

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

CENTRAL OREGON LANDWATCH,
Petitioner,

and

JEFFERSON COUNTY FARM BUREAU,
Intervenor-Petitioner,

vs.

JEFFERSON COUNTY,
Respondent.

LUBA No. 2021-054

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Rory Isbell filed a petition for review and reply brief and argued on behalf of petitioner.

Paul Dewey filed a petition for review on behalf of intervenor-petitioner.

Tamara MacLeod filed the response brief and argued on behalf of respondent. Also on the brief was Lynch Conger LLP.

RUDD, Board Member; ZAMUDIO, Board Chair, participated in the decision.

RYAN, Board Member, did not participate in the decision.

REMANDED

10/06/2021

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

NATURE OF THE DECISION

Petitioner appeals a county board of commissioners approval of an expansion of a city's urban growth boundary (UGB).

MOTION TO DISMISS

An appeal to LUBA is initiated by the filing of a notice of intent to appeal (NITA). In its response brief, the county asks us to determine whether the NITA that petitioner mailed to LUBA was timely filed and, if not, to dismiss the appeal.

The parties agree that the challenged decision became final when the county mailed notice of that decision on April 21, 2021. Accordingly, the deadline for filing the NITA was May 12, 2021. ORS 197.830(9); OAR 661-010-0015(1)(a).¹ OAR 661-010-0015(1)(b) provides that the filing of a NITA by

¹ ORS 197.830(9) provides, in part:

“A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615.”

OAR 661-010-0015(1)(a) provides:

“The [NITA] * * * shall be filed with [LUBA] on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3) - (5). A notice of intent to appeal plan and land use regulations processed pursuant to ORS 197.610 to 197.625 shall be filed with [LUBA] on or after the

1 regular United States mail is effective on the date of receipt by LUBA and that
2 the filing of a NITA by certified United States mail is effective on the date of
3 mailing. The certificate of filing that petitioner included with its NITA states that
4 petitioner filed the NITA by regular United States mail on May 11, 2021. LUBA
5 received the NITA by regular United States mail on May 12, 2021. Accordingly,
6 the NITA was timely filed. The motion to dismiss is denied.

7 **BACKGROUND**

8 Statewide Planning Goal 3 (Agricultural Lands) is “[t]o preserve and
9 maintain agricultural lands” for “farm use, consistent with existing and future
10 needs for agricultural products, forest and open space and with the state’s
11 agricultural land use policy.” ORS 215.203(1) provides that “[z]oning ordinances
12 may be adopted to zone designated areas of land within the county as exclusive
13 farm use [(EFU)] zones” and that “[l]and within [EFU] zones shall be used
14 exclusively for farm use except as otherwise provided in ORS 215.213, 215.283
15 or 215.284.”

21st day after the date the decision sought to be reviewed is mailed
to the parties entitled to notice under ORS 197.615. A [NITA] filed
thereafter shall not be deemed timely filed, and the appeal shall be
dismissed.”

1 The application of wastewater for irrigation is among the allowed uses on
2 EFU land. ORS 215.283(1)(v). Utility facilities necessary for public use are also
3 allowed on EFU land.² ORS 215.283(1)(c).

4 The county implements Goal 3 and ORS 215.283 through its Exclusive
5 Farm Use A-1 (EFU A-1) zone, a zone intended to “preserve areas containing
6 predominantly irrigated agricultural soils for existing and future farm uses related
7 to the production of agricultural crops or products.” Jefferson County Zoning
8 Ordinance (JCZO) 301.1(A). JCZO 301.3(E) permits irrigation with spray
9 effluent on EFU A-1 land. JCZO 301.3(Q) permits utility facilities necessary for
10 public service on EFU A-1 land.

11 In 1999, the county granted the city a conditional use permit (CUP)
12 authorizing construction and operation of the city’s wastewater facility, including
13 the application of wastewater for spray irrigation, on the subject property as a
14 utility facility necessary for public service. Record 147-51.³ The facility replaced
15 a “sewerage facility treatment plant * * * surrounded on three (3) sides by high

² A utility facility is necessary for public service if it must be sited in an EFU zone in order to provide the service. ORS 215.275(1). ORS 215.275(2) to (6) and OAR 660-033-0130(16)(a) set out the elements that an applicant must demonstrate in order for a utility facility to be classified as necessary for public service.

³ The CUP was issued based, in part, on compliance with OAR 660-033-0130(16). Record 148.

1 density housing with virtually no buffer zone between the existing lagoon dikes
2 and the residential property.” Record 150.

