

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MONDALEE LENGKEEK, MERVIN
5 “BILL” LENGKEEK, JAMES M. LONG,
6 STEPHEN P. NOFZIGER, JOANNE McLENNAN,
7 ARLEN SAMARD and EILEEN SAMARD,
8 *Petitioners,*

9
10 vs.

11
12 CITY OF TANGENT,
13 *Respondent,*

14
15 and

16
17 MELVIN BRUSH,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2004-164

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from City of Tangent.

26
27 Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners.
28 With her on the brief was Johnson and Sherton, PC.

29
30 Anne Corcoran Briggs, Portland, filed the response brief and argued on behalf of
31 respondent.

32
33 George B. Heilig, Corvallis, represented intervenor-respondent.

34
35 DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
36 participated in the decision.

37
38 REMANDED

10/12/2005

39
40 You are entitled to judicial review of this Order. Judicial review is governed by the
41 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners challenge a city decision that (1) approves a comprehensive plan map amendment that adds 84.26 acres to the city’s urban growth boundary (UGB) and redesignates the property from Agricultural to Residential, (2) adopts exceptions to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), (3) adopts a zoning map amendment from Exclusive Farm Use (EFU) to Low Density Residential (R-1), and (4) approves a partition.

FACTS

The subject property is an 84.26-acre parcel within the city limits of Tangent, lying west of agricultural land lying outside the city’s UGB.¹ The subject property lies east of Highway 99 and the Union Pacific Railroad tracks, and north of Tangent Drive. To the west across the railroad tracks are mixed commercial/residential uses. To the north is the Tangent Business Park. In 2004, the applicant below (intervenor) submitted an application seeking the land use approvals listed above. Petitioners appeal the city council’s adoption of Ordinance No. 2004-012, approving those requests.

FIRST ASSIGNMENT OF ERROR

The Tangent Zoning Ordinance (TZO) and Goal 14, Factors 1 and 2, require a demonstration of public need in order to amend the UGB and comprehensive plan map.² OAR

¹ As the city explains in its response brief, the city has unusual boundaries -- approximately two-thirds of the land lying within the city limits lies outside its UGB. Response Brief 1.

² TZO 36.8 requires that specific findings be made for quasi-judicial proposals to amend the comprehensive plan:

“A. Such amendments shall be approved only when the following findings are made:

“1. There is a public need for the change.

“* * *.”

Goal 14 provides, in relevant part:

1 660-004-0022(1)(a) provides that reasons exceptions to goal requirements may be based on a
2 “demonstrated need for the proposed use or activity.”³ Relying on a population projection of 1,581
3 for the year 2020 and on a housing study submitted by intervenor, the city concluded that there is a
4 demonstrated public need to include 90 additional acres of residentially designated land within the
5 Tangent UGB.

6 Petitioners’ first assignment of error provides:

7 “The City’s determination that there is a demonstrated public need to add the
8 subject 84.26-acre parcel to the Tangent UGB, and to change the Plan Map
9 designation of the parcel to Residential, is inconsistent with the population projection
10 and buildable lands inventory in the acknowledged Tangent Comprehensive Plan.
11 ORS 197.835(9)(a)(D).” Petition for Review 5.

12 As presented by petitioners, this assignment of error raises a Statewide Planning Goal 2 (Land Use
13 Planning) consistency argument. Goal 2 provides:

“Urban growth boundaries shall be established to identify and separate urbanizable land from rural land. Establishment and change of the boundaries shall be based upon consideration of the following factors:

- “(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
- “(2) Need for housing, employment opportunities, and livability[.]”

³ OAR 660-004-0022 provides, in pertinent part:

“An exception Under Goal 2, Part II(c) can be taken for any use not allowed by the applicable goal(s). The types of reasons that may or may not be used to justify certain types of uses not allowed on resource lands are set forth in the following sections of this rule:

“(1) For uses not specifically provided for in subsequent sections of this rule or OAR 660, Division 014, the reasons shall justify why the state policy embodied in the applicable goals should not apply. Such reasons include but are not limited to the following:

“(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Statewide Goals 3 to 19; * * *

“* * * * *”

1 “To establish a land use planning process and policy framework as a basis for all
2 decisions and actions related to use of land and to assure an adequate factual base
3 for such decisions and actions.

4 “City, county, state and federal agency and special district plans and actions related
5 to land use shall be consistent with the comprehensive plans of cities and counties
6 and regional plans adopted under ORS Chapter 268.”

