BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STUART I. FREEDMAN, CHRISTLIN FREEDMAN,
and FIRE MOUNTAIN GEMS, INC.,
Petitioners,

and

HOLGER T. SOMMER,
Intervenor-Petitioner,

vs.

CITY OF GRANTS PASS,
Respondent,

and

TIMBER PRODUCTS CO. LIMITED PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2008-056

FINAL OPINION
AND ORDER

Appeal from City of Grants Pass.

Gregory S. Hathaway and Jeff F. Evans, Portland, filed the petition for review and argued on behalf of petitioners. With them on the brief were Davis Wright Tremaine LLP, Michael J. Bird, Frank C. Rote, III and Brown, Hughes, Bird, Rote & Brouhard, LLP.

Holger T. Sommer, Merlin, represented himself.

David F. Doughman, Portland, filed a joint response brief and argued on behalf of respondent. With him on the brief were Beery Elsner & Hammond, LLP, Allen L. Johnson, Johnson & Sherton PC, Micheal M. Reeder and Arnold Gallagher Saydack Percell Roberts & Potter, PC.

Allen L. Johnson, Portland and Micheal M. Reeder, Eugene, filed a joint response brief and argued on behalf of intervenor-respondent. With them on the brief were Johnson & Sherton PC, Arnold Gallagher Saydack Percell Roberts & Potter, PC, David F. Doughman and Beery Elsner & Hammond, LLP.

1 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member,
2 participated in the decision.
3
4 REMANDED 09/04/2008
5
6 You are entitled to judicial review of this Order. Judicial review is governed by the
7 provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city decision that amends the comprehensive plan and zoning map designations for a 15.5 acre parcel.

FACTS

The subject property is a vacant 15.5-acre parcel that carries a comprehensive plan designation of Industrial and a corresponding I zoning designation. Intervenor-respondent Timber Products Co. Limited Partnership (intervenor) applied to the city for a minor comprehensive plan map amendment from Industrial to Business Park (BP), and a corresponding zone change from I to BP, with the intention of developing a Home Depot store. The city has three plan districts categorized as industrial districts: Industrial, Business Park, and Industrial Park. The BP zoning designation is a mixed-use zone that allows most of the industrial uses allowed in the I zone, but also allows a number of non-industrial uses, including retail commercial uses such as the proposed Home Depot.

Lands zoned General Commercial (GC) border the property to the north and northwest. Lands zoned BP border the property to the west and southwest. I zoned lands lie to the south and east.

The planning commission recommended approval of the proposed amendments. On February 20, 2008, the city council held a public hearing to consider the planning commission's recommendation of approval. At the conclusion of the hearing, the city council held the record open an additional seven days for additional written evidence. Record 29. The evidentiary record regarding the application closed on February 27, 2008.

Intervenor submitted its final written legal arguments on March 3, 2008. Attached to intervenor's submittal was a letter dated February 29, 2008, from intervenor's traffic consultant. At the March 19, 2008 public hearing the city council voted to approve the plan and zone map amendments, supported by adopted findings. The city council also adopted

1 and incorporated by reference a portion of the intervenor's final written argument and the
2 February 29, 2008 letter from the traffic consultant. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Grants Pass Comprehensive Plan (GPCP) requires that all comprehensive plan
5 amendments conform to the statewide planning goals. GPCP §13.5.4. Statewide Planning
6 Goal 9 (Economic Development) requires in relevant part that the city "[p]rovide for at least
7 an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety
8 of industrial and commercial uses consistent with plan policies." OAR chapter 660, division
9 9 implements Goal 9. OAR 660-009-0010(2) provides that comprehensive plans and land
10 use regulations shall be reviewed for compliance with the rule at the time of periodic review.
11 However, OAR 660-009-0010(4) specifies that a change in a comprehensive plan
12 designation for more than two acres from an industrial use designation to a non-industrial
13 designation "must address all applicable planning requirements," and further comply with a
14 set of additional, alternative requirements, including a demonstration that "the proposed
15 amendment is consistent with its most recent economic opportunities analysis * * *."[1]
16 OAR 660-009-0010(4)(a).

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[1] OAR 660-009-0010(4) provides: in pertinent part:

> "For a post-acknowledgement plan amendment under OAR chapter 660, division 18, that changes the plan designation of land in excess of two acres within an existing urban growth boundary from an industrial use designation to a non-industrial use designation, or an other employment use designation to any other use designation, a city or county must address all applicable planning requirements, and:
>
> "(a) Demonstrate that the proposed amendment is consistent with its most recent economic opportunities analysis and the parts of its acknowledged comprehensive plan which address the requirements of this division; or
>
> "(b) Amend its comprehensive plan to incorporate the proposed amendment, consistent with the requirements of this division; or
>
> "(c) Adopt a combination of the above, consistent with the requirements of this division."