3 The EFU A-1-zoned, 67.24-acre subject property contains two tax lots: the
4 35.1-acre tax lot 700 and the 32.14-acre tax lot 1300. “Tax lots 700 and 1300 are
5 contiguous parcels [located primarily northwest] of Oregon State Highway 361.”
6 Record 388. The city’s wastewater treatment plant and related lagoons, ponds,
7 and buildings occupy fifteen acres of tax lot 700. Record 389. The city’s main
8 wastewater line runs from the facility on tax lot 700 to and through the 3.7-acre
9 portion of tax lot 1300 located southeast of Highway 361. Effluent from the
10 wastewater treatment plant is used to irrigate a hay crop planted by adjacent
11 farmers on a portion of tax lot 700 and a portion of tax lot 1300. An existing home
12 site occupies a small area of tax lot 1300.⁴

13 Statewide Planning Goal 14 (Urbanization) is “[t]o provide for an orderly
14 and efficient transition from rural to urban land use, to accommodate urban
15 population and urban employment inside [UGBs], to ensure efficient use of land,
16 and to provide for livable communities.” OAR 660-015-0000(14). Pursuant to
17 Goal 14, cities, counties, and regional governments are required to establish and
18 maintain UGBs “to provide land for urban development needs and to identify and

⁴ The home is occupied by a tenant unconnected to the wastewater facility.

1 separate urban and urbanizable land from rural land.”⁵ On October 5, 2020, the
2 city adopted Ordinance 264, “amending the City’s Comprehensive Plan Map and
3 adding [a] Findings Document to the Comprehensive Plan text,” expanding the
4 UGB to include tax lots 700 and 1300, and changing the tax lots’ comprehensive
5 plan designation from the county’s EFU designation to the city’s Open
6 Space/Public Facilities (O/S) designation. Record 386. The findings for
7 Ordinance 264 provide, in part, “The City’s Wastewater Treatment Plant and
8 Spray Irrigation site lie immediately adjacent to the City’s existing City Limits
9 but are outside the City’s [UGB]. The City would like to have this facility inside
10 the City Limits under the City’s jurisdiction.” Record 385. Ordinance 264 does
11 not provide for a zone change or annexation.

12 The city requested that the county approve the UGB amendment. Record
13 347. On January 14 and 18, 2021, the county planning commission held public
14 hearings on the request. On February 2, 2021, the county planning commission

⁵ The Department of Land Conservation and Development (DLCD) defines “rural land” as “[l]and outside [UGBs] that is:

- “a) Non-urban agricultural, forest or open space,
- “b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or
- “c) In an unincorporated community.”

DLCD defines “urban land” as “[l]and inside [a UGB].”

1 recommended approval. On March 2, 2021, the board of commissioners held a
2 hearing on the request. On March 24, 2021, the board of commissioners
3 deliberated on the request. On April 7, 2021, the board of commissioners adopted
4 an ordinance approving the UGB amendment.

5 This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR⁶**

7 Petitioners' first assignment of error is divided into five subassignments of
8 error asserting that the county misconstrued and misapplied statewide planning
9 goals, administrative rules, and provisions of the Jefferson County
10 Comprehensive Plan (JCCP). LUBA shall reverse or remand a local government
11 land use decision if it is not in compliance with the statewide planning goals or
12 if the local government improperly construed or interpreted the applicable law.
13 ORS 197.835(6); ORS 197.835(9)(a)(D); ORS 197.829. In construing the law,
14 we will consider the text and context of the law at issue in order to determine the
15 intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or
16 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d
17 1042 (2009). For the reasons set out below, we sustain the first assignment of
18 error, in part.

⁶ Intervenor-petitioner joins in petitioner's assignments of error and we address intervenor-petitioner and petitioner collectively as "petitioners." Citations to the Petition for Review are to petitioner's petition for review.

1 **A. First Subassignment of Error**

2 Goal 14 provides:

3 “[C]hange of [UGBs] shall be based on the following:

4 “(1) Demonstrated need to accommodate long range urban
5 population, consistent with a 20-year population forecast
6 coordinated with affected local governments, or for cities
7 applying the simplified process under ORS chapter 197A, a
8 14-year forecast; and

9 “(2) Demonstrated need for housing, employment opportunities,
10 livability or uses such as public facilities, streets and roads,
11 schools, parks or open space, or any combination of the need
12 categories in this subsection (2). In determining need, local
13 government may specify characteristics, such as public
14 facilities, streets and road, schools, parks or open space, or
15 any combination of the need categories in this section (2). In
16 determining need, local government may specify
17 characteristics, such as parcel size, topography or proximity,
18 necessary for land to be suitable for an identified need. Prior
19 to expanding [a UGB], local governments shall demonstrate
20 that needs cannot be reasonably accommodated on land
21 already inside the [UGB].” OAR 660-015-0000(14).

