BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

4-J LAND CO., LLC,
Petitioner,

vs.

CITY OF SANDY,
Respondent.

LUBA Nos. 2005-047 and 2005-048

FINAL OPINION
AND ORDER

Appeal from City of Sandy.

Stark Ackerman and Steven R. Schell, Portland, and Andrew H. Stamp, Lake Oswego, filed the petition for review. With them on the brief were Black Helterline, LLP and Andrew H. Stamp, P.C. Andrew H. Stamp argued on behalf of petitioner.

David F. Doughman, Portland, filed the response brief and argued on behalf of respondent. With him on the brief were Pamela J. Beery and Beery, Elsner and Hammond, LLP.

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

REMANDED 11/07/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals two city ordinances that amend the city's comprehensive plan and development code.

REPLY BRIEF AND MOTION TO STRIKE

Petitioner moves to file a reply brief to respond to new issues presented in the respondent's brief. That motion is allowed.

Respondent moves to strike a number of extra-record documents that are attached to petitioner's reply brief. Petitioner contends that one of those documents is "akin to a secondary legal source" and, as such, can be considered by LUBA. Petitioner contends the other two documents are properly subject to official notice. Because we do not rely on those documents or the related legal arguments in the reply brief in reaching our decision in this appeal, we need not determine whether any of those documents are subject to official notice or whether LUBA could consider those documents for other reasons.

FACTS

The challenged ordinances adopt a number of changes to the city's comprehensive plan and development code. Petitioner contends that those changes will result in lower density residential development in two of the city's three low-density residential zoning districts. We briefly describe below (1) the structure of the city's comprehensive plan and (2) the comprehensive plan and zoning ordinance amendments that petitioner challenges, before turning to its assignments of error.

A. The City of Sandy Comprehensive Plan Residential Map Designations and Implementing Zoning District Designations

The City of Sandy Comprehensive Plan (SCP) includes three residential comprehensive plan map designations: (1) High Density Residential, (2) Medium Density Residential, and (3) Low Density Residential. The SCP High Density Residential designation is implemented by one residential zoning district, the High Density Residential (R-3) zone, which requires a minimum

development density of 10 units per acre and allows a maximum development density of 20 units per acre.[1] The SCP Medium Density Residential designation is also implemented by one residential zoning district, the Medium Density Residential (R-2) zone, which requires a minimum residential density of 8 dwelling units per acre and allows a maximum residential density of 14 dwelling units per acre. Neither the SCP High Density Residential nor the SCP Medium Density Residential plan designations nor their implementing zoning designations are directly at issue in this appeal.

The SCP Low Density Residential designation is implemented by three residential zoning districts, the Rural Residential (RR), the Single Family Residential (SFR), and the Low Density Residential (R-1) districts. The RR zone allows a maximum residential density of 2 dwelling units per acre, but requires no minimum density. The SFR zone requires a minimum density of 2 units per acre and allows a maximum density of 6 units per acre. The R-1 zone requires a minimum density of 5 units per acre and allows a maximum density of 10 units per acre. Petitioner's assignments of error are directed at the amendments to the SFR and R-1 zoning districts.[2] We briefly describe those amendments before turning to petitioner's assignments of error.

---

[1] The SCP and the City of Sandy Development Code (SDC) sometimes distinguish between "gross" acres and "net" acres. As defined by SDC 17.10.30, gross acreage includes "public streets or other areas to be dedicated or reserved for public use," and net acreage does not count such areas. The SCP and SDC do not always make the "net" and "gross" acreage distinction consistently. Although petitioner sometimes distinguishes between net acres and gross acres, petitioner does not use the distinction consistently and does not distinguish between net acres and gross acres in a way that makes the distinction relevant in this appeal. To avoid confusion and for simplicity, we therefore generally refer to acres in this opinion, and make no attempt to distinguish between gross acres and net acres.

[2] The SDC allows a number of different housing types in the SFR and R-1 zones. We list those different housing types below.

- Single Family Detached (SFD) dwellings are permitted outright in both the SFR and R-1 zones.
- Single Family Detached Manufactured (SFD-M) dwellings are permitted outright in both the SFR and R-1 zones.
- Single Family Detached Zero Lot-Line (SFD-ZLL) dwellings were permitted outright in both the SFR and R-1 zones. Ordinance 2005-03 makes SDF-ZLL dwellings a conditional use in the SFR zone.

