

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SUSAN GARRETT CROWLEY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF HOOD RIVER,
10 *Respondent,*

01/19/18 AM 10:53 LUBA

11 and

12
13
14 MID-COLUMBIA HOUSING AUTHORITY and COLUMBIA CASCADE
15 HOUSING CORPORATION,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2017-071

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Hood River.

24
25 Susan Garrett Crowley, Hood River, filed the petition for review and
26 argued on her own behalf.

27
28 Daniel Kearns, Portland, filed a joint response brief and argued on behalf
29 of respondent. With him on the brief was Reeve Kearns PC.

30
31 Jennifer M. Bragar, Portland, filed a joint response brief and argued on
32 behalf of intervenors-respondents. With her on the brief was Tomasi Salyer
33 Martin.

34
35 BASSHAM, Board Member; HOLSTUN Board Member, participated in
36 the decision.

37
38 RYAN, Board Chair, did not participate in the opinion.

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AFFIRMED

01/19/2018

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

NATURE OF THE DECISION

Petitioner appeals a city council decision approving comprehensive plan and zoning map amendments to allow a five-acre city park to be developed for high-density residential use.

FACTS

The subject property is known as Morrison Park, a 5.03-acre city park zoned Open Space/Public Facilities (OS/PF), located with the City of Hood River. The site is bordered on the north by Interstate-84, on the east by Jaymar Road, on the south by Wasco Street, and on the west by industrially zoned property. The park includes stands of trees and a year-round stream, and is undeveloped with the exception of a disc golf course built and maintained by the Hood River Valley Parks and Recreation District (Parks & Rec District).

The city acquired the property along with adjoining areas in the 1930s, and has used it ever since as a city park. In 1976, the city zoned the site Open Space, and in the early 1980s rezoned it to OS/PF as part of a larger comprehensive planning process. As part of that process, the city adopted and incorporated into its comprehensive plan the “Background Report for the City of Hood River Comprehensive Plan, May 1983” (Background Report). The Background Report includes the inventories and findings supporting the elements of the Hood River Comprehensive Plan (HRCP), including its Goal 8 Recreational Resource element. That element implements the city’s obligations

1 under Statewide Planning Goal 8 (Recreation). The Goal 8 Recreational
2 Resource Inventory in the Background Document includes Morrison Park on
3 the list of the city’s recreational resources. The Background Document states
4 that the resource inventory “contains a list of existing park sites and comments
5 concerning quality and suggested improvements.” Petition for Review,
6 Attachment (Att) D, 35.

7 The HRCP Goal 8 element, adopted in 1983, states that the city’s goal is
8 to “satisfy the recreational needs of the citizens of the community and visitors
9 to the area.” As discussed further below, HRCP Goal 8, Policy 1 provides in
10 relevant part that “[e]xisting parks sites will be protected from incompatible
11 uses[.]”

12 On August 24, 2015, the city council adopted and incorporated into the
13 HRCP a new Buildable Lands Inventory (BLI) and Housing Needs Analysis
14 (HNA), which conclude that the city has enough land within its urban growth
15 boundary to meet expected growth within the next 20 years, but notes that the
16 city’s supply of land zoned for high-density residential (R-3) land is limited,
17 and that if growth exceeds expectations, the city will exhaust its supply of
18 buildable lands. The HNA recommends that the city consider rezoning
19 residentially-zoned land to increase the supply of higher-density multi-family
20 development, *e.g.*, from R-1 and R-2 to R-3. The HNA also recommends that
21 the city identify “surplus city land for development of government-subsidized
22 housing[.]” Petition for Review, Att C, 50. On September 14, 2015, the city

1 council approved a document entitled “Housing Strategy,” which identifies as
2 one strategy to “[d]evelop affordable housing,” and identifies as one action
3 under that strategy to rezone land to allow additional high-density residential
4 development and identify publicly-owned lands that could be used for
5 affordable housing. Record 27.

6 On August 16, 2016, city planning staff, in cooperation with intervenor-
7 respondents Mid-Columbia Housing Authority and Columbia Cascade Housing
8 Corporation (intervenors) submitted an application to rezone Morrison Park
9 from OS/PF to R-3. The application initially included a proposal to also rezone
10 a sliver of land south of Wasco Avenue that is part of the same tax lot as
11 Morrison Park, and that is currently developed as a skate park, but that
12 proposal was later removed.

13 The planning commission conducted three public hearings, and
14 ultimately voted to recommend approval of the zone change to R-3. The city
15 council conducted two public hearings on the recommendation, and on May 22,
16 2017, voted to approve the rezone. This appeal followed.