22 We refer to these as the “need factors.”⁷

23 Goal 14 also sets out “location factors” to be considered when determining
24 where to expand the UGB.⁸ The Court of Appeals has explained that,

25 *“although the location of the UGB and changes to it are to be*
26 *determined ‘with consideration of’ the location factors, the issue of*

⁷ The parties do not argue that the 14-year forecast referenced in the first need factor, rather than the 20-year forecast, is at issue in this case.

⁸ The location factors are at issue in the second assignment of error.

1 *land need is addressed differently.* Under the plain text of the goal,
2 the change of a UGB must be based on both a 20-year need under
3 subsection (1) *and* a need for housing, employment opportunities,
4 livability or uses such as public facilities, streets and roads, schools,
5 parks or open space under subsection (2). In contrast with the
6 location factors, which must all be *considered* in determining
7 changes to a UGB, *the plain text of the goal requires that, to change*
8 *a UGB, there must be a demonstrated need for land under both of*
9 *the land-need subsections.”* *DLCD v. City of Klamath Falls*, 290 Or
10 App 495, 504, 416 P3d 326 (2018) (second and third emphases in
11 original; first and fourth emphases added) (citing *Friends of the*
12 *Columbia Gorge v. Columbia River*, 346 Or 415, 426, 212 P3d 1243
13 (2009); *State v. Clements*, 265 Or App 9, 19, 333 P3d 1177 (2014));
14 *see also id.* at 503 (“[T]he lack of a 20-year land need precludes a
15 local government from approving a UGB amendment.”).

16 OAR 660-024-0040(1) implements Goal 14 and provides, in part:

17 “The UGB must be based on the appropriate 20-year population
18 forecast for the urban area as determined under the rules in OAR
19 chapter 660, division 32, and must provide for needed housing,
20 employment and other urban uses such as public facilities, streets
21 and roads, schools, parks and open space over the 20-year planning
22 period consistent with the land need requirements of Goal 14 and
23 this rule.”

24 Petitioners’ first subassignment of error is that the decision misconstrues
25 and misapplies Goal 14 and OAR 660-024-0040 by amending the UGB to include
26 an existing public facility without demonstrating a need based on both a 20-year
27 population forecast and inadequate land within the UGB. Petition for Review 9.
28 For the reasons set out below, we agree.

29 First, as explained above, Goal 14 requires consideration of a 20-year
30 population forecast. The findings address the first need factor under Goal 14 in
31 two places. In both places, the findings assert that Goal 14 requires a showing of

1 “[d]emonstrated need to accommodate long-range urban population consistent
2 with a 20 to 50 years population forecast coordinated with the cities.” Record 13,
3 27. However, a 50-year population forecast is not relevant to finding compliance
4 with Goal 14.

5 Second, the county argues that the decision “does consider a 20-year
6 population forecast and the County made specific findings in regard to that
7 forecast.” Response Brief 11. In addressing OAR 660-024-0040, and in one of
8 the two parts of the decision addressing the first need factor under Goal 14, the
9 findings (1) quote an excerpt from the narrative for JCCP Goal 10 (Housing) and
10 (2) reproduce a portion of a 2006 population forecast beneath that narrative in the
11 JCCP showing the years 2020 to 2050. Record 19, 27. OAR 660-024-0040(1)
12 requires, however, that the UGB change be based on the appropriate 20-year
13 population forecast *as determined under OAR chapter 660, division 32*. OAR
14 660-032-0020(1) provides:

15 “A local government with land use jurisdiction over land that is
16 outside the Metro boundary shall apply the most recent final forecast
17 issued by the [Portland State University Population Research
18 Center] under OAR 577-050-0030 through 577-050-0060, when
19 changing a comprehensive plan or land use regulation that concerns
20 such land, when the change is based on or requires the use of a
21 population forecast, except that a local government may apply an
22 interim forecast as provided in 660-032-0040.”⁹

⁹ The interim forecast rules apply to periodic or other legislative review of a comprehensive plan by a local government outside the Metro boundary. OAR 660-032-0040(1).

1 The other part of the decision addressing the first need factor under Goal 14 cites
2 a Portland State University (PSU) forecast that “was done in 2018 and extends to
3 2078.” Record 13.¹⁰ We assume for purposes of this opinion that the 2018 PSU
4 forecast is the forecast prepared consistent with OAR 660-024-0040(1).¹¹

¹⁰ The findings state:

“[The] PSU Urban Population Research Center has prepared the population forecasts for the cities in Jefferson County. Staff finds the [City] has indicated that the City of Metolius forecast was done in 2018 and extends to 2078 with a population forecast in 2078 of 1500, nearly doubling the existing population of the City. Staff finds the [City] is indicating the City’s Wastewater Treatment plant may require upgrading and/or need to respond to advances in technology during this extended period.” Record 13.

