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

OREGON COAST ALLIANCE, WOAHINK LAKE ASSOCIATION, SUZANNE NAVETTA, Petitioners, v. **CITY OF DUNES CITY,** Respondent.	**LUBA No. 2011-113**

RESPONDENT'S BRIEF

Lauren Sommers, OSB #065989
Local Government Law Group, P.C.
A Member of Speer Hoyt LLC
975 Oak Street, Suite 700
Eugene, OR 97401
Telephone: (541) 485-5151
Of Attorneys for Respondent City of Dunes City

Sean Malone, OSB #084060
Attorney at Law
259 E. 5th Avenue, Suite 200-G
Eugene, OR 97401
Telephone: (303) 859-0403
Attorney for Petitioners

TABLE OF CONTENTS

I. PETITIONERS' STANDING

The City of Dunes City (City) does not contest Petitioners' standing in this appeal.

II. STATEMENT OF THE CASE

A. Nature of Challenged Decision

The challenged decision placed before the Board is the City Council's adoption of Ordinance No. 211A, which repealed the City's former septic maintenance ordinance, Ordinance No. 203, and adopted an educational program to promote adequate septic system maintenance. Record at 13-23.

B. Summary of Argument

The City offers three primary arguments in response to Petitioners' assignments of error. First, the City Council's interpretation of Dunes City Comprehensive Plan Policy E6 is plausible and therefore not susceptible to reversal or remand by the Board. Petitioners' argument that Ordinance No. 211A does not comply with the requirements of the City's comprehensive plan is truly a dispute over the Council's interpretation of Policy E6. The Council's interpretation is plausible so Petitioners' arguments must fail.

Second, Petitioners' arguments regarding the adequacy of the City Council's findings are based on an incorrect standard of review. Because the challenged decision is legislative in nature, the City Council was not required to adopt findings at all, as long as the record contains evidence to support the challenged decision. The record here contains considerable evidence supporting the City's decision, so the decision is not susceptible to reversal or remand by the Board.

Finally, Petitioners' argument that Ordinance No. 211A does not comply with Goal 6 also does not apply the correct standard of review. Pursuant to ORS 197.175(2)(d), adoption of Ordinance No. 211A is governed by the City's adopted comprehensive plan, so contrary to

Petitioners' assumptions, the City is not required to apply the statewide planning goals directly to the challenged decision. In addition, Dunes City Comprehensive Plan Policy E6 is a specific plan policy that provides a basis for the challenged decision and preempts direct application of the statewide planning goals. The challenged decision was not required to comply with Goal 6, so Petitioners' arguments provide no basis for reversal or remand by the Board.

C. Summary of Material Facts

The Oregon Department of Environmental Quality (DEQ) is responsible for permitting and inspecting septic systems in the state of Oregon. ORS 454.605 through ORS 454.755; OAR ch 340, div 71; Record at 13. DEQ has the authority to delegate oversight of septic systems to local governments. ORS 454.725. DEQ has entered into an agreement pursuant to ORS 454.725, delegating oversight of septic systems in Lane County to the county government. Record at 13.

On January 14, 2010, the Dunes City Council adopted Ordinance No. 203. Record at 15. Ordinance No. 203 amended Chapter 157 of the Dunes City Code of Ordinances to put in place maintenance, inspection, and reporting requirements for septic systems in the City. *Id.* Ordinance No. 203 did not amend any state law requirements regarding septic systems. Petition, Appendix at 1-14.[1] Ordinance No. 203 merely required an initial inspection, mapping and pumping of each septic system in Dunes City, as well as periodic inspections to be performed every five years or upon the occurrence of certain conditions, whichever came first. *Id.* at 7. If an inspection revealed that a septic system was being operated in violation of DEQ standards, notice was required to be sent to the appropriate state and county

[1] City does not object to the Board taking official notice of Ordinance No. 203, attached to Petitioners' brief as Appendix 1-14.

authorities. *Id.* Failure to inspect, pump, map or repair subjected the property owner to a fine of $250 per calendar day. *Id.* at 8.