7 Petitioners argue that the challenged decision is inconsistent with the Tangent Comprehensive Plan
8 (TCP) in two ways. First, they argue that the city erred in relying on housing data provided by
9 intervenor that is inconsistent with the buildable lands inventory in the acknowledged TCP. Second,
10 petitioners argue that the city’s conclusion that there is a demonstrated public need for more
11 residential land within the UGB is based on a population projection that is inconsistent with the
12 population projection found in the TCP.

13 **A. Buildable Lands Inventory**

14 Goal 10 (Housing) and its implementing administrative rules require local governments to
15 inventory the buildable residential lands within their UGB’s and to ensure that the supply of such
16 buildable lands is adequate to meet the local government’s anticipated housing needs. Goal 10;
17 ORS 197.295-.314; OAR 660-008-0010. *See also Opus Development Corp. v. City of*
18 *Eugene*, 28 Or LUBA 670, 694-95 (1995) (when adopting post-acknowledgment plan and zone
19 map amendments affecting residentially designated land within an urban growth boundary, a local
20 government must demonstrate that it continues to satisfy its Goal 10 obligation to maintain an
21 adequate inventory of buildable lands). In addressing compliance with Goal 10, the challenged
22 decision concludes that there is a demonstrated need to add 90 acres of residentially-designated
23 land to the Tangent UGB.⁴ Petitioners first argue that that conclusion is inconsistent with the TCP,

⁴ The city’s Goal 10 findings are extensive. Following its extensive analysis of the city’s housing needs, the challenged decision finds:

“The City finds that, based on the evidence in Findings 10-30, there is a demonstrated public need to add 90 acres of land with a Residential Comprehensive Plan Designation to the Urban Growth Boundary in order to provide adequate land to meet anticipated future demands for urban development in a logical and orderly manner and to provide, within the UGB, adequate amounts of

1 in violation of Goal 2. Petitioners state “no one can dispute” that the 2002 TCP includes a buildable
2 lands inventory that finds a need for only 75 acres of residential land “during the planning period.”
3 Petition for Review 7.⁵

4 The TCP was originally acknowledged in 1985, and was updated during periodic review in
5 1988 or 1989.⁶ In 2002, the city’s transportation system plan (TSP) was adopted and the TCP
6 was concurrently revised to reflect its adoption. However, the city did not adopt a new, updated
7 buildable lands inventory (BLI) at that time. It is clear from the ordinance revising the TCP in 2002
8 and the language in the 2002 TCP that the BLI, including the table set out in n 5, was not updated in
9 2002 when the TSP was adopted.⁷ Petitioners do not contend otherwise.⁸ Further, the BLI found
10 in the 2002 TCP provides a planning period that ends, at the latest, in 2005.⁹ Thus, the BLI

buildable land to meet the projected needs for residential land from 2000 to 2020, in compliance with Tangent Comprehensive Plan Purpose Statement D and Urbanization Policy 5 and Goal 10. Residentially designated land is needed for housing to accommodate long-range population growth in the City. Therefore, the City finds that the applications comply with TZO 36.8.A.1, OAR 660-004-022(1)(a) and Goal 14 Factors 1 and 2.” Record 21.

⁵ The TCP contains the following table:

“COMPARISON OF AVAILABLE AND NEEDED BUILDABLE LAND

| <u>“Type</u> | <u>Needed Acres</u> | <u>Planned and Zoned Acres</u> |
|----------------|---------------------|--------------------------------|
| “Single Family | 47.5 | 44.0 |
| “Multi-Family | 4.0 | 18.0 |
| “Mobile Home | <u>23.5</u> | <u>28.0</u> |
| “TOTAL | <u>75.0</u> | <u>90.0”</u> |

⁶ It is unclear whether the comprehensive plan’s BLI was updated during periodic review.

⁷ The BLI in the 2002 comprehensive plan references data from the late 1970’s or early 1980’s.

⁸ Petitioners only argue that the BLI was “re-adopted” when the comprehensive plan was revised in 2002.

⁹ The TCP provides: “Using the year 2005 population projection of 1,000, * * * it can be determined that a total of 420 housing units will be needed.” TCP 99-100. The plan also provides: “By allowing for mobile homes and multi-family housing in the forms described above, the City has provided sufficient buildable land to meet its housing needs to the year 2004.” TCP 99.

1 projects the needed residential lands only to the year 2005. Perhaps for this reason, intervenor
2 conducted its own buildable lands analysis. That analysis concluded that there was a need for 90
3 additional acres of residential land within the UGB to the year 2020.

4 Petitioners argue that the city’s reliance on this information provided by intervenor is
5 inconsistent with the BLI found in the TCP, which identifies a small surplus (15 acres) of land
6 through 2005. Petitioners rely on cases interpreting the Goal 2 consistency requirement in the Goal
7 10 context. We briefly summarize those cases before addressing petitioners’ arguments.