¹¹ For UGB expansions that are adopted as post-acknowledgment plan amendments, the 20-year period must start:

- “(a) On the date initially scheduled for adoption of the amendment specified by the local government in the initial notice of the amendment *required by OAR 660-018-0020*; or
- “(b) If more recent than the date determined in subsection (a), at the beginning of the 20-year period specified in the appropriate coordinated population forecast for the urban area *as determined under rules in OAR chapter 660, division 32*, unless ORS 197.296 requires a different date for local governments subject to that statute.” OAR 660-024-0040(2).

The parties do not identify a start date for the population forecast based on either the required notice to DLCD under OAR 660-024-0040(2)(a) or an OAR chapter 660, division 32 forecast under OAR 660-024-0040(2)(b). As far as we are able to discern, the record does not contain a copy of the required notice to

1 However, the county did not rely on the 2018 PSU forecast in determining
2 whether there is available land for the facility within the UGB. Instead, the
3 county's findings quote a statement from the 1999 CUP approval that "[t]he 20-
4 year growth projections for the City of Metolius will require all available and
5 usable land within the UGB for residential purposes." Record 24 (underscoring
6 omitted) (quoting Record 148).

7 The PSU and JCCP forecasts, as well as the actual population according to
8 the city, are reflected in the table below and show that actual population growth
9 has lagged prior forecasts.

Population Forecast Year	2006 JCCP Forecast ¹² (Record 19, 27)	2018 PSU Forecast (Record 361)	Actual Population (Record 361)
2020	1,131	1,158	830
2040	1,619	1,328	
2055	2,054	1,419	

DLCD. However, as mentioned, the decision cites a PSU forecast that "was done in 2018 and extends to 2078." Record 13.

¹² The portion of the 2006 JCCP forecast in the record is illegible. The forecast is, however, clear on page 61 of the JCCP itself. We take official notice of the JCCP pursuant to ORS 40.090(7).

1 OAR 660-024-0040 requires the use of an up-to-date population forecast in order
2 to evaluate the first need factor. The county did not use the required forecast to
3 identify a land need and the first need factor is not met.

4 The second need factor concerns the need for a wastewater facility. Like
5 the first need factor, the findings address the second need factor under Goal 14
6 in two places. In both places, the findings assert that there is a demonstrated need
7 for the facility because it has been in use for over 17 years. Record 13, 28. The
8 county concluded that “the City need for a wastewater treatment facility is
9 evident in the amount of urban wastewater being produced by the City which is
10 over 1,745,616 gallons a month and thus justifies the need for the urban
11 wastewater treatment facility within the UGB.” Record 11. The county found that

12 “the need is based on the amount of effluent the City is obligated to
13 process currently with an increasing urban wastewater stream as
14 evidenced by recent residential growth and the increased application
15 of spray irrigation at the site to meet the demand. Staff also finds
16 that residential growth within the City Limits obligates the city to
17 guarantee the future of the urban wastewater stream to this location
18 by advancing long range planning for the facility need making the
19 UGB expansion request not only needed but part of the facilities
20 long range planning process that protects the facility. Staff also finds
21 the City is ultimately responsible for infrastructure planning for
22 urban services including wastewater treatment which in this case
23 appears to be millions of gallons annually and at some point in the
24 future may potentially require a higher level of processing including
25 potentially mechanical or wetlands processing.” Record 5.

26 These findings do not answer the fundamental question of whether meeting the
27 public facility need *requires* expanding the UGB. The county acknowledges in

1 its response brief that the facility has excess capacity and that the city does not
2 need to expand the facility. Response Brief 13-14. The facility is currently taking
3 in between 55,000 and 65,000 gallons of wastewater a day, but it is designed take
4 in an average of 126,000 gallons a day with a peak daily flow of 253,000 gallons
5 a day. Record 389. In other words, the facility has an average daily capacity of
6 roughly twice the current average daily level. The 2018 PSU forecast shows that
7 the city's 2040 population will be 1,328, an increase of 498 over the actual 2020
8 population of 830.