17 **MOTION TO FILE REPLY BRIEF**

18 Petitioner moves to file a five-page reply brief to respond to two “new
19 matters” raised in the joint response brief. OAR 661-010-0039. The motion is
20 eight pages long, and includes petitioner’s three-page affidavit. The city does
21 not oppose the reply brief itself, but argues that the eight-page motion and
22 three-page affidavit consist mostly of additional legal argument that effectively

1 expands the reply brief beyond the five pages allowed under OAR 661-010-
2 0039. We largely agree with the city, and do not consider the arguments in Part
3 I-B of the motion (pages 3-7). The affidavit consists entirely of factual
4 assertions unnecessary to resolve the motion to file the reply brief, and
5 accordingly we do not consider the affidavit. The reply brief itself is allowed.

6 **MOTION TO STRIKE**

7 The city moves to strike one document in Attachment C and two
8 documents in Attachment F to the petition for review, arguing that the
9 documents are not in the local record. Petitioner concedes that there is no basis
10 for LUBA to consider one of the documents, a newspaper story dated October
11 11, 2017 in Attachment F. However, petitioner argues that two of the
12 documents, an e-mail dated August 23, 2017, and a memorandum dated May
13 19, 1988, are “central” to her arguments and should be considered for that
14 reason. We agree with the city that LUBA’s evidentiary review is limited to
15 the local record, absent circumstances not present here, and that petitioner cites
16 no basis to consider any of the three disputed documents. Therefore, LUBA
17 will not consider those documents.

18 **MOTIONS TO TAKE OFFICIAL NOTICE OF HOUSING STRATEGY**

19 Under ORS 40.090(7), LUBA may consider an “ordinance,
20 comprehensive plan or enactment of any county or incorporated city in this
21 state,” notwithstanding that such enactments are not in the local record. The
22 city moves for LUBA to take official notice of the Housing Strategy that was

1 accepted by the city council on September 14, 2015, and which the city
2 attaches as Appendix 2 to the Joint Response. The city contends that the
3 Housing Strategy operates as “local law” that is subject to official notice,
4 because it is an “enactment” within the meaning of ORS 40.090(7).

5 Petitioner opposes the motion, noting that the city council did not adopt
6 the Housing Strategy by ordinance or resolution, but rather simply “accepted”
7 it as “direction to Staff for implementing the next steps in this housing
8 strategy.” Joint Response, App 3, 5. Petitioner argues that the Housing
9 Strategy is not “law” of any type that is subject to judicial notice under ORS
10 40.090(7). We agree with petitioner. The minutes of the September 14, 2015
11 city council work session indicate that the city council accepted the Housing
12 Strategy as guidance to staff. Such an advisory document is not a source of law
13 that is subject to official notice under ORS 40.090(7). The city’s motion to
14 take official notice of the Housing Strategy is denied.

15 However, we note that, as the city argues, the Housing Strategy
16 strategies and action items were listed in the notice of hearing as “criteria,” and
17 quoted and addressed at length in the city council’s findings. Record 27. We
18 consider below petitioner’s arguments that the city council erred in relying in
19 part on the Housing Strategy to justify the challenged rezoning. But for present
20 purposes, we note that there is no need for a motion to take “official notice” of
21 the Housing Strategy in order for LUBA to consider the parties’ arguments

1 regarding the pertinent language of the Housing Strategy, because that
2 language appears in the local record and the city's findings.

3 **MOTIONS TO TAKE OFFICIAL NOTICE OF CITY LEGISLATION**

4 Petitioner moves to take official notice of portions of Attachments B, C,
5 D, E and F that consist of city ordinances and comprehensive plan language.
6 The city does not oppose taking official notice of the cited city legislation.
7 Petitioner's motion is granted.

8 On December 11, 2017, the city filed a two-page motion to take official
9 notice of the zoning for a number of city parks, which are depicted on Exhibits
10 1 and 2, attached to the motion. Exhibit 1 depicts aerial photographs of city
11 parks with associated zoning information for each park. Exhibit 2 appears to
12 be a print out of the city's zoning map from an electronic database, with zoning
13 information for city parks superimposed on the map. Petitioner opposes the
14 motion, arguing that Exhibits 1 and 2 may have been generated based on the
15 city's zoning map, but they are not themselves the adopted zoning map, and
16 therefore not official enactments of the city. Petitioner also argues that
17 Exhibits 1 and 2 are offered to support an adjudicative fact: that most of the
18 city's parks are zoned something other than OS/PF. We agree with petitioner
19 that the city has not established that the documents in Exhibits 1 and 2 are
20 subject to official notice under ORS 40.090(7). The city's motion is denied.

1 **MOTION TO TAKE EVIDENCE OUTSIDE THE RECORD**

2 Petitioner moves to take evidence outside the record under OAR 661-
3 010-0045(1), consisting of (1) her affidavit regarding her research into the legal
4 status of the Housing Strategy, and (2) the minutes of the September 14, 2015
5 meeting where the city council accepted the Housing Strategy. The city does
6 not object to LUBA’s consideration of the September 14, 2015 minutes (which
7 are attached to the Joint Response as Attachment 3); however, the city opposes
8 consideration of the affidavit, arguing that petitioner has identified no basis
9 under OAR 661-010-0045(1) to consider the affidavit. We agree with the city.