8 In *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 994 P2d 1205 (2000),
9 Metro had relied upon a 1996 draft document, instead of on a 1995 update of the acknowledged
10 plan, to determine the amount of land needed in an urban reserve area. The petitioners in that case
11 argued that Metro violated Goal 2 in doing so. The Court of Appeals summarized the Goal 2 issue
12 as follows:

13 “the question is whether the land use action itself, *i.e.*, the determination of the
14 amount of needed land, is consistent with and based upon the applicable plan and
15 ‘related implementation measures.’ The objective of the goal is to make the
16 planning process and planning documents the *basis* for all decisions and actions
17 related to use of land.’ (Emphasis added.) The draft report is not a plan or a
18 planning document of the kind that Goal 2 contemplates. It is an informal study that,
19 by its own terms, is not related to the designation of urban reserves and, by its own
20 terms, is not even a ‘final’ document for the purposes at which it is directed. Under
21 Goal 2, the computation of need must be based upon the functional plan and/or
22 Metro’s other applicable planning documents. Metro may, of course, amend those
23 documents in the manner prescribed by law, if it chooses, but it cannot simply
24 subordinate them to an informal study that is concerned with a remotely related
25 matter.” *Id.* at 22.

26 We recently explained our understanding of that ruling as follows:

27 “The Court of Appeals held that, in that circumstance, Metro could not
28 ‘subordinate’ applicable acknowledged planning documents to ‘an informal study.’
29 In other words, it could not choose to rely on an unacknowledged draft study over
30 an inventory completed a year earlier that was part of the acknowledged plan,
31 where the results of those two studies were clearly contradictory. Metro’s
32 determination was not consistent with the acknowledged plan in that case, in
33 violation of Goal 2.” *1000 Friends of Oregon v. City of Dundee*, ___ Or LUBA

1 ___ (LUBA Nos. 2004-144 and 2004-145, July 21, 2005), slip op 10, *rev*
2 *pending*.

3 In *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384, 395 (2001), we held
4 that the City of Woodburn was entitled to rely on the buildable lands inventory in its acknowledged
5 comprehensive plan, although that inventory was outdated. We most recently addressed this Goal 2
6 issue in *1000 Friends of Oregon v. City of Dundee*. In that case, the City of Dundee’s
7 acknowledged comprehensive plan contained a 1988 buildable lands inventory that was 15 years
8 old when the local decision in that case was issued. Approximately two years before the challenged
9 decision, the city updated its inventory pursuant to a comprehensive plan policy that required
10 periodic re-examination of developable lands. We held that the city’s reliance on that updated
11 inventory, although it was not incorporated into the comprehensive plan, did not render the city’s
12 findings demonstrating the sufficiency of its residential land supply inconsistent with the
13 comprehensive plan or its implementing measures. *1000 Friends of Oregon v. City of Dundee*,
14 slip op 11. Petitioners argue that this case is more like *D.S. Parklane* and less like the *City of*
15 *Dundee* case.

16 Another case cited by neither party, *Benchmark Enterprises v. City of Stayton*, 36 Or
17 LUBA 433 (1999), is potentially relevant here. In that case, the city denied the petitioner’s request
18 for annexation and subdivision approval because the city’s buildable lands inventory had not been
19 updated. We remanded, holding that the city’s denial of the annexation and subdivision proposals
20 based on a “lack of current buildable lands data and housing needs data” constituted a *de facto*
21 moratorium pursuant to the moratorium statutes. *See* ORS 197.524.¹⁰

¹⁰ The moratorium statutes were substantially rewritten in 1999. ORS 197.524 currently provides:

“(1) When a local government engages in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for the subdivision or partitioning of, or construction on, any land, including delaying or stopping issuance based on a shortage of public facilities, the local government shall:

“(a) Adopt a public facilities strategy under ORS 197.768; or

1 **1. Goal 2 Consistency**

2 Again, petitioners argue that the city’s conclusion that there is a demonstrated need to add
3 90 acres of residential land is inconsistent with the acknowledged inventory that finds a need for
4 only 75 acres of residential land. The Goal 2 consistency requirement, however, assumes that there
5 is something for the land use action to be consistent with. In *D.S. Parklane*, for instance, the court
6 held that the challenged decision in that case was inconsistent with the functional plan because the
7 land use action relied on a study that was itself inconsistent with the inventory in the functional plan.
8 For all intents and purposes, the TCP in this case does not contain a useable BLI because it
9 provides information for a planning period that ends in 2004 or 2005. *Compare Craig Realty*
10 *Group v. City of Woodburn*, 39 Or LUBA at 389 (no indication that the planning period that
11 applied to the acknowledged inventory had expired, only that the city’s housing inventory was
12 outdated).

