BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEFF HESS, STEVEN J. KUNERT,
KEVIN MARLEY, JOHN MORRIS,
JUNE SATAK, and CAROLYN SIMMONS,
*Petitioners,*

vs.

CITY OF CORVALLIS,
*Respondent,*

and

CAMPUS CREST COMMUNITIES,
*Intervenor-Respondent.*

LUBA No. 2014-040

PAUL GOODMONSON,
*Petitioner,*

vs.

CITY OF CORVALLIS,
*Respondent,*

and

CAMPUS CREST COMMUNITIES,
*Intervenor-Respondent.*

LUBA No. 2014-042

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Wallace W. Lien, Salem, filed a petition for review and argued on behalf of petitioners Hess et al. With him on the brief was Wallace W. Lien PC.

Alan M. Sorem, Salem, filed a petition for review and argued on behalf of petitioner Goodmonson. With him on the brief were Mark D. Shipman and Saalfeld Griggs PC.

James K. Brewer and David E. Coulombe, Corvallis, filed response briefs and argued on behalf of respondent. With them on the brief was Fewel, Brewer & Coulombe.

Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Seth J. King and Perkins Coie LLP.

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

REMANDED 10/28/2014

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

Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioners Hess *et al*. and Goodmonson appeal a city council decision approving (1) a comprehensive plan map amendment, (2) a zoning map amendment, (3) a conceptual development plan, (4) a detailed development plan, and (5) a subdivision.

**MOTION TO DISMISS**

Intervenor moves to dismiss petitioner Robert J. Simmons from LUBA No. 2014-040, arguing that he failed to appear during the proceedings before the city as required by ORS 197.830(2) and (9). There is no response to the motion. Petitioner Robert J. Simmons is dismissed as a petitioner in LUBA No. 2014-040.

**REPLY BRIEF**

Petitioner Goodmonson moves for permission to file a reply brief to respond to alleged "new matters" raised in the response briefs.[1] Section 1 of the reply brief contains arguments to support Goodmonson's Motion to Take Judicial Notice filed on August 26, 2014.[2] Section 2 of Goodmonson's reply brief responds to the city's and intervenor's responses to his first assignment of error that challenge the city's incorporation of a large number of documents as findings in support of the city's decision that the proposed comprehensive plan

[1] OAR 661-010-0039 allows a petitioner to file a reply brief that is confined to "new matters raised in the [respondents'] brief[s]."

[2] As we describe in more detail later in this opinion, Goodmonson asks LUBA to take official notice of a biological assessment prepared by the Federal Emergency Management Agency (FEMA) for the state of Oregon.

and zoning map amendments satisfy the Transportation Planning Rule at OAR 660-012-0060.

The city and intervenor object to the reply brief, arguing that it is not confined to responding to "new matters" within the meaning of OAR 661-010-0039. First, the city and intervenor point out that Section 1 of the reply brief merely contains additional arguments in support of Goodmonson's Motion to Take Official Notice, which we discuss below in our resolution of Goodmonson's third assignment of error. Second, the city and intervenor argue that Section 2 of the reply brief attempts to raise a new assignment of error that Goodmonson did not raise in his petition for review that challenges the city's incorporation of documents in the record as findings.

We agree with the city and intervenor that Goodmonson has not established that the entire reply brief is confined to "new matters" raised in the response briefs. Section 1 of the reply brief contains additional arguments in support of Goodmonson's Motion to Take Official Notice. That is not a "new matter[]" raised in the response briefs under OAR 661-010-0039.

However, Section 2 of the reply brief responds to the city's and intervenor's position in their response briefs that the city incorporated various documents as findings in support of its transportation planning rule analysis, and disputes that the city did incorporate those findings. That is a "new matter" that justifies a reply brief.

The motion to file a reply brief is granted as to Section 2 of the reply brief and denied as to Section 1 of the reply brief.

**FACTS**

The subject property is a 94.6 acre parcel located north of NW Harrison Boulevard, east of SW 53rd Street, and south of NW Circle Boulevard in the

City of Corvallis. In order to develop a 296-unit apartment building on 24.6 acres of the property and preserve the remaining 70 acres as open space, intervenor sought a comprehensive plan map amendment to redesignate 57.7 acres of Low Density Residential and 36.9 acres of Open Space-Conservation to 24.6 acres of Medium-High Density Residential and 70 acres of Open Space-Conservation, as well as conforming zone map amendments for the same acreages. Intervenor also submitted a Conceptual Development Plan (CDP) and a Detailed Development Plan (DDP), and further submitted a subdivision application to create three parcels, private streets, open space, stormwater drainage tracts and public streets.

The planning commission voted to recommend denial of the applications. Intervenor appealed the planning commission's decision to the city council. The city council voted to approve the applications with conditions. These appeals followed.

**FIRST ASSIGNMENT OF ERROR (HESS PETITIONERS)**

Adequate findings are required to support quasi-judicial land use decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977). Generally, findings must: (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

The city council adopted 121 single-spaced pages of findings in support of their decision. Record 67-187. In addition, the city council's decision adopts a number of staff reports and similar documents, including "any attachments or exhibits" to those documents, all of which the decision refers to as "Incorporated Findings:"

> "[T]he Applicant's narrative for the PAPA application and the Zone Change Application dated December 22, 2011 and revised June 17, 2013 * * *; the Applicant's narrative for the CDP/DDP and Subdivision Applications dated February 19, 2013, and resubmitted June 17, 2013 * * *; the Staff Report to the planning commission dated August 23, 2013 * * *; the Staff Report to the City Council dated November 22, 2013 (Exhibit I); supplemental information submitted by the applicant (Exhibit III); and supplemental information provided by City staff (Exhibit II)." Record 78.

Record 78-187 sets out what are labeled as "Supplemental Findings" that "elaborate upon and clarify the Incorporated Findings, and primarily address issued raised in opposition to the Applications." Record 78. The city council's decision includes a sentence that states "[i]n the event of a conflict between the Incorporated Findings and the Supplemental Findings, the Supplemental Findings shall control." Record 78. We refer to this sentence as the conflict resolution sentence.

