

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

3
4 FRIENDS OF YAMHILL COUNTY, LEE DOES,
5 AMY DOES, GRACE SCHAAD,
6 RANEE SOLOMONSSON and
7 CHERYL MCCAFFREY,
8 *Petitioners,*
9 vs.

10
11 CITY OF NEWBERG,
12 *Respondent.*

13
14 LUBA No. 2010-015

15
16 FINAL OPINION
17 AND ORDER

18
19 Appeal from City of Newberg.

20
21 James S. Coon, Portland, filed the petition for review and argued on behalf of
22 petitioners. With him on the brief was Swanson Thomas & Coon.

23
24 Terrence D. Mahr, City Attorney, Newberg, filed the response brief and argued on
25 behalf of respondent. With him on the brief was Corinne C. Sherton.

26
27 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
28 participated in the decision.

29
30 REMANDED

08/26/2010

31
32 You are entitled to judicial review of this Order. Judicial review is governed by the
33 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city ordinance that adopts a revised “Economic Opportunities Analysis” (EOA).

INTRODUCTION

Under OAR 660-009-0015, local governments are required to adopt an EOA as part of their comprehensive plan. The city adopted an EOA in 2006. The challenged decision updates that 2006 EOA. We address and resolve two preliminary matters before turning to petitioners’ assignments of error.

MOTIONS TO TAKE OFFICIAL NOTICE AND TO STRIKE

Respondent requests that LUBA take official notice of a document entitled “Ad Hoc Committee on Newberg’s Future – Report to Newberg City Council – Recommendations for Newberg’s Future (July 21, 2005).” The city also asks that LUBA take official notice of the minutes of a July 21, 2005 joint meeting of the city council and planning commission at which the city council and planning commission discussed and accepted the ad hoc committee report. Portions of the ad hoc committee report are attached as Appendix A of the Respondent’s Brief, and the minutes are attached as Appendix B. The city separately provided LUBA and petitioners with a complete copy of the ad hoc committee report. The city cites and relies on the ad hoc report on pages 25, 30, 33, 37, and 39 of the respondent’s brief.

Petitioners move to strike both appendices and the text in respondent’s brief where the city relies on the ad hoc report for evidentiary support in responding to petitioners’ challenges in their second assignment of error regarding industrial and employment use “site characteristics.”

Under OEC 202(7) and ORS 40.090(7), LUBA may take official notice of a city “ordinance, comprehensive plan, or enactment.” While the July 21, 2005 minutes may

1 qualify as an “enactment,” we agree with petitioners that the city council’s “acceptance” of
2 the ad hoc committee report does not have the legal effect of making that report a city
3 “enactment,” as that term is used in OEC 202(7) and ORS 40.090(7). This is particularly the
4 case since the resolution that “accepts” the ad hoc committee report specifically provides that
5 it does not “adopt” the ad hoc committee report.

6 Finally, even if the minutes qualify as a city enactment and the city’s acceptance of
7 the ad hoc committee report was sufficient to make it a city enactment, the city’s request to
8 take official notice must be denied. The city requests that LUBA take official notice of those
9 documents in order to bolster the evidentiary support for the EOA that is before us in this
10 appeal. As we have held on a number of occasions, LUBA review is generally limited to the
11 evidentiary record that is compiled before the local government, and LUBA’s authority to
12 take official notice of city enactments does not extend to taking official notice of adjudicative
13 extra-record evidence to resolve evidentiary disputes. *Lund v. City of Mosier*, 57 Or LUBA
14 527, 529 (2008); *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103
15 (2005); *Blatt v. City of Portland*, 21 Or LUBA 337, 342, *aff’d* 109 Or App 259, 819 P2d 309
16 (1991). With exceptions that do not apply here, our resolution of evidentiary disputes must
17 be limited to the record that the city transmitted in this appeal.

18 The city’s request to take official notice is denied; petitioners’ motion to strike is
19 granted. In resolving this appeal we have not considered the July 21, 2005 minutes, the ad
20 hoc committee report or the city’s arguments that rely on those documents.

21 **REPLY BRIEF**

22 Petitioners move for permission to file a reply brief. The part of the reply brief that
23 replies to respondent’s arguments in response to petitioners’ fifth assignment of error (pages
24 4-7) respond to new arguments in the city’s response brief. That part of the reply brief is
25 allowed. Petitioners’ stated reason for the balance of the reply brief is to address the city’s
26 attempt to rely on the ad hoc committee report, and petitioners state that the request for this

1 part of the reply brief is withdrawn in the event their motion to strike the ad hoc committee
2 report is granted. Because we grant petitioners’ motion to strike the ad hoc committee
3 report, we consider petitioners’ motion to allow that part of the reply brief to be withdrawn.¹

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners argue under their first assignment of error that there are internal
6 inconsistencies in the EOA that render it something other than the adequate factual base that
7 is required by Goal 2 (Land Use Planning). We understand petitioners to argue that the EOA
8 overstates anticipated employment and that this improper inflation of employment figures
9 violates Goal 2, which requires in part that land use planning “assure an adequate factual
10 base” for all “decisions and actions related to the use of land.” That Goal 2 language
11 requires that both legislative and quasi-judicial land use decisions be supported by
12 substantial evidence that all applicable approval criteria are satisfied. *Friends of Deschutes*
13 *County v. Deschutes County*, 49 Or LUBA 100, 104 (2005); *DLCD v. Douglas County*, 37 Or
14 LUBA 129, 132 (1999); *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372,
15 377-78, *aff’d* 130 Or App 406, 882 P2d 1130 (1994).

16 **A. Double Counting Job Growth**

17 Petitioners first argue that EOA Tables 12-14, 12-18 and 12-25 double count
18 projected employees in a way that improperly inflates the amount of land that the EOA
19 estimates will be required in the future to meet city employment needs.² Table 12-14 of the
20 EOA displays “Projected Newberg Employment through 2040.” Record 48. For the year
21 2030, Table 12-14 projects employment for four industries as set out below:

¹ Even if the request was not withdrawn, we would not allow that part of the reply brief. As the city correctly points out, that part of the reply brief simply elaborates on petitioners’ arguments under the second assignment of error and does not appear to address the ad hoc committee report at all.

² Petitioners only challenge some of the figures shown on Tables 12-14, 12-18 and 12-25. In this opinion we only set out the challenged figures from those tables.

