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

FRIENDS OF DESCHUTES COUNTY and SISTERS  
FOREST PLANNING COMMITTEE,  
*Petitioners,*

vs.

DESCHUTES COUNTY,  
*Respondent,*

and

CITY OF BEND, CITY OF REDMOND  
and CITY OF SISTERS,  
*Intervenors-Respondent.*

LUBA No. 2004-160

FINAL OPINION  
AND ORDER

MAR28'05 PM12:10 LUBA

RECEIVED

MAR 29 2005

BEERY ELSNER & HAMMOND

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioners.

Laurie E. Craghead, Assistant County Counsel, Bend, filed a response brief and argued on behalf of respondent.

Peter M. Schannauer, Bend, filed a response brief and argued on behalf of intervenor-respondent City of Bend. With him on the brief was Forbes and Schannauer. Spencer Q. Parsons, Portland, filed a response brief and argued on behalf of intervenor-respondent City of Redmond. With him on the brief was Beery, Elsner and Hammond LLP. Steve Bryant, Redmond, represented intervenor-respondent City of Sisters.

BASSHAM, Board Member; DAVIES, Board Member, participated in the decision; HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED

03/28/2005

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

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county comprehensive plan amendment that adopts an updated  
4 population forecast.

5 **FACTS**

6 ORS 195.036 requires the county to establish and maintain a population forecast for  
7 the areas within its boundaries. The county first adopted a population forecast in 1998.  
8 During the late 1990s and early 2000s, the county experienced an above-anticipated  
9 population growth. Due to the increased growth, the county developed a process to update  
10 the 1998 population forecast. The county and intervenors retained consultants and developed  
11 a new population forecast for the county and incorporated cities within the county.  
12 Petitioners challenged this forecast before the county, arguing that the forecasts for the  
13 county, the City of Bend, and the City of Redmond were too high. The county adopted the  
14 population forecast as an amendment to its comprehensive plan over petitioners' objections.  
15 This appeal followed.

16 **MOTIONS TO STRIKE**

17 **A. The County's Motion to Strike**

18 The county moves to strike the first four paragraphs of petitioners' summary of  
19 arguments. According to the county, the paragraphs are not a summary of the arguments in  
20 the assignments of error, but rather are arguments in addition to the assignments of error.  
21 Further, the county argues, the four paragraphs consist primarily of policy and political  
22 arguments that are irrelevant to LUBA's review.

23 We may consider arguments in the petition for review that are not framed as  
24 assignments of error, to the extent we are able to discern them. *Freedom v. City of Ashland*,  
25 37 Or LUBA 123, 124-25 (1999). The fact that the summary of arguments includes  
26 arguments in addition to those stated in the assignments of error is not in itself a basis to

1 ignore or strike those additional arguments. Nor do we agree with the county that it is  
2 impermissible to include "policy and political arguments" within the petition for review.  
3 However, if such arguments have no bearing on some basis for reversal or remand under our  
4 scope of review, then they assist neither the petitioner nor our review.

5 We tend to agree with the county that at least some of the arguments in the challenged  
6 paragraphs have little bearing on any asserted basis for reversal or remand. While it is  
7 appropriate for the county to point that out to us, we do not believe that filing a motion to  
8 strike the challenged paragraphs is an appropriate vehicle to do so. Moving to strike an  
9 argument that a party believes to be irrelevant to any basis for reversal or remand (as opposed  
10 to simply responding that the argument is irrelevant) requires that the Board explicitly  
11 address the motion, and may prompt a reply brief or a response from other parties, resulting  
12 in a waste of time and resources.

13 The county's motion to strike is denied.

14 **B. Petitioners' Motion to Strike**

15 ORS 197.835(2)(a) confines our review to the local record, absent circumstances not  
16 present here. Petitioners move to strike three appendices from the City of Redmond's  
17 response brief, on the ground that the appendices include documents that are not in the  
18 record. Those appendices include (1) a table of city annexations from 1980 to 2002, (2) an  
19 unsigned city resolution from 2005, and (3) population estimates from Portland State  
20 University (PSU).

21 After oral argument, the City of Redmond provided the actual city resolutions for the  
22 annexations that are summarized in Appendix 1. The city asks that we take official notice of  
23 these documents under Oregon Evidence Code (OEC) 202.<sup>1</sup>

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<sup>1</sup> OEC 202(7) provides that law subject to official notice includes:

"An ordinance, comprehensive plan or enactment of any county or incorporated city in this  
state, or a right derived therefrom \* \* \*"

1 The table summarizing the city annexations in Appendix 1 and the PSU population  
2 estimates in Appendix 3 clearly do not fall within materials subject to official notice, and we  
3 do not consider them or arguments based upon them.