B. The R-1 Zone Amendments

1. Minimum/Maximum Density

Prior to the disputed amendments, the R-1 zone provided that "[d]ensity shall not be less than 5 or more than 10 units per acre." Record 15. Ordinances 2005-02 and 2005-03 amend the R-1 zone to lower the minimum density to 3 units per acre.[3] Record 4, 15. Therefore, after Ordinances 2005-02 and 2005-03, a one-acre R-1 zoned property could be developed with as few as three dwelling units, whereas before those ordinances were adopted the same one-acre property would have to be developed with at least 5 dwelling units.

2. New Minimum Lot Sizes in the R-1 Zone

The maximum allowable density in the R-1 zone, both before and after the disputed amendments, is 10 dwelling units per acre. Prior to the disputed amendments, there was no minimum lot size in the R-1 zone, making it possible to achieve the 10-unit maximum density using any of the allowed types of housing. Ordinance 2005-03 amends the R-1 zone to require minimum lot areas of 5,500 square feet for the single-family detached (SFD) dwelling type and 5,000 square feet for the single family detached zero lot-line (SFD-ZLL) dwelling type. Record 16; *see* n 2. With these minimum lot sizes, it would no longer be possible to achieve the maximum density of 10

- Single Family Attached Zero Lot-Line (SFA-ZLL) dwellings are permitted outright in the R-1 zone and are a conditional use in the SFR zone.
- Duplexes are permitted outright in the R-1 zone and a conditional use in the SFR zone.
- Row Houses are permitted outright in the R-1 zone and are not allowed in the SFR zone.
- Manufactured Home Parks are permitted outright in the R-1 zone and are not allowed in the SFR zone.

[3] Petitioner cites Ordinance 2005-02 which amends SCP language concerning the R-1 zone minimum density requirement. Record 4. However, Ordinance 2005-03, which amends the R-1 zone, adopts the same change in the R-1 zone's minimum density requirement. Record 15.

units per acre in the R-1 zone if property is developed entirely with SFD dwellings or SFD-ZLL dwellings.[4]

C. The SFR Zone

1. New 7,500 Square Foot Minimum Lot Size

In the SFR zone, property must be developed with at least two dwelling units per acre but not more than six dwelling units per acre. Prior to the disputed amendments, there was no minimum lot size in the SFR zone. Therefore, prior to the Ordinance 2005-03, a development applicant in the SFR zone theoretically could achieve the maximum density of six units per acre using any of the allowed housing types. Ordinance 2005-03 imposes a 7,500 square foot minimum lot size for SFD dwellings. Record 13. Therefore, after the amendment, the maximum density possible on SFR-zoned property would be five units, if the property is developed exclusively with SFD dwellings.[5]

2. Single Family Detached Zero Lot-Line Dwellings

Prior to the challenged amendments, SFD-ZLL dwellings were permitted outright and SFA-ZLL dwellings were allowed as a conditional use in the SFR zone. Ordinance 2005-03 makes single family detached zero lot-line dwellings conditional uses rather than uses that are permitted outright.[6]

---

[4] With a minimum lot size of 5,500 square feet, no more than 7 SFD dwellings would be possible per acre (one acre (43,560 sq ft) divided by 5,500 sq ft = 7.92). With a minimum lot size of 5,000 square feet, no more than 8 SFD-ZLL dwellings would be possible per acre (43,560 sq ft divided by 5,000 sq ft = 8.712). With one possible exception, to achieve the maximum density of 10 units per acre, R-1 zoned property would have to include at least some of the other housing types that are not subject to minimum lot sizes. The possible exception would be to develop under the city's planned development provisions, which allow a density increase of up to 25 percent. SDC 17.64.40(C).

[5] 43,560 square feet divided by 7,500 square feet = 5.808.

[6] Petitioner also claims:

> "Finally, notwithstanding the changes made to densities, Ordinance 200503 maintained or increased existing setbacks and other requirements. * * *" Petition for Review 8.

It is not apparent to us how the increased and maintained setbacks and other unspecified requirements would affect development densities and petitioner makes no attempt to explain why that might be the case. We therefore do not consider this part of petitioner's argument further.

The tables below display the above-described amendments that form the basis of petitioner's appeal.