1

Table 12-14

| Industry | 2030 |
|-----------------------------------------|-------------|
| Transportation, Warehousing & Utilities | 259 |
| Information | 76 |
| Professional and Business Services | 645 |
| Other Services | 590 |

2

Table 12-18 of the EOA displays “Industrial Space Utilizing Employment Projection through 2040.” Record 63. Table 12-18 uses the figures in Table 12-14 to project the percentage of employees in each Industry that will utilize *industrial* space:

5

Table 12-18

| Industry | Percentage Industrial Space Utilizing | 2030 |
|-----------------------------------------|----------------------------------------------|-------------|
| Transportation, Warehousing & Utilities | 93% | 241 |
| Information | 88% | 67 |
| Professional and Business Services | 18% | 116 |
| Other Services | 93% | 549 |

6

Table 12-25 of the EOA displays “Office Space Utilizing Employment through 2040.” Record 73. Table 12-25 uses the figures in Table 12-14 to project the percentage of employees in each Industry that will utilize *office* space:

9

Table 12-25

| Industry | Percentage Office Space Utilizing | 2030 |
|-----------------------------------------|------------------------------------------|-------------|
| Transportation, Warehousing & Utilities | 30% | 78 |
| Information | 90% | 69 |
| Professional and Business Services | 90% | 580 |
| Other Services | 40% | 236 |

10

If we understand petitioners correctly, they contend that Tables 12-14, 12-18 and 12-25 overcount the land needs for projected employees because the city projects that a significant number the estimated employees for each industry in 2030 are allocated to both industrial and office space. More precisely, in the language used in the tables, the “percentage” of expected employees in each of the four industries that are expected to be “Industrial Space Utilizing” and “Office Space Utilizing” add up to more than 100 percent.

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1 As an example, of the 76 information industry employees projected on Table 12-14 for 2030,
2 88 percent are shown on Table 12-18 to be “Industrial Space Utilizing” and 90 percent are
3 shown on Table 12-25 to be “Office Space Utilizing,” for a total of 178 percent. Petitioners
4 argue:

5 “Thus [some] information workers are expected to show up for work both on
6 land allocated for industrial use and on land allocated for office use. The
7 double counting of these workers does not provide an adequate factual basis
8 for the EOA’s conclusions concerning the need for new office or industrial
9 space.” Petition for Review 9.

10 In its brief, the city responds:

11 “There are many industries where one type of employment generates land
12 needs in more than one category. Basically, one industrial job can create a
13 need for an office and for industrial space. A utility worker, as an example,
14 can start his/her day at the office while needing a shop to store equipment,
15 park trucks and other activities. Therefore, a job such as this may generate
16 land needs in a number of categories. The EOA reflects this type of
17 situation.” Respondent’s Brief 15.

18 The city also cites testimony below that each industrial job will generate a need for land for
19 both office and industrial space. *Id.*

20 While the EOA may in fact double count employees and artificially inflate the
21 amount of land that the city will need for industrial and office space, petitioners’ arguments
22 under this subassignment of error do not establish that such is the case. Petitioners have not
23 responded to the city’s contention that some employment in each of the above four industries
24 may utilize both office and industrial space, and that contention does not strike us as
25 implausible.

26 The first subassignment of error is denied.

27 **B. Failure to Account for Infill, Redevelopment and Intensification**

28 This subassignment of error is based on Table 21-21, which is set out below:

1 **Table 12-21 Site Size Distribution by Firm Employment (2010-2030)**

| Employees per Firm | Percent of Employment | Number of Employees | Number of Firms | Sites Needed | Size Range (Acres) | Average Site Size (Acres) | Average ROW Need (Acres) | Gross Buildable Acres Needed |
|--------------------|-----------------------|---------------------|-----------------|--------------|------------------------|---------------------------|--------------------------|------------------------------|
| 0-9 | 15% | 246 | 41 | 21 | <2 | 1 | 0.15 | 24 |
| | | | | 20 | infill & redevelopment | | 0 | |
| 10-74 | 40% | 657 | 19 | 13 | 2-10 | 5 | 0.75 | 75 |
| | | | | 6 | infill & redevelopment | | 0 | |
| 75-150 | 15% | 246 | 2 | 2 | 10-30 | 20 | 1.00 | 42 |
| 150+ | 30% | 493 | 1 | 1 | 30-50 | 40 | 2.00 | 42 |
| Total | 100% | 1,642 | 63 | 63 | | | | 183 |

2 The EOA provides the following description of the assumptions that underlie Table
 3 12-21:

4 “The table * * * includes assumptions that most (55%) of Newberg’s future
 5 industrial employment will be located on sites 10 acres or less, and that one-
 6 third of those future new industrial firms under 10 acres in size, and one-half
 7 of firms under 2 acres in size, will find a site through infill redevelopment or
 8 intensification of existing employment land uses.” Record 67.

9 The above EOA language is directed at the 55 percent of total employees included in
 10 the first two rows of Table 12-21. The EOA assumes that one half of the 246 employees
 11 expected for sites of <2 acres (or 123 employees) will be accommodated through infill and
 12 redevelopment, while the remaining 123 of the 246 employees will be accommodated on the
 13 24 gross buildable acres shown to be needed for sites of less than two acres. Similarly, the
 14 EOA assumes that one third of the 657 employees expected for sites of 2-10 acres (or 219
 15 employees) will be accommodated through infill and redevelopment, while the remaining
 16 438 of the 657 employees will be accommodated on the 75 gross buildable acres shown to be
 17 needed for sites of 2-10 acres.

18 Petitioners contend that while the EOA *says* that it assumes that a total of 342
 19 employees (123 + 219) will be accommodated through infill and redevelopment on sites less
 20 than 10 acres in size, Table 12-21 does not reflect that assumption. Petitioners take that
 21 position based on the following language in the EOA:

22 “* * * The totals land needs equate to approximately 10 employees per
 23 developed acre, which reflects the reality that many firms look for sites that

1 allow for future expansion, and is consistent with the site size per employee
2 ratio of many of Newberg’s largest industrial employers.” Record 67
3 (footnote omitted).

4 Petitioners contend the city either did not allocate any of the projected employees to infill
5 and redevelopment or, if it did, the employee to acreage ratio is far lower than the assumed
6 10 employees per developed acre. Petitioners base that contention on the following
7 calculation. First, petitioners subtract 342 employees from the 1,642 total employees (1,642
8 – 123 – 219 = 1,300) to arrive at the employees that will be accommodated on the 183 acres
9 Table 12-21 shows to be needed by 2030. Second, petitioners divide the 1,300 expected
10 employees that will not be accommodated via infill or redevelopment by the 183 gross
11 buildable acres needed, to arrive at the employees per developed acre ratio. The resulting
12 ratio of employees to acres needed is approximately 7.1, not 10. Petitioners then argue:

13 “The EOA either fails to allocate any actual employment to infill and
14 intensification or calculates an employee to acreage ratio far out of line with
15 its own assumptions and City history. The EOA does not provide the
16 adequate factual base required under Goal 2.” Petition for Review 11.

17 The city disputes the numerator and denominator that petitioners select in computing
18 the 7.1 ratio. However, we need not decide whose view of the appropriate numerator and
19 denominator is correct.³ The planning staff report for the January 14, 2010 planning
20 commission hearing in this matter explained that the city did not project its need for
21 industrial land based on an assumed employees to acreage ratio:

22 “Some cities determine their land needs by first determining the average
23 number of employees per acre their industries use, then dividing that number
24 into the projected population to establish how many acres the city will need
25 for employment. Newberg does not use this method of calculation. Instead,
26 we first determine the land needs of prospective employers based on our
27 target industries. We then calculate the number of sites needed for each

³ The city contends the correct numerator (number of employees) is 1,642 and the correct denominator (developed acres) is 166. Using those numbers, the employees per developed acre is 9.89. The city arrives at 166 developed acres by subtracting the acres that will be developed with rights of way. The city takes the position that the 342 new employees that will be accommodated by infill or redevelopment should not be subtracted from the numerator, as petitioners have done.

