

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

1000 FRIENDS OF OREGON,
Petitioner,

and

METRO,
Intervenor-Petitioner,

vs.

CITY OF HILLSBORO,
Respondent.

LUBA No. 2022-103

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

Devin Kesner filed a petition for review and reply brief and argued on behalf of petitioner. Also on the brief was 1000 Friends of Oregon.

Roger A. Alfred filed an intervenor-petitioner's brief and argued on behalf of intervenor-petitioner. Also on the brief was Metro.

Christopher D. Crean filed the respondent's brief and argued on behalf of respondent. Also on the brief was Beery, Elsner & Hammond, LLP.

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

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

REMANDED

07/20/2023

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 an ordinance amending the city's comprehensive plan to adopt an economic opportunities analysis (EOA).

BACKGROUND

Under OAR 660-009-0015, local governments are required to adopt an EOA as part of their comprehensive plan. The city adopted an EOA in 2017. Between May and October 2022, the city planning commission held public hearings on a proposed amendment to the Hillsboro Comprehensive Plan (HCP) to adopt a December 2021 Economic Opportunities Analysis (2021 EOA), to replace the existing EOA adopted in 2017. As relevant here, and as we discuss in more detail below, the 2021 EOA projected 61,895 new jobs within the city by 2040. The 2021 EOA also included technical Appendix C, Employment Land Needs, which identified, based on the projected new jobs, a need for 3,481 additional acres of land for the employment growth projected in the 2021 EOA.

At its October 2022 hearing, the planning commission voted to recommend that the city council adopt the 2021 EOA, including the technical appendices to the 2021 EOA, as part of the HCP. Record 616-17; *see also* Record 97-100 (describing the technical appendices).¹ At its November 15, 2022, hearing, the

¹ The city transmitted an original record, an amended record, and a supplemental record. All references to the record are to the amended record.

1 city council voted to adopt the 2021 EOA, including the technical appendices
2 into the HCP. This appeal followed.

3 **PETITIONER’S FIRST AND SECOND ASSIGNMENTS OF ERROR/**
4 **INTERVENOR-PETITIONER’S ASSIGNMENT OF ERROR**

5 As context for our resolution of the assignments of error, we first provide
6 a description of the legal framework for the city’s obligation to adopt the 2021
7 EOA and of the planning relationship between intervenor-petitioner Metro
8 (Metro) and the city.

9 **A. Requirement For and Contents of an EOA**

10 ORS 197.712, which was enacted in its current form in 1991, requires the
11 Land Conservation and Development Commission (LCDC) to adopt rules that
12 require local government comprehensive plans to include an EOA. ORS
13 197.712(2). OAR 660-009-0015 is one of the rules implementing ORS 197.712
14 and Statewide Planning Goal 9 (Economic Development), and it requires cities
15 and counties to include EOAs as part of their comprehensive plans, to “compare
16 the demand for land for industrial and other employment uses to the existing
17 supply of such land.”²

18 OAR 660-009-0015(1) through (4) describe the information that is
19 required to be included in an EOA. As relevant to this appeal, OAR 660-009-

² Goal 9 requires that the city “provide adequate opportunities for a variety of economic activities vital to the health, welfare, and prosperity of Oregon’s citizens.”

0015(4) requires an estimate of the types and amounts of industrial and other employment uses “likely to occur” in the city, considering the jurisdiction’s economic advantages and disadvantages, and lists several “[r]elevant economic advantages and disadvantages to be considered [that] *may include but are not limited to* * * * labor markets[.]” (Emphasis added.) OAR 660-009-0015(3) requires the city to “inventory * * * vacant and developed lands within the city designated for industrial or other employment use.”³ Finally, OAR 660-009-0020 requires that after adopting an EOA, the local government must amend its comprehensive plan to adopt policies, based on the EOA, that include a commitment to provide a “competitive short term supply of land * * * for industrial and other employment uses selected through the [EOA] * * *,” policies “to provide necessary public facilities and transportation facilities for the planning area[.]” and “detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed.” OAR 660-009-0020(1)-(2).

B. Metro Regional Planning

“Metro is a metropolitan service district established pursuant to ORS chapter 268, ORS 197.015(14), that includes land in Clackamas, Multnomah, and Washington counties. Metro is responsible for coordinating land use planning in that tri-county region. ORS 195.025; ORS 268.385. Among Metro’s

³ Petitioner challenges the 2021 EOA’s inventory of vacant and developed lands in its third subassignment of error under its second assignment of error.

responsibilities is the adoption of a regional [urban growth boundary (UGB)]. *See generally* ORS 268.380 - 268.390 (describing Metro’s planning and land use authority).” *Barkers Five, LLC v. LCDC*, 261 Or App 259, 266, 323 P3d 368 (2014).

The city is one of 24 cities within the tri-county Metro region.

