

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 TOM HAWKSWORTH,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF ROSEBURG,
10 *Respondent,*

11 and

12
13 UMPQUA VILLAGE LLC.,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2011-033

17
18 FINAL OPINION
19 AND ORDER

20
21
22 Appeal from City of Roseburg.

23
24 Tom Hawskworth, Roseburg, filed the petition for review and argued on his own
25 behalf.

26
27 No appearance by the City of Roseburg.

28
29 Pamela Hardy, Bend, filed the response brief and argued on behalf of intervenor-
30 respondent.

31
32 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
33 participated in the decision.

34
35 REMANDED

09/26/2011

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals an ordinance that amends the city’s comprehensive plan.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The motion is granted.

INTRODUCTION

The ordinance that is before us in this appeal is Ordinance 3367. That ordinance does two things. First, it amends the city’s urban growth boundary (UGB) to include 4.45 acres owned by intervenor-respondent (intervenor). Second, it applies the city’s Low Density Residential comprehensive plan map designation to the 4.45-acre property. Record 9-10.

A second ordinance that was not appealed to LUBA, and therefore is not before us in this appeal, also does two things. First, it annexes the 4.45 acres to the city. Second, it rezones the 4.45 acres to apply city residential zoning in place of the county residential zoning.¹

The issue presented in this appeal is whether the city erred by basing its comprehensive plan amendment, in part, on population projections and a buildable lands inventory (BLI) that have not been adopted as part of the city’s comprehensive plan. In *Sane Orderly Development v. City of Roseburg*, 59 Or LUBA 356 (2009), LUBA remanded a city decision that amended the city’s comprehensive plan to include updated population projections. Douglas County is considering amendments to the Douglas County Comprehensive plan to update its population projections for the county. When that Douglas County Comprehensive Plan amendment is adopted, the city apparently plans to amend the city’s comprehensive plan to be consistent with the county’s coordinated population projections for cities in the county. A draft of the county comprehensive plan amendment is

¹ The record in this appeal does not include a copy of the annexation and rezoning ordinance. A draft copy of that ordinance appears at Record 65-69.

1 included in the record. Record 116-63. Although we have not been advised of the current
2 status of the proposed Douglas County Comprehensive Plan amendment, it is undisputed that
3 the city has not yet amended the city comprehensive plan to include updated population
4 projections. The record also includes a draft Residential Buildable Lands Inventory for the
5 Roseburg Urban Growth Boundary (BLI). Record 91-115. That draft BLI includes an
6 inventory, a housing needs analysis, and an estimate of land needed for residential
7 development over the next 20 years. The housing needs analysis and estimate of land needs
8 is based, in part, on updated population projections that have not yet been adopted by the
9 city. Although there are suggestions in the parties' briefs that the city may have taken some
10 action to approve the draft BLI, it is undisputed that an updated BLI has not been adopted as
11 part of the city's comprehensive plan.

12 **FIRST ASSIGNMENT OF ERROR**

13 **A. The Merits**

14 In his first assignment of error, petitioner argues the city erred by adopting a
15 comprehensive plan amendment that relies in significant part on updated population
16 projections and an updated BLI that have not been adopted as part of the city's
17 comprehensive plan. Intervenor contends petitioner waived the issue presented in the first
18 assignment of error. We conclude below that petitioner did not waive the issue presented in
19 the first assignment of error. We normally address waiver arguments before we address the
20 argument on the merits. In this case it is easier to reverse that order to avoid having to
21 discuss the merits at length in resolving intervenor's waiver argument.

22 Goal 14 requires that UGB amendments be based on demonstrated need:

23 "Establishment and change of urban growth boundaries shall be based on the
24 following:

- 25 "(1) Demonstrated need to accommodate long range urban population,
26 consistent with a 20-year population forecast coordinated with affected
27 local governments; and

1 “(2) Demonstrated need for housing, employment opportunities, livability
2 or uses such as public facilities, streets and roads, schools, parks or
3 open space, or any combination of the need categories in this
4 subsection (2).”

5 The Land Conservation and Development Commission (LCDC) has adopted administrative
6 rules that elaborate on Goal 14. OAR 660-024-0030(1) elaborates on the above Goal 14
7 requirement that UGB amendments must be consistent with a coordinated 20-year population
8 forecast:

9 “*Counties* must adopt and maintain a coordinated 20-year population forecast
10 for the county and for each urban area within the county consistent with
11 statutory requirements for such forecasts under ORS 195.025 and 195.036.
12 *Cities* must adopt a 20-year population forecast for the urban area consistent
13 with the coordinated county forecast * * *. *The adopted forecast must be*
14 *included in the comprehensive plan or in a document referenced by the plan.*”
15 (Emphases added.)