After reviewing the maintenance, inspection, and reporting requirements of Ordinance No. 203, the City Council initiated amendments to Chapter 157 of the Dunes City Code of Ordinances by adopting Ordinance No. 211A on November 10, 2011. Record at 13 and 14. Ordinance No. 211A repealed Ordinance No. 203 and replaced it with "an educational program for septic system maintenance, to be implemented within one year." Record at 13.

III. BOARD'S JURISDICTION

The City does not contest the Board's jurisdiction over this appeal. The challenged decision is a land use decision. ORS 197.015(10). Petitioners filed their notice of appeal within 21 days of date that notice of the challenged decision was mailed to parties entitled to notice under ORS 197.615. ORS 197.830(9).

IV. RESPONSE TO FIRST ASSIGNMENT OF ERROR

Ordinance No. 203 required owners of property served by onsite septic systems to have those systems inspected every five years and to submit reports of the inspections to the City. Petition, App 1 at 6-7. If an inspection revealed a failing or faulty system, Ordinance No. 203 required notification of the appropriate county and state agencies. *Id.* The City Council evaluated the effectiveness of Ordinance No. 203 and determined that repeal of Ordinance No. 203 and adoption of Ordinance No. 211A was in the best interests of the citizens of Dunes City. Record at 13 ("the City Council finds it is not in the best interests of Dunes City residents to establish mandatory septic inspections, evaluations, or pumping"); 21 (Ordinance No. 211A "improves on the existing code requirements to address maintenance of septic systems for the benefit of all residents of Dunes City."). On November 10, 2011,

the City Council adopted Ordinance No. 211A, which repealed Ordinance No. 203 and adopted "an educational program for septic system maintenance." Record at 13-14.

The City Council found that Ordinance No. 211A satisfied applicable Dunes City Comprehensive Plan policies, including Policy E6. Record at 18 through 21. In determining that Ordinance No. 211A satisfied Dunes City Comprehensive Plan Policy E6, the Council interpreted Policy E6 to require a program to improve septic system maintenance beyond the regulatory floor set by state law. The Council's interpretation of Policy E6 is plausible and consistent with the express language of that policy. *Siporen v. City of Medford* 349 Or 247, 261, 243 P 3d 776, 783 (2010); ORS 197.829(1)(a). The City Council then adopted findings that Ordinance No. 211A complied with Policy E6. Record at 13, 21. The Council's findings are supported by evidence in the record. Record at 24, 25, 30, 52, 77, 82, 86, 88, 90, 274, 276, 306, 309, 310, and 313. Petitioners have not articulated a valid basis for reversal or remand of the challenged decision. This assignment of error should be denied.

A. The City's Interpretation of Policy E6 is Plausible and Owed Deference

Dunes City Comprehensive Plan Policy E6 provides that "[t]he City shall adopt a program to improve maintenance of septic systems for the benefit of all residents." Record at 21. The City Council adopted the following finding in response to this requirement:

> [Ordinance No. 211A is] consistent with this policy because the proposal improves upon the existing code requirements to address maintenance of septic systems for the benefit of all residents in Dunes City. Dunes City found that the existing requirements [sic] for mandatory septic system pumping does not benefit all of the residents and therefore initiated text amendments to the code to improve upon the existing program. To ensure that [Ordinance No. 211A is] consistent with the maintenance requirements established by the Oregon Department of Environmental Quality and administered by Lane County, referrals were sent to the Dunes City Building Official, Lane County Sanitation Department, DEQ and to DLCD notifying them of the proposed amendments. In response, the Lane County Sanitation Department and the Building Department LLC

responded stating they had no comments on the proposed amendments. This criterion is met.

Record at 21.

When read in its totality, Policy E6 requires the City to adopt a program: 1) to improve septic system maintenance; and 2) benefits all residents of the City. Record at 21. "Improve," means, among other things, "to augment." *Webster's Third New Int'l Dictionary* 1138 (unabridged ed 1986). The City Council interpreted Policy E6 to require a program for septic system maintenance that augments the existing state law floor for regulation of septic system installation, permitting and maintenance. *See* Record at 15 (Ordinance No. 211A "establishes an educational program to ensure septic system maintenance."); Record at 21 (the City requested review of Ordinance No. 211A by entities with the power to enforce state law requirements to ensure that Ordinance No. 211A would not contravene state law requirements); Record at 88 ("there is always going to be septic inspections and pumping in Dunes City but it is going to be at a Lane County level . . . [a]nd as far as the education goes, that is just the beginning.").