10 Petitioner’s motion to take evidence is granted as to the minutes of the
11 September 14, 2015 city council meeting, but is otherwise denied.

12 **POST-ORAL ARGUMENT MOTIONS**

13 At oral argument, in response to questions from the Board, the city took
14 the position that the city has delegated park master planning functions to the
15 Parks & Rec district, pursuant to a 1995 intergovernmental agreement (IGA).
16 On December 18, 2017, petitioner filed a three-page motion to “disregard” the
17 city’s oral statements regarding the 1995 IGA, arguing that the 1995 IGA is not
18 in the record. Petitioner also provided substantive rebuttals to the city’s
19 statements at oral argument. In the same pleading, petitioner moved to take
20 official notice of a city resolution adopting the 2017-2018 city budget, which
21 includes funds to maintain Morrison Park.

1 On December 22, 2017, the city responded with (1) a motion to take
2 official notice of the 1995 IGA, and (2) an objection to the substantive
3 responses in petitioner's December 18, 2017 motion. The city does not oppose
4 taking notice of the city resolution adopting the 2017-2018 city budget.

5 On December 26, 2017, petitioner filed a 14-page pleading that in part
6 expanded on her arguments in her December 18, 2017 motion. On December
7 29, 2017, the city opposed petitioner's December 26, 2017 filings.

8 On January 5, 2018, petitioner filed a 10-page response to the city's
9 December 22, 2017 pleading, objecting in part to the motion to take official
10 notice of the 1995 IGA. The city objects to petitioner's December 26, 2017
11 and January 5, 2018 pleadings, arguing that they consist mostly of substantive
12 arguments impermissibly expanding on petitioner's arguments in the petition
13 for review.

14 We agree with the city that much of the content of petitioner's post-oral
15 argument pleadings is not limited to permissible motion practice, but consists
16 of impermissible additional arguments on the merits of the assignments of error
17 stated in the petition for review. Nonetheless, we need not attempt to parse the
18 wheat from the chaff. As far as we can tell, the 1995 IGA and the city's 2017-
19 2018 budget have little, if anything, to do with resolving the merits of the two
20 assignments of error raised in the petition for review. We see no need to take
21 official notice of either the 1995 IGA or the resolution adopting the city's
22 2017-2018 budget. Accordingly, the motions to take official notice of those

1 documents are denied, and the Board will ignore the parties' related post-oral
2 argument pleadings.

3 **FIRST ASSIGNMENT OF ERROR**

4 As noted, HRCP Goal 8, Policy 1 provides in relevant part that "Existing
5 parks sites will be protected from incompatible uses * * *." Petitioner argues
6 that Morrison Park is an "[e]xisting park[] site" for purposes of HRCP Goal 8,
7 Policy 1, and that rezoning Morrison Park to allow it to be developed for high-
8 density residential development fails to "protect[]" Morrison Park from
9 "incompatible uses."

10 The city council rejected that interpretation of HRCP Goal 8, Policy 1,
11 concluding that the policy cannot be read to require the city to protect an
12 existing park from incompatible uses of the park site itself, because that would
13 mean that the city could never rezone an existing park to allow the land to be
14 put to a non-park use.¹ Instead, the city council more narrowly interpreted

¹ The city council's findings state, in relevant part:

"Hood River has not adopted a parks master plan or other formal or up-to-date inventory of park properties. The only mention of parks and recreational needs in the Comprehensive Plan are these Goal 8 policies and the only mention of specific park properties is a Recreational Resource Inventory in the 1983 Background Report for the Comprehensive Plan. This inventory represents only a list of the then-existing parks in the City, and the City has not updated or revised this 1983 list since that time. Morrison Park, in particular, is not even operated or managed by the City. Instead, it is managed by the Hood River Parks and Recreation District under an intergovernmental agreement. Since 1983 none of the parks on

1 HRCP Goal 8, Policy 1 to require only that the city protect existing parks from
2 incompatible uses that would *occur on other nearby properties*.

3 Petitioner argues that the city council’s interpretation is inconsistent with
4 the policy’s express language, its purpose and underlying policy, and hence not
5 affirmable under the deferential standard of review that LUBA must apply to a
6 governing body’s interpretation of a local comprehensive plan provision, under

the list have been removed and, in fact, the City has added approximately 55 acres of new park areas, including the 6-acre Waterfront Park and approximately 21 acres on the eastside of town, for possible use as trails to Hood River.

“* * * * *

“* * * The interpretation question [of the phrase ‘Existing park sites will be protected from incompatible uses’] is whether the protections of this policy provision apply to the park site itself or whether the policy directs the city to protect park sites from incompatible near-by uses on other properties. Opponents to this rezone argue that Goal 8, Policy 1 requires all existing parks, including Morrison Park to be protected from incompatible uses of the park.] * * * The necessary implication of the opponents’ interpretation is that no park property can ever be rezoned to a non-park designation. We reject that interpretation.

