision must be supported by
22 substantial evidence. *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999) (citing *1000*
23 *Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff’d* 130 Or App 406,
24 882 P2d 1130 (1994). Substantial evidence is evidence a reasonable person would rely on in
25 reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d
26 475 (1984). Where LUBA concludes that a reasonable person could reach the decision made by

1 the local government, in view of all the evidence in the record, the choice between conflicting
2 evidence belongs to the local government. *Younger v. City of Portland*, 305 Or 346, 360, 752
3 P2d 262 (1988). That a petitioner may disagree with the local government’s conclusions provides
4 no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993).

5 Petitioners argue that in its population projections the county failed to take into account the
6 limitations on water availability. According to petitioners, the large increases in projected growth for
7 the cities of Bend and Redmond are unsupportable when the cities themselves acknowledge that
8 there are insufficient water rights to accommodate such development. For example, petitioners cite
9 to a City of Bend statement that “the city’s existing water rights will be insufficient to meet the
10 projected demand in the next six to ten years.” Record 1017. The county, however, found that
11 sufficient water would be available.

12 The county’s population forecasts are based on several assumptions, including an
13 assumption that sufficient water will be available to serve the projected growth. The county relies
14 upon the testimony of a City of Bend water specialist and 26 exhibits including reports and studies
15 from governmental agencies regarding water availability and use. The testimony relied upon by the
16 county states that the regional aquifer has a massive surplus of groundwater and that the needs of
17 domestic and municipal users are dwarfed by the massive supply. Record 299. In addition, the
18 county found that it was reasonable to assume that the various local governments would be able to
19 acquire the needed water rights. For example, the City of Bend has implemented a program to
20 acquire additional water rights along with state directed efforts for groundwater acquisition
21 programs. Record 301, 367.

22 While petitioners cite to substantial evidence that the county’s forecasts were optimistic in
23 their view of future water availability, that is not the question before us. A petitioners’ burden is not
24 to show that the decision it advocates is supported by substantial evidence, but to show that no
25 reasonable person could reach the decision made by the local government. When there is
26 substantial evidence to support either resolution of the disputed facts, the decision belongs to the

1 local government. Petitioners have not shown that no reasonable person could reach the decision
2 made by the county based on the views of the experts it chose to believe.

3 The first and third subassignments of error are denied.

4 **B. Second Subassignment of Error**

5 Petitioners argue that the county failed to consider Goals 3 (Agricultural Lands) and 5
6 (Natural Resources, Scenic and Historic Areas, and Open Spaces), and that its population
7 projections are inconsistent with those goals. According to petitioners, the Goal 3, Planning
8 Guideline A(2) requires the county to consider the “carrying capacity” of the water resources in the
9 planning area, and to ensure that development actions do not exceed the carrying capacity of such
10 resources.² Similarly, petitioners argue, Goal 5, Implementation Guideline B(2) requires that the
11 “physical limitations of the land should be used as the basis for determining the quantity, quality,
12 location, rate and type of growth in the planning area.”³ Petitioners repeat their arguments that
13 water is or will be in short supply, and argue that the county must consider those limitations in
14 adopting its population projections. For example, petitioners express concern that cities will deal
15 with water shortage issues by acquiring irrigation water rights or groundwater rights, to the detriment
16 of agriculture and Goal 5-protected in-stream flows.

17 We note, initially, that the guidelines to the goals are advisory in nature. ORS 197.015(9);
18 *Downtown Community Assoc. v. City of Portland*, 80 Or App 336, 339-40, 722 P2d 1258

² Goal 3, Planning Guideline A(2) states:

“Plans providing for the preservation and maintenance of farm land for farm use, should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided by for such plans should not exceed the carrying capacity of such resources.”

³ Goal 5, Implementation Guideline B(2) states:

“The conservation of both renewable and non-renewable natural resources and physical limitations of the land should be used as the basis for determining the quantity, quality, location, rate and type of growth in the planning area.”

1 (1986). That point aside, we do not believe that the guidelines petitioners cite to are applicable to
2 the county’s decision to adopt population projections.

3 As we stated in *1000 Friends of Oregon v. Washington County*, 17 Or LUBA 671, 683
4 (1989):

5 “Although it is clear that amendments to acknowledged comprehensive plans must
6 comply with the goals, it is also clear that not *all* goal provisions impose standards
7 affecting *all* land use decisions. Stated differently, some plan amendments implicate
8 many goal requirements and therefore may require extensive goal findings, while
9 other plan amendments may implicate few if any goal requirements. The obligation
10 to adopt findings demonstrating goal compliance depends on (1) the subject matter
11 of the plan amendment, and (2) the nature or legal effect of the plan amendment or
12 the particular portion of the plan amendment at issue.” (Emphasis in original,
13 footnotes omitted.)