In addition, and related to, the responsibility for adopting a regional UGB pursuant to ORS 268.380 to 268.390, Metro is responsible for population forecasting for areas within its boundaries. Between 1995 and 2013, population forecasting was mandated by ORS 195.036 (1995), which provided:

“The coordinating body under ORS 195.025(1) shall establish and maintain a population forecast for the entire area within its boundary for use in maintaining and updating comprehensive plans, and shall coordinate the forecast with the local governments within its boundary.”

ORS 195.025(1) provided then and now that “the governing body of [Metro] shall be considered the county review, advisory and coordinative body for Multnomah, Clackamas and Washington Counties for the areas within that district.” Under ORS 195.036 (1995), then, Metro as the coordinating body under ORS 195.025(1) was responsible for establishing and maintaining a population forecast for the entire area within its boundary “for use in maintaining and updating comprehensive plans.”

In 2013 the legislature enacted significant revisions to the methodology for population forecasting for counties outside of the Metro region, now codified in ORS 195.033. Or Laws 2013, ch 574, §2. As part of the same legislation, ORS 195.036 was amended, and now provides that:

1 “Metro, in coordination with local governments within its boundary,
2 shall issue a population forecast for the entire area within its
3 boundary to be applied by Metro and local governments within the
4 boundary of Metro *as a basis for changes to comprehensive plans*
5 *and land use regulations.*”⁴ Or Laws 2013, ch 574, §4 (emphasis
6 added).

7 OAR 660-032-0030(1) implements the statute and provides in relevant part:

8 “Metro, in coordination with local governments within its boundary,
9 shall issue a coordinated population forecast for the entire area
10 within its boundary, to be applied by Metro and local governments
11 within the boundary as the basis for a change to a regional
12 framework plan, comprehensive plan or land use regulation, when
13 such change must be based on or requires the use of a population
14 forecast.”⁵

15 **C. Preparation of An EOA Does Not Require Population**
16 **Forecasting**

17 The essential question presented by petitioner’s first assignment of error
18 and Metro’s assignment of error is whether the city was required to apply Metro’s
19 coordinated population forecast in adopting the 2021 EOA. Stated differently, the

⁴ The legislative history indicates that the proposed amendment was not intended to change Metro’s then-existing responsibility for population forecasting for the Metro region. *See* Testimony, House Committee on Land Use, HB 2253, Mar 7, 2013 (letter from League of Oregon Cities, a member of the task force on urban growth). Accordingly, we understand the phrases “for use in maintaining and updating comprehensive plans” in ORS 195.036 (1995) and “as a basis for changes to comprehensive plans and land use regulations” in ORS 195.036 (2013) to mean the same thing.

⁵ We assume LCDC’s rule implements the statute without altering the statute’s meaning or effect. ORS 197.040(1)(b) (authorizing LCDC to “adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197.”)

1 question is whether ORS 195.036 requires Metro's coordinated population
2 forecast "to be applied by * * * [the city] * * * as a basis for" the 2021 EOA.
3 ORS 195.036; OAR 660-032-0030(1).

4 Petitioner first argues that the 2021 EOA includes a population forecast
5 and that the city violated ORS 195.036 in failing to use Metro's coordinated
6 projection.⁶ The city takes the position, and we agree, that the 2021 EOA does
7 not project or forecast population growth within the city during the 2021 EOA
8 planning period. Although the 2021 EOA refers to the city's population as of
9 2018, petitioner points to nothing in the 2021 EOA that projects the city's
10 population in 2040. Record 35.

11 Petitioner and Metro also argue that adoption of an EOA necessarily
12 requires the use of a population forecast "as a basis for" the 2021 EOA, and that
13 the city failed to comply with ORS 195.036 in failing to incorporate Metro's
14 population forecast in preparing and adopting the 2021 EOA.

15 Metro first argues that it is the entity *solely* responsible for regional
16 "employment growth forecasting," and the city may not adopt an employment
17 forecast that varies from Metro's employment forecast. Intervenor-Petitioner's
18 Brief 9-10. As part of that responsibility, Metro argues, Metro adopted the 2018
19 Regional Economic Forecast (2018 Forecast), which Metro notes, has historically

⁶ We do not understand Metro to argue that the 2021 EOA includes a population forecast.

1 been an accurate estimator of employment growth. Intervenor-Petitioner's Brief
2 13-14.

3 Metro attaches the 2018 Forecast as Appendix 1 to its brief. The 2018
4 Forecast is not in the record. Our review is generally limited to the record. ORS
5 197.835(2)(a). We may, however, take official notice of documents that (1) have
6 some relevance to the issues on appeal, and (2) constitute officially cognizable
7 law under ORS 40.090. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692
8 (2007). We may not "take official notice of facts within documents that are
9 subject to notice under [ORS 40.090], if notice of those facts is requested for an
10 adjudicative purpose (*i.e.*, to provide evidentiary support or countervailing
11 evidence with respect to an applicable approval criterion that is at issue in the
12 challenged decision)." *Id.* (citing *Friends of Deschutes County v. Deschutes*
13 *County*, 49 Or LUBA 100, 103-04 (2005)).