1 The city council adopted findings addressing OAR 660-009-0010(4)(a) and found
2 that the plan amendment from Industrial to Business Park is consistent with a recent
3 EcoNorthwest study of the capacity of the city's urban growth boundary. The EcoNorthwest
4 study indicates that the city will need approximately 1,400 acres of employment land over
5 the 20-year period between 2007-2027, with 700 acres needed for retail and service
6 commercial uses and 400 acres needed for industrial uses. The city concluded that the plan
7 amendment from Industrial to Business Park is consistent with that study, because it
8 maintains the property within an industrial plan designation that allows for a range of
9 industrial and commercial uses.

10 The decision notes, however, that the EcoNorthwest study is a draft document that
11 has not been adopted by the city. According to the decision, the most recent city-adopted
12 and acknowledged "economic opportunities analysis" (EOA) (henceforth, the Stone EOA),
13 indicates that the city's urban growth boundary includes a 23.2-year supply of industrial
14 lands. The decision states that the October 2006 Stone EOA "is the most recently adopted
15 and acknowledged data and therefore controlling for this Application." Record 35.

16 Petitioners argue that the city's findings are inadequate to demonstrate the plan
17 amendment is consistent with the city's most recent economic opportunities analysis, as
18 required by OAR 660-009-0010(4). Relatedly, petitioners argue that the city erred in relying
19 on the EcoNorthwest study, an unadopted, unacknowledged source of data, rather than the
20 Stone EOA, the most recent adopted, acknowledged EOA. Further, petitioners argue that the
21 city failed to address the substantive provisions of the Goal 9 rule, at OAR 660-009-0015
22 through 660-009-0030. Finally, petitioners argue that the city's findings fail to demonstrate
23 consistency with the parts of its acknowledged comprehensive plan which address the
24 requirements of the Goal 9 rule, as required by OAR 660-009-0010(4). According to
25 petitioners, any attempt to demonstrate consistency with the Goal 9 portion of the

1 comprehensive plan would be fruitless, because the comprehensive plan is outdated and does
2 not fully comply with the requirements of the Goal 9 rule.

3 Even if the Goal 9 rule does not apply, petitioners argue, the city is nonetheless
4 required to demonstrate that the plan amendment is consistent with the Goal 9 obligation to
5 provide an adequate supply of sites of suitable sizes, types, locations, and service levels for a
6 variety of industrial and commercial uses. *DLCD v. City of Warrenton*, 37 Or LUBA 933
7 (2000). According to petitioners, the challenged amendments effectively reduce the city's
8 supply of industrial land, by redesignating industrial land to a mixed-use plan and zone that
9 allow non-industrial uses such as large-format retail stores. Therefore, petitioners argue,
10 Goal 9 requires that the city demonstrate that the city retains an adequate supply of industrial
11 land, not only with respect to total acreage, but also with regard to size, type, location, and
12 service levels. *Opus Dev. Corp. v. City of Eugene*, 28 Or LUBA 670 (1995) (rezoning
13 industrial land to a mixed use zone that allows both industrial and residential uses requires a
14 demonstration under Goal 9 that the city retains an adequate supply of industrial and
15 commercial lands).

16 Intervenor responds, initially, that petitioners fail to recognize that the city expressly
17 adopted and incorporated into the decision a portion of intervenor's closing argument that
18 addresses Goal 9 compliance. That incorporated portion concludes that (1) OAR 660-009-
19 0010(4) does not apply for several reasons and (2), alternatively, if the rule applies the plan
20 amendment is consistent with the Stone EOA, which indicates that the city has a 23.2-year
21 supply of industrial land within the UGB. With respect to compliance with OAR 660-009-
22 0015 through 660-009-0030, intervenor argues that no issue was raised below regarding
23 these rule provisions, and therefore that issue is waived. ORS 197.763(1). With respect to
24 consistency with the city's comprehensive plan, we understand intervenor to argue that the
25 city properly addressed all applicable plan policies, and that even if the plan is outdated and

1 does not fully comply with the Goal 9 rule, the city is not require to update the entire plan in
2 the context of the present quasi-judicial plan amendment.