If all "attachments or exhibits" to the identified narratives, staff reports and supplemental information are included, the documents that the city incorporated as the Incorporated Findings number several hundred documents and more than a thousand pages. In their first assignment of error, Hess argues that due to the incorporation of a large number of documents and over a thousand pages of materials, the findings in support of the decision are inadequate as a matter of law. Hess also argues that the findings are inadequate because some of the Incorporated Findings contain inconsistencies with some of the other Incorporated Findings, and those inconsistencies are not resolved by the conflict resolution sentence described above. In particular, Hess argues that the city council incorporated the testimony of an opponent, Marley, as an exhibit to a staff report, and that testimony is inconsistent with other

incorporated findings that support approval of the applications. Petition for Review 15-16.

The city does not dispute that the city council's final decision in fact incorporates hundreds of documents and thousands of pages, but argues that a large incorporation in itself does not mean that the city's findings are inadequate as a matter of law. The city also responds that the Supplemental Findings specifically address all of the criteria that Marley argued were not met and conclude that the criteria are met, so that even if Marley's testimony is incorporated as part of the Incorporated Findings and is inconsistent with other Incorporated Findings, the Supplemental Findings control. Response Brief of City 9.

We have faced similar challenges to incorporated findings in previous decisions involving the City of Corvallis. *See Soares v. City of Corvallis*, 56 Or LUBA 551 (2008); *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004). In *Soares* and *Staus*, like in the present appeal, the city adopted specific findings, and also incorporated several other documents totaling hundreds of pages as findings. In both appeals, we concluded that, at least in the abstract, a city's decision to adopt specific findings and to incorporate a large number of additional documents as findings does not necessarily render the city's findings inadequate as a matter of law. In *Staus*, we held:

> "It is not uncommon for local decision makers to rely on staff reports for findings, and staff reports frequently include findings of fact and proposed conclusions of law. The other documents that the city purported to adopt as findings may be inadequately identified. If so, the attempted incorporation fails and the city may not rely on any 'findings' that may be included in those documents. *Gonzalez v. Lane County*, 24 Or LUBA 251, 258-59 (1992)[.] However, we do not see that an ineffective attempt to adopt additional findings by incorporation is necessarily a basis

> for reversal or remand, at least where the findings that the city clearly did adopt are adequate. It may be that the documents that the city adequately identifies and therefore incorporates into its decision as findings may constitute testimony rather than findings of fact or findings that explain how the relevant criteria are satisfied. But, even such an ineffective attempt to adopt *testimony* as *findings* may be harmless error if the findings that the city did adopt are otherwise adequate." 48 Or LUBA at 260-61 (emphasis in original; footnote omitted).

Thus, if the city's decision fails to adequately identify documents incorporated as findings, or attempts to incorporate documents that do not include findings, such a failure is not automatically a basis for reversal or remand. Rather, the purported incorporation of those other documents and materials fails, and the city may not rely on those documents to defend against a specific inadequate findings challenge. *Gonzalez*, 24 Or LUBA at 258-59. In addition, if the city attempts to incorporate documents that are not fairly described as findings, those documents may not be relied upon as findings to support the decision.

In the present appeal, we conclude that the city adequately described at Record 78 several documents that it incorporated as findings, and that function as findings, specifically: (1) the applicant's narratives in support of the applications that are dated December 22, 2011, June 17, 2013, February 19, 2013, and June 17, 2013; and (2) an August 23, 2013 staff report to the planning commission and a November 22, 2013 staff report to the city council. But the city's attempted incorporation of "any attachments or exhibits" to those incorporated documents is far more problematic. The decision does not adequately describe those attachments or exhibits, and essentially attempts to sweep into the decision a number of documents that do not function as findings. For that reason the attempted incorporation is overbroad and it fails.

Accordingly, we will not consider "attachments or exhibits" to the incorporated documents as findings in resolving petitioners' inadequate findings challenges.

Moreover, the city's attempted incorporation of documents described in the decision as "supplemental information submitted by the applicant (Exhibit III)" and "supplemental information provided by City staff (Exhibit II)" fails, because those documents are not adequately described by date, title, or subject in either the description included at Record 78, or in the record.[3] Accordingly, we will not consider those documents as findings adopted by the city in resolving an inadequate findings challenge.

In their second, third and fourth assignments of error, Hess challenges specific findings that Hess argues are inadequate for review. We address Hess' specific challenges to the city's findings below. However, we do not agree with Hess that the city's attempted overbroad incorporation of record documents as findings, in and of itself, is a basis for reversal or remand.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR (HESS PETITIONERS)**

Corvallis Land Development Code 2.1.30.06.a provides that "[c]omprehensive Plan Amendments shall be reviewed to ensure consistency with the policies of the Comprehensive Plan, and any other applicable policies and standards adopted by the City Council." The city council adopted findings that concluded that the city is not required to review the comprehensive plan amendment application for consistency with certain Corvallis Comprehensive

[3] There is no document in the record that was submitted by the applicant that is clearly labeled "Exhibit III," and there is no document in the record provided by city staff that is clearly labeled "Exhibit II." The record table of contents also does not identify any documents in that manner.

Plan (CCP) policies, but that even if consistency review is required, the comprehensive plan amendments are consistent with those policies. Hess challenges the city's findings regarding several comprehensive plan policies, arguing that the city council's decision improperly construes the applicable law, that the findings are inadequate, and that they are not supported by substantial evidence in the record. ORS 197.835(9)(a)(A),(C),(D).[4]

**A. CCP Policy 9.3.2**

CCP Policy 9.3.2 is one of the policies contained in the CCP section entitled "Residential Land Development and Land Use." CCP 9.3.2 provides:

> "Where a variety of dwelling types are permitted by the development district, innovative site development techniques and a mix of dwelling types should be encouraged to meet the range of demand for housing."

The city council adopted findings that explain the city council's interpretation of CCP Policy 9.3.2 as not applying to the comprehensive plan amendment application before it:

> "[CCP 9.3.2] is not an applicable approval criterion applicable to individual quasi-judicial land use applications. Further, this

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[4] As relevant here, ORS 197.835(9)(a) provides that LUBA shall reverse or remand a land use decision if the local government:

> "(A) Exceeded its jurisdiction;
>
> " * * * * *
>
> "(C) Made a decision not supported by substantial evidence in the whole record; [or]
>
> "(D) Improperly construed the applicable law[.]"

> provision does not mandate that each development provide a mix of housing types. Instead, the City Council finds that this policy provides a general direction to the City Council to adopt LDC provisions that encourage innovative development techniques and a mix of dwelling types and thus implement the policy. Further, the City Council finds that it has adopted these LDC provisions as clear and objective requirements (LDC Section 4.9.80), which are met by this proposal. * * *" Record 106-07.