16 OAR 660-024-0040(1) provides:

17 “The UGB must be based on the adopted 20-year population forecast for the
18 urban area described in OAR 660-024-0030, and must provide for needed
19 housing, employment and other urban uses such as public facilities, streets
20 and roads, schools, parks and open space over the 20-year planning period
21 consistent with the land need requirements of Goal 14 and this rule. * * *”

22 To summarize, under Goal 14, OAR 660-024-0030(1) and 660-024-0040(1), UGB
23 amendments must be consistent with the city’s 20-year population projections which in turn
24 must be consistent with the county’s population projection for the county and urban areas
25 within the county. For purposes of UGB amendments, both the county’s and the city’s
26 population projections must be “included in the comprehensive plan or in a document
27 referenced by the plan.”

28 Separate and apart from the above Goal 14 administrative rule requirements that the
29 population projections that are relied on to amend a UGB must be adopted as part of the
30 comprehensive plan, the Court of Appeals has determined that Goal 2 (Land Use Planning)
31 generally requires that comprehensive plan amendments be based on the analyses that are
32 included in the comprehensive plan, rather than analyses that are external to the

1 comprehensive plan. *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 215, 124
2 P3d 1249 (2005) (citing and relying on *D. S. Parklane Development Inc. v. Metro*, 165 Or
3 App 1, 994 P2d 1205 (2000)). In *Lengkeek v. City of Tangent*, 54 Or LUBA 160, 164-65
4 (2007), we held that when a city UGB is amended based on an updated BLI, that BLI must
5 be adopted as part of the city’s comprehensive plan.

6 The challenged decision relies on proposed findings that were submitted by
7 intervenor to address Goal 14. Some of those findings are set out below:

8 *“The need to include the subject property can be based solely on the need*
9 *demonstrated in the last urban growth expansion. The last UGB expansion*
10 *took place in 1982, and no significant amendments have occurred since. U.S.*
11 *Census data show that between 1980 and 2000 the population of Roseburg*
12 *increased from 16,644 to 20,017, a 20 percent increase. Since then the City*
13 *has likely added another 10% at least to its population for a total of at least*
14 *22,000 residents. Additionally, eighteen of the twenty years of population*
15 *increase that were anticipated in 1982 have elapsed.[²]*

16 “More recently, The Roseburg Buildable Lands Inventory, completed in
17 October, 2007, further indicated that more than half of the land available for
18 residential development within the existing UGB is on slopes greater than
19 25%. City staff have already determined goals to reduce hillside development
20 projects by a ratio of 30% for slopes ranging from 12-25% and a 60%
21 reduction for slopes greater than 25%. After adjusting for hillside
22 development reductions, only 105.12 acres of medium density residential land
23 and 35.3 acres of high density residential are available for development within
24 the existing UGB.

25 “Based solely on these numbers, the City can conclude that it no longer has a
26 20-year supply of buildable residential land within its urban growth boundary.
27 While there may be some legitimate debate about whether the City should
28 bring in 800, 1000 or 1200 acres, there can be no debate about whether
29 bringing in four and a half acres is currently justified. The city clearly no
30 longer has a 20-year supply of residential land within its UGB.

² The applicant submitted these proposed findings in 2010 and likely meant to say twenty-eight years have passed since the city adopted its 20-year population projection in the 1982 plan.

1 “This conclusion is supported by the City’s own analysis in its proposed UGB
2 amendment findings.^{3]} The City found that it would need an additional
3 1,243 acres of residential land to accommodate 20 years of growth. More
4 specifically the City found that it would need an additional 945 acres of low
5 density residential, such as the R-1-6 zone being requested by the applicant in
6 this matter.” (Record 258-59; emphasis added; citations omitted).

7 Despite the emphasized first two sentences in the above-quoted findings, it is quite
8 clear that the city did not rely solely on population projections and the inventory of land
9 needs in the city’s 1982 acknowledged comprehensive plan. To the contrary, the findings
10 make no attempt to identify the need that is shown in the 1982 comprehensive plan and they
11 do not rely on population projections or identified needs in the 1982 comprehensive plan at
12 all. The above findings, which were adopted by the city, rely in part on subsequent census
13 data for 1980 to 2000, in part on speculation about population increase after 2000 and in part
14 on the unadopted BLI. Importantly, the BLI in turn relies on the updated population
15 projections that the city has not yet adopted to project estimated residential land needs for the
16 next 20 years.

