

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 MONDALEE LENGKEEK, MERVIN LENGKEEK,  
5 EILEEN SAMARD, ARLEN SAMARD and  
6 JOANNE McLENNAN,  
7 *Petitioners,*  
8

9 vs.

10 CITY OF TANGENT,  
11 *Respondent,*  
12

13 and  
14

15 MELVIN M. BRUSH,  
16 *Intervenor-Respondent.*  
17

18 LUBA No. 2007-007  
19

20 FINAL OPINION  
21 AND ORDER  
22

23  
24 Appeal from City of Tangent.  
25

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

29 No appearance by City of Tangent.  
30

31 Edward F. Schultz, Albany, filed the response brief and argued on behalf of  
32 intervenor-respondent. With him on the brief were Andrew J. Bean and Weatherford  
33 Thompson Cowgill Black & Schultz, PC.  
34

35 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,  
36 participated in the decision.  
37

38 REVERSED

04/25/2007

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 appeal a city decision approving an urban growth boundary (UGB) amendment, a comprehensive plan amendment, a zoning map amendment, and exceptions to Goals 3 (Agricultural Lands) and Goal 14 (Urbanization).

**MOTION TO INTERVENE**

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

**FACTS**

This is the third time this matter has been appealed to LUBA. In *Lengkeek v. City of Tangent*, 50 Or LUBA 367 2005 (*Lengkeek I*), we remanded a city decision that amended the city’s UGB to add 84 acres.<sup>1</sup> We set out the facts in *Lengkeek I*:

“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. 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 \* \* \* approving those requests. 50 Or LUBA at 368-69 (footnote omitted).

After our remand in *Lengkeek I*, intervenor amended the application to request that only approximately 50 acres of the subject property be included inside the UGB. We remanded the city’s first remand decision in *Lengkeek v. City of Talent*, 52 Or LUBA 509 (2006) (*Lengkeek II*). On remand from our decision in *Lengkeek II*, the city approved a second remand decision to approve the original 84-acre parcel into the UGB. This appeal followed.

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<sup>1</sup> The subject property is already within city limits, but not within the UGB. The city has unusual boundaries; approximately two-thirds of the city lies outside its UGB.

1     **ASSIGNMENT OF ERROR**

2             To understand petitioners’ assignment of error, some background discussion of the  
3 prior cases is warranted. In order to amend the UGB to include the subject property as  
4 residential land, the city must demonstrate that there is a need for additional residential land.  
5 To demonstrate a need for additional residential land, a city generally relies on its buildable  
6 lands inventory (BLI). The Tangent BLI, however, only projects residential land needs  
7 through the year 2005, and shows that the city has a surplus of residential land. Because the  
8 Tangent BLI is outdated and does not show a need for additional residential land, intervenor  
9 submitted his own BLI purporting to demonstrate that there is a need for the additional land  
10 for residential purposes. The city relied on intervenor’s BLI to approve the UGB  
11 amendments, but did not adopt intervenor’s BLI as part of the Tangent Comprehensive Plan  
12 (TCP). The only BLI that is part of the TCP continues to be the expired BLI that shows a  
13 surplus of residential land through the year 2005.

14             **A.     *Lengkeek I***

15             In *Lengkeek I*, we explained that the BLI contained in the TCP only addresses  
16 residential land needs through 2005 and could not be relied upon to approve the UGB  
17 amendment. We also held that the city could not rely on intervenor’s updated BLI because it  
18 had not been adopted as part of the TCP.

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

25             We therefore remanded the city’s decision.

26             **B.     *Lengkeek II***

27             On remand, intervenor modified his application to propose to add approximately 50  
28 acres to the UGB. In approving the smaller UGB amendment, the city argued that it was

1 permissible to use the year 2020 population projections that are included in the city's  
2 transportation system plan to update the BLI, because the transportation system plan is  
3 adopted as part of the TCP. While we concluded in *Lengkeek II* that the year 2020  
4 population projections could be used to update the BLI, because those population projections  
5 are included in the TCP, we also concluded that the city again erred by relying on an updated  
6 BLI that had not been adopted as part of the TCP. We left open the possibility that there  
7 might be circumstances where a city could approve a UGB amendment without first adopting  
8 any necessary update to its BLI as part of its comprehensive plan. However, we observed  
9 that a recent Court of Appeals decision rendered that possibility "highly questionable." We  
10 also held that the city could not rely on the updated BLI in *Lengkeek II*, which was not  
11 adopted as part of the TCP, because it relied on assumptions that were not adopted in the  
12 TCP.