“Instead, we interpret Goal 8 Policy 1 as calling for the protection of parks that the Council as a matter of policy desires to retain as parks, from incompatible near-by uses on other properties that could adversely impact the park. We interpret this policy as providing a tool that the City can use to protect its parks from near-by incompatible uses through zoning of surrounding lands and permit reviews for near-by properties. * * * We reject any interpretation of this policy that suggests the City Council cannot rezone a park to some non-park designation. * * *.” Record 37-38 (underlining in original).

1 ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776
2 (2010).² Petitioner does not argue that HRCF Goal 8, Policy 1, or any other of
3 the relevant HRCF provisions, implements a statute, statewide planning goal or
4 administrative rule, and hence does not argue that the standard of review set
5 out at ORS 197.829(1)(d) applies. *See* n 2.

6 Petitioner argues, and we do not understand respondents to dispute, that
7 Goal 8, Policy 1 is expressed in mandatory terms and that Morrison Park is an
8 “[e]xisting park” for purposes of Goal 8, Policy 1. Where petitioner and the

² ORS 197.829 provides:

- “(1) [LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:
- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
 - “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
 - “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
 - “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
- “(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”

1 city depart is the meaning of the phrase “protect[] from incompatible uses[.]”
2 Petitioner notes that the HRCP defines the term “protect” to mean “[s]ave or
3 shield from loss, destruction, or injury or for intended use.”³ Petition for
4 Review Att B, 45. According to petitioner, rezoning an existing park in order to
5 facilitate the complete elimination of its function as a park obviously fails to
6 “save or shield” the park from “loss, destruction, or injury[.]” Petitioner also
7 argues that the phrase “incompatible uses” is unqualified and must be
8 understood to include uses of the park site itself that are incompatible with its
9 continued use as a city park. According to petitioner, the city impermissibly
10 narrowed the scope of “incompatible uses” to refer only to uses that are
11 allowed on property other than the park site. Petitioner contends that the city
12 council’s narrow interpretation impermissibly inserts a qualification
13 (“incompatible uses [*on other properties*]”) that was omitted, in violation of
14 ORS 174.010.⁴

³ This HRCP definition is identical to the definition of “protect” in the Statewide Planning Goals.

⁴ ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 Petitioner also argues that the city’s interpretation is inconsistent with
2 the context, purpose and policy underlying HRCP Goal 8, Policy 1. Petitioner
3 argues that the context includes other HRCP Goal 8 policies and
4 implementation strategies that generally call for low maintenance, natural parks
5 with the qualities that are present in Morrison Park. Petitioner also contends
6 that, while Morrison Park is not listed in the city’s inventory of resource sites
7 under HRCP provisions implementing Statewide Planning Goal 5 (Open Space,
8 Scenic and Historic Area and Natural Resources), the HRCP Goal 5 element in
9 the Background Report states that areas zoned OS/PF, including city parks,
10 “serve the residents for both recreational and open space needs.” Background
11 Report (Petition for Review, Att D, 6). Petitioner argues that the HRCP Goal 5
12 element generally call for protection of open space and scenic resources, in
13 terms that are not limited to resources that are included in the list of inventoried
14 Goal 5 resources. For example, petitioner notes that HRCP Goal 5, III Natural
15 Resources, Goal 3 states that “[l]ands zoned as Open Space will be preserved
16 as open space.” Petition for Review, Att C, 13. Petitioner contends that the
17 HRCP Goal 5 language is context for interpretation of HRCP Goal 8, Policy 1,
18 and that that context does not support the city’s interpretation that rezoning
19 Morrison Park to eliminate its function as a park and open space is consistent
20 with HRCP Goal 8, Policy 1.

21 Similarly, petitioner argues that the HRCP’s Goal 4 element, which
22 presumably implements Statewide Planning Goal 4 (Forest Lands), states that

1 forested spots inside the city that are located in parks or open space areas “will
2 continue to be protected by the zoning applied to those lands.” Petition for
3 Review, Att B, 9. Petitioner contends that this context supports a protective
4 interpretation of HRCP Goal 8, Policy 1, and is inconsistent with the city’s
5 interpretation that forested lands protected by open space zoning, including
6 Morrison Park, can be rezoned to allow for development.

7 The city and intervenors respond, and we agree, that petitioner has not
8 demonstrated that the city council’s interpretation of HRCP Goal 8, Policy 1 is
9 inconsistent with its express language, purpose or underlying policy, or
10 otherwise reversible under the deferential standard of review we must apply to
11 a governing body’s interpretation of local land use provisions, under *Siporen*.
12 HRCP Goal 8, Policy 1 is ambiguous regarding the meaning or scope of the
13 requirement to protect existing parks from “incompatible uses.” It could be
14 read, as petitioner does, to mean that the city must protect, via continued
15 protective open space zoning, against development of any park site with non-
16 park uses. Or it could require only, as the city council interpreted it, that the
17 city must protect existing parks from being impacted by incompatible uses on
18 nearby lands. Because HRCP Goal 8, Policy 1 is ambiguous on this point,
19 adopting either interpretation would require paraphrasing the policy in terms
20 that cannot avoid inserting language. Petitioner’s preferred interpretation
21 would suggest that the 1983 city council, in adopting HRCP Goal 8, Policy 1,
22 meant to tie the hands of future city councils, and to prohibit the city from ever