13 The information submitted by intervenor to demonstrate a public need for the amendment
14 uses an entirely different planning period. That data uses the population projection discussed below
15 and projects the residential land need to the year 2020. Because the acknowledged BLI does not
16 contain any information regarding the need for residential lands that is relevant to the challenged
17 decision, we disagree with petitioners that the challenged decision is inconsistent with the BLI in the
18 city’s acknowledged comprehensive plan.

19 **2. Goal 2 “Required Information”**

20 Although not presented as a separate assignment of error, petitioners also include a Goal 2
21 argument that relies on a different Goal 2 requirement. Petitioners argue that intervenor’s housing
22 analysis cannot provide the basis for the needs analysis. We understand petitioners to argue that
23 Goal 2 requires that where a local government relies on an applicant’s housing needs analysis,
24 instead of the housing needs analysis provided in the comprehensive plan, that housing analysis must

“(b) Adopt a moratorium on construction or land development under ORS
197.505 to 197.540.”

1 first be incorporated into the comprehensive plan.¹¹ Petition for Review 8-9. Petitioners explain
2 their rationale as follows:

3 “If Goal 2 does not prohibit the City from relying on this applicant’s BLI without
4 incorporating it into the Plan, then there is nothing to prevent the City from relying
5 on another, different BLI submitted by another applicant trying to get his property
6 into the UGB or have its plan designation/zoning changed, in a subsequent quasi-
7 judicial proceeding. Under these circumstances, the adopted, acknowledged plan
8 would become meaningless.” Petition for Review 9 n 6.

9 At oral argument, petitioners further argued that Goal 2 and Goal 1 (Citizen Involvement) require an
10 opportunity for the public to review information contained in the comprehensive plan, which includes
11 the buildable lands inventory.¹² The process followed in this case, they argue, included only one
12 joint public evidentiary hearing before the planning commission and city council.

13 As stated in *D.S. Parklane*, the intent of Goal 2 is to require that the comprehensive plan
14 provide the basis for land use actions. *D.S. Parklane*, 165 Or App at 22. Specifically, Goal 2
15 provides that land use plans shall include “inventories and factual information for each applicable
16 statewide planning goal.”¹³ We understand petitioners’ argument to be directed at this Goal 2

¹¹ At oral argument, we understood the city to argue that intervenor’s housing analysis in fact was incorporated into the comprehensive plan. It is unclear whether the city’s position is simply that the analysis was part of the record and formed the basis for the decision. Whatever its argument, incorporation of that information into the comprehensive plan would have required a legislative comprehensive plan amendment, as explained below. That process clearly was not followed.

¹² Goal 2 provides, in pertinent part:

“All land-use plans and implementation ordinances shall be adopted by the governing body after public hearing and shall be reviewed and, as needed, revised on a periodic cycle to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan. Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances.”

¹³ Goal 2 provides, in pertinent part:

“All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents. * * *”

1 language that requires inventories and certain information for each goal, Goal 10 in this instance, to
2 be included in the comprehensive plan. We agree with petitioners that Goal 10, Goal 2 and Goal 1
3 require that certain necessary information in the inventory appear in the comprehensive plan.
4 Without that information in the plan, a land use decision that implicates Goal 10 is not based on the
5 comprehensive plan. Further, to allow an applicant to provide that data in a proceeding that does
6 not and cannot lead to a conforming amendment to the comprehensive plan denies the public the
7 opportunity to provide input that is required by Goal 1.

8 The administrative rule implementing Goal 10 further supports petitioners' position that the
9 needs analysis must be incorporated into the comprehensive plan. OAR 660-008-0010 provides
10 that the mix and density of needed housing is determined in the "housing needs projection."¹⁴ OAR
11 660-008-0005(5) requires that the "housing needs projection" be "justified in the plan." It
12 provides:

13 "(5) 'Housing Needs Projection' refers to a local determination, *justified in the*
14 *plan*, of the mix of housing types and densities that will be:

15 "(a) Commensurate with the financial capabilities of present and future
16 area residents of all income levels during the planning period;

17 "(b) Consistent with any adopted regional housing standards, state
18 statutes and Land Conservation and Development Commission
19 administrative rules; and

20 "(c) Consistent with Goal 14 requirements." (Emphasis added).