R-1 Zone Amendments

Before Amendments	After Amendments
• **Min/Max Density** = 5 – 10 units	• **Min/Max Density** = 3 – 10 units
• **Min. Lot Sizes** = None	• **Min. Lot Sizes** = o 5,500 sq ft for SFD dwellings o 5,000 sq ft for SFD – ZLL dwellings o None for other housing types

SFR Zone Amendments

Before Amendments	After Amendments
• **Min. Lot Sizes** = None	• **Min. Lot Sizes** = o 7,500 sq ft for SFD dwellings o None for other housing types
• **SFA-ZLL Dwellings** = Permitted Use	• **SFA-ZLL Dwellings** = Conditional Use

SECOND ASSIGNMENT OF ERROR

Statewide Planning Goal 10 (Housing) provides, in part:

> "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"

SCP Goal 10, Policy 1 similarly provides:

> "[The city will a]ssure an adequate supply of developable land for low, medium, and high density housing to meet the 20-year population projections."

According to petitioner the city adopted a Buildable Lands Inventory (BLI) and Housing Needs Assessment (HNA) in 1997 to comply with its Goal 10 obligation to plan and zone an adequate supply of land to meet projected housing needs. The HNA includes a table that petitioner attached as appendix 66 to its petition for review. That table is reproduced below:

Housing Type	% Capture per Housing Type	Gross Density (units/acre)	New Households (1997-2017)	Gross Acre Needs (1997-2017) 1/	Net Acre Needs (1997-2017) 2/
Single Family	37	5	1,556	334	268
Low Density	22	8	925	124	99
Medium Density	27	12	1,136	102	81
High Density	14	16	589	40	32
Total			4,206	600	480

1/ Includes 7.5 percent vacancy rate allowance.
2/ Assumes 20% percent of land is dedicated for public and semi-public uses.

Although the first column labeled "Housing Types" makes no reference to zoning districts, petitioner and the city treat the references in that column to "Single Family" and to "Low Density" as though they are references to the Single Family Residential (SFR) zone and Low Density Residential (R-1) zone, respectively. We do not question that assumption. Column four shows that the HNA expects that the city will need to accommodate a total of 4,206 additional households between 1997 and 2017. The second column shows that the HNA anticipates that 37% of those households will be housed in units that will be constructed on land in the Single Family SFR zone and that the housing needed to accommodate those households in the SFR zone will be developed at an average density of 5 units per acre in the SFR zone.[7] The SCP anticipates that 22% of those households will be housed in the Low Density R-1 zone, and that the housing needed to accommodate those households will be developed at an average density of 8 units per acre in the R-1 zone.[8]

Simply stated, petitioner's central argument under the second assignment of error is that the city's decision to lower the permissible minimum density in the R-1 zone from 5 units to 3 units per acre and its decision to impose minimum lot sizes in the SFR and R-1 zone call into question whether development in the SFR and R-1 zones over the 1997 to 2017 planning period will achieve

[7] As we have already explained, the SFR zone requires a minimum density of 2 units and limits maximum density to 6 units per acre. Therefore, the HNA assumes that development in the SFR zone will average 5 units per acre, which is toward the higher end of the permissible density range.

[8] As we have already noted, before Ordinances 2005-02 and 2005-03, the R-1 zone had a minimum density of 5 units and a maximum density of 10 units, but after those ordinances the minimum density was reduced to 3 units while the maximum density of 10 units per acre remained unchanged. The HNA assumption that development in the R-1 zone will average 8 units per acre is not changed.

the 5 units and 8 units per acre that the SCP anticipates for development in the SFR and R-1 zones. Citing *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 694-5 (1995) (*Opus I*); *Opus Development Corp v. City of Eugene*, 30 Or LUBA 360, 373-4 (*Opus II*), *aff'd* 141 Or App 249, 918 P2d 116 (1996) and *Bernard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660, 683 (1998), petitioner contends the city's findings that the disputed amendments will not result in a failure of the city to achieve the residential development densities that the HNA anticipates for the SFR and R-1 zones are not supported by the evidence in the record and thus violate the Goal 2 requirement that the city's comprehensive plan and land use regulations be supported by an adequate factual base.[9]