4 The resolution in Appendix 2 and the resolutions submitted by the city after oral  
5 argument are potentially the types of law subject to judicial notice under OEC 202.  
6 However, we may only take notice of the resolutions in order to recognize the appropriate  
7 applicable laws. LUBA does not have authority to take official notice of adjudicative facts.  
8 *See Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995) (a resolution  
9 subject to official notice does not thereby become part of the local record which may provide  
10 evidentiary support for the challenged decision). As far as we can tell, the only reason for  
11 which the city requests we take official notice of the resolutions submitted after oral  
12 argument is so that we may consider certain facts included in documents attached to those  
13 resolutions (*i.e.*, the number of persons residing in the annexed areas) as evidentiary support  
14 for the challenged decision. We lack authority to do so. With that understanding, we grant  
15 the city's request to take official notice of the resolution in Appendix 2 and the resolutions  
16 submitted after oral argument.

17 Petitioners' motion to strike is granted, in part.

#### 18 **FIRST ASSIGNMENT OF ERROR**

19 Petitioners argue that the county violated Statewide Planning Goal 2 (Land Use  
20 Planning) by failing to adequately assess and address limitations on growth due to limitations  
21 on water and restrictions on its use.

##### 22 **A. First and Third Subassignments of Error**

23 In its first and third subassignments of error, petitioners argue that the county's  
24 population forecasts violate Goal 2 because they are not supported by an adequate factual  
25 base. In order to meet the Goal 2 adequate factual base, the county's legislative decision  
26 must be supported by substantial evidence. *DLCD v. Douglas County*, 37 Or LUBA 129, 132

1 (1999) (citing *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78,  
2 *aff'd* 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence is evidence a reasonable  
3 person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*,  
4 298 Or 104, 119, 690 P2d 475 (1984). Where LUBA concludes that a reasonable person  
5 could reach the decision made by the local government, in view of all the evidence in the  
6 record, the choice between conflicting evidence belongs to the local government. *Younger v.*  
7 *City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). That a petitioner may disagree with  
8 the local government's conclusions provides no basis for reversal or remand. *McGowan v.*  
9 *City of Eugene*, 24 Or LUBA 540, 546 (1993).

10 Petitioners argue that in its population projections the county failed to take into  
11 account the limitations on water availability. According to petitioners, the large increases in  
12 projected growth for the cities of Bend and Redmond are unsupportable when the cities  
13 themselves acknowledge that there are insufficient water rights to accommodate such  
14 development. For example, petitioners cite to a City of Bend statement that "the city's  
15 existing water rights will be insufficient to meet the projected demand in the next six to ten  
16 years." Record 1017. The county, however, found that sufficient water would be available.

17 The county's population forecasts are based on several assumptions, including an  
18 assumption that sufficient water will be available to serve the projected growth. The county  
19 relies upon the testimony of a City of Bend water specialist and 26 exhibits including reports  
20 and studies from governmental agencies regarding water availability and use. The testimony  
21 relied upon by the county states that the regional aquifer has a massive surplus of  
22 groundwater and that the needs of domestic and municipal users are dwarfed by the massive  
23 supply. Record 299. In addition, the county found that it was reasonable to assume that the  
24 various local governments would be able to acquire the needed water rights. For example,  
25 the City of Bend has implemented a program to acquire additional water rights along with  
26 state directed efforts for groundwater acquisition programs. Record 301, 367.

1           While petitioners cite to substantial evidence that the county's forecasts were  
2 optimistic in their view of future water availability, that is not the question before us. A  
3 petitioners' burden is not to show that the decision it advocates is supported by substantial  
4 evidence, but to show that no reasonable person could reach the decision made by the local  
5 government. When there is substantial evidence to support either resolution of the disputed  
6 facts, the decision belongs to the local government. Petitioners have not shown that no  
7 reasonable person could reach the decision made by the county based on the views of the  
8 experts it chose to believe.