9 The city's wastewater facility has operated on the property pursuant to a
10 CUP for at least 15 years, and 42 acres of the property is currently in farm use
11 and irrigated with the effluent. Despite years of operation outside the UGB, the
12 county argues that the UGB expansion is needed because the city is preparing for
13 possible upgrades and/or advances in technology and because the city is
14 considering locating a public works department building on the site at some time
15 in the future. Response Brief 12-13 (citing Record 13, 147). The county has not
16 shown that changes in technology, upgrades, or an increase in the wastewater
17 stream require adding acreage to the UGB or that a public works building needs
18 to be sited on the subject property.

19 The city engineering team indicated that an emergency access road is
20 proposed for the 3.7-acre portion of tax lot 1300 to the southeast of Highway 361
21 to serve an existing, adjacent subdivision and that the city also plans to use that
22 portion of tax lot 1300 for storing sewer piping and accessory fixtures needed for

1 wastewater sewer repair and construction. Record 142. However, the county does
2 not explain the need to expand the UGB in order to provide that access road and
3 storage area.

4 As petitioners point out, LUBA and the courts once recognized an
5 “unneeded but committed” exception to Goal 14’s otherwise applicable
6 requirement that UGB amendments be based on need, but that exception was
7 overturned in *Milne v. City of Canby*, 195 Or App 1, 96 P3d 1267 (2004). In
8 *Milne*, the city amended its UGB to add a 30-acre island of agricultural property
9 entirely encircled by the city’s UGB. The city took the position that the 30 acres
10 were committed to urban use. The court explained that Goal 14 was unambiguous
11 and that the need factors had to be met in order to amend the UGB:

12 “In the absence of a change in the governing law, it is possible that
13 the city may use existing mechanisms for amending a UGB—that
14 is, take an exception to Goal 14 as authorized by LCDC or use the
15 periodic review process in which all of the goals and areas of
16 jurisdiction are considered.” *Milne*, 195 Or App at 19.

17 However, “[n]othing in the text of Goal 14 authorizes the ‘unneeded but
18 committed’ doctrine as a mechanism by which a local government is relieved
19 from the requirement of considering all of the seven Goal 14 factors in a decision
20 to amend an existing UGB.” *Id.* at 16.

1 Here, to the extent that the county found that the city's long-range planning
2 for its *existing facility* creates a need to expand the UGB, the county's decision
3 is inconsistent with Goal 14.¹³

4 The county found:

5 "[O]n occasion[,] * * * Cit[ies] do transport their wastewater via
6 piping to spray irrigation facilities outside the City UGB. Staff finds
7 that the UGB expansion in this request should include the spray
8 irrigation lands in this request due to the location of the buildings
9 and lagoons being on the far side of the site and the intense use of
10 urban wastewater spray irrigation on the site making any farm crop
11 on the site not suitable for direct human consumption." Record 11.

12 This finding recognizes that wastewater may be transported outside a UGB for
13 disposal, but it concludes that the location of the facility on the property and the
14 inability of the property to produce a farm crop suitable for human consumption
15 makes adding the entire property to the UGB appropriate. This ignores the fact
16 that the property remains suitable for a farm crop, the existing hay. The city's
17 desires to have land use control over the property and to have its facility, which
18 it considers an urban use, within its jurisdiction do not override the need
19 requirements of Goal 14 and OAR 660-024-0040. *Friends of French Prairie v.*
20 *Marion County*, 58 Or LUBA 387, 391 (2009) (explaining that, under Goal 14, a
21 local government may not expand a UGB based solely on a desire to
22 accommodate a certain use without establishing a need for the expansion based

¹³ As the court explained in *Milne*, the county may consider taking an exception to Goal 14. 195 Or App at 19.

1 on a 20-year population forecast). Both the first and second need factors must be
2 met. The county's decision meets neither.

3 The first subassignment of error is sustained.

4 **B. Second Subassignment of Error**

5 Goal 14's second need factor requires that a UGB expansion be supported
6 by a "[d]emonstrated need for housing, employment opportunities, livability or
7 uses such as *public facilities*, streets and roads, schools, parks or open space, or
8 any combination of the need categories in this subsection (2)." OAR 660-015-
9 0000(14) (emphases added). The county found:

10 "[T]he treatment ponds are 15 acres in size, however staff also finds
11 the impacted area from the wastewater facility, access and the
12 existing dwelling on the site total approximately 23 acres leaving 44
13 acres for wastewater spray irrigation. Staff also finds that the
14 impacted and committed areas on the site * * * are located in a
15 manner where they are spread throughout the site making customary
16 farming techniques such as use of a pivot not practicable * * *."
17 Record 16.