Our *Opus I, Opus II* and *Bernard Perkins* decisions recognize that Goal 10 requires that cities plan for a variety of needed housing types. However the actual mix of housing that will be constructed and the density at which that housing will be constructed is almost always uncertain. This is because comprehensive plans and land use regulations almost always allow a variety of housing types and densities within any given zoning district and the menu of residential development options almost always varies between zoning districts. This requires that a city make assumptions about the types of housing that will be developed and the expected density of that housing, so that an adequate amount of land can be planned and zoned for the anticipated number of units of the various housing types that will be needed. When such assumptions are adopted as part of the acknowledged comprehensive plan and land use regulations, as they have been here, subsequent amendments to the comprehensive plan and land use regulations must assure that the acknowledged assumptions that the city relies on to ensure that its comprehensive plan and land use regulations comply with Goal 10 remain valid. This assurance of continued Goal 10 compliance need not be the product of the kind of precision that is expected in rocket science, but it does require a level and

[9] Goal 2 requires that land use decision making be supported by an "adequate factual base." We have held that the requirement for an adequate factual base requires evidence that a reasonable person would believe, *i.e.*, substantial evidence. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff'd* 130 Or App 406, 882 P2d 1130 (1994).

kind of justification that a reasonable decision maker would rely on to conclude that the amendment will not leave the city unable to accommodate expected housing needs with the land that is planned and zoned for that purpose.

Before turning to the city's findings, we note and reject two arguments the city advances in defense of the appealed ordinances. The city first argues that maximum densities in the SFR and R-1 zones are unchanged, and it is still *possible* to develop property in both of those zones so as to achieve the target densities set out in the HNA, if housing types other than SFD dwellings are constructed or planned development approval is sought. The city argues that the existence of this *possibility* means its decision could not violate Goal 10.

The bare possibility that there are options for development in the SFR and R-1 zones that would result in achievement of the development densities anticipated in the HNA is not sufficient to demonstrate that the disputed amendments do not violate Goal 10. Goal 10 requires inventories, analysis, assumptions and projections. The relevant inquiry under Goal 10 in considering whether the plan and land use regulations are consistent with Goal 10 is not what types or densities of housing are theoretically "possible." Rather the relevant inquiry under Goal 10 is whether the amendments will alter the types or densities of residential development that the HNA anticipates will actually occur in the city's residential zones during the planning period. It is these assumed densities that must be achieved, if the city is to meet its housing needs over the planning period with the amount of land that is placed in the city's various residential zones. The potential effect the amendments may have on the densities in the affected zones that the HNA assumes will be required to meet housing needs is the proper starting place in addressing Goal 10. The city may not rely on theoretically possible densities of development that are not anticipated in the HNA to demonstrate compliance with Goal 10.

A second general argument advanced by the city is that its decision need not be consistent with its adopted BLI and HNA:

> "A BLI and HNA are required pursuant to the terms of ORS 197.296. That statute only applies to Metro's regional framework plan * * * and to additional cities as determined by the Land Conservation and Development Commission (LCDC). ORS 197.296(1)(a) and (b) (2003)." Respondent's Brief 14.

Petitioner contends that the city is required to adopt a BLI and HNA pursuant to ORS 197.296, but in making that argument relies on extra-record evidence that we do not consider.

We conclude that it is unnecessary to decide whether the city is subject to ORS 197.296. LCDC's administrative rule implementing Goal 10 provides in part:

> 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.[10] OAR 660-008-0010 (emphasis added).

Without regard to whether the city was obligated to adopt a BLI and HNA under ORS 197.296, the city's acknowledged comprehensive plan relies on those documents, in part, to comply with the Goal 10 requirement for a housing needs projection. Because the city has adopted and relied on the BLI and HNA to ensure that its comprehensive plan and land use regulations comply with Goal 10, it must ensure that the assumptions in those documents remain valid when it later amends its comprehensive plan and land use regulations in ways that may call those assumptions into question. If the disputed amendments will render critical assumptions invalid, the city must either modify the amendments so that the assumptions remain valid, or take other steps to

---

[10] OAR 660-008-0005(5) provides the following definition of "housing needs projection:"

> "'Housing Needs Projection' refers to a local determination, justified in the plan, of the mix of housing types and densities that will be:
>
> "(a) Commensurate with the financial capabilities of present and future area residents of all income levels during the planning period;
>
> "(b) Consistent with any adopted regional housing standards, state statutes and Land Conservation and Development Commission administrative rules; and
>
> "(c) Consistent with Goal 14 requirements."