1 rezoning a city park to allow for a non-park use, in effect to require the city to
2 maintain all existing city parks as city parks in perpetuity, unless and until
3 HRCP Goal 8, Policy 1 is repealed. That represents an extraordinary gloss to
4 place on HRCP Goal 8, Policy 1. The city council, in justifying its narrower
5 interpretation, rejected the implication that the 1983 city council intended to
6 prohibit future city councils from rezoning park sites to allow non-park uses:

7 “[A]s a matter of general policy, we do not interpret any of the
8 Goal 8 policies as prohibiting the Council from making the policy
9 decision that a particular park property is better suited to a non-
10 park use and rezoning it for some future non-park development.
11 We interpret these Goal 8 policies as empowering the Council
12 with tools for protecting its designated parks that the Council, as a
13 matter of policy, desires to retain as parks. For those parks, such
14 as this one, for which the Council has identified a different and
15 better use than as a park, we do not interpret Goal 8 policies as
16 precluding de-designation. In short, these policies do not apply to
17 those particular parks that, as a matter of policy, the Council has
18 decided to de-designate and someday devote to a different use.
19 With regard to Policy 1 in particular, we interpret this policy as
20 applying only to those parks that the Council desires to retain as
21 parks and protect with these Goal 8 policies. We interpret Goal 8
22 Policy 1 to apply as the City reviews development proposals for
23 land adjacent to parks, and then only to those parks the Council
24 determines to preserve as parks.” Record 38-39.

25 The city’s narrower interpretation of HRCP Goal 8, Policy 1 is as least as
26 consistent with the express language of the policy as petitioner’s preferred
27 interpretation. Accordingly, petitioner has not established that the city
28 council’s interpretation of HRCP Goal 8, Policy 1 is inconsistent with its
29 express language.

1 Petitioner’s contextual arguments also do not demonstrate that the city
2 council’s interpretation of HRCP Goal 8, Policy 1 is reversible under ORS
3 197.829(1)(b) or (c) and *Siporen*. The general HRCP policies and guidelines
4 regarding public parks that petitioner cites do not suggest that the city council
5 must maintain existing city parks as city parks in perpetuity. As the city’s
6 findings note, Morrison Park is not inventoried as a significant natural resource
7 on the city’s inventory of Goal 5 resources, and the city council rejected
8 petitioner’s interpretation of HRCP Goal 5 suggesting that city parks are
9 protected under the city’s Goal 5 element or that the city is precluded from
10 rezoning city parks to allow non-park uses. Record 35-36. Similarly, the city
11 council rejected petitioner’s arguments that references in the HRCP Goal 4
12 element to a “few forested spots” in the city and statements that such spots
13 “will continue to be protected by the zoning applied to those lands” do not
14 indicate that forested parks such as Morrison Park are HRCP Goal 4 resources,
15 or suggest that the city is prohibited from rezoning such parks to a non-park
16 use. Record 34-35.

17 In sum, petitioner has not demonstrated that the city’s interpretation of
18 HRCP Goal 8, Policy 1 is inconsistent with the policy’s express language, or its
19 purpose or underlying policies, or otherwise implausible.

20 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 Hood River Municipal Code (HRMC) 17.08.040 authorizes the city to
3 rezone land based, in relevant part, on findings that “[t]here is a public need for
4 the change[,]” or “[c]onditions have changed within the affected area, and the
5 proposed zone or plan change would therefore be more suitable than the
6 existing zone or plan designation.” HRMC 17.08.040(A)(2) and (3).

7 The city found that both HRMC 17.08.040(A)(2) and (3) justify the zone
8 change to R-3, based on a “compelling and critical public need” for affordable
9 housing in the city. The city’s findings cite three documents to provide a
10 policy basis for those conclusions: (1) the HRCP Goal 10 element, (2) the HNA
11 adopted August 24, 2015 as an amendment to the HRCP, and (3) the Housing
12 Strategy document adopted on September 14, 2015.⁵ As noted, the HNA

⁵ The HNA includes the following language:

“Hood River has a limited supply of residential land. Hood River’s residential land supply is essentially enough land to meet expected growth of new residents in Hood River over the next 20 years. If Hood River grows more quickly than the forecast for growth, then the city may not have enough land to accommodate additional growth. * * *

“Hood River has a very limited supply of land for multifamily development. Hood River has about 18 acres of vacant and partially vacant R-3 land. Hood River is able to accommodate more than half of the City’s need for multifamily land on residential land within the UGB. Accommodating the remaining land [needed for multifamily development] requires assuming that some land zoned C-2 [General Commercial] will develop with housing, as part of a mixed-use

1 recommends “identifying surplus city land for development of government-
2 subsidized housing (working with Mid-Columbia Housing Authority).”
3 Petition for Review Att C, 50. The Housing Strategy includes a similarly
4 worded Action 3.1: to “[i]dentify publicly-owned properties that could be used
5 for affordable housing and partner with the Mid-Columbia Housing Authority
6 and Columbia Cascade Housing to develop affordable housing.” Record 27.
7 The city’s findings cite the HNA recommendation and the Housing Strategy
8 Action 3.1 as one basis for the finding of “public need” for the rezone.