21 The city in this case, and any local government that has a housing inventory with a housing
22 needs projection that uses a planning period that has already passed, is essentially operating without
23 a useable acknowledged housing needs analysis. If a local government were to deny an application

¹⁴ OAR 660-008-0010 provides:

"The mix and density of needed housing is determined in the housing needs projection. Sufficient buildable land shall be designated on the comprehensive plan map to satisfy housing needs by type and density range as determined in the housing needs projection. The local buildable lands inventory must document the amount of buildable land in each residential plan designation."

1 because there is no applicable housing needs analysis in the comprehensive plan, however, it risks
2 remand for the reasons we remanded in *Benchmark Enterprises*; *i.e.*, it could be enacting a *de*
3 *facto* moratorium. On the other hand, if it relies on a housing study provided by the applicant
4 without incorporating that analysis into its comprehensive plan, it risks violating Goal 2 for the
5 reasons provided by petitioners.

6 Goal 10 requires local governments to inventory buildable lands, and Goal 2 requires that
7 those inventories be part of the comprehensive plan. Where local governments do not have a
8 useable inventory, they may rely on an applicant to provide that information. However, if they do
9 so, the comprehensive plan must be amended concurrently to incorporate that inventory.¹⁵

10 In this case, the projection of housing need in the comprehensive plan only provides
11 estimates to year 2005. As discussed above, Goal 10, Goal 2 and Goal 1 require that intervenor's
12 buildable lands analysis, which is the only basis for determining public need for the proposed UGB
13 expansion, be incorporated into the comprehensive plan.

14 **B. Population Projection**

15 The BLI in the city's acknowledged comprehensive plan includes a population projection of
16 1,000 for the year 2005. In 1999, Linn County adopted a year 2020 official population projection
17 for the county and for the cities located within the county, including the City of Tangent. The
18 county's estimated 2020 population for the City of Tangent was 1,581.¹⁶ In 2002, the city adopted
19 its TSP, which was referred to and approved by the voters. The TSP, which was incorporated into
20 the TCP, contains a reference to an estimated population that ranges from 1,684 to 2,010 for the
21 year 2020. Record 518.

¹⁵ While the obligation to inventory buildable land is intended to be that of the local government, where a local government has not satisfied its obligation to periodically update its inventory, and where the acknowledged inventory is essentially useless, the applicant's burden to demonstrate compliance with Goal 10, Goal 14 and the showing of public need may, in some instances, require the applicant to supply the background, technical information that Goal 2 mandates be made part of the comprehensive plan.

¹⁶ The city alleges that it adopted that population projection. Petitioners allege that that assertion by the city relies on minutes reflecting that adoption, and that those minutes are not part of the record.

1 Petitioners allege that the city used three separate methods in reaching its conclusion that
2 there is a demonstrated need to add 90 acres of residentially-designated land to the Tangent UGB.
3 According to petitioners, all three methods are based on a year 2020 population projection of
4 1,581. Petitioners allege that the TCP contains a projection of 1,000 by the year 2020 and that the
5 projection the city relied upon is therefore inconsistent with the population projection in the
6 acknowledged comprehensive plan.¹⁷

7 The city alleges that any TCP reference to a population projection of 1,000 population is to
8 the year 2005, and that any reference to a 1,000 estimate as a projection for 2020, instead of for
9 2005, is a typographical error. We agree. Linn County’s population projection, the population
10 projection in the TSP and all of the data included in the BLI support the city’s explanation on this
11 point.¹⁸ If petitioners are correct that the city did not adopt Linn County’s population projection of
12 1,581, then the population projection adopted in the TSP provides the only population projection
13 upon which the city could rely. That population projection range (1,684 – 2,010) is *higher* than the
14 1,581 population projection that the city relied upon in concluding the public need for 90 additional
15 acres of residential land. Accordingly, if the city had used the TSP population projection, it would
16 have concluded that it needed more, not less, residential land. In any event, the question petitioners
17 seek to answer is whether the challenged decision is consistent with the TCP. Again, because the
18 population projection in the acknowledged BLI only estimates population figures to 2005, the
19 challenged decision, which relies upon data based on a population projection for 2020 and, in any
20 event, which is lower than the population projection included in the TSP, is not *inconsistent* with
21 the TCP.

¹⁷ The sole reference to the figure relied upon by petitioners appears in Goal 10 of the TCP: “CITY GOAL 1: TO PROVIDE FOR THE HOUSING NEEDS OF THE COMMUNITY WITH AN ANTICIPATED POPULATION OF APPROXIMATELY 1,000 BY THE YEAR 2020.” TCP 20.

¹⁸ The city’s actual population in the year 2000 was 933. Record 84. It is doubtful that the city adopted a population projection of 1,000 for the year 2020, when it adopted the TSP in 2002, knowing that the actual population in the year 2000 was 933.