14 The city moves to strike Appendix 1 and arguments that rely on Appendix
15 1, arguing first that ORS 40.090(7) only authorizes official notice of ordinances
16 adopted by cities and counties. We reject that argument. LUBA has taken official
17 notice of Metro ordinances, and taking official notice of official actions of Metro
18 is consistent with the legislative policy that LUBA's decisions be made consistent
19 with sound principles of judicial review. *Homebuilders Assoc. v. Metro*, 42 Or
20 LUBA 176, 179, *aff'd* 184 Or App 663, 57 P3d 204 (2002). We have the authority
21 to take official notice of Appendix 1 as long as the material is not submitted to
22 provide evidentiary support for Metro's challenge to the city's decision.

1 The city also argues that Metro impermissibly seeks to have LUBA
2 consider the 2018 Forecast to establish adjudicative facts. Metro responds that
3 the purpose of Metro’s motion is to “‘detail the methodologies used’ in creating
4 the 2018 Forecast.” Metro’s Response to Motion to Strike 3 (citing *Warren v.*
5 *Washington County*, 76 Or LUBA 295, 304 (2017)). Although it is a close call,
6 we agree that the purpose of Metro’s request is not purely to establish that the
7 2018 Forecast was adopted, but to establish that Metro’s methodology and
8 therefore forecast is more reliable than the 2021 EOA. That is an impermissible
9 purpose.

10 One additional point bears mentioning. OAR 661-010-0046(2)(a) requires
11 that a motion to take official notice must

12 “contain a statement explaining with particularity what the material
13 sought to be noticed is intended to establish, how it is relevant to an
14 issue on appeal, and the authority for notice under ORS 40.090. *The*
15 *motion to take official notice shall be filed in writing and as a*
16 *separate document and shall not be contained within a brief or other*
17 *filing.*” (emphasis added).

18 Metro has not complied with that rule. Accordingly, because Metro seeks to have
19 LUBA consider the 2018 Forecast to establish adjudicative facts, and because
20 Metro failed to comply with OAR 661-010-0046(2)(a), we grant the city’s motion
21 to strike Appendix 1 from Metro’s brief and we will not consider the arguments
22 that cite and rely on Appendix 1.

23 Metro argues that when a city within Metro’s boundary adopts a
24 comprehensive plan amendment that includes “growth projections,” like the 2021

1 EOA's projection of job growth, that city must apply Metro's "growth forecast,"
2 including its adopted population forecast. Intervenor-Petitioner's Brief 9. Metro
3 points out that Metro adopted both population and employment growth forecasts
4 for all cities within Metro's region in 2021, and that Metro's job growth
5 projection for the city by 2045 is 17,800 new jobs, which is significantly lower
6 than the 2021 EOA's projection of 61,895 new jobs by 2040. Intervenor-
7 Petitioner's Brief 12-13. Metro argues that, contrary to the city's position,

8 "employment projections do not operate completely independently
9 from population projections. The two are directly correlated because
10 the city's estimated four-fold increase over Metro's employment
11 forecast is so large that it could not be met without a significant
12 increase in Metro's estimate of the number of people who would
13 have to move to the Metro region in the next 20 years to full those
14 62,000 jobs." *Id.* at 13.

15 The city responds that Metro fails to identify any source of authority for
16 Metro's claim that it is solely responsible for regional "growth forecasting."
17 Respondent's Brief 12. The city argues that Metro is conflating its obligation to
18 adopt a coordinated population forecast, and to forecast housing need pursuant to
19 ORS 197.296 and ORS 197.303 based on that population forecast, with its
20 *practice* of developing regional employment forecasts and forecasting job growth
21 throughout the cities in the region. Accordingly, the city argues, the city is not
22 obligated to rely on or defer to Metro's employment forecast when the city adopts
23 an EOA that is required by OAR 660-009-0015. The city also argues that nothing

1 in LCDC's rules implementing ORS 197.712 requires the city to forecast
2 population when it adopts or amends an EOA.

3 Whether the city is required to use Metro's population forecast in the 2021
4 EOA is a matter of statutory interpretation. In construing the meaning of a statute,
5 our task is to determine the legislature's intent in adopting the statute, looking at
6 the text, context, and legislative history of the statute, and resorting, if necessary,
7 to maxims of statutory construction. *PGE v. Bureau of Labor and Industries*, 317
8 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by*, *State v. Gaines*, 346 Or
9 160, 171-72, 206 P3d 1042 (2009). For the reasons set forth below, we agree with
10 the city.