3 There are several problems with the purported incorporation of intervenor's closing
4 argument. Under the heading of "Summary of Evidence," the city council's decision lists a
5 number of documents that were submitted into the record. Some of those documents, the
6 decision states, are "hereby adopted and incorporated herein," including Part V of
7 intervenor's closing argument. Record 30. The decision does not state that the documents
8 are adopted as *findings*, and several of the documents adopted and incorporated, including a
9 map and appendices to the Stone EOA, could not possibly function as findings. Later
10 sections of the city council decision explicitly set out the findings that address the applicable
11 criteria, and nothing in those findings refer to intervenor's closing argument or purport to
12 adopt that argument as part of the city's findings.

13 That lack of clarity is compounded by the fact that the city council's decision takes
14 the position that OAR 660-009-0010(4) applies, and adopts findings addressing the rule. As
15 noted, Part V of intervenor's closing argument initially takes the position that the rule does
16 not apply at all. The two positions are not expressed as alternatives, and neither the decision
17 nor the closing argument attempts to reconcile them. Thus, even assuming the city intended
18 to adopt Part V of the closing argument as findings, the findings as a whole appear to be in
19 conflict on that point. For lack of a better alternative, we will assume for purposes of this
20 opinion that the city council's position is correct, and that the challenged plan amendment
21 triggers the application of OAR 660-009-0010(4).

22 We generally agree with petitioners that, assuming OAR 660-009-0010(4) applies,
23 the city must demonstrate consistency with the Stone EOA, the most recently adopted EOA,
24 and cannot satisfy the rule based on the unadopted, draft EcoNorthwest study. *See D. S.*
25 *Parklane Development, Inc. v. Metro*, 165 Or App 1, 994 P2d 1205 (2000) (Metro erred in
26 relying on a draft analysis of urban growth boundary capacity instead of a study incorporated

1 into Metro's acknowledged plan); *1000 Friends of Oregon v. City of Dundee*, 203 Or App
2 207, 124 P3d 1249 (2005) (city errs in relying on a final, unadopted study of housing
3 inventory rather than the inventory in the city's acknowledged comprehensive plan). We
4 also agree with petitioners that, even if OAR 660-009-0010(4) is not triggered by the plan
5 amendment, the city must nonetheless demonstrate that the amendment is consistent with
6 Goal 9 itself.

7 With respect to compliance with OAR 660-009-0015 through 660-009-0030,
8 petitioners do not respond to intervenor's waiver argument, and therefore that issue is
9 waived. With respect to petitioners' argument that the city cannot find that the plan
10 amendment is consistent with the parts of its acknowledged comprehensive plan which
11 address the requirements of the Goal 9 rule, because the comprehensive plan is outdated and
12 does not fully comply with the Goal 9 rule, we agree with intervenor that petitioners have not
13 demonstrated that the city is required to update its comprehensive plan Goal 9 element in the
14 context of the present quasi-judicial plan amendment.

15 As noted, intervenor's closing argument does conclude, in the alternative, that the
16 plan amendment is consistent with the Stone EOA, and therefore satisfies that element of
17 OAR 660-009-0010(4). The closing argument also separately addresses Goal 9, and argues
18 that, based on the Stone EOA, the plan amendment is consistent with the Goal 9 obligation to
19 "provide for at least an adequate supply of sites of suitable sizes, types, locations, and service
20 levels for a variety of industrial and commercial uses * * *." Thus, assuming Part V of the
21 closing argument is part of the city's findings, it might well rectify the two principal errors
22 that petitioners identify: the failure to rely on the Stone EOA and the failure to address Goal
23 9 itself. Petitioners do not challenge that portion of the closing argument; however, as
24 discussed above, it is not clear that the city council incorporated the closing argument as part
25 of its findings.

As discussed below, we remand the decision under the second assignment of error for the city to rectify a procedural error. Given that disposition, we conclude that it is also appropriate to sustain the first assignment of error in part and remand the decision to the city to clarify whether Part V of the closing argument is adopted and incorporated into the decision as part of the city's findings. If the city adopts Part V of the closing argument as findings, it should reconcile any conflicts between the city council findings and the closing argument. In addition, or in the alternative, the city may adopt any other findings it deems necessary.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

On February 20, 2008 the city council held the public hearing for the application. At the hearing the city council voted to keep the record open for an additional seven days to submit new written testimony to respond to questions and concerns at the hearing. Record 156. The evidentiary record was closed on February 27, 2008. Petitioners' transportation engineer, Mike Weishar, submitted a letter dated February 29, 2008, which was accepted into the record and, in fact, incorporated into the city's decision. The stated purpose of the letter was to respond to "the presentation delivered by Southern Oregon Transportation Engineering at the February 20, 2008 City Council Meeting." Record 93.