9           The first and third subassignments of error are denied:

10           **B.       Second Subassignment of Error**

11           Petitioners argue that the county failed to consider Goals 3 (Agricultural Lands) and 5  
12 (Natural Resources, Scenic and Historic Areas, and Open Spaces), and that its population  
13 projections are inconsistent with those goals. According to petitioners, the Goal 3, Planning  
14 Guideline A(2) requires the county to consider the "carrying capacity" of the water resources  
15 in the planning area, and to ensure that development actions do not exceed the carrying  
16 capacity of such resources.<sup>2</sup> Similarly, petitioners argue, Goal 5, Implementation Guideline  
17 B(2) requires that the "physical limitations of the land should be used as the basis for  
18 determining the quantity, quality, location, rate and type of growth in the planning area."<sup>3</sup>  
19 Petitioners repeat their arguments that water is or will be in short supply, and argue that the

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<sup>2</sup> Goal 3, Planning Guideline A(2) states:

"Plans providing for the preservation and maintenance of farm land for farm use, should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided by for such plans should not exceed the carrying capacity of such resources."

<sup>3</sup> Goal 5, Implementation Guideline B(2) states:

"The conservation of both renewable and non-renewable natural resources and physical limitations of the land should be used as the basis for determining the quantity, quality, location, rate and type of growth in the planning area."

1 county must consider those limitations in adopting its population projections. For example,  
2 petitioners express concern that cities will deal with water shortage issues by acquiring  
3 irrigation water rights or groundwater rights, to the detriment of agriculture and Goal 5-  
4 protected in-stream flows.

5 We note, initially, that the guidelines to the goals are advisory in nature.  
6 ORS 197.015(9); *Downtown Community Assoc. v. City of Portland*, 80 Or App 336, 339-40,  
7 722 P2d 1258 (1986). That point aside, we do not believe that the guidelines petitioners cite  
8 to are applicable to the county's decision to adopt population projections.

9 As we stated in *1000 Friends of Oregon v. Washington County*, 17 Or LUBA 671,  
10 683 (1989):

11 "Although it is clear that amendments to acknowledged comprehensive plans  
12 must comply with the goals, it is also clear that not *all* goal provisions impose  
13 standards affecting *all* land use decisions. Stated differently, some plan  
14 amendments implicate many goal requirements and therefore may require  
15 extensive goal findings, while other plan amendments may implicate few if  
16 any goal requirements. The obligation to adopt findings demonstrating goal  
17 compliance depends on (1) the subject matter of the plan amendment, and (2)  
18 the nature or legal effect of the plan amendment or the particular portion of the  
19 plan amendment at issue." (Emphasis in original, footnotes omitted.)

20 The question therefore is whether Goals 3 or 5 apply to the challenged decision. With  
21 respect to Goal 3, the population forecasts do not preserve or develop land of any kind, or  
22 farmland in particular. The population forecasts do not change any zoning designations or  
23 allow any potential development that would differ from what is already allowed. Petitioners  
24 cite administrative rules and county comprehensive plan policies that call for the protection  
25 of farmland, but petitioners do not adequately explain how the challenged decision violates  
26 those provisions. While the population forecasts may eventually be used to provide a partial  
27 basis for a local government to take future actions that might have an effect upon farmland,  
28 the forecasts themselves do not do so. See *Tipperman v. Union County*, 44 Or LUBA 98, 106  
29 (2003) (population projections do not trigger application of the Goal 12 rule, even if the  
30 projections may set the stage for later decisions that will trigger the rule). We disagree with


1 petitioners that the county must apply Goal 3, Guideline A(2) to the challenged population  
2 projection.

3 With respect to Goal 5, Guideline B(2), petitioners argue that in adopting the  
4 population forecasts the county must take into account the "physical limitations of the land"  
5 in determining the "rate \* \* \* of growth in the planning area." The population forecasts,  
6 however, do not *determine* the rate of growth in the area. The population forecasts are simply  
7 a prediction of what the growth in the area will be, in order to assist local governments in  
8 planning for that predicted growth. Petitioners correctly point out that local governments use  
9 population projections as a basis to expand urban growth boundaries and adopt or amend  
10 comprehensive plan provisions and land use regulations to accommodate projected growth.  
11 Petitioners may also be correct that there can be a self-fulfilling aspect to such population  
12 projections: local government actions taken in reliance on population projections may  
13 actually foster rather than anticipate population growth that might not otherwise occur, or  
14 occur at the projected rate. Nonetheless, assuming that Goal 5, Guideline B(2) is an approval  
15 criterion at all, we believe that the appropriate point to apply it is at the time local  
16 governments adopt planning actions intended to accommodate estimated growth, not at the  
17 time the county adopts a coordinated regional population forecast. *See Citizens Against*  
18 *Irresponsible Growth v. Metro*, 179 Or App 12, 19-20 and n 8, 38 P3d 956 (2002) (the Goal  
19 14 conversion factors are best addressed when local governments convert urbanizable land to  
20 urban land, not when the local government amends the UGB to bring rural land into the urban  
21 area).