The city council also adopted alternative findings that the project complies with CCP 9.3.2, if it applies:

> "Alternatively, the City Council finds that this plan policy is applicable, and the Applications are consistent with this Policy. The Project incorporates innovative site development techniques by preserving significant natural features and clustering development on the remainder of the Property. Additionally, the Project incorporates a mix of dwelling types by including both townhome and non-townhome dwelling types." Record 107.

In the first sub-assignment of error, Hess argues that the city council's interpretation of CCP Policy 9.3.2 as not requiring a consistency determination for the application for a comprehensive plan amendment improperly construes the policy. First, according to Hess, the city's planning staff and the planning commission identified CCP Policy 9.3.2 as a policy that required a consistency determination for the comprehensive plan amendment, and the city council's conclusion in its decision that no consistency determination was in fact required improperly construes the provision in light of the city planning staff and planning commission's previous determinations. Second, Hess argues that the city council's interpretation of CCP Policy 9.3.2 as not applying is inconsistent with the express language of the policy.

LUBA applies a highly deferential standard of review to a local governing body's interpretation of local land use legislation. LUBA is required

to affirm that interpretation unless that interpretation is "implausible," *i.e.*, inconsistent with the express language, purpose or policy underlying the legislation. ORS 197.829(1)(a)-(c); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). Hess does not point to any language in CCP 9.3.2 or any other provision of the CCP, or to any purpose or policy underlying CCP Policy 9.3.2 that the city council's interpretation is inconsistent with. Accordingly, we affirm the city council's interpretation of CCP Policy 9.3.2 as not requiring consistency review for individual quasi-judicial land use applications.

Finally, we also understand Hess to argue that the city council's alternative finding that if CCP Policy 9.3.2 applies the comprehensive plan amendment is consistent with it improperly construes CCP 9.3.2 and is not supported by substantial evidence in the record. Hess Petition for Review 24. Hess' challenges to the city council's alternative finding do not provide a basis for reversal or remand. First, nothing in the LDC, the CCP or anything else cited to us prohibits the city council from adopting alternative findings to support a land use decision. Second, given our affirmation of the city council's interpretation of the policy as not applying, any error or inadequacy in the city's alternative findings is at most harmless error.

**B. CCP Policy 9.4.6**

CCP Policy 9.4.6 is one of the policies contained in the CCP Section entitled "Housing Needs." CCP Policy 9.4.6 provides:

> "The City shall maintain minimum standards for multi-family units that encourage the development of units designed for long-term family living. Factors which need to be considered include privacy, child and adult recreation areas, variety of building design, play space / open space, and landscaping."

The city council concluded that review of the comprehensive plan amendment for consistency with CCP 9.4.6 was not required because the policy directs the city to enact standards to implement the policy, and the city has enacted those standards in various provisions of the LDC. The city also adopted alternative findings that if the city is required to review the comprehensive plan amendment for consistency with CCP 9.4.6, the amendment is consistent with CCP 9.4.6.[5] Hess' challenges to the city council's conclusions regarding the applicability of CCP 9.4.6 are identical to their challenges to the city council's conclusions regarding CCP 9.3.2. We reject them here as well. First, Hess does not point to any language in CCP 9.4.6 or any other provision of the CCP, or to any purpose or policy underlying

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[5] The city found:

> "• The Project will encourage long-term family living because it will include many amenities such as a swimming pool and workout facilities. *See* September 30, 2013 letter from Applicant to Planning Commission. Further, the City Council finds that the record does not reflect any limits on the duration of tenancies.
>
> "• The Project is not limited to students, and Applicant has stated it will market the Project to all classes of persons without discrimination. *Id*.
>
> "• Even if an individual student rents a unit, that student constitutes a 'family.' *See* LDC 1.6.30 ('Family, defined as '<u>Individual</u> or two or more persons related by blood, adoption, or marriage, or a group of not more than five adults unrelated by blood or marriage, living together in a dwelling unit.') (Emphasis supplied.)
>
> "• Additionally, the extensive design elements and landscaping associated with the Project are also consistent with this policy." Record 109 (italics and underlining in original).

CCP 9.4.6, that the city council's interpretation is inconsistent with. Accordingly, we affirm the city council's interpretation of CCP Policy 9.4.6 as not requiring consistency review for individual quasi-judicial land use applications. For the same reasons described above, Hess' challenges to the city council's alternative finding that, if CCP Policy 9.4.6 applies, the comprehensive plan amendment application is consistent with CCP Policy 9.4.6 also do not provide a basis for reversal or remand.

### C. CCP Policy 9.4.7

CCP Policy 9.4.7 is another policy contained in the section of the CCP entitled "Housing Needs." CCP Policy 9.4.7 provides:

> "The City shall encourage development of specialized housing for the area's elderly, disabled, students, and other groups with special housing needs."

The City Council determined that the comprehensive plan amendment is consistent with CCP Policy 9.4.7:

> "Opponents contend that the Applications violate the intent of this provision because the Project will not serve elderly persons or those in need of affordable housing. The City Council denies this contention because the Applicant stated on the record that it would not discriminate against any class of persons in its marketing and leasing at the Project. Further, Applicant stated that it intends to primarily market the Project to students, which are identified in this policy. For these reasons, the City Council finds that the Applications are consistent with this policy." Record 110.

Hess first argues that the city's findings regarding CCP Policy 9.4.7 are inconsistent with its alternative findings regarding CCP Policy 9.3.2 and Policy 9.4.6 (that rely on the apartments' potential to provide housing for a variety of under-served groups), and that the city's failure to explain the inconsistency requires reversal or remand. Hess Petition for Review 28. Hess also argues

that the city council's conclusion that the application is consistent with CCP 9.4.7 is not supported by substantial evidence in the record.

The city and intervenor (respondents) respond that all three CCP policies attempt to address different and often competing needs of the city in the residential land use and housing contexts and all address a particular subject within those larger contexts. Accordingly, they argue, the policies and the city's findings regarding each policy are not inconsistent with each other when each policy addresses a different need and requires slightly different considerations regarding whether the policy is met.