ensure that the city's comprehensive plan and land use regulations adequately provide for needed housing and remain in compliance with Goal 10.[11]

A. The City's Findings

In support of the Ordinance 2005-02 amendment that reduces the minimum density requirement in the R-1 zone, the city adopted the following relevant findings;

> "iii) The amendment's reduction of the R-1's density range will not materially affect the density of the R-1 zone, nor will it violate the zone's land needs as identified in the BLI.
>
> (1) The record reveals that land has generally developed at the higher end of the R-1 zone's density range.
>
> "* * * * *." Record 7.

The city adopted similar findings in support of Ordinance 2005-03:

> "10. Goal 10: Housing. The findings for such amendments potentially affecting the amount of buildable land within a given jurisdiction must show that sufficient land will continue to be available for the development of needed housing types. Based on the following findings, the City finds that Goal 10 is satisfied.
>
> "i) The City's comprehensive plan states that an adequate supply of developable land for low, medium, and high density housing must exist to meet the 20-year population projections.
>
> "ii) The City believes that, based upon the current supply of developable land for the above noted housing types, more than an adequate supply of developable land will continue to exist after the amendments are implemented.
>
> "iii) The amendments' institution of minimum lot sizes in the SFR and R-1 zones for certain housing types will not materially affect the density of those zones, nor will it violate the zones' land needs as identified in the BLI.

[11] For example, if the city now wishes to encourage less dense housing, it may be that additional land will have to be designated for urban residential development to meet anticipated housing needs.

> "(1) The record reveals that land has generally developed at the higher end of the zones' density range.
>
> "(2) Thus any reduction in density that may result from the amendments are likely to be offset by the historically higher density development in the R-1 and SFR zones' density ranges. Moreover, the amendments themselves do not reduce the maximum densities that are achievable in the zones. For instance, in the R-1 zone, minimum lot sizes are established only for single detached and zero lot line dwellings. In the SFR, minimum lot sizes are established only for single detached dwellings. No minimum lot size is established for any other allowed use in the zones. Therefore, it is not certain that development in the future will be at a lower density that it has been historically.
>
> "* * * * *. Record 36-37.

Petitioner argues that the above findings are inadequate because they are conclusory and are not supported by substantial evidence in the record. While the challenged decision is legislative and does not necessarily have to be supported by findings if there are other ways to demonstrate that the amendments are consistent with relevant legal standards, we agree with petitioner that findings, which are supported by substantial evidence, are required in this case to determine if the disputed amendments have left the city's comprehensive plan and land use regulations inconsistent with Goal 10. *See Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002) ("there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered"). There also needs to be evidence in the record to support the city's conclusion that its comprehensive plan and land use regulations remain in compliance with Goal 10 where, as was the case here, the decision maker is faced with plausible arguments that the amendments will lead to failures to meet the target densities the HNA establishes for the city's residential zones. We turn to the only evidence that the parties cite.

In support of both the change in minimum density in the R-1 zone and the imposition of minimum lot sizes in both the SFR and R-1 zone for certain single family dwellings, the city found

that development in those zones has historically been at the high end of the permissible range of development densities in those zones. The only real evidence that bears directly on that finding appears at page 118 of the record. The charts that appear at Record 118 give the acreage and number of approved lots for eight subdivisions—four subdivisions in the R-1 zone and four in the SFR zone. Unfortunately the charts do not provide the resulting density for each subdivision. However, the number of approved lots can be divided by the number of acres to compute the resulting density in dwelling units per acre, and petitioner has provided those computations.[12] The relevant information is displayed separately for the subdivisions in the SFR zone and the subdivisions in the R-1 zone below:

SFR Zone

Subdivision (year approved)	Timberline Est. Phase I (2004)	Sandy Bluff Annex (2002)	Sandy Bluff 2 (1977)	Dreamatcher Est. (2002)	SFR Total
Gross Acreage	16.5	6.5	11.27	1.93	36.2
Number of Lots	56	31	68	11	166
Density in lots/acre	3.4	4.8	6.0	5.7	4.6

[12] Actually, the computations that appear at pages 9 and 31 of the petition for review include errors. Following oral argument, petitioner provided corrected computations. LUBA has calculated the densities in lots per acre set out in the tables in the text.