9 Petitioner does not dispute that the city has a need for more affordable
10 housing in the city, but argues that land use decisions designed to address the
11 need for affordable housing must be based on, and consistent with, the city’s

development. The policy implications of Hood River’s limited supply of multifamily land are:

“* * * * *

“The City may want to consider rezoning land to increase the supply of land for multifamily development. We recommend that the City identify opportunities to rezone land from R-1 and R-2 to R-3.

“Hood River has an existing deficit of affordable housing * * *.

“* * * * *

“We recommend that the City consider other policy options to encourage development of comparatively affordable housing, such as: identifying surplus city land for development of government-subsidized housing (working with Mid-Columbia Housing Authority) * * *.” Petition for Review, Att C, 48-50 (bold and italics in original).

1 acknowledged comprehensive plan, pursuant to Statewide Planning Goal 2
2 (Land Use Planning) and the similar provisions of HRCP Goal 2. Statewide
3 Planning Goal 2 requires in relevant part that the comprehensive plan be the
4 “basis” for specific implementation measures, and that such measures be
5 “consistent” with the comprehensive plan.⁶ We understand petitioner to argue
6 that (1) the Housing Strategy is not part of the city’s acknowledged
7 comprehensive plan, and therefore cannot be relied upon as a basis for the
8 rezoning decision, and (2) the acknowledged comprehensive plan provisions,

⁶ Statewide Planning Goal 2 is “[t]o establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.”

Goal 2 goes on to provide, in relevant part:

“City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268. All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents. The plans, supporting documents and implementation ordinances shall be filed in a public office or other place easily accessible to the public. The plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. Each plan and related implementation measure shall be coordinated with the plans of affected governmental units.”

1 including the BLI, the HNA and the HRCP Goal 10 element, do not support the
2 proposed rezoning. According to petitioner, the BLI, HNA and the HRCP Goal
3 10 element instead show that there is no need for additional R-3-zoned land in
4 the city, and provide no basis to rezone Morrison Park to meet the city's need
5 for affordable housing.

6 With respect to the Housing Strategy, petitioner argues that because the
7 Housing Strategy is not part of the city's acknowledged comprehensive plan,
8 the city cannot rely on Action 3.1 or any other part of the Housing Strategy as
9 legal support for the proposed rezone, citing *1000 Friends of Oregon v. City of*
10 *Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005). In *1000 Friends of*
11 *Oregon*, the Court of Appeals held that the city violated the Statewide Planning
12 Goal 2 "basis" and "consistency" requirements by justifying land use
13 legislation based on data in a recently adopted but unacknowledged buildable
14 lands inventory, rather than data in the city's outdated but acknowledged
15 inventory. *Id.*

16 However, the present circumstances differ from those in *1000 Friends of*
17 *Oregon*. The city is not relying on data in an unacknowledged document to
18 support a land use change, while ignoring data in its acknowledged
19 comprehensive plan. The city is citing an action item in an adopted, but
20 advisory, strategy document that directly implements a policy recommendation
21 in the acknowledged HNA, that the city should identify "surplus city land for
22 development of government-subsidized housing (working with Mid-Columbia

1 Housing Authority).” Petition for Review, Att C, 50. Housing Strategy Action
2 3.1 could not support the proposed rezoning on its own. However, because it
3 directly implements a policy recommendation in the acknowledged HNA, in
4 almost identical language, we see no violation of Statewide Planning Goal 2 in
5 considering consistency with Action 3.1 as an additional justification for the
6 proposed rezone.

7 With respect to the city’s acknowledged legislation, which includes the
8 BLI, HNA and the HRCP Goal 10 element, petitioner argues that the city’s
9 acknowledged comprehensive plan in fact does not support rezoning public
10 park land or other lands zoned OS/PF in order to increase the supply of R-3-
11 zoned land. Petitioner first notes that public park land and other lands zoned
12 OS/PF are not included in the BLI, meaning those lands were not deemed to be
13 either available or needed for housing when the city adopted the BLI and HNA.
14 Further, petitioner notes that the HNA in fact indicates a need for additional
15 park land in the city, including a need for “about 5 acres of land for
16 neighborhood parks within the UGB,” approximately the amount of land lost to
17 park usage under this decision. Petition for Review, Att C 43. Petitioner also
18 notes that the HNA indicates that there is no current or projected deficit of
19 lands within the UGB zoned R-3. While the HNA recommends additional
20 precautionary measures to increase the supply of R-3 zoned lands in case the
21 city grows faster than projected, petitioner argues that the identified measures
22 discuss strategies such as rezoning R-1 and R-2 lands to R-3, and do not