Policy E6 also requires that the program to improve septic maintenance benefit all residents of the City. The City Council found that Ordinance No. 203 did not benefit all the residents of the city because it was costly, mandatory, and based on one-size-fits-all maintenance requirements. Record at 13 ("Dunes City Council finds it is not in the best interests of Dunes City residents to establish mandatory septic inspections, evaluations or pumping."). The Council found that Ordinance No. 211A's flexible education program would improve upon Ordinance No. 203 because it would benefit all the residents of the City. Record at 13 (the Dunes City Council finds it is in the best interests of Dunes City residents to establish an educational program to ensure adequate septic system

maintenance"); Record at 21 (Ordinance No. 211A "improves upon the existing code requirements to address maintenance of septic systems for the benefit of all residents in Dunes City. Dunes City found that the existing requirements [sic] for mandatory septic system pumping does not benefit all of the residents and therefore initiated text amendments to the code to improve upon the existing program."). There is ample evidence in the record to support the City's findings. Record at 52, 82, 83, 86, 90, 274, 276, and 313.

Petitioners claim that Policy E6 requires Ordinance No. 211A to improve septic system maintenance over and above any improvements in septic system maintenance attributable to Ordinance No. 203. Petition at 12. However, as the City's findings clearly demonstrate, the City Council has interpreted Policy E6 to require a program that augments state law requirements regarding septic system maintenance and that benefits all residents of the City. The City Council's interpretation of Policy E6 is plausible and consistent with the express language of the policy; therefore, LUBA must defer to the City Council's interpretation. ORS 197.829(1)(a); *Siporen v. City of Medford* 349 Or 247, 261, 243 P3d 776, 783 (2010) (LUBA may not adopt its own interpretation of a local government's land use regulations if the local government offers a plausible interpretation of those regulations). The City Council "enjoys considerable deference in interpreting its comprehensive plan." *Swyter v. Clackamas County*, 40 Or LUBA 166, 174 (2001).

The City Council's interpretation of Policy E6 is clear from the findings it adopted related to that policy. The Council's interpretation of Policy E6 "need not assume any particular form . . . as long as it suffices to identify and explain in writing" the Council's understanding of the meaning of the policy. *Alliance for Responsible Land Use in Deschutes County v. Deschutes County*, 149 Or App 259, 266, 942 P2d 836, 839 (1997), *rev dismissed as improvidently allowed*, 327 Or 555, 971 P2d 411 (1998). Given the Council's adopted

findings regarding Policy E6 it is clear that the Council interpreted the policy to require a program that augments state law requirements regarding septic system maintenance and that benefits the residents of the City. Petitioners offer a different interpretation of Policy E6, but they do not explain why the Council's interpretation is implausible. The Board must defer to the Council's interpretation of its own comprehensive plan policy as long as that interpretation is plausible. Petitioners have not shown that the Council's interpretation of Policy E6 is implausible; therefore, Petitioners' arguments under this first assignment of error do not provide a basis for reversal or remand and this assignment of error should be denied.

Petitioners devote a fair amount of space under their subassignment of error 1a citing to evidence in the record to support their assertion that Ordinance No. 203 improved septic system maintenance. Petition at 12-13. However, whether or not Ordinance No. 203 improved septic system maintenance is irrelevant to LUBA's review of the City's decision. The City's findings show that the Council has interpreted Policy E6 to require a program that augments state law requirements for septic system maintenance and that benefits the residents of the City. Ordinance No. 211A requires implementation of an educational program that augments state law requirements, and the Council has determined that Ordinance No. 211A benefits the residents of the City. Record at 13, 21. Petitioners do not allege that the Council's interpretation of Policy E6 is implausible or clearly wrong, so there is no basis for LUBA to reverse or remand the Council's decision.