22 The second subassignment of error is denied.

23 The first assignment of error is denied.

24 **SECOND ASSIGNMENT OF ERROR**

25 Petitioners argue that the population forecast figures for the City of Redmond violate  
26 Goal 2 because they are not supported by an adequate factual base. 



1           **A. First Subassignment of Error**

2           Petitioners argue that the growth rate for the City of Redmond improperly takes into  
3 account population increases from city annexations over the period 1980 to 2002, in  
4 calculating the estimated growth rate used to estimate population growth for 2002 to 2020.  
5 According to petitioners, the city determined that it grew at an average annual rate of 4.42  
6 percent from 1980 to 2002. However, petitioners argue, an indeterminate amount of that  
7 population increase was due to county residents annexed into the city. Petitioners argue that  
8 the county erred in including any population increase due to annexations. Petitioners also  
9 dispute the county's finding that any population increase due to annexations was minimal.<sup>4</sup>  
10 Petitioners note that at the time of the county's decision the city possessed records on  
11 annexations only for the period 1994-2002, and that there is no evidence in the record  
12 regarding how much annexations prior to that date contributed to the city's population  
13 increase.

14           With some caveats discussed below, we disagree with petitioners that it is  
15 impermissible for a local government to include population growth from annexations in  
16 calculating the historic rate of growth, and hence in estimating its future rate of growth. As  
17 we noted in *Tipperman*, there is no statutorily-prescribed methodology for projecting future  
18 populations, and counties are free to adopt different methodologies, even for different areas  
19 of the county, as long as the resulting projections are supported by an adequate factual base.  
20 44 Or LUBA at 105. Nothing cited to us requires the county to either include or exclude  
21 annexations in calculating the historic rate of growth for a city.

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<sup>4</sup> The county's findings state, in relevant part:

"While annexations are included in this growth rate, they have little effect on the rate: annexations accounted for about 2% of total population growth between 1980 and 2002 (3% between 1994 and 2002 - the period for which the City has records). In short, the effect of annexations on the average annual growth rate is less than 0.1%." Record 60.

1           One potential caveat to including annexations in calculating city growth is to ensure  
2 that annexations are correspondingly taken into account in calculating the historic growth rate  
3 for rural and unincorporated lands outside cities under county jurisdiction and in projecting  
4 the future growth rate of rural and unincorporated lands. For example, if a city takes  
5 annexations into account in calculating the historic growth rate, it would seem necessary for  
6 the county to reduce its count of the rural and unincorporated population accordingly, as  
7 otherwise there is the potential for double-counting.<sup>5</sup> Similarly, if a city assumes future  
8 population increase from future annexations, it would seem necessary in adopting a  
9 coordinated population forecast under ORS 195.036 for the county to use similar  
10 assumptions in estimating the future rural or unincorporated population.

11           In the present case, the county assures us, and petitioners do not dispute, that the  
12 county took annexations into account in estimating the historic population growth of rural  
13 and unincorporated lands. It is not clear to us what the city or county assumed with respect to  
14 future annexations. It might be that the pace and extent of historic annexations by the City of  
15 Redmond will not be replicated in the future, for whatever reason, and thus population  
16 increases due to historic annexations are not accurate predictors of population increases from  
17 future annexations, for purposes of estimating the future average annual growth rate.  
18 However, petitioners do not argue that such is the case, or cite any reason to believe that the  
19 historic course of annexations to the City of Redmond is not a reasonably accurate predictor  
20 of future annexations.

21           Even if petitioners had cited such a reason, the county found that the population  
22 contribution from annexed lands is essentially *de minimis*, less than one percent, in  
23 determining the historic rate of growth. Given the inherent imprecision of predicting future

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<sup>5</sup> Similarly, if the population estimates of two nearby cities are based on plans to annex and incorporate the populations of the same unincorporated lands, it would seem incumbent on the county, in adopting a coordinated regional population forecast, to adjust the cities' estimates to prevent double-counting.

1 population increases based on historic data, a variation of that minimal size might well fall  
2 within a statistically acceptable margin of error. *See DLCD v. Douglas County*, 37 Or LUBA  
3 at 137 (a county may rely on historic population estimates that differ from state estimates,  
4 where the difference between the estimates is so small that a reasonable person could  
5 conclude that the two estimates are essentially consistent with each other).