13 "We leave open the possibility that a comprehensive plan BLI might be  
14 structured so that it can be extended past its nominal expiration date without  
15 amending the comprehensive plan, although the permissibility of such an  
16 option seems highly questionable given the Court of Appeals' decision in  
17 [*1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 124 P3d 1249  
18 (2005) (*Dundee*)]. But whatever may be the case in other circumstances, the  
19 City of Tangent's BLI is not structured in that way. As petitioners point out,  
20 intervenor was required to apply assumptions that are not included in the  
21 comprehensive plan's BLI. Extrapolation of the BLI based on assumptions  
22 not in the comprehensive plan is not consistent with the Goal 2 requirement  
23 that decisions be 'based on' the comprehensive plan. While all of the  
24 assumptions that underlie intervenor's extrapolation of the now expired BLI  
25 may be valid, extrapolation of the BLI based on those assumptions must be  
26 adopted as part of the city's comprehensive plan, if the city intends to rely on  
27 that extrapolation or assumptions as a basis for the challenged UGB  
28 amendment. As part of the comprehensive plan amendment process, the  
29 validity of those assumptions can be challenged and defended." 52 Or LUBA  
30 at 514-15 (footnote omitted).

31 Because the city relied on a BLI that was not adopted as part of the TCP and relied on  
32 assumptions that were not included in the TCP, we again remanded the city's decision.

1           **C.     1000 Friends of Oregon v. City of Dundee**

2           In the above quoted portion of *Lengkeek II*, we stated that the Court of Appeals’  
3 decision in *Dundee* makes the proposition that an expired or outdated BLI may be updated  
4 and relied on to approve a UGB amendment, without first adopting that updated BLI as part  
5 of the TCP, “highly questionable.” In *Dundee*, LUBA affirmed a city decision that amended  
6 the city’s comprehensive plan to allow a proposed highway through the city that opponents  
7 alleged would occupy needed residential land. *1000 Friends of Oregon v. City of Dundee*, 49  
8 Or LUBA 601 (2005). In concluding that the plan amendment would leave the city with  
9 sufficient residential land, the city relied on an updated BLI. The comprehensive plan  
10 expressly recognized the need for BLI updates and anticipated that such BLI updates would  
11 be adopted in the future, but the update the city relied on had not yet been adopted as part of  
12 the city’s comprehensive plan. In affirming that city’s decision in *Dundee*, LUBA concluded  
13 that the express requirement in the city’s comprehensive plan for BLI updates allowed the  
14 city to rely on such updates even though they had not yet been adopted as part of the city’s  
15 comprehensive plan. The Court of Appeals reversed our decision.

16           “In sum, a planning decision based on a study contemplated by a  
17 comprehensive plan but not incorporated into the comprehensive plan after  
18 the study is carried out is not a planning decision that is made on the basis of  
19 the comprehensive plan and acknowledged planning documents \* \* \*. That is  
20 not a matter of mere abstract concern. Rather, it goes to the heart of the  
21 practical application of the land use laws: The comprehensive plan is the  
22 fundamental document that governs land use planning. Citizens must be able  
23 to rely on the fact that the acknowledged comprehensive plan and information  
24 integrated in that plan will serve as the basis for land use decisions, rather  
25 than running the risk of being ‘sandbagged’ by government’s reliance on new  
26 data that is inconsistent with the information on which the comprehensive  
27 plan was based. LUBA erred in concluding otherwise.” 203 Or App at 216.

28           Although the Court of Appeals’ decision in *Dundee* may be limited to its facts, it  
29 stands for the general proposition that where a comprehensive plan is amended in a way that  
30 relies on an updated BLI, that updated BLI must be incorporated into the city’s  
31 comprehensive plan.

1           **D.     The Current Appeal**

2           After our remand in *Lengkeek II*, the city apparently focused on the following portion  
3 of our opinion, which we also quoted earlier:

4           “‘We leave open the possibility that a comprehensive plan BLI might be  
5 structured so that it can be extended past its nominal expiration date without  
6 amending the comprehensive plan, although the permissibility of such an  
7 option seems highly questionable given the Court of Appeals’ decision in  
8 *Dundee*.” 52 Or LUBA at 514.

9           In the footnote omitted above, we described what such a permissible BLI and update  
10 might look like:

11           “‘For example an acknowledged comprehensive plan BLI might both provide  
12 estimates for a specific planning period *and expressly provide a methodology*  
13 *for updating that estimate after that planning period expires in a manner that*  
14 *does not require that the comprehensive plan to be amended.*” 52 Or LUBA  
15 at 514 n 4 (emphasis added).

16           Intervenor argues that on remand, the updated BLI was based completely on extrapolations  
17 “made solely on valid assumptions that are contained within the TCP.” Response Brief 4.