We agree with respondents that the city council's conclusion that the comprehensive plan amendment application is consistent with CCP Policy 9.4.7 does not conflict with the alternative findings regarding CCP Policy 9.3.2 and CCP Policy 9.4.6, or that any tension between those sets of findings is a basis for remand. We have affirmed above the city council's interpretation that CCP Policy 9.3.2 and CCP Policy 9.4.6 do not apply. Even if those policies apply, the city council is entitled to some latitude in reconciling competing plan policies that address different but related city needs regarding residential land use and housing, and the city's findings are not inconsistent merely because they recognize some tension between the policies. Finally, we agree with respondents that substantial evidence in the record supports the city's conclusion that the application is consistent with CCP Policy 9.4.7, where the evidence shows that the apartments will be primarily student housing but not limited to students.

Hess' second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR (HESS PETITIONERS)**

CCP Policy 1.2.3 is contained in a section of the CCP entitled "Comprehensive Plan Amendments" and provides:

> "Amendments to the Comprehensive Plan can only be approved where the following findings are made:
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> "A. There is a demonstrated public need for the change.
>
> "B. The advantages to the community resulting from the change shall outweigh the disadvantages.
>
> "C. The change proposed is a desirable means of meeting the public need."

In their third assignment of error, Hess asserts that the city council's findings that the comprehensive plan amendment satisfies CCP Policy 1.2.3 are inadequate in various ways. We address each challenge below.

**A. Demonstrated Public Need**

**1. Medium-High Density Residential**

The city council adopted almost three single spaced pages of supplemental findings explaining its conclusion that there is a demonstrated public need for the change to medium-high density residential. Record 86-88. The city council relied in part on the city's Buildable Lands Inventory (BLI) that was adopted as part of the CCP in 1998. The BLI projects a deficit of 64 acres of medium-high density residential land at the end of the planning period (2020), and provides that the shortfall could be met by redesignating lower density residential lands to a higher density designation.

The city also relied in part on testimony and evidence from economists who testified that there is a need for additional student housing because growth in university attendance has outpaced the increase in student housing units in

the last decade, and that increasing the supply of student housing will ease the housing shortage caused by students living in areas where they compete for housing with traditional families. Additionally, the city relied on provisions of the CCP that establish the need for student housing.

Hess argues that the city's findings are inadequate to explain why "there is a demonstrated public need for the change" and that the city's findings are not supported by substantial evidence in the record. Hess quotes one sentence in the nearly three single-spaced pages of findings, and argues that the sentence is inadequate to explain the city's decision.[6] However, a single sentence that expresses a very broad view of the words "public need" in CCP Policy 1.2.3, alone, does not provide a basis for reversal or remand. Hess' challenge to one sentence in almost three single spaced pages of findings is not a sufficiently developed challenge to the entirety of the findings to provide a basis for reversal or remand.

Hess also challenges the city council's reliance on the city's adopted BLI, pointing out that the BLI identifies a need for 64 more acres of land and the comprehensive plan amendment will only fulfill 24 acres of that need. Hess additionally argues that evidence provided by economists of a need for more student housing does not necessarily equate to evidence of a need for more medium-high density residential land, as opposed to lands in other designations that could also provide additional student housing. Finally, Hess

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[6] The city council's findings include the following sentence:

> "[T]he City Council finds 'a demonstrated public need' exists for purposes of this policy when the record shows by reasoning that there is a lack of something desired by the community at large." Record 86.

challenges a sentence in the decision that concludes that "[t]he City Council finds that the opponents did not present substantial evidence that undermines [the economists'] testimony" and argues that the city impermissibly shifted the burden of proof to petitioners to provide substantial evidence to support a denial of the applications. Record 88.

The city and intervenor respond, and we agree, that substantial evidence in the record supports the city's decision. The city reasonably relied on its BLI and testimony from economists that more multi-family units are needed to support its conclusion that there is a need for land designated in a manner that will allow development of multi-family housing. We disagree with Hess that the city impermissibly shifted the burden of proof to project opponents. The sentence at Record 88 that Hess challenges can be read to say, simply, that the city chose to rely on intervenor's evidence rather than opponents' conflicting evidence. A city's choice between believable conflicting evidence is not the same thing as impermissibly shifting the burden of proof.

**2. Open Space**

The city adopted findings explaining why it concluded there is a demonstrated public need for more open space land. Record 88. First, the city relied on its BLI that identifies a deficit in park land. Second, the city found a need for the change in order to protect natural features on the property such as stands of Oregon White Oak, wetlands, wildlife habitat, and a portion of Witham Hill.

Hess argues that the city's findings are inadequate for several reasons. Hess argues that the city failed to explain how an unmet need for park land is satisfied by designating private land as open space. In other words, we understand Hess to argue that open space is not necessarily park land. Hess

also argues that the city's findings that the change is needed to protect natural features on the entire property is not supported by substantial evidence, where other evidence in the record suggests the entire 94 acres will be graded.

The city responds that the open space designation allows "park-like" community recreation uses, such as trails and viewing areas and picnic areas, and that the city council properly relied on the BLI's identification of a need for more park land to support its conclusion that a need for more land designated open space had been demonstrated. The city also responds that increasing the area of the property designated Open Space-Conservation from 36.9 acres to 70 acres will protect more of the natural features in the open space because the 70 acres of open space will not be graded.

While it is a closer question whether the BLI's identification of a need for more park land supports a conclusion that a re-designation of private land to open space is needed, at least in the absence of any showing that the open space land will be developed and used in a way that will meet the identified need for more park land, we have no trouble concluding that the city council's findings that additional open space will protect more of the natural features of the property are adequate to explain why there is a demonstrated public need for the change to open space.

**B. Advantages Outweigh the Disadvantages**

CCP Policy 1.2.3.B requires the city to engage in a balancing process to determine whether "[t]he advantages to the community resulting from the change shall outweigh the disadvantages." The city identified eight advantages of approving the change to medium-high density residential and five

disadvantages of approving the change.[7] The city council concluded that the advantages outweighed the disadvantages both quantitatively and qualitatively

[7] For brevity, the advantages are summarized as follows:

- Change will nearly double the portion of the property protected from development;
- Change will allow a planned collector street to be located in a location that will preserve more wetlands;
- On-site stormwater detention may reduce the risk of downstream flooding;
- Change will reduce the footprint of the development and a more concentrated development pattern will support higher transit usage;
- Change will facilitate the development of additional multi-family housing and address an identified shortfall of housing in the city;
- Change will facilitate the development of additional multi-family housing closer to the main OSU campus and encourage alternative modes of transportation;
- Change will relieve redevelopment pressure on existing neighborhoods nearer to the main campus;
- Change will achieve off-site transportation improvements.