R-1 Zone

Subdivision (year approved)	Cascadia 6 (2002)	Sandy Meadows (2003)	Deer Pointe I (2004)	Deer Pointe II (2004)	R-1 Total
Gross Acreage	6.75	4.74	8.7	11.65	31.84
Number of Lots	44	30	49	58	181
Density in lots/acre	6.5	8.02	5.6	5	5.6

If the above data accurately reflects historical development in the SFR and R-1 zone, it lends partial support at best for the city's finding that development in the SFR zone and R-1 zone has been at the high end of the permissible density range in those zones. The SFR zone requires a density between 2 and 6 units per acre. The 4.6 units per acre average in the four SFR-zoned subdivisions is very close to the 5 units per acre that is assumed in the HNA and closer to the maximum six units allowed in the SFR zone than it is to the minimum of two units. The city's finding regarding historical development in the SFR zone is supported by the above evidence.

However, the city's finding concerning the R-1 zone is not supported by the above evidence. The actual development density of 5.6 is barely above the 5 units per acre *minimum* density that was required before the city adopted the disputed ordinances and nowhere near the 10 units per acre *maximum*. Just as significantly, the 5.6 dwelling units per acre is noticeably below the 8 units per acre development density that the HNA assumes will result in the R-1 zone. If development continues at 5.6 dwelling units per acre in the R-1 zone and the city has accurately projected its housing needs, the city will not have sufficient land planned and zoned R-1 to develop the number of units in the R-1 zone that the HNA assumes will be needed over the planning period. Petitioner contends that lowering the required minimum density and imposing new minimum lot sizes in the R-1 zone seem likely to exacerbate that density shortfall in the R-1 zone, rather than have a neutral or corrective effect. Absent a better explanation from the city to the contrary, we agree with petitioner.

We hasten to add that there may well be a reasonable explanation for why the disputed changes do not necessarily result in a violation of the city's obligation to provide adequate land for the city's identified housing needs. It may be that the experience of the above subdivisions is not typical and that there are other reasons to expect that the anticipated eight units per acre in the R-1 zone will be achieved over the planning period. It may be that the likely effect of the amendments to the R-1 zone is so small that it is within the margin of predictive error in the HNA assumptions. Some of the city's findings suggest that may be the case, but we agree with petitioner that a better explanation of that position is required if the city is to rely on it to support the challenged amendments. It may also be that the actual development densities in other zoning districts has been or is likely to be higher than anticipated in the HNA, thus providing surplus density that would offset any likely reduction in density that could be attributed to the disputed amendments. There are no doubt other possible rationales why the disputed amendments might not support a conclusion that the city will be unable to achieve its needed housing goals over the planning period, as required by Goal 10. However, the above evidence regarding the eight subdivisions is the only evidence that the parties have called to our attention. We believe a reasonable decision maker would not find, based on that evidence, that historical development in the R-1 zone has been close to the maximum ten units per acre allowed in the R-1 zone. Just as importantly, we believe a reasonable decision maker would conclude that (1) the above evidence shows that the city is not meeting the HNA assumption that development over the planning period in the R-1 zone will achieve an average density of 8 units per acre and (2) that lowering the minimum density and imposing new minimum lot sizes, where there were none before, may worsen rather than correct that density shortfall.

On remand the city must either produce additional evidence that supports the above-quoted findings or adopt better findings to explain why the disputed amendments will not cause the city to fail to meet anticipated development densities in the R-1 zone. With regard to the SFR zone, while the above evidence supports the city's finding that historical development appears to be consistent with the HNA assumption regarding the anticipated density of development in that zone, the city

must provide a better explanation for why it may reasonably assume that introducing minimum lot sizes for SFD and SFD-ZLL dwellings will not cause the city to fail to achieve the housing densities that are anticipated in the HNA.

Petitioner's second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

Under its first assignment of error, petitioner offers additional reasons why it believes the challenged decisions fail to demonstrate compliance with Goal 10. [13]

A. The City's Findings

In our resolution of petitioner's evidentiary challenge under the second assignment of error, we agree with petitioner that the evidentiary record is not sufficient to support the city's findings that the disputed amendments will have no effect on development densities in the SFR and R-1 zone and that the city can rely on historically dense development in the SFR and R-1 zone to offset any reduction in density that the disputed amendments might have. Petitioner's arguments under this subassignment of error largely duplicate its arguments under the second assignment of error. In addition to our agreement with petitioner regarding the lack of evidentiary support for the disputed findings, we agree with petitioner that the city's findings are conclusory and are inadequate for that reason as well.

