BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MONDALEE LENGKEEK, MERVIN LENGKEEK,
EILEEN SAMARD, ARLEN SAMARD,
JOANNE McLENNAN, and SEATON McLENNAN,
Petitioners,

vs.

CITY OF TANGENT,
Respondent,

and

MELVIN M. BRUSH,
Intervenor-Respondent.

LUBA No. 2006-076

FINAL OPINION
AND ORDER

Appeal from City of Tangent.

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

No appearance by City of Tangent.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Andrew J. Bean and Weatherford, Thompson, Cowgill, Black and Schultz, PC.

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

REMANDED 09/11/2006

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

Petitioners appeal a city decision that expands its urban growth boundary (UGB).

MOTION TO INTERVENE

Melvin Brush (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief. The reply brief properly responds to new matters raised in the intervenor-respondent's brief. The motion to file a reply brief is granted.

FACTS

Intervenor owns an 84.26-acre parcel within the city limits, but outside the UGB, of the City of Tangent. In 2004, intervenor applied for a UGB amendment, comprehensive plan map amendment, and zoning map amendment to bring the parcel within the UGB. The city approved the application, and the decision was appealed to LUBA. We remanded the city's decision in *Lengkeek v. City of Talent*, 50 Or LUBA 367 (2005) (*Lengkeek I*). On remand, intervenor amended his application to seek an expansion of the UGB to include approximately 50 acres, as well as a comprehensive plan map amendment, a zoning map amendment, and an exception to Goals 3 (Agricultural Lands) and 14 (Urbanization). The city approved the application and this appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Seaton McLennan

All of the petitioners except Seaton McLennan were petitioners in *Lengkeek I*. On remand, the city conducted a purported public hearing but limited participation solely to parties to *Lengkeek I*. Petitioner Seaton McLennan attempted to participate at the hearing and submit written testimony, but the city refused to accept his written materials or allow his

participation. Petitioners argue the city erred by refusing to allow petitioner Seaton McLennan to participate in the hearing on remand.[1]

When LUBA remands a decision, a local government has considerable discretion in determining the procedure on remand. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36 (1996) (absent instructions from LUBA or local provisions to the contrary, a local government is not required on remand to repeat the procedures that were followed in the initial proceedings). Depending on the nature of the remand from LUBA, a local government may proceed in a number of different ways. There is no absolute requirement that a local government hold a public hearing to accept additional evidence on remand. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 208 (2001); *Washington Co. Farm Bureau v. Washington County*, 22 Or LUBA 540 (1992). For instance, where a decision is remanded for defective findings, a local government may simply need to rewrite the findings. In other circumstances, the local government may conduct additional hearings and accept additional evidence into the record. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

As the parties note, in *Crowley v. City of Bandon*, 43 Or LUBA 79, 96 (2002), we stated that whether a local government "may limit participation in the proceedings on remand to the parties in the original appeal * * * is an open question."[2] We now answer that question, at least as it applies to the present circumstances. In this case, as we have already noted, the applicant modified his proposal and submitted additional documentation in support of that amended application. In such a case, while the city may limit legal argument and any

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[1] Intervenor suggested at oral argument that Seaton McClennan did not attempt to appear below. Even though this argument was not raised in the response brief as required by OAR 661-010-0040(1), we nonetheless reject it. Seaton McLennon attempted to give oral testimony and to submit a letter into the record. The juncture of the public hearing at which this attempt was made is immaterial.

[2] In *Crowley*, the city purported to limit participation in a public hearing to the parties in the original appeal, but at the hearing allowed other parties to participate.

evidentiary submittals on remand to argument and evidence that is relevant to the issues that must be resolved on remand, we do not believe the city may limit participation to the parties who participated in the first appeal.

Neither the parties to the first appeal nor other persons who for whatever reason did not participate in the first appeal have had an opportunity to comment on the modified application. As petitioners correctly point out, the city's own plan guarantees its citizens a right to do so. The city erred in limiting participation below to the parties in *Lengkeek I*.[3]

This subassignment of error is sustained.

B. DLCD

Petitioners also argue that the city erred by preventing the Department of Land Conservation and Development (DLCD) from participating. Given the special role that is assigned to DLCD regarding post-acknowledgment plan amendments, we agree with petitioners. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993).

This subassignment of error is sustained.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

A. Buildable Lands Analysis

The City of Tangent Zoning Ordinance (TZO) and Goal 14, Factors 1 and 2, require a demonstration of public need in order to amend the UGB. In *Lengkeek I*, we determined that the buildable lands inventory analysis (BLI) contained in the Tangent Comprehensive Plan (TCP) only provides analysis to 2005 and could not be relied upon to expand the UGB. Intervenor attempted to demonstrate the public need for additional residential housing by submitting his own BLI. After discussing the relevant caselaw, we remanded the city's

[3] A local government is of course still free to exercise its inherent gatekeeping authority and to enforce any local exhaustion of remedies requirements.

decision because the housing analysis was not contained in the comprehensive plan or proposed as an amendment to the comprehensive plan.

> "Goal 10 requires local governments to inventory buildable lands, and Goal 2 requires that those inventories be part of the comprehensive plan. Where local governments do not have a useable inventory, they may rely on an applicant to provide that information. However, if they do so, the comprehensive plan must be amended concurrently to incorporate that inventory." 50 Or LUBA at 378-79.