The disadvantages are summarized as follows:

- Change could result in higher long-term maintenance costs to the city if the open space land is acquired by the city;
- Change will reduce the supply of low density residential land available;
- Change may impact pastoral views of the hillside from a distance;

and that the disadvantages could be mitigated through appropriate conditions. Record 89-91.

Hess argues that the advantages of the plan amendment that the city identified are not really advantages because at least some of them, such as on-site stormwater detention, will be required in order to develop the property anyway. Hess additionally argues that city has failed to adequately explain why some of the advantages that the city identified are in fact advantages. Finally, Hess argues that the some of the advantages that the city identified are not supported by substantial evidence in the record. Regarding the disadvantages that the city identified, Hess argues that the disadvantages that the city identified are overstated in quantity and impact.

The city and intervenor respond that the balancing process that is required by CCP Policy 1.2.3.B is not a mechanical process and that a great deal of deference is due the city in identifying the advantages and disadvantages of the comprehensive plan amendment. Moreover, we understand the city and intervenor to suggest that whether identified impacts of the change qualify as advantages or disadvantages is somewhat subjective.

In the absence of anything that constrains the city in identifying and balancing advantages and disadvantages, we agree the city has wide latitude to interpret CCP Policy 1.2.3.B in making the required identifications and conducting the required balancing. We have previously recognized that a

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- Change will facilitate development of the property.
- Change will increase demand for public services.

Record 89-90.

similar balancing process is inherently subjective. *McInnis v. City of Portland*, 25 Or LUBA 376, 384 (1993). When faced with such an inherently subjective criterion, the city is entitled to appropriate deference in selecting the advantages and disadvantages it chooses to consider and how it balances those advantages and disadvantages. Hess challenges the advantages and the disadvantages identified by the city and the city's conclusion that the advantages to the community outweigh the disadvantages. But Hess' arguments reduce to a disagreement with the city over how the city identified and balanced the advantages and disadvantages. When faced with a highly subjective criterion that requires the city to identify and balance the advantages and disadvantages of a comprehensive plan amendment, a petitioner must do more than point to disagreement with the outcome of that balancing. Accordingly, Hess' arguments in the portion of the petition for review challenging the city's conclusion that CCP Policy 1.2.3.B is met provide no basis for reversal or remand.

**C. Desirable Means of Meeting the Public Need**

CCP Policy 1.2.3.C requires the city to find that "[t]he change proposed is a desirable means of meeting the public need." The city council adopted three single-spaced pages of findings that concluded that the comprehensive plan amendment is desirable. Record 91-94. First, the city considered whether annexing additional land into the city and designating it medium-high density residential is a desirable means for meeting the public need. The city concluded based on the cost and uncertainty of annexation, the unavailability of appropriate land in the UGB, and the discontiguity of many of the properties from the city limits, that annexation is not desirable. Next the city considered whether re-designating other lands within the city is desirable, and concluded it

is not, due to limits on existing infrastructure. Third, the city considered increasing the density on properties already designated medium-density residential and concluded that that is not a desirable means of meeting the public need. Ultimately, the city concluded that the comprehensive plan amendment is a desirable means of meeting the public need because the proposed development will provide trails identified in the city's Trails Master Plan, and because it will increase the supply of multi-family housing available in the city by allowing students to relocate from other multi-family housing and making that housing available to families.

Hess argues that the city's findings are inadequate to explain why the comprehensive plan amendment is a desirable means of meeting the public need, and that alternative methods of meeting the public need are more desirable. The city and intervenor respond that CCP Policy 1.2.3.C does not require a finding that the proposed comprehensive plan amendment is the most desirable means of meeting the identified need, only that it is "a" desirable means, and that the city's findings are adequate to explain why the city concluded that the plan amendment is a desirable means.

We agree with the city and intervenor that the city's findings are adequate to explain why the plan amendment is a desirable means of meeting the identified need. Even if there are other desirable means of meeting the need, that would not provide a basis for reversal or remand of the decision where the city is not required to choose the most desirable means of meeting the need.

Hess' third assignment of error is denied.

**FIRST ASSIGNMENT OF ERROR (GOODMONSON)**

In several subassignments of error under Goodmonson's first assignment of error, Goodmonson challenges the city's conclusion that the comprehensive plan amendment and zone change will not significantly affect transportation facilities within the meaning of OAR 660-012-0060, part of the Transportation Planning Rule (TPR). As relevant here, OAR 660-012-0060 requires local governments to determine whether proposed plan amendments and zone changes will "significantly affect" a transportation facility in one of the ways described in the rule.[8] Where the amendment changes the plan or zoning

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[8] OAR 660-012-0060(1) provides, in relevant part:

> "If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule * * *. A plan or land use regulation amendment significantly affects a transportation facility if it would:
>
> "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
>
> "(b) Change standards implementing a functional classification system; or
>
> "(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. * * *
>
> "(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

designation, an initial question in addressing OAR 660-012-0060(1)(c) is whether the amendment allows uses with greater traffic-generation capacity compared to the previous plan or zone designations. If not, there may be no need for further inquiry under the TPR. If there is an increase in traffic-generation capacity, then further analysis is required. *Barnes v. City of Hillsboro*, 61 Or LUBA 375, 399, *aff'd* 239 Or App 73, 243 P3d 139 (2010); *Mason v. City of Corvallis*, 49 Or LUBA 199, 222 (2005).

The city concluded that the plan and zone designation changes will not significantly affect any existing or planned transportation facilities because although the property will generate more *daily* trips compared to the former plan and zoning, the proposed designations will generate fewer trips during the AM and PM peak hours, the critical time periods for purpose of evaluating the performance standards that apply to a transportation facility. For that reason, the city concluded the plan and zone changes will not "significantly affect" a transportation facility within the meaning of OAR 660-012-0060(1). Record 84. The city relied on intervenor's traffic engineer's analysis that compared the trip generation capacity of the property under the existing plan and zone designations with the trip generation capacity of the property under the new plan and zone designations. In analyzing the trip generation capacity of the

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> "(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or
>
> "(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan."

property under the new plan and zone designations, intervenor's traffic engineer used the Institute of Transportation Engineers Trip Generation Manual (ITE Manual) category of "Land Use Code 220-Apartments" to calculate the trip generation potential under the new zoning.