11 First, nothing in the text of ORS 197.712, Goal 9, or LCDC's rules that
12 implement the statute either refer to ORS 195.036 or require use of a population
13 forecast in preparing the EOA. Context for interpreting a statute can include
14 "other provisions of the same statute and other related statutes." *PGE*, 317 Or at
15 611. Here, nothing in ORS 195.036 references a population forecast as a
16 requirement for the EOA that is required by ORS 197.712 and LCDC's rules at
17 OAR chapter 660, division 9.

18 ORS 197.303(2) shows that the legislature knows how to enact a
19 requirement to use the population forecast required by ORS 195.036. *Bridgeview*
20 *Vineyards, Inc. v. State Land Board*, 211 Or App 251, 263-64, 154 P3d 734, *rev*
21 *den*, 343 Or 690 (2007). ORS 197.303(2) provides in relevant part that "[f]or the
22 purpose of estimating housing needs, as described in ORS 197.296(3)(b), a local

1 government shall use the population projections prescribed by ORS 195.033 or
2 195.036[.]” Similarly, LCDC’s rules that apply to urban growth boundaries, at
3 OAR 660-024-0040, refer to the population forecasts required under ORS
4 195.034 and 195.036, evidencing that LCDC knows how to adopt a rule that
5 requires use of the population forecasts required by ORS 195.033 and 195.036.

6 OAR 660-009-0015 does not refer to the use of a population forecast in
7 preparing the required EOA. The closest that OAR 660-009-0015 comes is OAR
8 660-009-0015(4)(d)’s reference to “labor market factors” as a “[r]elevant
9 economic advantage[] and disadvantage[]” that the city “may” consider.
10 However, listing consideration of “labor market factors” as an economic
11 advantage or disadvantage that the city has the discretion to consider is a far cry
12 from constituting a mandate to use Metro’s coordinated population forecast as a
13 basis for preparing an EOA.⁷ Moreover, Metro does not point to, and we cannot

⁷ We recognize here the potential conflict between the city’s discretion in adopting an EOA that is required by the Goal 9 rules, that could result in a projected need for additional employment land, and Metro’s sole authority to add land to the Metro UGB. That conflict is not resolved by our resolution of these assignments of error. However, although no party cites it, we note that OAR 660-024-0040(5) provides in relevant part:

“Except for a metropolitan service district described in ORS 197.015(13), the determination of 20-year employment land need for an urban area must comply with applicable requirements of Goal 9 and OAR chapter 660, division 9, and must include a determination of the need for a short-term supply of land for employment uses consistent with OAR 660-009-0025. *Employment land need may be based on an estimate of job growth over the*

1 locate, any source of authority for Metro to require the city to adhere to Metro's
2 regional jobs forecast.⁸

3 Petitioner's first assignment of error is denied. Metro's assignment of error
4 is denied.

5 **D. The 2021 EOA Is Supported by an Adequate Factual Base**

6 In its second assignment of error, petitioner argues that the 2021 EOA is
7 not supported by an adequate factual base, as required by Statewide Planning
8 Goal 2 (Land Use Planning).⁹ Goal 2 requires that a decision that amends a
9 comprehensive plan or land use regulation be supported by an adequate factual
10 base. An "adequate factual base" is equivalent to the requirement that a quasi-
11 judicial decision be supported by substantial evidence in the whole record.
12 *Restore Oregon v. City of Portland*, 80 Or LUBA 158, 162 (2019), *aff'd*, 301 Or
13 App 769, 458 P3d 703 (2020) (citing *1000 Friends of Oregon v. City of North*
14 *Plains*, 27 Or LUBA 372, 378, *aff'd*, 130 Or App 406, 882 P2d 1130 (1994)).
15 Substantial evidence exists to support a finding of fact when the record, viewed

planning period; [a] local government must provide a reasonable justification for the job growth estimate but Goal 14 does not require that job growth estimates necessarily be proportional to population growth." (Emphasis added).

⁸ Neither petitioner nor Metro argue that the Metro Regional Functional Plan or any other plan adopted by Metro requires the city to use Metro's population forecast in preparing an EOA.

⁹ Goal 2 requires, in part, that land use planning "assure an adequate factual base" for all "decisions and actions related to [the] use of land."

1 as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood*
2 *River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*,
3 305 Or 346, 351-52, 752 P2d 262 (1988).” We first describe the 2021 EOA’s
4 methodology and data before turning to petitioner’s subassignments of error.

5 **1. 2021 EOA’s Methodology**

6 The city based the 2021 EOA in part on employment data from the Oregon
7 Employment Department from 2007 to 2018 and from 2004 to 2019, and in part
8 on national, state, and local employment trends, input from local business leaders
9 and on the city’s industry targets.¹⁰ Record 101-02. The 2021 EOA explains that
10 the time period from 2007 to 2018 reflects one full economic cycle, while the
11 time period from 2004 to 2019 includes two down cycles and one up cycle.
12 Record 127-28.