The first subassignment of error is sustained.

B. Clear and Objective Standards

As we explained in some detail in *Home Builders Assn. v. City of Eugene*, 41 Or LUBA 370, 377-9 (2002) and *Rogue Valley Ass'n of Realtors v. City of Ashland*, 35 Or LUBA 139,

[13] As we explained in *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55, 61 (1992), "[u]nder Statewide Planning Goal 2 (Land Use Planning) and *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 18, 569 P2d 1063 (1977), a local government may not amend its comprehensive plan map in a way that conflicts with the unamended textual provisions of the comprehensive plan." We understand petitioner to contend in its first assignment of error that the amendments adopted by Ordinances 2005-02 and 2005-03 are inconsistent with the SCP assumptions regarding development density in the SFR and R-1 zone and therefore violate Goal 2 as well as Goal 10.

153-58 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999), ORS 197.307(6), and LCDC's Goal 10 administrative rule require that the approval standards that local governments apply to needed housing must be "clear and objective."[14] The city points out that some housing types in both zones are unaffected by the new minimum lot sizes and that if future residential development includes those housing types, the density assumptions in the HNA could easily be met.[15] We have already concluded in resolving the second assignment of error, that no evidence has been called to our attention that would support the city's conclusion that the densities anticipated in the HNA for the SFR and R-1 zones will still be achieved, despite the challenged amendments. We assume it is possible that developers faced with minimum lot sizes for some housing types in the SFR and R-1 zones will opt to build other housing types that will allow them to achieve higher densities. However, the city points to no evidence that developers will reject the lower densities allowed by the disputed amendments and opt instead to seek approval for higher density housing types.

Under this subassignment of error, petitioner goes further and argues that even if there were evidence that developers will seek to develop other housing types in the SFR and R-1 zones in the future that are not subject to minimum lot sizes or seek to increase residential density under the

---

[14] ORS 197.307(6) provides:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

OAR 660-008-0015 provides:

> "Local approval standards, special conditions and procedures regulating the development of needed housing must be clear and objective, and must not have the effect, either of themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

[15] The SFR zone allows SFD-ZLL and SFA-ZLL dwellings and duplexes as conditional uses. See n 2. The R-1 zone allows SFD dwellings, duplexes, SFD-ZLL dwellings, SFA-ZLL dwellings, duplexes and row houses as permitted uses. While Ordinance 2005-03 lowers the minimum density from 5 units per acre to 3 units per acre, and imposes minimum lot sizes on SFD and SFD-ZLL dwellings, housing types other than SDF and SFD-ZLL in the R-1 zone can still be developed without minimum lot sizes. In addition, residential development in the R-1 zone is eligible for development under the city's Planned Development provisions that make a 25% density bonus available. SDC 17.64.40(C).

city's planned development provisions, the city cannot not rely on that higher housing density to justify the disputed amendments under Goal 10 because some of those housing types would be subject to approval standards that are not clear and objective. Specifically, petitioner contends that conditional use approval of duplexes and SFD-ZLL and SFA-ZLL dwellings in the SFR zone and approval of planned development in either zone would require that the city apply approval standards that are not clear and objective.

The city responds that even if the standards that the city applies in approving conditional uses and planned developments are not clear and objective, they were already part of the city's acknowledged comprehensive plan and land use regulations before Ordinances 2005-02 and 2005-03 were adopted and already applied to some of the housing types that the city identifies as needed. Any legal error the city may commit in the future in applying standards that are not clear and objective to some of the city's needed housing is not a function of the challenged ordinances and may not be asserted in this appeal

We agree with the city. The second subassignment of error is denied.[16]

C. Housing at Different Price Ranges and Rent Levels

As defined by ORS 197.303(1), "needed housing" includes "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels."[17] ORS 197.303(3)(a) provides:

---

[16] In agreeing with the city that the two ordinances that are before us in this appeal do not violate the statutory and rule requirement for clear and objective standards for needed housing, we do not mean to suggest that the city may, consistently with ORS 197.307(6) and OAR 660-008-0015, apply previously adopted approval standards that are not clear and objective to needed housing. That question is not before us in this appeal of Ordinances 2005-02 and 2005-03. We also recognize that Ordinance 2005-03 makes SFD-ZLL dwellings a conditional use in the SFR zone whereas before Ordinance 2005-03 that housing type was a permitted use. To that limited extent, the city might be required to demonstrate that its conditional use standards are clear and objective or amend Ordinance 2005-03 to refrain from applying those conditional use standards to any needed SFD-ZLL housing. However, petitioner does not make this more limited argument and we therefore do not consider it.