**A. First Subassignment of Error**

In his first subassignment of error, Goodmonson argues that the city's decision improperly construes the applicable law because the city failed to require intervenor's traffic engineer to conduct a local traffic study that examines similar developed uses in the vicinity and to base his trip generation estimates on the local study rather than a category set out in the ITE Manual. According to Goodmonson, the ITE Manual specifies some circumstances in which a local trip generation study should be used to validate the ITE Land Use Code trip generation rates instead of resorting to an ITE Manual category. Goodmonson Petition for Review 14-16. Goodmonson contends that, because the proposed apartments' intended use is student housing, the use requires a local traffic study of trip rates and use of a "per bedroom" assumption regarding the number of persons occupying the building, rather than an assumption based on the number of apartment units.

The city and intervenor respond, and we agree, that Goodmonson has not cited to any provision of the LDC or the CCP or any other law that requires the city to base its decision on data provided by a local traffic study, and accordingly Goodmonson's argument provides no basis for reversal or remand of the decision. The ITE Manual itself describes the circumstances in which a local traffic study may be needed to validate the ITE trip generation rates in hortatory, rather than mandatory terms (the analyst "should" collect local data and establish a local rate"). Accordingly, the city did not improperly construe

the applicable law in failing to require a local traffic study to validate the trip generation estimates in the ITE Manual.

Also in his first subassignment of error, Goodmonson argues that the city erred in deferring a determination of compliance with the TPR to a later review stage by imposing Conditions 45 and 47. Condition 45 requires intervenor to conduct a traffic analysis after the apartment building is occupied to determine whether additional traffic control devices are needed that would require additional right of way. Condition 47 similarly requires intervenor to install traffic calming devices if they are warranted.

The city and intervenor respond, and we agree, that the city made a current determination in its decision that the proposed plan and zone changes will not significantly affect a transportation facility, and that conditions 45 and 47 merely reflect the voluntary agreement by intervenor to assess actual traffic and assist in improving affected facilities if the actual traffic warrants the improvements.

**B. Second Subassignment of Error**

In his second subassignment of error, Goodmonson argues that the city's findings are inadequate to explain why the city chose to rely on intervenor's traffic engineer's trip generation assumptions and methodology, instead of relying on information submitted by a traffic engineer retained by opponents, Birkby, that called that methodology into question. As explained above, the opponent's traffic engineer's testimony questioned the use of the ITE Land Use Code-220 trip generation estimates due to the presumed use of the apartments for student housing, and cited to a Florida Department of Transportation Study that concluded that student housing (presumably in Florida) generates more trips than typical multi-family apartments generate. Goodmonson argues that

the city's supplemental and incorporated findings do not address the issue raised by Birkby.

In the supplemental findings, the city found:

> "The City Council finds that the Project will not significantly affect any existing or planned transportation facilities. In support of this conclusion, the City Council relies upon the 'worst case scenario' analysis prepared by Applicant's transportation consultant, DKS Associates (DKS) dated February 5, 2013. In that analysis, DKS compared the reasonable worst-case trip generation scenario of the Property under the existing comprehensive plan map designations (PD(RS-6) and AG-OS) with the reasonable worst case trip generation scenario under the proposed zoning designation (PD(RS-12) and C-OS). See DKS Memorandum dated February 5, 2013 (Exhibit III). This comparison indicated that the Property would generate more daily trips under the proposed zoning designation but fewer trips during the AM and PM peak hours. *Id*.
>
> "Based upon these results, DKS concluded that the Applications would not significantly affect any existing or planned transportation facilities for purposes of the TPR. The City Council finds that City Engineering staff and ODOT staff have reviewed and concurred with DKS' conclusions. *See* pages 32 and 52 of the Staff Report (Exhibit 1). No substantial evidence was presented that undermined this testimony." Record 84-85.

The city and intervenor first respond that a document or documents that the city purported to incorporate as findings - "supplemental information provided by City staff (Exhibit II)" - responds to the issues raised in Birkby's testimony. Intervenor's Response Brief 18; Brief of Respondent City 17-19; Record 4063-64. The city and intervenor also respond that other findings in the decision at Record 97 that address the comprehensive plan amendment's compliance with a CCP provision regarding traffic impacts from the plan

amendment are sufficient to respond to the issues raised by Birkby regarding the TPR.

We have previously concluded that the city's attempted incorporation at Record 78 of "supplemental information provided by City staff (Exhibit II)" fails because the incorporated "information" is not adequately described by date, title, or subject in either the description included at Record 78 or in the record, such that a reasonable person could locate the document and recognize it as part of the city's decision. *Gonzalez v. Lane County*, 24 Or LUBA 251, 258-59 (1992). Accordingly, assuming that the document that the city and intervenor cite to is the document that the city intended to incorporate, that incorporation fails, and the city may not rely on that document as findings in responding to Goodmonson's inadequate findings challenge. We also reject the city's attempt to rely on findings adopted in support of a CCP provision regarding traffic impacts to support a finding that the proposal will not "significantly affect" a transportation facility within the meaning of the TPR, where it is not clear that the CCP provision and the TPR require the same analyses.

Nothing in the above-quoted findings regarding the TPR responds to Birkby's testimony, and the city and intervenor do not point to any other properly incorporated findings that address the issues that Birkby raised. That issue appears to be a legitimate issue regarding compliance with the TPR that requires some response. The city and intervenor offer no basis for LUBA to affirm the city's determination of compliance with the TPR in the absence of findings addressing that issue. Accordingly, we agree with Goodmonson that remand is warranted for the city to adopt findings addressing the TPR issue raised by Birkby.

The second subassignment of error is sustained.

**C. Third Subassignment of Error**

In his third subassignment of error, Goodmonson argues that the decision is not supported by substantial evidence in the record. Goodmonson's third subassignment of error is derivative of his first subassignment of error. Because we deny the first subassignment of error, the third subsassignment of error provides no basis for reversal or remand of the decision.

Goodmonson's first assignment of error is sustained, in part.