Petitioners contend that the Weishar letter includes new evidence submitted after the evidentiary record closed, and that the city erred in accepting and relying upon the document. ORS 197.763(6)(e).[2] Petitioners argue that the procedural error prejudiced their substantial

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[2] ORS 197.763(6)(e) provides:

> "Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, *but shall not include any new evidence*." (emphasis added).

1 rights because the city council relied on the contents of the letter without giving petitioners
2 an opportunity to respond.

3 Intervenor responds that petitioners have not demonstrated that the Weishar letter
4 includes new evidence or, if so, that the letter had any effect on the city's decision. *See City*
5 *of Damascus v. Metro*, 51 Or LUBA 210, 228 (2006) (to show prejudicial error, petitioners
6 must demonstrate that the local government accepted new evidence after the close of the
7 evidentiary record, and "offer some substantial reason to believe the [new evidence] had
8 some effect on the ultimate decision.") Intervenor argues that the letter was attached to
9 intervenor's final argument, which the city adopted and incorporated by reference as
10 findings, which indicates that the city believed that the letter constituted argument that could
11 be adopted as findings, not new evidence. According to intervenor, the expressed intent of
12 the letter is to rebut assertions made by the opponents' traffic expert at the February 20, 2008
13 hearing. In doing so, intervenor argues, the Weishar letter simply cites to evidence that was
14 already in the record.

15 We agree with petitioner that the Weishar letter includes "new evidence," and
16 therefore the city was required to either (1) reopen the record to allow other participants an
17 opportunity to respond to the new evidence; or (2) reject the new evidence as untimely. *Wal-*
18 *Mart Stores, Inc v. City of Oregon City*, 50 Or LUBA 87 (2005) (*citing ODOT v. City of*
19 *Mosier*, 36 Or LUBA 666, 683 (1999), and *Brome v. City of Corvallis,* 36 Or LUBA 225,
20 234-35, *aff'd sub nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999)).
21 Under ORS 197.763(6)(e) and the parallel Grants Pass Development Code § 8.038(4), the
22 city council may consider final written legal argument when making its final decision.
23 However, a local government may not consider new evidence, as part of legal arguments

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ORS 197.763(9)(b) defines "Evidence" to mean "facts, documents, data *or other information* offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision." (emphasis added.)

1 submitted under the applicable codes, without providing an opportunity for rebuttal. *Oregon*
2 *Department of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000). The Weishar
3 letter specifically states that Weishar is responding to the opponents' traffic expert, and
4 includes a point by point evidentiary rebuttal. It also responds to two questions raised by city
5 councilors at the February 20, 2008 hearing. Even if we assume that all of the underlying
6 facts, documents, and data cited in the Weishar letter are derived from the TIA or otherwise
7 found elsewhere in the existing record, something intervenor has not established, Weishar's
8 ultimate conclusions constitute new "other information" referenced in ORS 197.763(9)(b), in
9 the form of new expert testimony. We note that the city held the record open an additional
10 seven days, until February 27, 2008, to allow evidentiary rebuttals to testimony submitted at
11 the February 20, 2008 hearing. The Weishar letter is dated February 29, 2008, and the letter
12 appears to be, on its face, an evidentiary rebuttal to testimony submitted at the hearing,
13 apparently intended for submission during the open record period. For whatever reason, the
14 Weishar letter was not submitted during the open record period, and intervenor's attorney
15 apparently chose to submit it as an attachment to the applicant's closing argument. Under
16 these circumstances, the Weishar letter is reasonably viewed as "new evidence" and the act
17 of attaching it to the closing argument does not convert the letter into "argument." Further,
18 there is no doubt that the Weishar letter had an affect on the decision, as the city expressly
19 adopted the letter and incorporated it into the decision.
20 Petitioners were given no opportunity to respond to the Weishar letter. The city's
21 acceptance of the Weishar letter, without reopening the record to allow petitioners an
22 opportunity to respond to the new expert testimony it included, prejudices petitioners'
23 substantial rights, and requires remand to open the evidentiary record and allow an
24 opportunity for rebuttal.
25 Where LUBA sustains a procedural assignment or error that requires remand to re-
26 open the evidentiary record and that will probably require adoption of additional findings,

1 LUBA does not proceed further to address other assignments of error that challenge the
2 existing record and findings.
3 The second assignment of error is sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 The third assignment of error challenges the city's findings that the plan and zoning
6 amendments comply with the transportation planning rule and related city regulations with
7 respect to impacts on nearby transportation facilities. However, because the decision must
8 be remanded for additional evidentiary proceedings and adoption of new or revised findings
9 with respect to transportation, it would be premature to resolve the transportation issues
10 raised in the third assignment of error based on the existing record and findings. Therefore,
11 we do not reach the third assignment of error.
12 The city's decision is remanded.