1 Although petitioners frame the question as whether the challenged decision is inconsistent
2 with the comprehensive plan, they also appear to argue that the city failed to render a decision that
3 was based on its comprehensive plan. For the same reasons discussed above, we agree with
4 petitioners that Goal 2 requires that the population projection that forms the basis of the needs
5 analysis be incorporated into the comprehensive plan.¹⁹ Accordingly, this subassignment of error is
6 sustained.

7 Petitioners' first assignment of error is sustained in part.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioners argue that the city's findings addressing certain Statewide Planning Goal 14
10 (Urbanization) considerations are inadequate because they rely on tables and figures that are not
11 incorporated into the decision. Consequently, it is impossible to determine, without the tables and
12 figures, whether the findings demonstrate compliance with the applicable approval criteria.

13 The challenged decision refers to two figures and two tables in support of its Goal 14
14 findings. The tables and figures are part of the record. However, apparently as a result of an
15 oversight involving a computer formatting problem, those tables and figures were not included,
16 attached or incorporated as part of the final order. Petitioners argue that the challenged decision
17 merely refers to the figures and tables "without indicating any intent to incorporate such documents
18 by reference * * *." Petition for Review 11.

19 Petitioners are wrong, however, that the figures and tables are not incorporated by
20 reference in the challenged findings. The findings state: "The information and analyses on pages 8
21 through 12 and Attachment A of the application are adopted as Findings of Fact by the City."
22 Record 18. Attachment A includes intervenor's housing needs analysis, which in turn includes the
23 tables and figures at issue. Accordingly, the tables and figures in fact were incorporated as findings

¹⁹ If the city, on remand, adopts a legislative plan amendment incorporating the housing needs analysis into its comprehensive plan, whatever population projection the city uses for that needs analysis will presumably become part of the comprehensive plan.

1 of fact. We therefore agree with the city that although the tables and figures did not appear in the
2 findings document itself, they were specifically adopted as findings. The findings are therefore
3 adequate to demonstrate compliance with the criteria identified by petitioners, and the clerical error
4 in omitting the tables and figures does not require remand.

5 Petitioners' second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 The uses proposed are low-density residential uses. OAR 660-004-0020(2)(d) requires a
8 demonstration that the "proposed uses are compatible with other adjacent uses or will be so
9 rendered through measures designed to reduce adverse impacts."²⁰ Petitioners argue that the city's
10 findings are inadequate because they rely on development features, *i.e.*, a park and a landscaped
11 trail, that are not required by the challenged decision.

12 In addressing OAR 660-004-0020(2)(d), the city found that the proposed low-density
13 residential development will be compatible with adjacent residential and commercial uses.²¹

²⁰ Petitioners also cite to Goal 14, factor 7, which requires consideration of: "Compatibility of the proposed urban uses with nearby agricultural activities" when establishing or changing urban growth boundaries." While the findings identify agricultural uses to the east of the subject property, petitioners challenge only the city's reliance on the park and landscaped trail to demonstrate compatibility with surrounding residential and commercial uses.

²¹ The findings state:

"The City finds the proposed use of the subject property is residential with a 10,000 minimum square foot minimum lot size. The City finds the subject property borders urban uses on three sides and agricultural use to the east. Seventy percent of its perimeter borders urban uses. The property borders large-lot, residential development to the south, across Tangent Drive. A 6.0 acre park will be developed on the north side of Tangent Drive, further separating development on the subject property from existing residences. The low density residential development that will occur in this part of the property will be completely compatible with existing residential development to the south.

"The City finds the subject property borders mixed commercial/residential uses to the west, across the Union Pacific Railroad right-of-way, and Tangent Business Park to the north. A 30-foot wide, landscaped perimeter trail will be built along the west and northern boundaries. This will provide a buffer between the uses. The City finds that low density residential development will be compatible with existing planned uses to the west and north, due to the general compatibility of the types of uses and the extensive separation and landscape buffering.

1 Petitioners argue that while the challenged decision relies on the development of a park on the south
2 part of the subject property and a landscaped perimeter trail on the west and north sides of the
3 subject property, to support its conclusion regarding compatibility, the challenged decision does not
4 require those features as conditions of approval. Petition for Review 12 (citing *Collins v. Klamath*
5 *County*, 26 Or LUBA 434, 437 (1994) (where local government relies on particular features to
6 assure compliance with approval standards, local government must “assure that there is an adequate
7 reason to assume” that such features will be part of the authorized use)). The findings are therefore
8 inadequate, petitioners assert.