**SECOND ASSIGNMENT OF ERROR (GOODMONSON)**

LDC 2.1.30.03(b)(2), LDC 2.2.40.02(a)(2) LDC 2.4.30.01(b)(2), and LDC 2.5.40.01(b)(2) require "signed consent" of the property owner to accompany the various respective applications described above. In the second assignment of error, Goodmonson argues that the city's findings are inadequate to explain why those LDC provisions are met. The city and intervenor respond that the LDC provisions that Goodmonson cites are application requirements, not approval standards. Accordingly, they argue, even if the application requirements have not been satisfied, Goodmonson's argument provides no basis for reversal or remand of the decision where Goodmonson does not argue that the alleged failure to comply with the owner consent provisions has resulted in noncompliance with any approval standards. We agree. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369, 378 (2009).

Goodmonson's second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR (GOODMONSON)**

In Goodmonson's third assignment of error, we understand him to argue that the city improperly failed to consider whether the proposal will result in a

violation of the Endangered Species Act (ESA), 16 USC § 1531 *et seq. as amended*, and whether the proposal complies with Statewide Planning Goal 6 (Air, Water and Land Resources Quality).[9]

**A. Motion to Take Official Notice**

Goodmonson moves that LUBA take official notice under Oregon Evidence Code 202(2) of a Program Level Biological Assessment prepared by the Federal Emergency Management Agency (FEMA).[10] The city and intervenor object to the motion. We agree with Goodmonson that LUBA may take official notice of the Biological Assessment as an "* * * official act[] of" FEMA, for appropriate purposes under OEC 202(2).

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[9] Goal 6 is in relevant part:

> "To maintain and improve the quality of the air, water and land resources of the state. All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources." OAR 660-015-0000(6).

[10] ORS 40.090, Oregon Evidence Code 202(2), provides that law judicially noticed includes:

> "Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States."

**B. Endangered Species Act**

Goodmonson's argument that the city was required to consider whether the proposal violates the ESA is difficult to understand. According to Goodmonson, in February, 2013, FEMA issued a Program Level Biological Assessment that proposes changes to the National Flood Insurance Program (NFIP) in Oregon.[11] Biological Assessment 276. The Biological Assessment notes that the assumed timeframe for implementation in Oregon is four years. However, the biological assessment adopts an interim program that requires that local governments that participate in the NFIP follow FEMA's regulation at 44 CFR §60.3(a)(2), which requires local governments that participate in the NFIP to ensure that all necessary federal permits are obtained prior to issuance of a floodplain development permit. Biological Assessment 281. However, how that leads to the conclusion that the city is required to consider whether the plan and zoning amendments at issue in the present case violate the ESA is not clear.

The city and intervenor respond initially that no party raised an issue below that the city was required to evaluate the proposal for compliance with the ESA and therefore the issue raised in the third assignment of error is waived. ORS 197.835(3) 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." ORS 197.763 provides that an issue

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[11] The Program Level Biological Assessment was the result of a settlement in 2010 of a complaint filed in the U.S. District Court for the District of Oregon against the FEMA that required FEMA to consult with the National Marine Fisheries Service (NMFS) to determine the effects of FEMA's implementation of the NFIP on threatened or endangered salmon.

"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." ORS 197.763 additionally requires that "issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."

Goodmonson responds that the issue raised in his third assignment of error was raised by several participants in the proceedings below. Goodmonson first points to written testimony submitted to the city that includes expressions of concern regarding the proposed storm water detention system and potential impacts to Chinook salmon habitat and possible ESA violations. Record 2448. Goodmonson also points to the City of Corvallis Salmon Response Plan at Record 2480-2489, which discusses impacts to salmon habitat from development. Goodmonson also cites a letter to the city from another participant who explained that she had significant concerns regarding the proposed development and its impact to natural resources including threatened and endangered species (referred to as "T and E Species" within that testimony); with the lack of buffer between the development and wetlands; and that no fish study was submitted on salmonids or trout species. Record 1508, 1510, 3639.[12]

Finally, Goodmonson points to a Technical Memorandum prepared by intervenor's environmental consultant, Dalton. The technical memorandum responds to testimony regarding the presence of threatened or endangered species or habitat on the property by confirming that whether surveys of

[12] Record 3639 includes testimony that argues that no fish study was submitted and that argues that the "[s]ite may be supporting *state* listed salmonid/trout species * * *." (Emphasis added)

endangered species or habitat on the property are needed will be reviewed and determined during the joint permit application process to the Oregon Department of State Lands (ODSL) and the U.S. Army Corps of Engineers (ACOE), which will be reviewed by other agencies, including the Oregon Department of Fish and Wildlife. Record 3003. The city adopted Condition 37, which requires intervenor to obtain applicable state and federal permits from the ODSL, ACOE and the Oregon Department of Environmental Quality prior to development. Record 62.

The purpose of ORS 197.763 is to ensure that the local government is put on notice of a particular issue during local proceedings, so it can respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). A petitioner adequately raises an issue under ORS 197.763(1) and 197.835(3) by citing the relevant legal standard, presenting argument that includes the operative terms of the legal standard, or taking other actions to raise the issue such that the city knows or should know that the issue is one that needs to be addressed in its decision. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001).

We have reviewed the pages cited by Goodmonson, and we agree with the city and intervenor that the issue raised in Goodmonson's third assignment of error was not raised during the proceedings below by any participant, and thus Goodmonson is precluded from raising them for the first time at LUBA. The issue presented in Goodmonson's third assignment of error is that the biological assessment and 44 CFR §60.3(a)(2) require the city to determine

whether the development will result in a "take" as defined in the ESA.[13] The testimony from the record pages Goodmonson cites in support of his position that the issue raised in his third assignment of error was raised below is simply not sufficient to raise the issue that Goodmonson raises in his third assignment of error. At best, the arguments on the cited record pages raise generalized concerns about the effects of the proposed development on threatened or endangered species, without arguing that any federal, state or local law or federal, state or local regulation make the ESA directly applicable to the applications, or that any federal, state or local law requires the city to directly determine whether the applications will result in a "take" under the ESA.

However, even if the issue was not waived, we reject Goodmonson's argument that the biological assessment or 44 CFR §60.3(a)(2) require the city to consider whether the proposal complies with the ESA. First, Goodmonson has not established that the biological assessment imposes mandatory obligations on the city to do anything. At best, the biological assessment proposes changes that may take effect in the future that may require local governments to update their existing ordinances. Biological Assessment 282.