18 The county also found:

19 "[T]he current City wastewater facility uses all of the land for its
20 current wastewater treatment process, infrastructure or storage area
21 needs including the facility line that crosses Highway 361 from the
22 [northwest] side of the highway passing through the small acreage
23 on the [southeast] side of the Highway * * *. Staff finds that 23 acres
24 are impacted by facility site structural development and that the
25 remaining 44 acres are used for wastewater spray irrigation." Record
26 32.

1 The county points out in its response brief that the spray irrigation sites were part
2 of the CUP review in 1999 and argues that the irrigation sites should not be
3 considered independent of the remainder of the facility.

4 Petitioners' second subassignment of error is that the decision does not
5 comply with Goal 14 or OAR 660-024-0040 because only 15 of the 67 acres of
6 EFU land added to the UGB are occupied by the public wastewater facility and
7 because the county did not conduct a land inventory to evaluate whether any need
8 established can be met on land within the UGB. Petition for Review 18.

9 OAR 660-024-0050(4) provides, in part, "Prior to expanding the UGB, a
10 local government must demonstrate that the estimated needs cannot reasonably
11 be accommodated on land already inside the UGB." "Goal 14 requires that the
12 quantity of land added to [a UGB] be justified by a calculated or 'demonstrated'
13 need to add land * * *." *Hildenbrand v. City of Adair Village*, 217 Or App 623,
14 632, 177 P3d 40 (2008).¹⁴ We understand petitioners to argue that, although

¹⁴ In *Hildenbrand*, an application was made to expand the city's UGB by 142 acres and to enact plan designations and zoning changes to accommodate 694 high-density residential units. In concluding that the 142-acre expansion area was justified, the city and county assumed that the average lot size for each residential unit would be 6,000 square feet. In making that assumption, the city and county relied on a city comprehensive plan policy that arguably required that development allowed by a UGB amendment bring the average city lot size closer to 6,000 square feet. The court concluded that justifying the 142-acre expansion area "require[d] a projection of likely development under the densities allowed by the city's high-density residential zoning" and that the city and county's reliance on the comprehensive plan policy did not constitute substantial evidence of a 'demonstrated need' under Goal 14." 217 Or App at 632. The court reversed

1 public facilities are listed as a type of use for which the requisite need *may* be
2 demonstrated, the county failed to consider whether land within the UGB is
3 available for disposal of the associated effluent.

4 The county found that “the Wastewater Treatment Plant is a demonstrated
5 needed public facility by being in use for over 17 years that the City[] wishes to
6 place within the City’s jurisdiction.” Record 13; *see also* Record 28. However,
7 under Goal 14, “[p]rior to expanding [a UGB], local governments shall
8 demonstrate that needs cannot reasonably be accommodated on land already
9 inside the [UGB].” OAR 660-015-0000(14). OAR 660-024-0050(1) provides,
10 “When evaluating or amending a UGB, a local government must inventory land
11 inside the UGB to determine whether there is adequate development capacity to
12 accommodate 20-year needs determined in OAR 660-024-0040.” We agree with
13 petitioners that the county failed to inventory land to determine whether the
14 identified need to dispose of the effluent can be met within the UGB. Instead, the
15 county found that the 1999 CUP decision file

16 “shows the thorough analysis of needs and siting and consideration
17 of land inventory that occurred via a Facilities Plan seventeen years
18 ago when the facilit[y] was built including the needed northward
19 direction of flow that the entire sewer system is designed with that
20 places this location as the best choice. Staff finds that the land
21 inventory found in [the 1999 CUP decision file] indicates the reason

and remanded our order “as ‘unlawful in substance’ because [it] failed to require a justification of the quantity of land needed for high-density residential use that is necessary for the urban growth boundary change to pass muster under Goal 14.” *Id.* at 637.

1 for the facility to be placed outside the City and UGB at this location
2 was based on a twenty year land supply need and the 20 year
3 population forecast to maintain the 20 year land need determined by
4 the City which appears to be consistent with OAR 660-024-0040.”
5 Record 21.

6 The county did not complete the necessary inventory to evaluate whether there
7 are effluent disposal options within the UGB.

8 Petitioners argue:

9 “The decision fails to inventory and consider land already inside the
10 UGB as locations to dispose of effluent wastewater (which first
11 requires finding that wastewater treatment plant effluent is a valid
12 need recognized by Goal 14 as reason to add land to a UGB, which
13 has not been done here either).” Petition for Review 25.