13 The 2021 EOA forecasts job growth by assuming (1) negative growth for
14 industry sectors for which employment declined between 2007 to 2018; (2) linear
15 growth (Linear Growth Rate) for industry sectors that added the same number of
16 jobs per year on average during the 2007 to 2018 time period; (3) a hybrid growth
17 rate between a Linear Growth Rate and a Compound Average Growth Rate
18 (Hybrid Growth Rate), where the data on job growth for some sectors during both
19 time frames was inconsistent because an industry sector experienced both straight

¹⁰ These are “computers and electronics,” “software and information technology,” “advanced manufacturing,” and “bioscience and medical devices.” Record 66.

1 line and exponential growth during the two time frames; and (4) a compound
2 average growth rate of 3.5 percent (CAGR) for certain industry sectors that
3 experienced exponential growth during the 2007 to 2018 time period.¹¹ Record
4 125-42. In other words, the 2021 EOA assigned different growth rates to different
5 employment sectors, and projected jobs in 2040 based on the different growth
6 rates applied to different industry sectors. The 2021 EOA and the city's decision
7 sometimes refer to this as the "Scenario C Growth Model."

¹¹ The 2021 EOA explains:

"This Scenario C Hybrid Growth model occurs via a 4-phase scenario selector or sector *toggle* approach described as follows:

"0 – is applied to sectors for which employment decline was experienced from 2007-18. Rather than forecasting continued job loss, these sectors are assumed to experience no net change (None) in employment going forward to 2040.

"1 – is applied to sectors for which Scenario A straight-line (Linear) results are assumed as most applicable to the Scenario C hybrid, comprised of sectors not part of Hillsboro cluster industry targets.

"2 – is applied to sectors that are likely to be strongly influenced by exponential growth, though not expected to fully experience continued exponential growth going forward. These sectors are assigned mid-point (Mid) results by averaging outputs of Scenarios A and B.

"3 – is applied to sectors that are most expected to experience continued exponential (Exp) growth going forward, particularly target industry sectors." Record 107 (emphasis in original, boldface omitted).

2. First Subassignment of Error

In its first subassignment of error under the second assignment of error, petitioner points out that the 2021 EOA used different growth rates for different sectors that experienced similar growth patterns, which showed countervailing trends during the two time periods, and for that reason the 2021 EOA is not supported by an adequate factual base. Specifically, petitioner points to the difference in growth rates assigned to sectors that experienced similar growth patterns during the two time periods from 2004 to 2019 and from 2007 to 2018. First, petitioner notes that the Finance and Insurance sector and the Real Estate sector both experienced similar growth patterns, but the city applied the Hybrid Growth Rate to the Finance and Insurance sector, and the CAGR or exponential rate to the Real Estate sector. *See* Petition for Review 28-29. Similarly, petitioner notes that the Wholesale Trade sector and the Construction sector experienced similar growth patterns, but the city applied the Linear Growth Rate to the Wholesale Trade sector and the CAGR to the Construction sector. Petitioner argues that where those sectors experienced similar growth trends during the two time periods, application of different growth rates is not supported by an adequate factual base.

The city first responds that the 2021 EOA and the technical appendices explain how different sectors were assigned different growth rates, and explain that the city assigned more weight to the 2007 to 2018 time period because it reflects one full economic cycle, while the data from 2004 to 2019 includes two

1 down cycles and one up cycle, skewing that data towards a conservative growth
2 rate. Record 128. The city also responds that the 2021 EOA considered the size
3 of the industry sector in determining which growth rate to apply.¹² Record 127,
4 130-32, 136. The 2021 EOA explains that because the real estate sector is a
5 “relatively small sector,” even a small number of additional jobs will equate to a
6 much higher growth rate, and that applying the CAGR for the Real Estate sector
7 amounts to only 40 jobs more than the Linear Growth Rate would produce over
8 the planning period. Record 136. For the Construction sector, the 2021 EOA
9 explains that the more recent growth patterns in that sector support applying the
10 CAGR, while for the Wholesale Trade sector the recent growth patterns indicate
11 stagnant growth, and the 2021 EOA therefore applied the Linear Growth Rate to
12 that sector. Record 130, 132.

13 The 2021 EOA and the city’s detailed findings explain the basis for
14 assigning different growth rates to different industry sectors for each industry,
15 and petitioner does not reference any of those findings or challenge any of the
16 explanations. Record 32 - 40, 200-51. We agree with the city that the 2021 EOA
17 is supported by an adequate factual base where the record includes evidence
18 supporting the city’s use of different growth rates for different sectors, and
19 detailed explanations for the use of different growth rates.

¹² The record identifies other jurisdictions within the Metro boundary that used a CAGR in their adopted EOAs, including Portland and Beaverton, and that Metro used a CAGR in its 2009 growth report. Record 250-51.