Petitioners argue the city failed to respond to LUBA's remand:

> "In *Lengkeek I*, 50 Or LUBA at 372, LUBA determined that the buildable lands analysis contained in the TCP covers 'a planning period that ends, at the latest, in 2005' and, therefore, 'projects needed residential lands only to the year 2005.' LUBA also found that any local government 'with a housing needs projection that uses a planning period that has already passed, is essentially operating without a useable acknowledged housing needs analysis.' *Lengkeek I*, 50 Or LUBA at 378. LUBA stated that if a local government does not have a useable housing needs analysis, it 'may rely on an applicant to provide that information,' but 'the comprehensive plan must be amended concurrently' to incorporate that analysis. *Id*. LUBA concluded by holding that Statewide Planning Goals 10 (Housing), 2 (Land Use Planning) and 1 (Citizen Involvement) require that a buildable lands analysis upon which a determination of public need for a UGB amendment is based must be incorporated into the comprehensive plan."

> "The legal determinations by LUBA were not appealed to the Court of Appeals and, therefore, cannot be challenged now. The only way the applicable law has changed since LUBA's decision in *Lengkeek I*, is that the Court of Appeals has made it even more definite that Goal 2 requires that a UGB amendment must be based on a city's acknowledged comprehensive plan and land use regulations. *See 1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, ___ P3d ___) (2005) (comprehensive plan amendment).

> "The challenged decision relies on a new residential land need analysis that apparently purports to cover the period 1985 – 2022. This analysis has been adopted as part of the findings supporting the challenged decision, but has not been incorporated into the comprehensive plan. * * *

> "What the city appears to have done is adopt an analysis proposed by the applicant, in which isolated data and assumptions taken from the TCP's expired housing needs analysis, and a population projection from the TSP * * *, have been used to extend the expired housing needs analysis for an additional 17 years. * * * [S]ome of the parameters used in the analysis (*e.g.*, 4.0 dwellings per net buildable acre, 25% of gross buildable acres being used

> for streets or other public infrastructure) are not found in the TCP." Petition for Review 9-10 (footnotes and some citations omitted).

We leave open the possibility that a comprehensive plan BLI might be structured so that it can be extended past its nominal expiration date without amending the comprehensive plan, although the permissibility of such an option seems highly questionable given the Court of Appeals' decision in *Dundee*.[4] But whatever may be the case in other circumstances, the City of Tangent's BLI is not structured in that way. As petitioners point out, intervenor was required to apply assumptions that are not included in the comprehensive plan's BLI. Extrapolation of the BLI based on assumptions not in the comprehensive plan is not consistent with the Goal 2 requirement that decisions be "based on" the comprehensive plan. While all of the assumptions that underlie intervenor's extrapolation of the now expired BLI may be valid, extrapolation of the BLI based on those assumptions must be adopted as part of the city's comprehensive plan, if the city intends to rely on that extrapolation or assumptions as a basis for the challenged UGB amendment. As part of the comprehensive plan amendment process, the validity of those assumptions can be challenged and defended.

This subassignment of error is sustained.

B. Population Projections

In *Lengkeek I*, the city relied on a population projection that was not contained in the TCP. We held that the city could only rely on a population projection that had been incorporated into the TCP. The TCP does include a population projection that was produced in the city's transportation system plan (TSP), which is part of the city's comprehensive plan. Although the city did not rely on the population projection contained in the TSP (which is higher than the population projection used in *Lengkeek I*), we stated that the population projection contained in the TSP "provides the only population projection upon which the city

[4] For example an acknowledged comprehensive plan BLI might both provide estimates for a specific planning period and expressly provide a methodology for updating that estimate after that planning period expires in a manner that does not require that the comprehensive plan to be amended.

could rely." 50 Or LUBA at 380. On remand, the city relied upon the population projection in the TSP. Petitioners argue that using the TSP population projection was error.

While we agree with petitioners that our statement regarding the TSP population projection was *dictum*, we also see no reason to depart from that *dictum* here. As we discussed in *Lengkeek I*, what is important about population projections and BLIs is that they must be included in the comprehensive plan. The particular part of the comprehensive plan where a population projection is included is not critical. Petitioners argue that the TSP population figures were adopted for purely transportation purposes and constitute worst case scenarios that are inappropriate for BLIs. While the city was presumably not bound to use the TSP population projections, the fact that they were developed for transportation planning purposes rather than for housing purposes is not critical unless there is some reason to suspect that those population projections are so tailored for a specific planning purpose that they cannot be used for other purposes. While the TSP population projections may constitute "worst case scenarios," the city is presumably entitled to assume worst case scenarios when estimating its need for buildable lands. The city did not error by using the TSP population projections.

This subassignment of error is denied.

The second assignment of error is sustained in part and denied in part.

DE FACTO MORATORIUM

Intervenor argues that "failure to allow any development because of the lack of buildable lands data in the [TCP] and related planning documents results in a de facto moratorium." Response Brief 11. We are not sure what significance to assign to that argument. Intervenor did not file a cross-petition for review as allowed by OAR 661-010-0030(7), and we do not see that he could, since he concurred with the city's decision. Intervenor does not style his argument as a cross-assignment of error, and we do not see that it is, since a cross-assignment of error is typically used to request LUBA's review of alleged

errors in the decision only if the decision is remanded for reasons set out in the petition for review. Intervenor does not argue the city erred in any way.

If intervenor is arguing that the result of sustaining petitioners' assignments of error would force the city into a de facto moratorium, we do not agree. The city did not deny intervenor's application – the city approved the UGB amendment. The city's error was in not concurrently amending its comprehensive plan to include the BLI that the UGB amendment depends on. On remand, there is nothing that would prevent the city from including the updated BLI in its comprehensive plan (and the city may already be in the process of doing so). If on remand the city denies intervenor's application, intervenor could then make the argument that such denial constitutes a de facto moratorium.[5] Any consideration of the issue at this point would be premature and speculative.

However intervenor's argument is categorized, it is rejected.

The city's decision is remanded.

[5] We express no opinion here on the merits of such an argument.