14 As explained in the above-quoted finding, the county found that its
15 inventory analysis in the 1999 CUP decision file *appeared to be consistent with*
16 *OAR 660-024-0040*. To the extent that petitioners argue that an inventory of
17 available land within the UGB must also address the need for the physical public
18 facility, we agree that the county has not and must inventory land available within
19 the UGB for the public facility itself.¹⁵

¹⁵ In a footnote, petitioner also argues that “the decision fails to make findings in response to OAR 660-024-0040(7), which requires that 20-year land needs for public facilities also must comply with Goal 11 and other rules and statutes applicable to public facilities planning.” Petition for Review 24 n 3. OAR 660-024-0040(7) provides:

“The determination of 20-year land needs for transportation and public facilities for an urban area must comply with applicable requirements of Goals 11 and 12, rules in OAR chapter 660, divisions 11 and 12, and public facilities requirements in ORS

1 The second subassignment of error is sustained.

2 **C. Third Subassignment of Error**

3 OAR 660-024-0050(7) provides, “Lands included within a UGB pursuant
4 to OAR 660-024-0065(3) to provide for a particular industrial use, or a particular
5 public facility, must be planned and zoned for the intended use and must remain
6 planned and zoned for that use unless the city removes the land from the UGB.”¹⁶

197.712 and 197.768. The determination of school facility needs must also comply with 195.110 and 197.296 for local governments specified in those statutes.”

We will not address arguments raised in a footnote. *Falls v. Marion County*, 61 Or LUBA 39, 46 (2010); *Frewing v. City of Tigard*, 59 Or LUBA 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19, *aff’d*, 223 Or App 761, 197 P3d 1152 (2008), *rev den*, 346 Or 10 (2009).

¹⁶ OAR 660-024-0065(3) provides:

“When the primary purpose for expansion of the UGB is to accommodate a particular industrial use that requires specific site characteristics, or to accommodate a public facility that requires specific site characteristics, and the site characteristics may be found in only a small number of locations, the preliminary study area may be limited to those locations within the distance described in section (1) or (2), whichever is appropriate, that have or could be improved to provide the required site characteristics. For purposes of this section:

“(a) The definition of ‘site characteristics’ in OAR 660-009-0005(11) applies for purposes of identifying a particular industrial use.

“(b) A ‘public facility’ may include a facility necessary for public sewer, water, storm water, transportation, parks, schools, or

1 As mentioned, the decision amends the subject property's comprehensive plan
2 map designation from the county's EFU designation to the city's O/S designation.
3 Petitioners' third subassignment of error is that the decision fails to comply with
4 OAR 660-024-0050(7) because the decision does not zone the property for public
5 facilities use. We sustain this subassignment of error.

6 As the county observes, OAR 660-024-0050(7) does not state that the
7 comprehensive plan amendment and conforming zone change must occur at the
8 same time, and we have held that Statewide Planning Goal 2 (Land Use Planning)
9 and ORS 197.175 do not require that a comprehensive plan map change and
10 conforming zone map change occur contemporaneously. In *Neighbors for*
11 *Livability v. City of Beaverton*, the petitioners appealed the city's decision
12 approving a comprehensive plan map amendment, arguing in part that the city
13 erred by approving a comprehensive plan map amendment without, at the same
14 time, imposing an implementing zone designation. 37 Or LUBA 408, 414-15
15 (1999), *aff'd*, 168 Or App 501, 4 P3d 765 (2000). The city found that a range of
16 commercial zonings could be applied to implement the new comprehensive plan
17 designation and that the applicant would not be able to develop the site until it
18 was rezoned. *Id.* at 415. We explained:

fire protection. Site characteristics may include but are not
limited to size, topography and proximity.”

The county does not argue that OAR 660-024-0065(3) does not apply.
Accordingly, we assume for purposes of this decision that it does.

1 “The decision specifically provide[d] that if substantial progress
2 [was] not achieved in pursuing development of the sites within two
3 years, then the plan map designation changes that [were] approved
4 by the challenged decision [would], without further action by the
5 City, automatically revert to their previous * * * Plan Map
6 designations.” *Id.* at 413 (quotation omitted).

7 We further explained that the decision defined “substantial progress” to include
8 the filing of zone change applications. *Id.* at 413-14.

9 Here, the subject property is already developed with the city’s public
10 facility use, so the city’s desire to provide a wastewater treatment facility will not
11 require it to rezone the subject property to conform to the new O/S
12 comprehensive plan map designation. Although the county reports that the city
13 has stated that it will rezone the property when it is annexed into the city, the
14 county does not identify a condition of approval requiring annexation or a zone
15 change. The decision does not ensure that the comprehensive plan and zoning
16 map designations will be consistent and, thus, does not comply with OAR 660-
17 024-0050(7).