[17] ORS 197.303(1) goes on to specify that needed housing includes "single family housing and multi-family housing for both owner and renter occupancy" "[m]obile home or manufactured dwelling parks" as well as [m]anufactured homes on individual lots planned and zoned for single family residential use."

> "When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing, including housing for farmworkers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need."

Although petitioner's argument under this subassignment of error is unclear, petitioner seems to argue that the city's decision will encourage low density housing, which necessarily is expensive housing and runs counter to statements in the HNA and BLI that call for higher density, lower cost housing. However, as we have already noted, the challenged decisions do not affect the amount of land that is included in zoning districts that allow higher density housing and housing types that lend themselves to higher residential development densities. Petitioner's argument under this subassignment of error is insufficiently developed to add anything to the error we have already identified in sustaining the second assignment of error and the first subassignment of error under the first assignment of error.

This subassignment of error is denied.

D. SCP Goal 10, Policy 9

SCP Goal 10, Policy 9 provides:

> "Assure that residential densities are appropriately related to site conditions, including slopes, potential hazards, and natural features."

After quoting the above policy, petitioner's entire argument under this subassignment of error is as follows:

> "The subject amendments change the residential density mix, but there are no findings that address whether such density changes are being based on site conditions such as steep slopes, wetland features, potential hazards, and natural features. Given that the code contains density transfer provisions related to such features, it seems that this consideration must be addressed any time changes in the density mix are considered. Because that analysis has not been completed, the decisions must be remanded." Petition for Review 28.

As was the case with the prior subassignment of error, petitioner's argument under this subassignment of error is not clear. The first sentence seems to argue that changes in density must

be *based on* site conditions. Goal 10, Policy 9 simply does not say that. The second sentence cites an unidentified density transfer provision that petitioner believes the city should have addressed. We do not understand the argument.

This subassignment of error is denied.

THIRD ASSIGNMENT OF ERROR

SDC 17.24.70 establishes "Review Criteria" for amendments to the SCP:

> "**17.24.070 REVIEW CRITERIA**
>
> Comprehensive Plan amendments shall be reviewed to assure consistency with the purposes of this chapter, policies of the Comprehensive Plan, and any other applicable policies and standards adopted by the City Council. Amendments shall be approved only when the following findings are made:
>
> "**A.** The change being proposed is the best means of meeting the identified public need; and
>
> "**B.** The change will result in a net benefit to the community."

Petitioner argues the city failed to address either of the above plan amendment criteria.

The city did not adopt any findings that specifically address SCD 17.24.070(A) and (B), as such. However, the city identifies the following finding that the city adopted under Goal 2:

> "Prior to adopting the amendment, the City discussed alternatives to the amendment, but it ultimately believes that the goal of encouraging more variety in lot sizes is best met by the amendment." Record 5.

We agree with the city that the above-quoted finding is adequate to address the standard stated in criterion A of SDC 17.24.070.

The city also cites statements that were made during the local proceedings in support of making larger lots a more available option under the city's current menu of development options. While it is reasonably clear that the persons making those statements favored amendments that would result in more larger-lot residential development, there are no findings that address the inquiry that is required by SDC 17.24.070 criterion B. Criterion B requires that the city find that there will be "a net benefit to the community." While it seems likely that the city council feels that the resulting

larger lot sizes will be a benefit to the community, the requirement for a finding of "net" benefit implies that the city must adopt findings that balance any detriment that the amendments might cause against any perceived benefit to ensure that there will be a net benefit. There are no such findings. Petitioner's challenge to the city's failure to address criterion B of SDC 17.24.070 is sustained.

The third assignment of error is sustained in part.

The city's decisions are remanded.