1 mention rezoning lands zoned OS/PF to R-3. *Id.* at 49. Further, while the
2 HNA recommends measures such as “identifying surplus city land” to increase
3 the supply of land for affordable housing, petitioner argues that the HNA does
4 not contemplate that city parks such as Morrison Park be considered for
5 rezoning, and moreover there is no finding or evidence in the record that
6 Morrison Park is “surplus” to the city’s park needs. *See* n 5. Petitioner
7 contends that the record includes evidence that there are other city-owned
8 properties that are not parks that could be viewed as “surplus,” and that the city
9 erred in failing to rezone those sites instead of Morrison Park. For these
10 reasons, petitioner argues that the city’s decision to rezone Morrison Park to R-
11 3 has no “basis” in the BLI, HNA or HRCF Goal 10 element, and is not
12 “consistent” with those acknowledged plan provisions.

13 Respondents argue that the HNA provides a basis for the proposed
14 rezoning, by noting the existing deficit of affordable housing in the city, and
15 recommending that the city identify surplus city land for development with
16 government-subsidized housing, working with intervenor Mid-Columbia
17 Housing Authority. *See* n 5. We agree with respondents that the HNA
18 includes language that provides a policy basis for rezoning public land to R-3
19 to facilitate development of affordable housing, for purposes of Statewide
20 Planning Goal 2.

21 Petitioner argues nonetheless that the city does not have a current or
22 projected deficit of R-3 zoned land. That is correct, but the HNA states, and

1 petitioner does not dispute, that the city has a deficit of *affordable housing*. As
2 the city’s findings explain, the need to ameliorate the deficit of affordable
3 housing is the “public need” that the proposed rezone is intended to address,
4 not a deficit of R-3 zoned land. Record 25. The HNA identifies conversion of
5 surplus city land as one strategy to address the need for affordable housing.
6 The city’s findings explain that the private sector housing market is unable to
7 address the public need for affordable housing, and that simply providing
8 additional R-3 zone land is not sufficient. Record 29-30. The city council
9 concluded that what is needed is the contribution of public resources, *i.e.*,
10 donating public land and partnering with established housing groups to develop
11 affordable housing. *Id.* Consequently, that the BLI and the HNA indicates that
12 the city’s UGB includes an adequate supply of R-3 zoned land to last for 20
13 years does not undercut the city council’s conclusion that there is a “public
14 need” to rezone public land in order to facilitate the development of affordable
15 housing. *Id.*

16 Petitioner is correct that the city council did not expressly find that
17 Morrison Park is considered “surplus” city land. The findings do note that in
18 1989 the subject property was the subject of an unsuccessful attempt to declare
19 it surplus. Record 22. The findings addressing the “public need” criterion at
20 HRMC 17.08.040(A)(2) state in relevant part that:

21 “Morrison Park has been discussed for several years as a location
22 for R-3 Zoning and affordable housing. It was originally zoned R-
23 3 in the 1954 Zoning Map, and was rezoned to [OS/PF] in 1980 in
24 recognition that it was city-owned land. It is included in the 1983

1 City park inventory, and the only current development in this park
2 is a Disc Golf Course, which was allowed as a temporary use.
3 * * * We view the rezone and development of all or a part of
4 Morrison Park as one step forward in meeting the City’s adopted
5 goals for increasing the number of affordable housing units in
6 Hood River.

7 “* * * * *

8 “Morrison Park provides an excellent opportunity to implement
9 the City’s Comprehensive Plan and findings from the [HNA] as it
10 meets the criteria for public land to be used for affordable housing.
11 In that light, we find that this zone change application is well-
12 suited to meet, in part, the need for affordable housing sites, and
13 satisfies the public need criterion for a quasi-judicial rezone.”
14 Record 28.

15 Thus, the city council found that Morrison Park “meets the criteria” for public
16 land to be used for affordable housing, in an apparent reference to “findings
17 from the Housing Needs Analysis.” Record 28. While those findings do not
18 describe Morrison Park as “surplus,” the city council clearly regards Morrison
19 Park as public land that has less intrinsic value to the city as park land,
20 compared to the more pressing need for affordable housing. *See, e.g.*, Record
21 29 (“The need for affordable housing is so great as to outweigh the relatively
22 small impact of losing this open space and park resource.”). Other findings
23 note that there are “other public parks within walking distance of this
24 neighborhood” and that “a substantial number of city and county parks remain,
25 and the City is virtually surrounded by Forest Service land and the Columbia
26 Gorge National Scenic Area that is open and available to the public for
27 recreational use.” Record 29, 33. The city also rejected arguments that

1 retaining Morrison Park as a park is necessary to “satisfy the recreational needs
2 of the citizens of the community,” in the words of HRCP Goal 8, given the
3 “City’s existing and remaining city parks, trails, rivers and streams, and this
4 vast area of public land outside the city limits[.]” Record 40. While the city
5 stopped short of declaring Morrison Park “surplus” to the city’s recreational
6 needs, it is clear that the city council does not regard such a finding to be
7 necessary to demonstrate a “public need” for the rezoning, for purposes of
8 HRMC 17.08.040(A)(2). Petitioner has not demonstrated that that the city
9 erred in failing to first declare that Morrison Park is “surplus” city land.