Petitioner also argues that the 2021 EOA impermissibly relies on subjective, non-quantifiable considerations such as input from “those knowledgeable about [the city’s] key employment sectors[.]” Record 56. However, we see nothing in the rule that prevents the city from seeking and considering input from local business leaders. OAR 660-009-0010(5) supports this, and provides that

“The effort necessary to comply with OAR 660-009-0015 through 660-009-0030 will vary depending upon the size of the jurisdiction, the detail of previous economic development planning efforts, and the extent of new information on national, state, regional, county, and local economic trends. A jurisdiction’s planning effort is adequate if it uses the best available or readily collectable information to respond to the requirements of this division.”

The first subassignment of error is denied.

3. Second Subassignment of Error

Petitioner’s second subassignment of error challenges the city’s application of OAR 660-009-0015(4), which provides:

“Assessment of Community Economic Development Potential. The economic opportunities analysis must estimate the types and amounts of industrial and other employment uses likely to occur in the planning area. The estimate must be based on information generated in response to sections (1) to (3) of this rule and must consider the planning area’s economic advantages and disadvantages. Relevant economic advantages and disadvantages to be considered *may include but are not limited to*:

“(a) Location, size and buying power of markets;

“(b) Availability of transportation facilities for access and freight mobility;

- 1 “(c) Public facilities and public services;
- 2 “(d) Labor market factors;
- 3 “(e) Access to suppliers and utilities;
- 4 “(f) Necessary support services;
- 5 “(g) Limits on development due to federal and state environmental
- 6 protection laws; and
- 7 “(h) Educational and technical training programs.” (Emphasis
- 8 added).

9 In its second subassignment of error, petitioner argues that the 2021 EOA’s
10 use of a CAGR or exponential rate for some sectors is not supported by an
11 adequate factual base, where there is evidence in the record that the labor market,
12 housing, and transportation facilities in the region are not adequate to support the
13 projected number of jobs. Petitioner argues that “Exponential [CAGR]
14 employment growth would need to be matched with exponential growth in the
15 factors of OAR 660-009-0015(4) such as skilled workforce, housing, public
16 facilities, and transportation infrastructure capacity.” Petition for Review 33.
17 Petitioner argues that the 2021 EOA does not demonstrate where the labor force
18 for the projected 61,895 new jobs will come from, or how existing transportation
19 facilities can accommodate the new employees, where the evidence in the record
20 is that approximately 80 percent of people who work in the city commute from
21 other locations in the Metro boundary and outside the Metro boundary. Petitioner
22 points out that evidence in the record is that Metro has projected significantly less

1 growth in the city and that existing transportation facilities cannot support the
2 city's job growth estimates without significant increases in capacity.

3 The city responds that OAR 660-009-0015(4) does not require the city to
4 find solutions to "disadvantages" that are described in an EOA, but rather
5 requires the city to describe the relevant economic advantages and disadvantages.
6 The city argues that OAR 660-009-0020 requires the city to amend the
7 comprehensive plan to include policies that implement the 2021 EOA, and the
8 2021 EOA includes suggested implementation policies to address the
9 disadvantages. More importantly, the city responds, the 2021 EOA includes a
10 lengthy and detailed discussion of the inadequacy of the transportation system
11 and challenges presented by the lack of skilled workforce, which petitioner does
12 not address. Respondent's Brief 6, 34 (citing Record 64-65, 87, 91, 93, 121-24,
13 147, 153-54, 158, and 159).

14 We agree with the city. The 2021 EOA addresses the factors in OAR 660-
15 009-0015(4) in detail at Record 64-65 and 151-60. The 2021 EOA satisfies the
16 requirements in the rule, particularly where the language of OAR 660-009-
17 0015(4) is hortatory, and the list of factors is non-exclusive. The 2021 EOA is
18 supported by an adequate factual base, even where Metro's lower job growth
19 projections are included in the record. The city is entitled to choose between
20 conflicting evidence as long as the evidence relied upon, viewed in light of the
21 whole record, is substantial. *Dodd*, 317 Or at 179. As explained in our resolution
22 of the first assignment of error, petitioner and Metro have not identified any

1 statutory or other basis to require the city to rely on Metro's employment
2 projections.

3 The second subassignment of error is denied.

4 **4. Third Subassignment**

5 OAR 660-009-0015(3) requires an EOA to "include an inventory of vacant
6 and developed lands within the planning area designated for industrial or other
7 employment use." As explained above, the 2021 EOA includes such an
8 inventory, which we refer to as a Buildable Lands Inventory (BLI).

9 The definition of "vacant land" at OAR 660-009-0005(14) includes (1) any
10 lot or parcel larger than one-half acre that is completely undeveloped, and (2) any
11 lot or parcel larger than five acres with at least four and one-half acres
12 undeveloped. "Developed lands" is defined as "non-vacant land that is likely to
13 be redeveloped during the planning period." OAR 660-009-0005(1).