1 category of size of firm. The total acreage is determined by multiplying the
2 number of sites needed by the average site size for that category of firm. * *
3 *” Record 154-55.

4 It is readily apparent that the city arrived at “Gross Buildable Acres Needed” in Table
5 12-21 in the manner described above, and did not do so by assuming that the 183 Gross
6 Buildable Acres it determined would be needed by 2030 would be developed at an assumed
7 10 employees per developed acre ratio. If the numbers of “Sites Needed” shown on Table
8 12-21 are multiplied first by the Average Site Size and next by the Average ROW Need, and
9 the sums of those two calculations are added, the result is the Gross Buildable Acres Needed
10 figures shown on the table. Simply stated, petitioners’ argument under this subassignment of
11 error erroneously assumes that the city arrived at its conclusion that it will need 183 Gross
12 Buildable Acres by 2030 based on an assumption that those acres would be developed at a
13 ratio of 10 employees per acre.

14 Finally, petitioners argue under this subassignment of error that the city erred by
15 failing to assume that at least some of the projected employees would be accommodated
16 through infill or redevelopment activity on sites that are larger than 10 acres.

17 The planning staff report for the January 14, 2010 planning commission hearing in
18 this matter addresses petitioners’ contention as follows:

19 “One comment was whether infill should be assumed for larger sites as well.
20 The table is used to determine the number of new large industrial sites needed.
21 It does allow that some of the large site employment could be in expansion of
22 existing larger sites. For example, 246 employees were allocated to the ‘75-
23 150 employees’ category. This translates into either 2 or 3 sites. At the high
24 end, this could be 3 firms employing an average of 75 employees each,
25 leaving 21 employees for ‘infill’ of existing sites. At the midpoint, it could be
26 2 firms employing 113 employees each, leaving 20 employees for infill. To
27 get down to only 1 firm, you would have to assume that 96 to 171 employees
28 would be ‘infill’ or 40% to 70% of the employment. This seems unlikely
29 because as stated earlier many of the existing firms have infilled already,
30 leaving only modest room for more infill. Notably, neither of Newberg’s
31 current largest campuses [is] likely to have much if any infill. Employment at
32 SP Newsprint is unlikely to rise over the planning period. The A-dec campus
33 has infilled numerous times over the past decade, and has little additional

1 potential for further infill. Further expansion is more likely to occur on
2 adjoining buildable land held by the business owner.” Record 155-56.

3 Although the above staff report was not specifically adopted by the city council as
4 findings to support the challenged decision, and we are not sure we follow all of the
5 reasoning quoted above, it does express a contrary view regarding the wisdom of including
6 express assumptions that a particular number of employees will be accommodated by infill or
7 redevelopment activity between 2010 and 2030 by employers occupying sites that are larger
8 than 10 acres. Given the uncertainty and difficulty that are inherent in developing valid
9 assumptions to project employment land needs twenty years into the future, we do not agree
10 that the city’s failure to assume that at least some precise amount of the projected
11 employment need will be met through infill and redevelopment on sites in excess of 10 acres
12 constitutes a failure to comply with Goal 2’s requirement for an adequate factual base.

13 This subassignment of error is denied.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 **A. Introduction**

17 The second assignment of error presents what appears to be the heart of the parties’
18 dispute. We begin with a discussion of Goal 9 (Economic Development) and the Goal 9
19 administrative rule, which sets the regulatory backdrop for the parties’ arguments under the
20 second assignment of error.

21 Goal 9 (Economic Development) requires that the city “provide adequate
22 opportunities * * * for a variety of economic activities.” In performing that obligation, Goal
23 9 specifically directs local governments to take “into consideration” a number of factors,
24 including “availability of key public facilities” and “current market forces.” Goal 9 requires
25 that local governments “[p]rovide for at least an adequate supply of sites of suitable sizes,

1 types, locations, and service levels for a variety of industrial and commercial uses consistent
2 with plan policies.”⁴

3 The Land Conservation and Development Commission (LCDC) has adopted an
4 administrative rule to elaborate on Goal 9. OAR chapter 660, division 9. OAR 660-009-
5 0020 requires that local governments adopt “Industrial and Other Employment Development
6 Policies.” OAR 660-009-0020(1)(c) requires that local government comprehensive plans
7 must include a “Commitment to Provide Adequate Sites and Facilities.”⁵ OAR 660-009-
8 0025 requires “Designation of Land for Industrial and Other Employment Uses.”⁶ Next,

⁴ Relevant text of Goal 9 is set out below:

“To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.

“Comprehensive plans and policies shall contribute to a stable and healthy economy in all regions of the state. Such plans shall be based on inventories of areas suitable for increased economic growth and activity after taking into consideration the health of the current economic base; materials and energy availability and cost; labor market factors; educational and technical training programs; availability of key public facilities; necessary support facilities; current market forces; location relative to markets; availability of renewable and non-renewable resources; availability of land; and pollution control requirements. Comprehensive plans for urban areas shall:

- “1. Include an analysis of the community’s economic patterns, potentialities, strengths, and deficiencies as they relate to state and national trends;
- “2. Contain policies concerning the economic development opportunities in the community;
- “3. Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies;
- “4. Limit uses on or near sites zoned for specific industrial and commercial uses to those which are compatible with proposed uses.”

⁵ OAR 660-009-0020(1)(c) provides:

“* * * The plan must include policies committing the city or county to designate an adequate number of sites of suitable sizes, types and locations. The plan must also include policies, through public facilities planning and transportation system planning, to provide necessary public facilities and transportation facilities for the planning area.”

⁶ OAR 660-009-0025(1) provides:

1 OAR 660-009-0015, which is the focus of the parties’ dispute, requires that local
2 governments adopt an economic opportunities analysis as part of their comprehensive plan.
3 That rule requires that local governments follow a four-step planning process: “(1) Review of
4 National, State, Regional, County and Local Trends,” “(2) Identification of Required Site
5 Types,” “(3) Inventory of Industrial and Other Employment Lands,” and “(4) Assessment of
6 Community Economic Development Potential.” The parties’ dispute under the second
7 assignment of error focuses on the second step, OAR 660-009-0015(2), which provides:

8 “Identification of Required Site Types. The economic opportunities analysis
9 must identify the number of sites by type reasonably expected to be needed to
10 accommodate the expected employment growth *based on the site*
11 *characteristics typical of expected uses*. Cities and counties are encouraged to
12 examine existing firms in the planning area to identify the types of sites that
13 may be needed for expansion. Industrial or other employment uses with
14 compatible site characteristics may be grouped together into common site
15 categories.” (Emphasis added.)