14 The question therefore is whether Goals 3 or 5 apply to the challenged decision. With
15 respect to Goal 3, the population forecasts do not preserve or develop land of any kind, or
16 farmland in particular. The population forecasts do not change any zoning designations or allow any
17 potential development that would differ from what is already allowed. Petitioners cite administrative
18 rules and county comprehensive plan policies that call for the protection of farmland, but petitioners
19 do not adequately explain how the challenged decision violates those provisions. While the
20 population forecasts may eventually be used to provide a partial basis for a local government to take
21 future actions that might have an effect upon farmland, the forecasts themselves do not do so. *See*
22 *Tipperman v. Union County*, 44 Or LUBA 98, 106 (2003) (population projections do not trigger
23 application of the Goal 12 rule, even if the projections may set the stage for later decisions that will
24 trigger the rule). We disagree with petitioners that the county must apply Goal 3, Guideline A(2) to
25 the challenged population projection.

26 With respect to Goal 5, Guideline B(2), petitioners argue that in adopting the population
27 forecasts the county must take into account the “physical limitations of the land” in determining the
28 “rate * * * of growth in the planning area.” The population forecasts, however, do not *determine*
29 the rate of growth in the area. The population forecasts are simply a prediction of what the growth

1 in the area will be, in order to assist local governments in planning for that predicted growth.
2 Petitioners correctly point out that local governments use population projections as a basis to
3 expand urban growth boundaries and adopt or amend comprehensive plan provisions and land use
4 regulations to accommodate projected growth. Petitioners may also be correct that there can be a
5 self-fulfilling aspect to such population projections: local government actions taken in reliance on
6 population projections may actually foster rather than anticipate population growth that might not
7 otherwise occur, or occur at the projected rate. Nonetheless, assuming that Goal 5, Guideline B(2)
8 is an approval criterion at all, we believe that the appropriate point to apply it is at the time local
9 governments adopt planning actions intended to accommodate estimated growth, not at the time the
10 county adopts a coordinated regional population forecast. *See Citizens Against Irresponsible*
11 *Growth v. Metro*, 179 Or App 12, 19-20 and n 8, 38 P3d 956 (2002) (the Goal 14 conversion
12 factors are best addressed when local governments convert urbanizable land to urban land, not
13 when the local government amends the UGB to bring rural land into the urban area).

14 The second subassignment of error is denied.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioners argue that the population forecast figures for the City of Redmond violate Goal 2
18 because they are not supported by an adequate factual base.

19 **A. First Subassignment of Error**

20 Petitioners argue that the growth rate for the City of Redmond improperly takes into
21 account population increases from city annexations over the period 1980 to 2002, in calculating the
22 estimated growth rate used to estimate population growth for 2002 to 2020. According to
23 petitioners, the city determined that it grew at an average annual rate of 4.42 percent from 1980 to
24 2002. However, petitioners argue, an indeterminate amount of that population increase was due to
25 county residents annexed into the city. Petitioners argue that the county erred in including any
26 population increase due to annexations. Petitioners also dispute the county's finding that any

1 population increase due to annexations was minimal.⁴ Petitioners note that at the time of the
2 county's decision the city possessed records on annexations only for the period 1994-2002, and
3 that there is no evidence in the record regarding how much annexations prior to that date
4 contributed to the city's population increase.

5 With some caveats discussed below, we disagree with petitioners that it is impermissible for
6 a local government to include population growth from annexations in calculating the historic rate of
7 growth, and hence in estimating its future rate of growth. As we noted in *Tipperman*, there is no
8 statutorily-prescribed methodology for projecting future populations, and counties are free to adopt
9 different methodologies, even for different areas of the county, as long as the resulting projections
10 are supported by an adequate factual base. 44 Or LUBA at 105. Nothing cited to us requires the
11 county to either include or exclude annexations in calculating the historic rate of growth for a city.

12 One potential caveat to including annexations in calculating city growth is to ensure that
13 annexations are correspondingly taken into account in calculating the historic growth rate for rural
14 and unincorporated lands outside cities under county jurisdiction and in projecting the future growth
15 rate of rural and unincorporated lands. For example, if a city takes annexations into account in
16 calculating the historic growth rate, it would seem necessary for the county to reduce its count of the
17 rural and unincorporated population accordingly, as otherwise there is the potential for double-
18 counting.⁵ Similarly, if a city assumes future population increase from future annexations, it would
19 seem necessary in adopting a coordinated population forecast under ORS 195.036 for the county
20 to use similar assumptions in estimating the future rural or unincorporated population.

⁴ The county's findings state, in relevant part:

“While annexations are included in this growth rate, they have little effect on the rate: annexations accounted for about 2% of total population growth between 1980 and 2002 (3% between 1994 and 2002 – the period for which the City has records). In short, the effect of annexations on the average annual growth rate is less than 0.1%.” Record 60.

⁵ Similarly, if the population estimates of two nearby cities are based on plans to annex and incorporate the populations of the same unincorporated lands, it would seem incumbent on the county, in adopting a coordinated regional population forecast, to adjust the cities' estimates to prevent double-counting.