14 The BLI identified approximately 8,900 acres of land designated for
15 industrial or other employment use, with 5,800 acres developed and 3,090 acres
16 as vacant. Record 223. The BLI then identified 1,314 acres of that vacant land as
17 potentially developable during the planning period. *Id.* The BLI identified as
18 "vacant lands" lots and parcels that are entirely undeveloped *and* the vacant
19 portions of all improved lots and parcels regardless of parcel size. Record 166.

20 In its third subassignment of error under the second assignment of error,
21 petitioner argues that the BLI failed to evaluate the redevelopment potential of
22 "developed lands" consistent with the rule's definition because the city did not

1 evaluate whether the developed portion of lots and parcels is “likely to be
2 redeveloped.” Petition for Review 38. Rather, petitioner argues, the city
3 impermissibly only evaluated the vacant portions of already developed lots and
4 parcels for future development, instead of evaluating whether already developed
5 portions of lots and parcels are “likely to be redeveloped” by 2040.

6 The city responds that the BLI properly assumed that all developed land
7 will redevelop if it contains any bare land. Respondent’s Brief 41. However, the
8 BLI did not evaluate the likelihood of redevelopment of the 5,800 acres of land
9 it identified as developed land, but only evaluated the development potential of
10 lots and parcels and portions of lots and parcels currently without improvements
11 on them. We do not understand the BLI to have evaluated whether the developed
12 portions of lots and parcels are likely to redevelop during the planning period.
13 Accordingly, we agree with petitioner that that part of the 2021 EOA, of which
14 the BLI is a part, is not supported by an adequate factual base.

15 The third subassignment of error is sustained.

16 The second assignment of error is sustained, in part.

17 **THIRD ASSIGNMENT OF ERROR**

18 The city processed the adoption of the 2021 EOA as a Comprehensive Plan
19 Minor Text Amendment as described in Hillsboro Community Development
20 Code (CDC) 12.80.164(A). In its third assignment of error, petitioner argues that
21 the city improperly construed CDC 12.80.164(A) when it determined that the

1 adoption of the 2021 EOA was a Minor Comprehensive Plan Amendment.¹³
2 Petition for Review 40 (citing ORS 197.835(9)(a)(D)). Petitioner also argues that
3 the adoption of the 2021 EOA was a Comprehensive Plan Major Amendment and
4 that the city failed to consider the applicable criteria in CDC 12.80.166(F).¹⁴
5 Petition for Review 46.

¹³ Both types of amendments require a Type IV proceeding. CDC 12.80.164(C); CDC 12.80.166(E).

¹⁴ CDC 12.80.166(F), “Approval Criteria,” provides:

“To approve a Comprehensive Plan Major Amendment, the Review Authority shall make findings of fact, based on evidence provided, that the following criteria are satisfied:

- “1. The amendment or revision is in the City’s best interest.
- “2. A factual basis has been documented, establishing the public need for the amendment.
- “3. All applicable provisions of the adopted Public Communications and Engagement Plan have been satisfied pursuant to Subsection 12.70.062.C.
- “4. Except for project timing and financing provisions, the Public Facility Plan or Community Plan is consistent with Statewide Planning Goals and with the Comprehensive Plan.
- “5. The Public Facility Plan complies with applicable State statutes and regulations that regulate those portions of a public facility plan that are required to be included in the Comprehensive Plan.
- “6. The proposed changes reflect the factual basis established in the adopted Comprehensive Plan’s technical framework or

1 Petitioner also argues that the city's failure to follow the procedures in CDC
2 12.80.166(E) that apply to a Comprehensive Plan Major Amendment was a
3 procedural error.¹⁵ Petition for Review 46-47 (citing ORS 197.835(9)(a)(B)).

4 **A. CDC 12.80.166(E) Procedures**

5 The city first responds that petitioner failed to raise the issue raised in the
6 third assignment of error during the proceedings below, and having failed to
7 object, may not now assign error to the city's procedure. *See* ORS 197.835(3)
8 ("Issues shall be limited to those raised by any participant before the local
9 hearings body as provided by ORS 197.195 or 197.797, whichever is
10 applicable."). However, the city's response does not acknowledge that the third
11 assignment of error includes an argument that the city's decision improperly
12 construed CDC 12.80.166(F) by failing to apply that criteria. Accordingly,
13 because the "raise it or waive it" rule does not generally apply to issues raised in
14 appeals challenging legislative decisions, we reject the city's argument that the

implementing plans as they are updated and amended over
time.

"7. The proposed changes support the intent of applicable goals
and policies in the Comprehensive Plan.

"8. The proposed changes are equally or more supportive of the
Comprehensive Plan and its components taken together as a
whole than the existing language or designation."

¹⁵ CDC 12.80.166(E) contains the procedures for a Comprehensive Plan
Major Amendment.

1 issue of the applicability of that criteria is waived. However, as explained below,
2 we agree with the city that the alleged procedural error is waived.