16 Finally, OAR 660-009-0005 defines some of the terms used in the Goal 9 rule, including
17 “site characteristics:”

18 ““Site Characteristics’ means *the attributes of a site necessary for a particular*
19 *industrial or other employment use to operate*. Site characteristics include,
20 but are not limited to, a minimum acreage or site configuration including
21 shape and topography, visibility, specific types or levels of public facilities,
22 services or energy infrastructure, or proximity to a particular transportation or
23 freight facility such as rail, marine ports and airports, multimodal freight or
24 transshipment facilities, and major transportation routes.” OAR 660-009-
25 0005(11) (emphasis added).

“Identification of Needed Sites. The plan must identify the approximate number, acreage and site characteristics of sites needed to accommodate industrial and other employment uses to implement plan policies. Plans do not need to provide a different type of site for each industrial or other employment use. Compatible uses with similar site characteristics may be combined into broad site categories. Several broad site categories will provide for industrial and other employment uses likely to occur in most planning areas. Cities and counties may also designate mixed-use zones to meet multiple needs in a given location.”

1 **B. The Parties’ Conflicting Interpretations of OAR 660-009-0015(2) and**
2 **660-009-0005(11)**

3 Simply stated, petitioners contend that the city’s EOA identifies a number of site
4 characteristics without establishing that those site characteristics are “attributes * * *
5 necessary for a particular industrial or other employment use to operate.” Although
6 petitioners never clearly say what they think the word “necessary” means, as it is used in
7 OAR 660-009-0005(11), it is reasonably clear that they believe it should be understood in its
8 normal dictionary sense, *i.e.* something “that cannot be done without” or something that
9 “must be had.” *Webster’s Third New Int’l Dictionary* (unabridged ed 1981) 1510. We
10 understand petitioners to argue that when the county is identifying “the site characteristics
11 typical of expected uses,” as required by OAR 660-009-0015(2), it must ensure that any
12 selected site characteristic is an attribute that “a particular industrial or other employment
13 use” must have or cannot do without.

14 While petitioners’ focus is almost exclusively on the word “necessary” in OAR 660-
15 009-0005(11), the city’s focus is almost exclusive on scattered references in Goal 9 and the
16 Goal 9 rule to “marketing,” and the city’s desire to use the EOA to put the city in a better
17 position to compete with other cities in the area for economic development. The city seems
18 to suggest that it can adopt as a site characteristic any characteristic that would give the city
19 an additional advantage in competing with other area jurisdictions for industrial and
20 employment uses.

21 While there is certainly nothing wrong with the city wanting to use its EOA to allow
22 it to more effectively compete with neighboring cities for new industrial development, OAR
23 660-009-0015(2) limits the city’s ability to use site characteristics to eliminate sites from
24 consideration. For the reasons explained below, we reject both petitioners’ and the city’s
25 interpretations of OAR 660-009-0005(11) and 660-009-0015(2).

1 The Court of Appeals recently described the methodology it employs to interpret
2 administrative rules in *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 33-34, 220
3 P3d 445 (2009):

4 “In interpreting an administrative rule, our objective is to determine the intent
5 of the body that promulgated the rule. *State v. Papineau*, 228 Or App 308,
6 311, 208 P3d 500, *rev den*, 346 Or 590 (2009). To make that determination,
7 we examine the text of the rule, in context. *Id.*; *see Abu-Adas v. Employment*
8 *Dept.*, 325 Or 480, 485, 940 P2d 1219 (1997) (in interpreting administrative
9 rules, the court uses the same methodology as it does in interpreting statutes);
10 *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859
11 P2d 1143 (1993); *ODOT v. City of Klamath Falls*, 177 Or App 1, 8, 34 P3d
12 667 (2001). ‘Context includes other provisions of the same rule, other related
13 rules, the statute pursuant to which the rule was created, and other related
14 statutes.’ *Abu-Adas*, 325 Or at 485.”

15 Applying that methodology here, the text of OAR 660-009-0005(11) itself suggests LCDC
16 did not intend that a site characteristic must be an attribute that cannot be done without or an
17 attribute that must be had. OAR 660-009-0005(11) includes a non-exclusive list of
18 examples. Given a properly motivated developer, it is hard to see how a specific site “shape”
19 or “visibility” could ever be an attribute that could not be done without. Perhaps more
20 importantly, both petitioners and the city ignore the language in OAR 660-009-0015(2),
21 quoted above, which is the rule that actually requires the city to identify sites based on site
22 characteristics. OAR 660-009-0015(2) directs that identification of needed sites is to be
23 “based on the site characteristics *typical* of expected uses.” (Emphasis added.) The choice
24 of the word “typical” in OAR 660-009-0015(2) strongly suggests that LCDC intended the
25 word “necessary” in OAR 660-009-0005(11) to mean something other than “cannot be done
26 without.” While “typical” attributes would presumably include those attributes that are
27 absolutely necessary to construct and operate a business, “typical” attributes would also
28 likely include those attributes that while not “necessary,” in the dictionary sense of the word,
29 are nevertheless typically required for a business to operate successfully.

30 If the words “attributes of a site necessary for a particular industrial or other
31 employment use to operate,” in the definition of “site characteristics” are viewed in context

1 with the language of 660-009-0015(2), we believe that site characteristics are properly
2 viewed as attributes that are (1) typical of the industrial or employment use and (2) have
3 some meaningful connection with the operation of the industrial or employment use. If the
4 record demonstrates that an attribute is both typical and has some meaningful connection
5 with the operational requirements of the industrial or employment use, we believe OAR 660-
6 009-0005(11) and 660-009-0015(2) would permit the city to list it as a site characteristic.
7 OAR 660-009-0005(11) and 660-009-0015(2) do not require that the city go further, as
8 petitioners argue, and demonstrate that the site characteristic is essential, in the sense it
9 would not be possible to construct or operate the industrial or employment use without the
10 attribute.

11 We recognize that the interpretation we adopt above is subjective and may be
12 difficult to apply in some cases. However, petitioners' interpretation would make site
13 characteristics a largely illusory tool for identifying industrial and employment sites that will
14 be attractive to potential developers so that they will actually be developed for the intended
15 uses, which is clearly the intent of OAR chapter 660, division 9. And the city's apparent
16 belief that it can select site characteristics solely to give it sites that will have competitive
17 advantages gives no meaning to the OAR 660-009-0005(11) requirement that a site
18 characteristic must be an "attribute" that is "necessary" for the desired industrial use to
19 "operate." The city's exclusive focus on marketing concerns also runs the risk that the city
20 might run afoul of other statewide planning goal and statutory obligations for establishing
21 urban growth boundaries in a way that balances the need to provide adequate land for
22 industrial development and statutory and goal standards for protecting agricultural, forest and
23 other sensitive lands.

24 With the above understanding of the parameters the city must observe in selecting
25 site characteristics under OAR chapter 660, division 9 we turn to the parties' arguments.