18           Intervenor focuses on the proper paragraph from *Lengkeek II*, but appears to ignore  
19 the emphasized language in footnote four in *Lengkeek II* and the remainder of that paragraph  
20 that explains that while in theory a BLI might be structured to alleviate the need for adoption  
21 of a new BLI into the comprehensive plan, the BLI in the TCP is not such a BLI. We quote  
22 the rest of that paragraph again.

23           “*But whatever may be the case in other circumstances, the City of Tangent’s*  
24 *BLI is not structured in that way.* As petitioners point out, intervenor was  
25 required to apply assumptions that are not included in the comprehensive  
26 plan’s BLI. Extrapolation of the BLI based on assumptions not in the  
27 comprehensive plan is not consistent with the Goal 2 requirement that  
28 decisions be ‘based on’ the comprehensive plan. While all of the assumptions  
29 that underlie intervenor’s extrapolation of the now expired BLI may be valid,  
30 extrapolation of the BLI based on those assumptions must be adopted as part  
31 of the city’s comprehensive plan, if the city intends to rely on that  
32 extrapolation or assumptions as a basis for the challenged UGB amendment.  
33 As part of the comprehensive plan amendment process, the validity of those  
34 assumptions can be challenged and defended.” 52 Or LUBA at 514 (emphasis  
35 added).

1 Even if there is some way to read the Court of Appeals' *Dundee* decision to allow a  
2 comprehensive plan BLI to be structured in a way that would permit it to be updated and  
3 relied on without amending the comprehensive plan, and assuming that our decision in  
4 *Lengkeek II* does not authoritatively decide that the BLI in the TCP is not one of those  
5 theoretically possible BLIs, intervenor's latest attempt does not demonstrate that the city may  
6 rely on the updated BLI without first amending the TCP to replace the expired BLI with the  
7 updated BLI. As we noted in *Lengkeek II*, such a BLI would need to provide estimates for a  
8 specific planning period *and* "expressly provide a methodology for updating that estimate."  
9 52 Or LUBA at 514 n 4. The BLI in the TCP provides a residential land needs estimate for a  
10 specific planning period (through the year 2005), but it is completely silent on the subject of  
11 updating the BLI. It certainly does not "*expressly provide a methodology for updating*" the  
12 BLI to estimate residential land needs after the year 2005. It appears that the updated BLI  
13 that the city relied on in the decision that is before us in this appeal merely took the 20-year  
14 old assumptions that were used to produce the expired BLI that is adopted as part of the TCP  
15 and applied those old assumptions to the year 2020 population projection that is included in  
16 the city's transportation system plan. That is certainly not the type of updated BLI we gave  
17 as an example in *Lengkeek II* that might be relied upon without adopting that updated BLI as  
18 part of the comprehensive plan, in the unlikely event that *Dundee* does not foreclose such an  
19 exercise altogether. We reach the same conclusion we reached in *Lengkeek I* and *Lengkeek*  
20 *II*: the city may not rely upon intervenor's updated BLI without incorporating it into the TCP.

21 Finally, intervenor argues that even though the BLI may have expired in 2005, under  
22 the "fixed goal post rule" of ORS 227.178(3), the city can rely on the earlier BLI to approve  
23 the UGB amendment. If intervenor is arguing that the UGB amendment can be approved  
24 based *solely* on the expired BLI because it had not yet expired when the applications were  
25 filed, we reject that argument. The expired BLI does not show a demonstrated need for  
26 additional residential lands; it shows a surplus of vacant residential land inside the UGB.

1           Petitioners’ assignment of error is sustained.

2   **CONCLUSION**

3           Petitioners request that we reverse the city’s decision rather than remand the decision  
4 for the city to attempt to approve the UGB amendment without first updating its BLI again.  
5 OAR 661-010-0071(1)(c) provides that LUBA shall reverse a decision if “[t]he decision  
6 violates a provision of applicable law and is prohibited as a matter of law.” In *Lengkeek I*,  
7 we held the city could not rely on a BLI update that is not included in the TCP. In *Lengkeek*  
8 *II*, we held that the city could not rely on a BLI that was not expressly structured to allow  
9 updates without the necessity of a TCP amendment and that the TCP was not so structured.  
10 In the present appeal, we again hold that the BLI in the TCP is not structured in a way that  
11 allows that outdated BLI to be updated and relied upon to amend the UGB, without first  
12 incorporating the amended BLI into the TCP, and that the city cannot rely on intervenor’s  
13 updated BLI without incorporating it into the TCP. It is clear that the proposed UGB  
14 amendment is prohibited as a matter of law, unless the city first amends its TCP to include an  
15 updated BLI.

16           The city’s decision is reversed.