3 LUBA has long held that where a party has the opportunity to object to a
4 procedural error before the local government, but fails to do so, that error cannot
5 be assigned as grounds for reversal or remand of the resulting decision. *Torgeson*
6 *v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Dobaj v. Beaverton*, 1 Or LUBA
7 237, 241 (1980). We have affirmed that the requirement to object to a procedural
8 error is present in a process that culminates in a legislative decision. *McCaffree*
9 *v. City of Coos Bay*, 79 Or LUBA 512, 517-18, *aff'd*, 299 Or App 521, 449 P3d
10 594 (2019), *rev den* 366 Or 205 (2020); *Dobson v. City of Newport*, 47 Or LUBA
11 267, 277 (2004) (citing ORS 197.835(9)(a)(B)). This obligation to object to
12 procedural errors overlaps with, but exists independently of, ORS 197.797(1) and
13 197.835(3). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393
14 (2002); *Simmons v. Marion County*, 22 Or LUBA 759, 774 n 8 (1992). While the
15 “raise it or waive it” requirement at ORS 197.797(1) has a similar purpose to the
16 requirement that a party with an opportunity to object to a procedural error must
17 do so in order to seek remand based on that error, the two requirements share no
18 antecedents and otherwise have no relationship with each other. *See Murphy*
19 *Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312, 317 n 6 (1993)
20 (the “raise it or waive it” provisions of ORS 197.797(1) and 197.835(3) do not
21 supersede the requirement that parties raise objections to procedural errors when
22 it is possible to do so). Petitioner does not identify any place in the record where

1 the city's failure to follow the procedure in CDC 12.80.166(E) was raised below,
2 and accordingly petitioner may not now raise it for the first time at LUBA.

3 **B. CDC 12.80.166(F) Criteria**

4 The remaining portion of petitioner's assignment of error is that the city
5 improperly failed to apply the criteria in CDC 12.80.166(F). Petition for Review
6 46. Petitioner argues that the city improperly construed CDC 12.80.164(A) in
7 concluding that adoption of the 2021 EOA into the city's comprehensive plan
8 was a Comprehensive Plan Minor Text Amendment, and that the city's adoption
9 of the 2021 EOA qualifies as a Comprehensive Plan Major Amendment because
10 it provides for a "significant change" to the city's comprehensive plan.

11 CDC 12.80.164(A) provides:

12 "A Comprehensive Plan Minor Text Amendment application
13 provides a process to consider small-scale legislative amendments
14 to the text of the Comprehensive Plan whenever the evidence of the
15 need for such a revision is documented, and the amendment does
16 not have significant effect beyond an immediate site or area. Such
17 amendments may be necessary to reflect changing community
18 conditions, needs, and desires; to fulfill regional obligations; or to
19 address changes in State law. A Comprehensive Plan Minor Text
20 Amendment is distinguished from a Comprehensive Plan Major
21 Amendment by the scale and scope of the amendment and
22 geography affected."

23 CDC 12.80.166 provides in relevant part:

24 "A. Purpose. A Comprehensive Plan Major Amendment
25 application provides for a significant change or revision to the
26 Comprehensive Plan text or map and is initiated by the City
27 Council or Planning Commission.

1 “B. Major Amendment-Significant Change. The City Council or
2 Planning Commission are authorized to initiate a
3 Comprehensive Plan Major Amendment that proposes a
4 significant change to the Plan. A ‘significant change’ is one
5 that amends or refines both the Plan text and map, affects a
6 large geographic area and is likely to have significant
7 environmental, energy, economic and social consequences. A
8 significant change includes but is not limited to Plan
9 amendments that incorporate community plans as part of the
10 Comprehensive Plan or incorporate portions of a public
11 facility plan as part of the Comprehensive Plan in accordance
12 with State statute and regulations implementing Statewide
13 Planning Goal 11.” (Underscoring omitted.)

14 The respondent’s brief includes an interpretation of CDC 12.80.164(A)
15 and CDC 12.80.166(A) and (B) that is not included in the city council’s findings,
16 and notes that the city council could have considered petitioner’s argument and
17 adopted an express interpretation of the CDC if petitioner had raised the issue
18 below. Respondent’s Brief 49-50. Although ORS 197.829(2) provides that we
19 may interpret a provision where the local government fails to do so, we decline
20 to do so here. In the circumstances presented here, because we sustain the third
21 subassignment of error under the second assignment of error, remand is required
22 for the city to evaluate the likelihood of redevelopment of developed lands. The
23 city may interpret the CDC in the first instance on remand. *Green v. Douglas*
24 *County*, 245 Or App 430, 441-42, 263 P3d 355 (2011) (where the decision must
25 be remanded in any event for further proceedings, the better course is to allow
26 the governing body to supply the interpretation on remand).

27 We do not reach the third assignment of error.

1 The city's decision is remanded.