1 **C. The Challenged Site Characteristics**

2 Petitioners contend the city erred by adopting a number of site characteristics without
3 establishing that they are “attributes [that are] necessary for a particular industrial or other
4 employment use to operate.” The challenged site characteristics are set out below:

5 **1. Site Size**

- 6 “● Minimum parcel size 5 vacant acres (or vacant with less than ½ acre
7 occupied by permanent structures)
- 8 “● Group of at least 20 suitable acres as defined below
- 9 “● May include parcels with less than 5 vacant acres if site is currently an
10 industrial use or is vacant and adjacent to industrial use or group of 20
11 suitable acres” Record 68.⁷

12 **2. Topography**

13 “Exclude:

- 14 “● Slopes of 10% or greater

15 “* * * * *

- 16 “● Remaining suitable area contiguous and generally rectangular in shape
17 for efficient development.” *Id.*⁸

18 **3. Proximity to Transportation and Services**

19 “Include parcels (or groups of parcels):

20 “* * * * *

- 21 “● Adjacent to or within 1/8 mile of a major arterial or state highway
22 access without travel through non-industrial properties

- 23 “● Provides connection to I-5 via Highway 219

24 “* * * * *

⁷ A fourth site size attribute is listed on Record 68 but petitioners do not challenge that attribute.

⁸ Petitioners do not challenge two of the required site characteristics under this category.

1 “● Adjacent to existing industrial areas, or agglomeration of at least 100
2 new acres to facilitate agglomeration economies and minimize adverse
3 impacts

4 “* * * * *. *Id.*⁹

5

6 **4. Compatibility**

7 “Exclude sites that:

8 “● Abut residential neighborhood on more than 25% of the site perimeter
9 unless effective topographical or road buffers present or planned

10 “● Abut large contiguous tracts of agricultural land unless effective
11 topographic or road buffers are present or planned

12 “● Result in truck traffic through downtown.” *Id.*

13 Petitioners’ challenges to the above site characteristics are generally couched as
14 failures on the city’s part to provide the adequate factual base that is required by Goal 2.
15 However, petitioners also contend the challenged decision and EOA lack findings that
16 explain how the above site characteristics are necessary operational attributes:

17 “The EOA does not explain its conclusion that these targeted industries
18 require large sites[.]” Petition for Review 14

19 “The EOA does not explain why any of the targeted industries must be part of
20 an agglomeration of at least 100 acres.” *Id.* at 15.

21 “Neither the findings nor the EOA explains why all targeted industries require
22 a flat, rectangular site nor why any specific targeted industry requires a flat,
23 rectangular site.” *Id.* at 16.

24 “As with all the preceding site suitability characteristics, neither the EOA nor
25 the findings explain why [the compatibility site characteristics] are
26 requirements necessary [for] each of the industrial uses to operate, nor is there
27 any evidence in the record to support such a finding.” *Id.* at 16-17.

⁹ Petitioners do not challenge two of the required site characteristics under this category.

1 **D. The City’s Findings**

2 The findings that the city adopted to support its decision in this appeal appear at
3 Record 89-95. The EOA itself appears at Record 19-88. If there is any attempt in those
4 findings or the EOA itself to demonstrate that the site characteristics quoted above are
5 “typical” of the industries the city wishes to attract we have not been able to find it. The city
6 devotes over 20 pages of its brief responding to the second assignment of error. It cites to
7 general testimony that Newberg lacks sites with sufficient size and suitable characteristics to
8 attract the kinds of industry the city wants to attract. But that evidence falls substantially
9 short of demonstrating that the site characteristics set out above are “typical” of the
10 industries the city wishes to attract. Some of the evidence the city attempts to rely on is
11 contained in the ad hoc committee report that we have already determined we may not
12 consider for its evidentiary value.

13 Some of the above site characteristics quoted above likely are typical. For example,
14 the ten percent slope standard for industrial development seems difficult to argue with.
15 Similarly, it seems likely that a minimum parcel size of some sort and some minimal access
16 to arterials or other transportation facilities is also typical. But the city does not identify
17 anything that supports a conclusion that 5 acres is a typical attribute or that industries
18 typically require that arterials be no more than 1/8 mile away. While the evidentiary basis
19 for the necessary findings may be present, the evidence cited by the city is not adequate,
20 without supporting findings, to establish that the above described site characteristics are
21 typical of the industries the city wishes to attract.

22 The city in responding to another assignment of error notes that although quasi-
23 judicial land use decisions generally must be supported by findings, there is no generally
24 applicable statutory requirement that the city support *legislative* land use decisions with
25 findings. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12, 16 (2008);
26 *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539, 546 n 7 (2001), *aff’d* 179

1 Or App 12, 38 P3d 956 (2002); *Churchill v. Tillamook County*, 29 Or LUBA 68, 77 (1995).
2 However, in affirming our decision in *Citizens Against Irresponsible Growth*, the Court of
3 Appeals observed that even in circumstances where there is no statutory requirement that a
4 particular legislative decision be supported by findings, “there must be enough in the way of
5 findings or accessible material in the record of the legislative act to show that applicable
6 criteria were applied and that required considerations were indeed considered.” *Citizens*
7 *Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n6, 38 P3d 956 (2002). In this
8 case the short findings and the material in the record cited by the city are simply not
9 sufficient to establish that the siting standards set out above are “typical” of the industries the
10 city seeks to attract. Additional findings and perhaps additional evidence will be required to
11 make that demonstration.

12 The second assignment of error is sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 At the February 1, 2010 city council hearing in this matter, petitioner Friends of
15 Yamhill County attempted to submit a ten-page letter, and petitioners Does attempted to
16 submit a two-page letter. Petitioners were all given an opportunity to testify orally, but the
17 city relied on its “City Council Guidelines and Rules” to reject the written testimony because
18 it was not submitted before the hearing. Petitioners contend that the city committed a
19 procedural error by refusing to accept their written testimony. Petitioners contend the time
20 they were allowed for oral testimony was not sufficient for them to present orally all of the
21 written testimony that they wished to submit at the hearing. Petitioners contend that the
22 city’s procedural error prejudiced their substantial rights by denying them an adequate
23 opportunity to be heard. ORS 197.835(9)(a)(B).¹⁰

¹⁰ ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a decision where LUBA finds that the local government “[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner.”

1 The notice that preceded the February 1, 2010 city council public hearing is set out in
2 part below:

3 “HEARING NOTICE

4 “The Newberg City Council will hold a public hearing on February 1, 2010 at
5 7 p.m. at the Newberg Public Safety Building, 401 E. Third Street, Newberg,
6 OR, to evaluate the [EOA].

7 “* * * * *

8 “You may examine information regarding this proposal at the Newberg
9 Planning and Building Department, 414 E. First Street, Newberg OR 97132,
10 or on the City’s website at www.newbergoregon.gov. The staff
11 recommendation regarding this proposal will be available one week before the
12 public hearing. * * * All interested persons may appear and provide
13 testimony. Only those persons who participate either orally or in writing in
14 the hearing proceedings leading to the adoption of the action may appeal the
15 decision.