9 The city concedes that the identified features are referenced, but argues, with regard to the
10 park:

11 “the findings rely primarily on the fact that low density residential uses allowed in the
12 R-1 zone will be compatible with the low density residential uses located to the
13 south, rather than the existence of the park itself, to conclude that uses of the
14 subject property will be compatible with uses located on adjacent properties.”
15 Response Brief 13-14.

16 Although the park is mentioned in the findings, the city concluded that the proposed use,
17 low-density residential, “will be completely compatible with existing [low-density] residential
18 development to the south.” That finding relies in no way upon the park. Rather, it simply takes the
19 position that low-density residential uses are compatible with other low-density residential uses.
20 Petitioners offer no reason to question that position.

21 The findings regarding compatibility with the adjacent commercial uses to the west and
22 north, on the other hand, appear to rely primarily on the landscaped perimeter trail:

23 “The City finds that low density residential development will be compatible with
24 existing planned uses to the west and north, due to the general compatibility of the
25 types of uses *and the extensive separation and landscape buffering.*” Record
26 32 (emphasis added).

“* * * *” Record 32.

1 We cannot say that the city would have arrived at the same conclusion regarding compatibility if the
2 trail were not anticipated. We therefore agree with petitioners that the city’s reliance on that feature
3 to support its conclusion regarding compatibility requires that it be required as a condition of
4 approval. On remand, the city must either (1) impose a condition of approval assuring that the
5 perimeter trail will be required or (2) adopt findings clarifying that it does not rely on that feature as
6 a basis for its conclusion that the proposed use will be compatible with uses on adjacent properties.

7 Petitioners’ third assignment of error is denied in part and sustained in part.

8 **FOURTH ASSIGNMENT OF ERROR**

9 Petitioners argue that the challenged findings addressing Goal 14, factors 1 through 7, were
10 not adopted as part of the TCP, as required by Goal 14.²²

11 The city responds:

12 “Ordinance 2004-012 includes text amendments to the TCP to incorporate ‘Exhibit
13 C’ of the Final Order into the TCP by reference. Exhibit C includes findings
14 addressing the seven Goal 14 factors. R. 11-24.” Response Brief 14.

15 Ordinance No. 2004-012 provides, in pertinent part:

16 “The Comprehensive Plan Text of Tangent is Amended to include the Exceptions to
17 Statewide Planning Goals 3 and 14 as shown in Exhibit C.” Record 3.

18 Exhibit C includes the findings of fact supporting the challenged decision. Those findings include
19 findings addressing the reasons justifying an exception to Goal 14. As part of justifying that

²² Goal 14 provides, in relevant part:

“Urban growth boundaries shall be established to identify and separate urbanizable land from rural land. Establishment and change of the boundaries shall be based upon consideration of the following factors:

“* * * * *

“The results of the above considerations shall be included in the comprehensive plan. * * *

“* * * * *”

1 exception, the city adopted findings addressing the seven Goal 14 factors.²³ Those findings were
2 adopted as part of the TCP per the language in Ordinance 2004-012 quoted above, as required by
3 Goal 14.

4 Petitioners' fourth assignment of error is denied.

5 **FIFTH ASSIGNMENT OF ERROR**

6 Petitioners challenge the city's findings demonstrating that the zone change complies with
7 Goal 11 (Public Facilities and Services) and TCP Goal 11, Policy 1.²⁴

8 The challenged findings conclude that it is feasible for all public facilities to be made
9 available prior to or concurrent with the proposed development. Record 41.²⁵ Petitioners argue,
10 however, that the findings do not rely on a condition of approval, and that even if they did, the
11 conditions of approval are not adequate to ensure that the capacity of the city's community sanitary
12 sewer system will be adequate to serve the development of the subject property.²⁶ It appears to be

²³ The findings state: "The reasons justifying an exception to Goal 14 are presented under the seven factors of Goal 14 in Findings 33-39." Record 22.

²⁴ Goal 11 requires the city to "plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." "Urban facilities and services" is defined to include "appropriate types and levels of * * * sanitary facilities."

Plan Goal 11, Policy 1 states: "[t]he City of Tangent shall ensure that a full range of services are available for the citizens of Tangent at levels appropriate for the planned development during the planning period."

²⁵ The findings state:

"The City finds that the information presented in the application and reviewed in Findings 76-84 demonstrates that it is physically and economically feasible for all public facilities, services and improvements necessary for residential development to be made available prior to or concurrent with the development. The City finds that the cost of utility services for any new development or proposed land division can and shall be paid by the developer. The City finds that, at the time of subdivision of the property, the developer can and shall be responsible for providing and paying for the services required, and for upgrading and improving impacted public facilities and services as necessary." Record 41.