6 Finally, petitioners have not established that the county erred in relying on annexation  
7 data from 1994 to 2002, to conclude that annexations from 1980 to 2002 have contributed  
8 only minimally to the historic growth rate. The county apparently believed that annexation  
9 records prior to 1994 were not available. As noted above, it appears that such data might be  
10 available, although it is neither in the record before us nor something of which we can take  
11 official notice. Nonetheless, we see no reason why the county cannot extrapolate from the  
12 annexation data in the record from 1994 to 2002, in assessing the population contributions of  
13 annexations for the period 1980 to 2002.

14 The first subassignment of error is denied.

15 **B. Second Subassignment of Error**

16 Petitioners next argue that the county improperly applied the 4.42 percent growth rate  
17 to the year 2000 population of the City of Redmond urban growth boundary (UGB), which  
18 was 15,505, rather than to the year 2000 population of the city itself, which was only 13,770.  
19 According to petitioners, the beginning population figure used to calculate future population  
20 is a critical factor in that calculation. Petitioners contend that applying the historic growth  
21 rate within the city boundaries to a starting population that includes population within the  
22 UGB but outside the city improperly inflates the ultimate year 2025 population estimate. If  
23 the city wants to use the year 2000 UGB population as its starting point, petitioners argue, the  
24 city must apply the historic growth rate of the population within the UGB, which petitioners  
25 contend is lower than 4.42 percent, not the historic growth rate within the city. Conversely, if

1 the city wants to apply the historic growth rate within the city, it must use as its starting point  
2 the year 2000 city population.

3 The city points out that in February 2005 it annexed all unincorporated lands within  
4 its UGB, and that at present the city population and UGB population are exactly the same.  
5 Therefore, the city argues, there is no reversible error in applying the 4.42 percent growth rate  
6 to the UGB population figure rather than the city population figure. In addition, the city  
7 argues that once the annexed areas develop at urban densities there is no reason to believe  
8 that the population in those areas will increase at a slower rate than in other parts of the city.

9 We agree with the city that, even assuming it was error to apply the 4.42 percent  
10 growth rate to the year 2000 UGB population instead of the year 2000 city population,  
11 petitioners have failed to establish that that error requires reversal or remand. The county  
12 adopted the population forecasts in September 2004. Less than six months later the city  
13 annexed the entire unincorporated area within the UGB, making any discrepancy between the  
14 city population and the UGB population seemingly a moot point. Given that fact, and also  
15 given the absence of a reason to believe that the recently annexed areas will increase in  
16 population at a rate different than the rest of the city, it seems unlikely that the difference  
17 between applying the 4.42 percent growth rate to the year 2000 UGB population rather than  
18 the year 2000 city population would be significant over the 2000 to 2025 period. Again,  
19 given the uncertainties inherent in projecting future population growth, the 2025 population  
20 as calculated by the county and the 2025 population as petitioners would calculate it are  
21 probably both well within the range that a reasonable decision-maker would accept.  
22 Whatever the case, petitioners have not established that any error in applying the 4.42 percent  
23 growth rate to the UGB population warrants reversal or remand.

24 The second subassignment of error is denied.

1           **C.     Third Subassignment of Error**

2           Petitioners argue that the city impermissibly assumes a flat 4.42 percent growth rate  
3 throughout the 25-year period, rather than a declining growth rate. Petitioners point out that  
4 the state population forecast for the city assumes that the rate of population growth will  
5 decrease over time.

6           Petitioners do not explain why the city must, like the state forecast, assume a  
7 declining growth rate. As we explained in *Tipperman*, a local government is not obligated to  
8 conform its population projection with the state projection, and may take a different approach  
9 with different results as long as that approach is supported by an adequate factual base. The  
10 county's forecast discusses different options for forecasting population growth, explains why  
11 it differs from the state forecast with respect to the City of Redmond, and explains the basis  
12 for its preferred approach. Petitioners have not established that that approach lacks an  
13 adequate factual base, or otherwise warrants reversal or remand.

14           The third subassignment of error is denied.

15           The second assignment of error is denied.

16           The county's decision is affirmed.

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2004-160 on March 28, 2005, 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 28th day of March, 2005.

  
Kelly Burgess  
Paralegal

\_\_\_\_\_  
Kristi Seyfried  
Administrative Specialist