16 “Published: January 20, 2010” Record 140.

17 We agree with petitioners that a reasonable person reading the above notice would
18 understand it to give notice that interested parties could appear and provide testimony, orally
19 or in writing, at the February 1, 2010 meeting.

20 The city relied on the following in its City Council Guidelines and Rules to deny
21 petitioners’ request to submit written testimony:

22 “Communications from the Floor: Persons speaking to the Council from the
23 floor will be given the opportunity to speak for not less than three (3) minutes
24 nor more than five (5) minutes; and speakers may share their time at the
25 discretion of the Mayor or presiding officer. The Mayor may extend the time
26 limit. Speakers may address the Council for less than their allotted time.
27 *Speakers are encouraged to submit information in writing at least ten (10)*
28 *days prior to the Council meeting for the Council’s review. Speakers may*
29 *also submit information at the meeting, but it may or may not be read and*
30 *considered by the Mayor and Council.” (Emphasis added.)*

31 Although the January 20, 2010 published notice of hearing does not reference the City
32 Council Guidelines and Rules, they are available via a link on the city website.

1 The city council recognized that its guideline, literally read, only purports to
2 authorize the city council to refuse to read or consider written evidence that is submitted less
3 than 10 days before the hearing. The city council nevertheless determined that it would reject
4 petitioners' written testimony, and relied on the fact that petitioners were present and able to
5 testify orally to avoid any prejudice to their substantial rights. Respondent's Brief Appendix
6 37-38 (comments of Councilman Witherspoon and City Counsel).

7 We believe the procedure the city was bound to follow in this case is at least in part
8 dictated by the notice it gave. In this case, as we have already noted, the January 20, 2010
9 notice did not mention the City Council Guidelines and Rules and a reasonable person could
10 read that notice to state that if he or she submitted written testimony at the February 1, 2010
11 hearing it would be accepted, considered and constitute an appearance for purposes of further
12 appeal. Given those representations in the January 20, 2010 notice, we believe it was error
13 for the city to refuse to accept petitioners' written testimony. To follow the city's reasoning,
14 a party who received the January 20, 2010 notice on the same day it was published and
15 wanted to be sure his or her written testimony makes it into the record and is considered
16 would have two days (until January 22, 2010) to prepare and submit that written testimony.
17 Because the staff report is not issued until seven days before the hearing, that written
18 testimony would have to be prepared without the benefit of the staff report. A person who
19 did not already know about the City Council Guidelines and Rules would also have to
20 discover and read those rules during that same two-day period. In the circumstances
21 presented in this case, we believe it was a procedural error for the city to represent in its
22 January 20, 2010 notice that written testimony could be submitted at the February 1, 2010
23 hearing and then refuse to accept that written testimony.

24 The only remaining question is whether the city council's decision to reject the
25 written evidence resulted in prejudice to petitioners substantial rights. The substantial rights
26 that are protected by ORS 197.835(9)(a)(B) include an opportunity to prepare and submit a

1 case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). The
2 city contends petitioners were given an adequate opportunity to present their written
3 testimony orally and therefore suffered no prejudice.

4 When the person speaking on behalf of Friends of Yamhill County had been speaking
5 for five minutes, a buzzer sounded. The mayor asked the speaker to “* * *wrap it up please.”
6 Respondent’s Brief Appendix 39. However, the speaker was allowed to speak for almost
7 five additional minutes. Petitioners Does were similarly give additional time to testify orally,
8 and petitioner Amy Does said the Does’ two-page letter contained what she planned to say at
9 the hearing.

10 The city’s refusal to accept the Does’ two page letter does not appear to have resulted
11 in any prejudice to the Does. The Does had sufficient time to read their letter into the record.
12 The city’s refusal to accept petitioner Friends of Yamhill County’s ten-page letter is more
13 problematic. The speaker may have arrived planning to rely on the written document for the
14 arguments set out in the written document and intending to present additional arguments
15 orally. Even if that was not the case, the ten-page letter is set out at Exhibit A of the
16 separately bound Attachments to the Petition for Review. It would be difficult or impossible
17 to read that letter in ten minutes. And the speaker was not told he had as much time to testify
18 as it would take to read the letter into the record. After five minutes the speaker was
19 interrupted by a buzzer and told to “wrap it up.” At that point the speaker did not know how
20 much additional time he would be given to testify. Viewed in total, we conclude the city’s
21 failure to accept the proffered written testimony constituted a procedural error and that the
22 error prejudiced petitioner Friends of Yamhill County’s substantial rights.

23 The third assignment of error is sustained.

24 **FOURTH ASSIGNMENT OF ERROR**

25 Petitioners argue the notice of hearing that was published did not specifically mention
26 that the city might amend its buildable lands inventories of residential lands, park land and

1 institutional land.¹¹ Petitioners contend there are no findings explaining the bases for these
2 changes. Petitioners argue the city’s failure to provide adequate notice led two petitioners
3 who would have testified about the residential lands, park land and institutional land
4 inventories not to attend the hearing, resulting in a violation of Goal 1 (Citizen Participation).
5 Petitioners argue the city’s failure to demonstrate the bases for the changes means the
6 changes lack an adequate factual base, and thus that failure violates Goal 2.

7 With regard to petitioners’ allegations regarding the hearing notice, the city contends
8 that the changes to those inventories are closely related to the changes adopted by the EOA
9 and that if all three of the different notices that were provided are examined, a reasonable
10 person would have understood that the proposed amendments to the EOA might also result in
11 changes to the comprehensive plan land inventories.

12 The post-acknowledgment plan amendment notice that was sent to LCDC includes
13 the following description of the proposal:

14 “* * * Revises Newberg’s Economic Opportunities Analysis. Updates the
15 analysis with certain information from the 2005-2007 American Community
16 Survey and regional studies. Revises and clarifies list of Newberg targeted
17 industries. Updates industrial and commercial lands needs, inventories, and
18 suitability criteria. *Updates comprehensive plan text and land use inventories*
19 *to reflect updated information.*” Record 413 (emphasis added).

20 In addition, newsletters were sent to a larger number of persons. The newsletter lists a
21 number of proposed changes, including: “[u]pdated buildable lands inventories and the
22 addition of maps that illustrate the available industrial and commercial buildable land by
23 area.” Record 133. Finally, while it is true that the published notice that is the focus of this

¹¹ The relevant text from that notice is set out below:

“Revised Economic Opportunities Analysis. Consider revisions to the Newberg Economic Opportunities Analysis (EOA). The EOA revisions include updated buildable lands inventories for commercial and industrial land, updated demographic and economic statistics, updated information regarding Newberg’s economic development strategy, and updates to the Comprehensive Plan land need and supply tables. * * *” Record 140.

1 assignment only specifically mentions the buildable lands inventories for commercial and
 2 industrial land, the final sentence of the notice also states that the EOA includes “updates to
 3 the Comprehensive Plan land need and supply tables.” We conclude that all three notices
 4 were adequate to put petitioners on notice that, in addition to the industrial and commercial
 5 land buildable lands inventories, other buildable lands inventories might also be amended.
 6 We reject petitioners challenge to the adequacy of the notice.