Second, Goodmonson has not established that 44 CFR §60.3(a)(2) applies to the applications, where no floodplain development permit is sought. 44 CFR §60.3 is a FEMA rule entitled "[f]lood plain management for flood-prone areas" and is found within the subchapter "Insurance and Hazard

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[13] Section 9(a)(1)(B) and (C) of the ESA prohibits actions that result in the "take" of threatened or endangered species. 16 USC §1538(a). Conduct that causes a "take" is defined as an action to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 USC § 1532(19).

Mitigation." According to the biological assessment, the intent of the rule is to ensure that all necessary federal permits are obtained before issuance of a floodplain development permit. Biological Assessment 281. The city takes the position that the property is not located in a floodplain, and as far as we are informed, none of the applications seek or are required to seek a floodplain development permit. Goodmonson does not even assert that a floodplain permit will be required when the property is developed. Accordingly, Goodmonson fails to demonstrate that 44 CFR §60.3 applies to the applications or requires the city to determine whether the applications will result in a "take."

**B. Goal 6**

Also in his third assignment of error, we understand Goodmonson to argue that Goal 6 requires the city to determine whether the applications are consistent with the ESA. As we explained in *Friends of the Applegate Watershed v. Josephine County*, 44 Or LUBA 786, 802 (2003):

> "The function served by Goal 6 is not to anticipate and precisely duplicate state and federal environmental permitting requirements. The function of Goal 6 is much more modest. Goal 6 requires that the local government establish that there is a reasonable expectation that the use that is seeking land use approval will also be able to comply with the state and federal environmental quality standards that it must satisfy to be built."

Nothing in Goodmonson's arguments persuades us that Goal 6 requires a determination at this stage that the applications satisfy the ESA, or that it is unreasonable to expect that intervenor will be able to comply with state and federal permitting requirements, particularly in light of Condition 37's mandate that it do so prior to development.

Goodmonson's third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR (GOODMONSON)**

Statewide Planning Goal 10 (Housing) is "to provide for the housing needs of citizens of the state."[14] Goal 10 requires the city to inventory buildable lands, and Goal 2 requires the inventory to be a part of the comprehensive plan. In his fourth assignment of error, Goodmonson argues that the city's decision improperly construes the applicable law and is "not in compliance with [Goal 10]."[15]

As we explain above, in 1998 the city adopted its BLI and the BLI projected a shortage at the end of the planning period, 2020, in the amount of medium-high density residential land. Relying on the shortage identified in the BLI, the city concluded that the comprehensive plan map amendment is consistent with Goal 10 because it decreases the shortage.[16] Goodmonson

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[14] ORS 197.175(2)(a) requires the city amend its comprehensive plan "in compliance with [the statewide planning goals]."

[15] ORS 197.835(6) provides that LUBA "shall reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals."

[16] The city found:

> "The City Council finds that the Applications will reduce the developable area of the Property from 57.7 acres of Low Density Residential land to 24.6 acres of Medium-High Density Residential land. The City Council finds that the City's acknowledged Buildable Lands Inventory ("BLI") anticipates a surplus of 341 acres of Low Density Residential land in 2020, but a shortfall of 64 acres of Medium-High Density Residential land. During that same planning period. Based upon the acknowledged BLI, the City Council finds that the proposed Medium High Density Residential designation fulfills an identified need for

argues that the city improperly concluded that a shortage in medium-high density residential land exists because the city failed to consider annexations have occurred since the city's BLI was adopted that have annexed more than 430 acres of land into the city. According to Goodmonson, the city erred in considering only the city's adopted BLI without considering the amount of lands now "designated for multi-family uses" in the comprehensive plan. Goodmonson Petition for Review 48.

The city and intervenor respond that the city is entitled to, and in fact is required to, rely on its acknowledged BLI under Statewide Planning Goal 2 (Land Use Planning) and *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249, 1254 (2005) to conclude that a shortage exists. In *Dundee*, the Court rejected the city's attempt to rely on a buildable lands inventory that had not, at the time of the city's decision approving a comprehensive plan amendment, been incorporated into the city's comprehensive plan. However, as we understand Goodmonson's argument, it is not that the city erred in relying on its acknowledged BLI, but that the city erred in failing to *also* consider its acknowledged comprehensive plan map designations, which include lands annexed after adoption of the BLI.

We do not understand Goodmonson to argue that the approximately 430 acres of land that has been annexed since the BLI was adopted has been *designated* in the city's comprehensive plan as *medium-high density residential land*, or some other designation that allows *medium-high density residential*

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increasing acreage for multi-family housing while not generating a shortfall of acreage for single-family housing.

"The City Council finds that the Applications are consistent with Goal 10." Record 83.

*uses*, or even that any of the land that was annexed was vacant land and thus available for development with *medium-high density residential* uses to meet the projected shortage.[17] Rather, Goodmonson argues that the annexed land is designated in the city's comprehensive plan "for multi-family uses." That argument falls short of establishing that the city erred in failing to consider its comprehensive plan map designations and instead relying on its adopted BLI that projects a shortage of medium-high density residential lands.

Finally, Goodmonson does not develop any argument that explains how the city's reliance on its BLI "is not in compliance with Goal 10." Goodmonson Petition for Review 48. Goal 10 requires the city to inventory buildable lands, and the city has done that. Even if Goodmonson is correct that, due to recent annexations and rezoning of annexed lands there is no longer a shortage of lands designated medium-high density, Goodmonson fails to

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[17] The evidence in the record Goodmonson cites provides in relevant part:

> "I have * * * found that since 1998, in the fourteen years to 2011 (the last year for which figures were available) there were annexations in eight (1998, 99, 2000, 01 , 03, 04, 05 and 08) and that in that period, four hundred and thirty-five point seven (435.7) acres of land were added to the city through annexations. Not all of that land is available for multi-family development, but much of it is, which is reflected in a consistent pattern of multi-family housing construction through the period from 1998 to 2011. During that period, the city housing department reports, 1916 units of new multi-family housing (including duplexes) were opened (the number is larger by 499 than the one I used in my August 30th testimony because it includes duplexes). Some of that development took place on land annexed between 1998 and 2011, but much of it took place on sites in the city which had previously been occupied by single-family units." Record 2580.

explain why rezoning additional lands to create a surplus of medium-high density residential land is inconsistent with Goal 10.

Goodmonson's fourth assignment of error is denied.

The city's decision is remanded.