10 Petitioner is correct that the HNA indicates a need for about 30 more
11 acres of park land by the year 2035, including five acres of neighborhood
12 parks. Petition for Review, Att C, 43. The city’s findings acknowledge the
13 tension between the need to provide recreational opportunities for its citizens,
14 under HRCP Goal 8, and the need to provide more affordable housing, for
15 purposes of HRCP Goal 10 and the HNA.⁷ The city council chose to resolve

⁷ The city council findings state:

“* * * Many opponents to this rezone argued that it is bad policy to start a process that will eliminate a city park by rezoning it to a non-park designation, that the city’s population is growing, that the demand for neighborhood and in-city parks will only increase, and it is very difficult and expensive for a city to replace any park that is lost to a non-park use. We understand and agree with these sentiments about the importance of city parks to the City’s residents and visitors. We live here too and value all of our city parks, and there is no dispute on this point. If the only priority at

1 that tension in favor of affordable housing.⁸ Petitioner’s preference for a
2 different resolution in favor of preserving Morrison Park does not provide a
3 basis for reversal or remand.

4 Nonetheless, petitioner argues that there is no need to choose between
5 parks and affordable housing, because the record includes evidence that there
6 are several other publicly-owned vacant or redevelopable properties that are
7 not parks, that could be rezoned to facilitate development of affordable housing
8 instead of Morrison Park. In an apparent response to that evidence, the city’s
9 planning director informed the city council that the city is presently pursuing

issue were parks and how to obtain and retain more parks, we would deny this rezone request. However, we are tasked with balancing competing policy objectives, and in this case, we have a significant unmet need for affordable housing competing with the need for urban parks. In this particular case and with this particular property, we find that the balance in this debate tips in favor of rezoning this park to a non-park designation for the specific purpose of promoting a public-private affordable housing development. In this particular situation, we reluctantly reject these policy arguments in favor of a rezone that will lead to an increase in the number of affordable housing units.” Record 39.

⁸ To reduce the impact on recreational opportunities, the city council modified the proposal slightly to reduce the area to be rezoned, leaving the sliver of land south of Wasco Avenue, currently developed as a skate park, zoned OS/PF. The city council also imposed a condition of approval requiring that the subject property when developed include a “significant park area” with an onsite bike/pedestrian greenway connection. Record 44. The city’s findings note that the R-3 zone (in fact all city zones) allow public parks. Record 39. For the same reason, the city concluded that rezoning Morrison Park to R-3 does not require that Morrison Park be removed from the inventory of city parks in the Background Report. *Id.*

1 efforts to develop three other identified publicly-owned properties with
2 affordable housing, two of them owned by other public entities. Record 128-29
3 (“We need them all to provide housing for those citizens that the private market
4 do[es] not build for.”). The city’s findings explain that “[t]he City is evaluating
5 several other publicly owned parcels for housing, but the need is great and
6 immediate and [the subject property] is one means to address this public need.”
7 Record 30; *see also* Record 32 (finding that alternative publicly owned sites
8 “will [also] be needed to accommodate the need” for affordable housing, but
9 that the subject property is “available and owned outright by the City.”). These
10 findings belie petitioner’s suggestion that the city could avoid choosing
11 between preserving park land and affordable housing by developing publicly-
12 owned lands that are not parks, instead of developing Morrison Park. Based on
13 those findings, the city council believes that the alternative publicly owned
14 properties cited in the record must also be rezoned and developed in order to
15 ameliorate the need for affordable housing. Petitioner offers no basis to
16 conclude that the city erred in first seeking to rezone Morrison Park, given that
17 it is available and owned by the city, or that the city is obligated to first rezone
18 alternative sites before rezoning Morrison Park.

19 In sum, petitioner has not demonstrated that the city’s justifications for a
20 “public need” for the rezone under HRMC17.08.040(A)(2) are not based on
21 acknowledged comprehensive plan provisions or are inconsistent with the
22 city’s acknowledged comprehensive plan.

- 1 The second assignment of error is denied.
- 2 The city's decision is affirmed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-071 on January 19, 2018, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

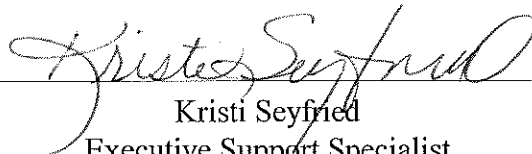
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Dated this 19th day of January, 2018.

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