7 Regarding petitioners’ findings and Goal 2 adequate factual base challenge, the city
 8 responds that the lack of findings is not necessarily fatal because this is a legislative land use
 9 decision and in any event the allegedly missing explanation of the factual base for the
 10 changes appears in the text of the EOA. That text is set out below; the deleted text is shown
 11 stricken through and the new text is underlined:

12 “The Newberg Planning Division prepared an inventory of buildable land in
 13 the Newberg UGB in 2004, which was updated in November 2009. The
 14 buildable land inventory includes vacant and redevelopable land in the
 15 existing (2009~~4~~) UGB. This land base is the starting point for determining
 16 how much future growth can be accommodated inside the existing UGB and
 17 the size of the unmet land need that must be accommodated through zone
 18 changes or UGB expansion. Physical constraints such as steep slopes (greater
 19 than 25%) and stream setbacks have been deducted from the parcel size, so
 20 the buildable land inventory is based on buildable acres, not total acres. In
 21 addition, lands that are under development (where a building permit has been
 22 issued) are not considered buildable. This inventory also does not include
 23 land located within the future right-of-way of the proposed Newberg-Dundee
 24 Bypass. In November 2009~~4~~, the Newberg UGB had approximately 778
 25 1,071 acres of buildable land ~~inside the UGB~~ (Table IV-1).

26 “Table IV-1. Newberg UGB Buildable Land Inventory (Nov. 2009 ~~2004~~)

| Plan Designation | Buildable Land |
|----------------------------|------------------------------------|
| Low Density Residential | 359 ac <u>585 ac.</u> |
| Medium Density Residential | 142 ac <u>132 ac.</u> |
| High Density Residential | 13 ac <u>45 ac</u> |
| Commerical | 105 ac <u>120 ac.</u> |
| Industrial | 159 ac <u>56 ac.</u> |
| <u>Park</u> | <u>41 ac.</u> |
| <u>Institutional</u> | <u>92 ac.</u> |
| Total | 778 ac <u>1,071 ac.</u> |

1 ~~“Source: Ad Hoc Committee on Newberg’s Future (2005), Report to City~~
2 ~~Council Newberg Planning Division, Buildable Lands Inventory, November~~
3 ~~2009.”~~ Record 82.

4 The city argues that source of the changes is clearly identified, the “Newberg
5 Planning Division, Buildable Lands Inventory, November 2009.” The city explains:

6 “* * * the update was a largely mechanical exercise of counting acreage
7 where development or plan/zone changes had occurred since the last update
8 and updating the table accordingly. * * *” Respondent’s Brief 9.

9 While the actual 2009 planning division buildable lands inventory apparently is not in
10 the record—at least the city does not identify where it appears in the record—that likely is
11 because there was apparently no question raised below concerning whether Table IV-1
12 accurately reflects the data in that inventory. The EOA adequately explains where the
13 buildable land inventory figures came from and without some challenge to those figures
14 below, we conclude petitioners have not demonstrated that Table IV-1 lacks the adequate
15 factual base required by Goal 2.

16 The fourth assignment of error is denied.

17 **FIFTH ASSIGNMENT OF ERROR**

18 In determining employment land needs for purposes of adopting urban growth
19 boundary (UGB) amendments, OAR 660-024-0040(9) provides a safe harbor.¹² Under that

¹² As relevant, OAR 660-024-0040(9) provides:

“The following safe harbors may be applied by a local government to determine its employment needs for purposes of a UGB amendment under this rule, Goal 9, OAR chapter 660, division 9, Goal 14 and, if applicable, ORS 197.296.

“(a) A local government may estimate that the current number of jobs in the urban area will grow during the 20-year planning period at a rate equal to either:

“(A) The county or regional job growth rate provided in the most recent forecast published by the Oregon Employment Department; or

“(B) The population growth rate for the urban area in the adopted 20-year coordinated population forecast specified in OAR 660-024-0030.

“* * * * *”

1 safe harbor, a local government may assume that employment will grow during the 20-year
2 planning period at either (1) “[t]he county or regional job growth rate provided in the most
3 recent forecast published by the Oregon Employment Department, or (2) “[t]he population
4 growth rate for the urban area in the adopted 20-year coordinated population forecast
5 specified in OAR 660-024-0030.” In the EOA, the county asserts that its employment
6 projections for Newberg to 2030 comply with the OAR 660-024-0040(9) safe harbor
7 requirements.

8 “Newberg employment projections for 2010-2040 were made consistent with
9 the ‘safe harbor’ methodology described in OAR 660-024-0040(9). This
10 methodology allows a local government to estimate that the current number of
11 jobs in the urban area will grow either at a rate equal to the Oregon
12 Employment Department regional job forecast rates, or at a rate equal to the
13 population growth rate for the urban area. Future employment projections for
14 the Newberg urban area were made using a combination of these allowed
15 methodologies.

16 “Retail trade and leisure & hospitality employment was projected to grow
17 according to Newberg population growth. This was done because the need for
18 retail services typically grows along with population, and also because of
19 Newberg’s strong potential for leisure & hospitality employment growth in its
20 targeted industry cluster of wine/tourism.

21 “For other industries, employment was projected to grow for the 2008-2018
22 period at the same rate as the * * * six-county change [projected by the
23 Oregon Employment Department]. For employment projections beyond 2018,
24 employment was projected to grow at the same rate as the projected
25 population growth. This rate is in accordance with the safe harbor provisions
26 stated above, and allows Newberg to plan adequately for the 20-year planning
27 horizon to 2030. This is essential for Newberg to maintain its desired jobs-
28 housing balance into the future and to avoid becoming solely a bedroom
29 community.” Record 47-48 (footnote omitted).

30 Petitioners contend that the EOA erroneously relies on the safe harbor established by
31 OAR 660-024-0040(9)(a), for three reasons. First, and most fundamentally, the OAR 660-
32 024-0040(9)(a) safe harbor, like OAR Chapter 660 division 24 generally, is limited to
33 decisions that amend the UGB. Second, the OAR 660-024-0040(9)(a)(A) and (B)
34 methodologies for projecting jobs for the 20-year planning period are alternative and the city

1 went back and forth between the two for different industries and for different portions of the
2 planning period. Finally, petitioners contend the population projections that the city used are
3 the population projections in the city’s comprehensive plan, which are not “coordinated”
4 population projections as specified in OAR 660-024-0030.