²⁶ Condition 11 provides:

"Prior to proposed development on the property, the applicant shall provide verification of adequate water and sanitary sewer capacity on-site to serve the proposed use. Calculations prepared by a Registered Professional Engineer shall certify sanitary sewer flows for the proposed development, and shall clearly identify the capacity of the STEP system and

1 undisputed that the city’s sewer system does not currently have the capacity to serve the proposed
2 development over the planning period.²⁷ Petitioners argue:

3 “First, it is not clear that the Conditions of Approval will be applicable to future
4 development of the property, since they were not made a part of the City’s land use
5 regulations by Ordinance No. 2004-12. Under ORS 197.015(11) and 197.195(1)
6 subdivisions within a UGB are ‘limited land use decisions’ that are subject only to
7 standards in a city’s land use regulations. Further, Condition 11 requires only that
8 the applicant ‘provide verification of adequate water and sanitary sewer capacity
9 **on-site** to serve the proposed use.’ (Emphasis added.) Beyond that, Condition 11
10 requires only that the applicant ‘identify the capacity of the STEP system and
11 treatment facilities **needed** to support the proposed development.’ The conditions
12 do not require a demonstration that the City STEP system has adequate treatment
13 capacity to serve proposed development of the subject property.” Petition for
14 Review 15 n 12 (citations omitted; emphasis added by petitioners).

15 Petitioners appear to be arguing that where the city concludes that capacity is not currently
16 available, but that it is feasible for all public facilities to be made available prior to or concurrent with
17 the proposed development, the city must adopt a condition of approval that ensures that such public
18 facilities will actually be available prior to the development. *See Rhyne v. Multnomah County*, 23
19 Or LUBA 442, 447-48 (1992) (local government may find that it is feasible to comply with an
20 approval criterion and impose conditions of approval to assure compliance with that criterion);
21 *Paterson v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2004-155, April 5, 2005), *rev’d and*
22 *remanded on other grounds* ___ Or App ___ (August 31, 2005, slip op 4) (“Generally, where
23 there is conflicting evidence regarding whether compliance with an approval criterion is feasible, the
24 local government may determine that compliance is feasible and impose conditions of approval as

treatment facilities needed to support the proposed development. All new STEP system facilities shall be designed and constructed in conformance with the Tangent Public Work’s Design Standards.” Record 102.

²⁷ The findings state:

“The City of Tangent uses a STEP community sanitary sewer system. The capacity of the current system is approximately 1,369 individuals based on the City Engineering Firm’s (Westech Engineering, Inc.) memo dated Jan. 8, 2004, which is hereby incorporated into these Findings. The City finds that this is an increase of about 350 to 400 over the current population. The projected 20-year increase in population is 648 individuals. Improvements will need to be made to the system within the City’s 20-year planning period.” Record 42.

1 necessary to ensure compliance.”). We understand petitioners to argue that the city’s findings are
2 inadequate because the finding of feasibility does not rely on a condition of approval that ensures
3 that adequate sewage disposal facilities will be available.

4 The city responds that the condition of approval requiring submittal of a Master
5 Development Plan that addresses, among other things, proposed sanitary sewer improvements is
6 sufficient to “assure that adequate public facilities will be planned for and developed over the
7 planning period to serve not only the subject property but other property within the UGB, consistent
8 with Goal 11 and TCP Goal 11, Policy 1.”²⁸ Response Brief 16.²⁹

9 As petitioners point out, however, condition 1 relating to a Master Development Plan
10 merely requires that the sanitary sewer improvements be reflected in the Master Development Plan;
11 it does not require any demonstration of capacity or adequacy of that system. We also agree with
12 petitioners that the city’s explanation of how it plans to fund the necessary improvements is
13 insufficient to demonstrate compliance with Goal 11 and Plan Goal 11, Policy 1. The city’s finding
14 of feasibility, unaccompanied by a condition of approval that ensures compliance with the applicable
15 approval criteria, requires remand.

16 Petitioners’ fifth assignment of error is sustained.

17 The city’s decision is remanded.

²⁸ Condition 1 provides, in pertinent part:

“No development of the property or further land division of the property shall occur until a Master Development Plan is presented to the City and approved by the City Council. The Development Plan may be submitted as part of a Subdivision request or a Planned Development request. Elements of the Development Plan shall include:

“* * *

“Sanitary Sewer Improvements

“* * *” Record 101.

²⁹ The city also argues that the recently adopted land use regulations require adequate sewage disposal prior to development. Both parties concede, however, that those regulations were not in existence when the challenged decision was adopted. Accordingly, they cannot be relied upon as a basis for determining compliance with Goal 11 and TCP Goal 11, Policy 1.