17 If the UGB the city adopted almost 30 years ago included only a 20-year supply of
18 buildable land at the time it was adopted, and the UGB has not been significantly amended
19 since it was adopted, it seems entirely likely that the city no longer has a 20-year supply of
20 buildable land. However, even if so, the city first needs to amend its comprehensive plan to
21 include an updated 20-year population projection. Under OAR 660-024-0030(1) and 660-
22 024-0040(1), if the county wishes to amend its comprehensive plan based on the updated
23 population projections rather than the population projections in its 1982 comprehensive plan,
24 it must first amend its comprehensive plan to include the updated population projections, and
25 the city erred by failing to do so.

³ The city UGB findings reference here is likely a reference to findings that have been prepared to support a city legislative effort to expand its urban growth boundary, a legislative effort that is in progress but has not been completed.

1 Once the updated population projection has been adopted as part of the city’s
2 comprehensive plan, or in conjunction with that plan amendment, the city will be in a
3 position to amend its comprehensive plan to include a BLI that will provide the factual base
4 necessary to project the city’s 20-year land needs and demonstrate a need to expand its UGB.
5 The city erred by relying on an updated BLI that has not been adopted as part of the city’s
6 comprehensive plan.

7 **B. Waiver**

8 Under ORS 197.763(1), a petitioner at LUBA must raise an issue below, to preserve
9 that issue for appeal.⁴ Under ORS 197.835(3), LUBA’s scope of review is expressly limited
10 to issues that were adequately raised below.⁵ Intervenor contends petitioner waived the issue
11 presented in the first assignment of error by failing to raise the issue below.

12 Petitioner and other opponents admittedly did not raise the issue presented in the first
13 assignment of error with precision and clarity. But ORS 197.763(1) and ORS 197.835(3)
14 only require that parties provide fair notice of the issues to preserve them for LUBA review.
15 *See Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (ORS
16 197.763(1) “requires no more than fair notice to adjudicators and opponents, rather than the
17 particularity that inheres in judicial preservation concepts”). We conclude that petitioner and
18 other opponents gave fair notice of the issue presented in the first assignment of error.
19 Record 57-59, 82-83, 195-96, 214-15.

⁴ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

⁵ ORS 197.835(3) limits LUBA’s scope of review and provides that “[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 One opponent clearly took the position that the city could not rely on updated
2 population projections that had been remanded by LUBA and had not been readopted by the
3 city since LUBA's remand:

4 "The proposed development * * * does not supply adequate findings of fact
5 that show the support of a coordinated 20 yr. population forecast or a current
6 population forecast passed into ordinance by the City of Roseburg's City
7 Council. The most current population forecast voted on by the City Council
8 was in December of 2008, and the Council decided not to vote on it a second
9 time, thereby making it an approved City Ordinance, because the Forecast was
10 appealed to LUBA. In July of 2009, that Forecast was remanded back to the
11 City by LUBA and has remained in limbo since." Record 214-15.

12 The above admittedly does not expressly state that the population projections must be
13 adopted *as part of the comprehensive plan*. However, the above is clearly adequate to raise
14 the issue of whether those population projections must be adopted before the disputed UGB
15 amendment can be approved, or at the same time. Having adequately raised that issue below,
16 in a proceeding to amend the comprehensive plan, petitioner is entitled to argue at LUBA
17 that the updated population projections must be adopted as part of the comprehensive plan.

18 The arguments advanced by petitioner and other opponents regarding the BLI were
19 far more confusing. Nevertheless, the 20-year coordinated population projection is a
20 necessary and integral part of the BLI's estimate of the amount of residential land needed for
21 the next 20 years. By raising the issue of whether the population projections the city was
22 proposing to rely on to approve the disputed UGB amendments must first be adopted, we
23 believe opponents also adequately raised the issue of whether the BLI must first be adopted
24 before it can be relied on to approve the UGB amendment. Having adequately raised the
25 issue of whether the BLI must be adopted before it can be relied on to amend the UGB, the
26 issue of whether the BLI must be adopted as part of the comprehensive plan may also be
27 raised in this appeal.

28 Petitioner did not waive the issue presented in the first assignment of error. The first
29 assignment of error is sustained.

1 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

2 In his second and third assignments of error, petitioner challenges the county's
3 annexation and rezoning ordinance. However, as we explained earlier, petitioner only
4 appealed Ordinance 3367, which only approves a UGB and comprehensive plan map
5 amendment. Our remand of Ordinance 3367, until the city takes action on remand, leaves
6 intervenor's property with a county comprehensive plan map designation and a city zoning
7 map designation. We are not sure what effect our remand of Ordinance 3367 has on the
8 annexation ordinance. However, because we lack jurisdiction to review the unappealed
9 ordinance, we do not consider petitioner's arguments under the second and third assignments
10 of error on the merits.

11 The second and third assignments of error are denied.

12 Ordinance 3367 is remanded.