1 In the present case, the county assures us, and petitioners do not dispute, that the county
2 took annexations into account in estimating the historic population growth of rural and
3 unincorporated lands. It is not clear to us what the city or county assumed with respect to future
4 annexations. It might be that the pace and extent of historic annexations by the City of Redmond
5 will not be replicated in the future, for whatever reason, and thus population increases due to historic
6 annexations are not accurate predictors of population increases from future annexations, for
7 purposes of estimating the future average annual growth rate. However, petitioners do not argue
8 that such is the case, or cite any reason to believe that the historic course of annexations to the City
9 of Redmond is not a reasonably accurate predictor of future annexations.

10 Even if petitioners had cited such a reason, the county found that the population contribution
11 from annexed lands is essentially *de minimis*, less than one percent, in determining the historic rate
12 of growth. Given the inherent imprecision of predicting future population increases based on historic
13 data, a variation of that minimal size might well fall within a statistically acceptable margin of error.
14 *See DLCD v. Douglas County*, 37 Or LUBA at 137 (a county may rely on historic population
15 estimates that differ from state estimates, where the difference between the estimates is so small that
16 a reasonable person could conclude that the two estimates are essentially consistent with each
17 other).

18 Finally, petitioners have not established that the county erred in relying on annexation data
19 from 1994 to 2002, to conclude that annexations from 1980 to 2002 have contributed only
20 minimally to the historic growth rate. The county apparently believed that annexation records prior
21 to 1994 were not available. As noted above, it appears that such data might be available, although
22 it is neither in the record before us nor something of which we can take official notice. Nonetheless,
23 we see no reason why the county cannot extrapolate from the annexation data in the record from
24 1994 to 2002, in assessing the population contributions of annexations for the period 1980 to 2002.

25 The first subassignment of error is denied.

1 **B. Second Subassignment of Error**

2 Petitioners next argue that the county improperly applied the 4.42 percent growth rate to the
3 year 2000 population of the City of Redmond urban growth boundary (UGB), which was 15,505,
4 rather than to the year 2000 population of the city itself, which was only 13,770. According to
5 petitioners, the beginning population figure used to calculate future population is a critical factor in
6 that calculation. Petitioners contend that applying the historic growth rate within the city boundaries
7 to a starting population that includes population within the UGB but outside the city improperly
8 inflates the ultimate year 2025 population estimate. If the city wants to use the year 2000 UGB
9 population as its starting point, petitioners argue, the city must apply the historic growth rate of the
10 population within the UGB, which petitioners contend is lower than 4.42 percent, not the historic
11 growth rate within the city. Conversely, if the city wants to apply the historic growth rate within the
12 city, it must use as its starting point the year 2000 city population.

13 The city points out that in February 2005 it annexed all unincorporated lands within its
14 UGB, and that at present the city population and UGB population are exactly the same. Therefore,
15 the city argues, there is no reversible error in applying the 4.42 percent growth rate to the UGB
16 population figure rather than the city population figure. In addition, the city argues that once the
17 annexed areas develop at urban densities there is no reason to believe that the population in those
18 areas will increase at a slower rate than in other parts of the city.

19 We agree with the city that, even assuming it was error to apply the 4.42 percent growth
20 rate to the year 2000 UGB population instead of the year 2000 city population, petitioners have
21 failed to establish that that error requires reversal or remand. The county adopted the population
22 forecasts in September 2004. Less than six months later the city annexed the entire unincorporated
23 area within the UGB, making any discrepancy between the city population and the UGB population
24 seemingly a moot point. Given that fact, and also given the absence of a reason to believe that the
25 recently annexed areas will increase in population at a rate different than the rest of the city, it seems
26 unlikely that the difference between applying the 4.42 percent growth rate to the year 2000 UGB

1 population rather than the year 2000 city population would be significant over the 2000 to 2025
2 period. Again, given the uncertainties inherent in projecting future population growth, the 2025
3 population as calculated by the county and the 2025 population as petitioners would calculate it are
4 probably both well within the range that a reasonable decision-maker would accept. Whatever the
5 case, petitioners have not established that any error in applying the 4.42 percent growth rate to the
6 UGB population warrants reversal or remand.

7 The second subassignment of error is denied.

8 **C. Third Subassignment of Error**

9 Petitioners argue that the city impermissibly assumes a flat 4.42 percent growth rate
10 throughout the 25-year period, rather than a declining growth rate. Petitioners point out that the
11 state population forecast for the city assumes that the rate of population growth will decrease over
12 time.

13 Petitioners do not explain why the city must, like the state forecast, assume a declining
14 growth rate. As we explained in *Tipperman*, a local government is not obligated to conform its
15 population projection with the state projection, and may take a different approach with different
16 results as long as that approach is supported by an adequate factual base. The county's forecast
17 discusses different options for forecasting population growth, explains why it differs from the state
18 forecast with respect to the City of Redmond, and explains the basis for its preferred approach.
19 Petitioners have not established that that approach lacks an adequate factual base, or otherwise
20 warrants reversal or remand.

21 The third subassignment of error is denied.

22 The second assignment of error is denied.

23 The county's decision is affirmed.