18 The third subassignment of error is sustained.

19 **D. Fourth Subassignment of Error**

20 Quasi-judicial amendments to the JCCP must:

21 “1. Comply with applicable Statewide Planning Goals, Oregon
22 Revised Statutes and Administrative Rules, or comply with
23 requirements for an exception to the goal(s);

24 “2. Comply with all applicable [JCCP] goals and policies; and

25 “3. *Be necessary due to changes in physical, economic or social*
26 *conditions, population growth, or development patterns*

1 *which require an adjustment in the land uses designations in*
2 *the area where the amendment is proposed.” JCCP 94*
3 *(emphasis added).*

4 Petitioners’ fourth subassignment of error is that the decision fails to
5 comply with the JCCP because the UGB amendment is not necessary or required
6 due to changes in physical, economic, or social conditions, population growth, or
7 development patterns.

8 The findings address that standard in two places. The county found that
9 that standard is met because the city owns and operates the wastewater treatment
10 site, because the city has been responsible for maintaining the plant operations
11 since the plant was completed in 2003, and because “the City Council determined
12 that it is desirable for the City to have the Plant under its jurisdiction.” Record
13 14. The county also found that that standard is met because “there is a change in
14 population growth and development patterns that support the active role the City
15 of Metolius is taking in meeting the established need for adequate wastewater
16 facilities to support the development that is occurring.” Record 26. The findings
17 cite information in the record “pertaining to significant housing increase for the
18 City of Metolius over the past three years where 47 homes were built, an increase
19 in housing stock of about 17% over three years.” *Id.*

20 We review the board of commissioners’ interpretation of its own
21 regulations under ORS 197 .829(1) and are required to affirm that interpretation
22 so long as it is not inconsistent with the regulations’ express language, underlying
23 purposes, or policies—that is, if it is plausible. *Siporen v. City of Medford*, 349

1 Or 247, 259, 243 P3d 776 (2010).¹⁷ The county has not, however, interpreted
2 what it means for an amendment to “be necessary” or “required.” The county
3 does not explain how recent housing development or the city’s desire for land use
4 control over the site *require or make necessary* an adjustment in land use
5 designation where the city’s wastewater facility was permitted over 20 years ago
6 and has long been in operation on the site. ORS 197.829(2) provides, “If a local
7 government fails to interpret a provision of its comprehensive plan or land use
8 regulations, or if such interpretation is inadequate for review, [LUBA] may make
9 its own determination of whether the local government decision is correct.” We
10 conclude that the county’s decision is incorrect.

¹⁷ ORS 197.829(1) provides:

“[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.”

1 Common definitions of “require” include “to demand as necessary or
2 essential” and to “make indispensable.” *Webster’s Third New Int’l Dictionary*
3 1929 (unabridged ed 2002). Common definitions of “necessary” include
4 “essential” and “indispensable.” *Id.* at 1511. The county has not explained why
5 it is necessary, indispensable, or essential that the subject property be within the
6 UGB, and we do not see how it is necessary or required. Petitioners argue that
7 “[t]he decision in response to this JCCP provision finds the UGB amendment ‘is
8 desirable’ but makes no mention of it being necessary to accommodate a ‘change
9 in physical, economic or social conditions, population growth or development
10 patterns.’” Petition for Review 28-29. We agree. The county has not shown that
11 the UGB expansion is necessary, essential, or something for which there is a
12 compelling need.

13 The fourth subassignment of error is sustained.

14 **E. Fifth Subassignment of Error**

15 Petitioners’ fifth subassignment of error, in its entirety, is:

16 “In the event the decision is not reversed for being unlawful in
17 substance by violating Goal 14’s requisite showing of need to amend
18 a UGB, as well as OAR 660-024-0050 and the JCCP, then it should
19 be remanded for failure to make sufficient findings supported by an
20 adequate factual base that a need exists. Goal 2.” Petition for Review
21 30.

22 Because we sustain the first four subassignments of error, we do not address the
23 fifth subassignment of error.

24 The first assignment of error is sustained, in part.

1 **SECOND ASSIGNMENT OF ERROR**

2 Goal 14 requires that the UGB amendment be based on both meeting the
3 need factors and considering the location factors. Petitioners' second assignment
4 of error is that the UGB amendment does not comply with the location factors.
5 Because the county failed to establish a need for the UGB expansion, we need
6 not proceed to consideration of the location factors and do not address the second
7 assignment of error.

8 **DISPOSITION**

9 ORS 197.835(9)(a)(D) allows LUBA to reverse or remand a decision
10 where the local government "[i]mproperly construed the applicable law." OAR
11 661-010-0071(2)(d) provides that LUBA will remand a decision that "improperly
12 construes the applicable law, but is not prohibited as a matter of law." We
13 conclude that the decision is not prohibited as a matter of law.

14 The county's decision is remanded.