5 Petitioners are correct on all points. The references in OAR 660-024-0040(9)(a) to
6 Goal 9 and OAR chapter 660, division 9 admittedly invite confusion. *See* n 12. However, it
7 is reasonably clear that the safe harbor established by OAR 660-024-0040(9)(a) is only
8 available to local governments when addressing the requirements of “Goal 9, OAR chapter
9 660, division 9, Goal 14 and, if applicable, ORS 197.296,” when “determin[ing] its
10 employment needs for purposes of a UGB amendment under [OAR chapter 660, division
11 24.” OAR 660-024-0000(1) provides that the rules in OAR chapter 660, division 24 “clarify
12 procedures and requirements of Goal 14 regarding a local government adoption or
13 amendment of an urban growth boundary (UGB).” OAR 660-024-0000(1) makes no
14 mention of EOAs. While it is no doubt true that employment projections in EOAs generally
15 and the EOA in this appeal may later be relied on in amending urban growth boundaries,
16 which leaves the relationship between the OAR 660-024-0040(9)(a) safe harbor and the
17 employment projections in those EOAs somewhat murky, any future clarification of that
18 relationship must come from LCDC. As OAR chapter 660, division 24 is now written, the
19 OAR 660-024-0040(9)(a) safe harbor is simply not available for decisions that adopt or
20 amend EOAs, without also amending a UGB.

21 Even if the OAR 660-024-0040(9)(a) safe harbor were potentially available to the
22 city in amending its EOA, we agree with petitioners that the Oregon Employment
23 Department job growth projection rate authorized by OAR 660-024-0040(9)(a)(A) and the
24 coordinated population forecast projection rate authorized by OAR 660-024-0040(9)(a)(B)
25 are mutually exclusive alternatives. A local government must select one or the other and

1 may not switch back and forth between those two projection methodologies, if the local
2 government is seeking the protection of the OAR 660-024-0040(9)(a) safe harbor.

3 Finally, we agree with petitioners that the population projections in the Newberg
4 Comprehensive Plan, which the city relied on this case, are not a “coordinated population
5 forecast specified in OAR 660-024-0030.” OAR 660-024-0030 sets out a number of
6 requirements for a “coordinated 20-year population forecast,” and we do not understand the
7 city to assert that the population forecast in the city’s acknowledged comprehensive plan
8 qualifies as a “coordinated 20-year population forecast” under OAR 660-024-0030.¹³

9 In its brief the city takes the position that it was not “relying” on the OAR 660-024-
10 0040(9)(a) safe harbor but merely was taking the position that its employment projection in
11 the amended EOA is “consistent” with the OAR 660-024-0040(9)(a) safe harbor. The city
12 contends that its jobs projections are based in part on official state projections and in part on
13 population projections in its acknowledged comprehensive plan. We understand the city to
14 contend that even if it was wrong about whether its employment projections qualify for the
15 OAR 660-024-0040(9)(a) safe harbor, those projections are nevertheless supported by
16 substantial evidence and for that reason petitioners’ fifth assignment of error provides no
17 separate basis for remand.

18 The city’s stated rationale for the 20-year employment projections in the amended
19 EOA was the OAR 660-024-0040(9)(a) safe harbor. For the reasons explained above, the
20 protection of that safe harbor is not available to the city. If the city now wants to adopt an
21 alternative legal rationale for why it may project expected employment in the way that it has,
22 it must amend the EOA to state that different rationale. The city may not adopt that
23 alternative legal rationale for the first time in its brief at LUBA. *See Friends of French*
24 *Prairie v. Marion County*, 58 Or LUBA 387, 392 (2009) (county may not in its decision

¹³ Petitioners offer a fourth reason for why the city improperly applied the OAR 660-024-0040(9)(a), which we do not address.

1 disavow use of population projections for land need projection purposes and then argue for
2 the first time in its brief on appeal that population projections were used).

3 The fifth assignment of error is sustained.

4 **SIXTH ASSIGNMENT OF ERROR**

5 OAR 660-009-0015(4) requires, in part, that an EOA “must estimate the types and
6 amounts of industrial and other employment uses *likely to occur* in the planning area.”
7 (Emphasis added.) One of four “target” industries is manufacturing. Petitioners contend that
8 manufacturing has been particularly hard hit during the past two years. In accordance with
9 OED projections, the EOA projects that manufacturing jobs will decline from 2,557 in 2008
10 to 2,514 in 2018. Record 48. Despite this outlook for manufacturing jobs, the EOA adopts a
11 strategy of developing a large block of agricultural land called the South Industrial Area.
12 Record 158. Petitioners argue:

13 “No evidence in the EOA record suggests that manufacturing, which will
14 decline through 2018, is ‘likely’ to rebound thereafter to the extent required
15 for urbanization of the ‘South Industrial Area’. The EOA therefore does not
16 comply with OAR 660-009-0015(4).” Petition for Review 30.

17 The city responds by citing to evidence of opportunities for industrial development.
18 Record 29, 31, 49, 53. The city also cites to evidence that the loss of manufacturing jobs
19 during the current recession is nearly at an end and will not be repeated in the future and that
20 Newberg is in a position to attract manufacturing jobs between now and 2030. Record 146,
21 297, 358; Respondent’s Brief Appendix 42.

22 If we limited our consideration to the parties’ respective arguments concerning the
23 adequacy of the factual base for the city’s manufacturing job projections, we likely would
24 deny this assignment of error. No evidence cited to us supports petitioners’ suggestion that
25 the city must assume the current recession will persist and significantly reduce number of
26 new manufacturing jobs it would otherwise be reasonable to expect between 2010 and 2030,
27 and the evidence cited by the city is at least some evidence that it will not.

1 However, as the EOA recognizes, manufacturing and other industrial land needs are
2 largely a function of employment growth. Record 85. The EOA explains:

3 “In November 2009, the Oregon Employment Department issued new
4 employment growth forecasts for the 2008-2018 period. The Newberg
5 Planning Division then updated the Industrial land need projections based on
6 this new data. For employment projections beyond 2018, employment was
7 projected to grow at the same rate as the projected population growth. This
8 rate is in accordance with the safe harbor provision described in OAR 660-
9 009-0040(9). * * *” *Id.*

10 Based on our disposition of the fifth assignment of error, the city erroneously relied
11 on the OAR 660-009-0040(9) safe harbor. The city may or may not be able to justify
12 assuming that employment between 2018 and 2030 should be projected based on the estimate
13 of future population growth in the city’s comprehensive plan. If not, the projected number of
14 manufacturing jobs in the EOA could be affected. Based on that unresolved uncertainty, we
15 decline to decide the sixth assignment of error.¹⁴

16 We do not decide the sixth assignment of error.

17 The city’s decision is remanded.

¹⁴ There is another unresolved uncertainty regarding the EOA’s discussion of the South Industrial Area, although it does not appear to be directly implicated by the sixth assignment of error. The EOA expressly recognizes that development of the South Industrial Area will require a future UGB amendment and any such UGB amendment must comply with the prioritization hierarchy set out at ORS 197.298 and OAR 660-024-0060 that is designed to avoid development of agricultural lands if there are viable alternative lands. Record 158. But the EOA also points out that the EOA site suitability characteristics will influence application of that priority hierarchy. *Id.* However, petitioners challenge those site suitability characteristics in their second assignment of error, and we sustain that assignment of error. The city may or may not be able to justify those site suitability characteristics on remand.