B. The Record Contains Evidence to Support the City's Decision

Petitioners' subassignments of error 1b and 1c appear to challenge the adequacy of the City's findings in relation to Policy E6. To the extent that Petitioners' arguments are based on an interpretation of Policy E6 that would require Ordinance No. 211A to increase

septic system maintenance over and above the program developed by Ordinance No. 203, Petitioners' arguments are irrelevant. To the extent that Petitioners' arguments challenge the City's adopted findings for lack of a foundation in the record, Petitioners' arguments fail. The record reveals considerable evidence showing that Ordinance No. 211A is consistent with Policy E6.

As discussed in depth in the City's response to Petitioners' second assignment of error, this is a legislative decision and so the City is not required to make findings to support the decision. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12, 15 (2008). The City need only point to evidence in the record that supports its decision. *Redland/Viola/Fischer's Mill Community Planning Organization v. Clackamas County*, 27 Or LUBA 560 (1994).

As discussed in detail in response to Petitioners' second assignment of error, the record contains ample evidence to show that "the existing requirements [sic] for mandatory septic system pumping does not benefit all of the residents," and to support the Council's conclusion that the repeal of the existing septic maintenance program and creation of an education program would improve upon the existing system and benefit the residents of Dunes City. Record at 52, 82, 83, 86, 90, 274, 276, and 313.

The record also contains ample evidence to show that the baseline requirements for inspection and permitting of septic systems are controlled by state law and enforced by the Department of Environmental Quality (DEQ) and by Lane County through a delegation of authority from DEQ. Record at 13 ("the State of Oregon has reserved unto itself, unless it has entered into an agreement with one of its counties pursuant to ORS 454.725, jurisdiction over wastewater disposal systems in the State of Oregon; and . . . the State of Oregon has entered into an agreement pursuant to ORS 454.725 with Lane County, Oregon, for the

oversight of wastewater disposal systems in Lane County"); 24; 25; 30 (DEQ rules require an owner to maintain his septic system); 77; 88 (if Ordinance No. 211A is adopted, Lane County will retain the authority to conduct septic inspections in Dunes City); 276 (state and county septic regulations are adequate and the City does not need to regulate further); 306 (Ordinance No. 203 merely duplicates Lane County inspection and testing efforts; Lane County has primary responsibility for septic inspection and permitting); 309 and 310. In addition, Petitioners concede that the program adopted by Ordinance No. 203 merely ensures compliance with existing state regulations. Petition at 10, n 3.

Ordinance No. 211A complies with existing state law requirements and augments those requirements with an education program. As noted above, the Council concluded that adoption of Ordinance No. 211A will benefit the City's residents. There is evidence in the record to show that Ordinance No. 211A creates a program to improve septic system maintenance for the benefit of the City's residents. That is all Policy E6 requires. This subassignment of error should be denied.

C. Ordinance No. 211A is Consistent with Policy E6

In their second subassignment of error, Petitioners argue that Ordinance No. 211A impermissibly attempts to amend Policy E6 because Ordinance No. 211A reads out the policy's requirements: 1) for a program; and 2) that the program improve septic system maintenance. Petition at 16-17. Petitioners appear to base this argument on the Court of Appeals' decision in *Foland v. Jackson County*; however, Petitioners' reliance on *Foland v. Jackson County*, is misplaced. In *Foland*, the Court of Appeals recognized its obligation to defer to a local government's plausible interpretations of its own land use regulations, but reversed Jackson County's interpretation of its land development ordinance because the interpretation was clearly inconsistent with the express language of the ordinance. 215 Or

App 157, 164, 168 P3d 1238, 1240, *rev den*, 343 Or 690, 174 P3d 1016 (2007) (County read into the ordinance the requirements for initial *and* final approvals of a preliminary development plan, when the land use ordinance only referenced a single approval). Unlike the county's interpretation in *Foland*, the City's interpretation of Policy E6 is plausible and consistent with the express language of the ordinance and is owed deference. ORS 197.829(1)(a); *Siporen v. City of Medford* 349 Or 247, 266, 243 P 3d 776, 786 (2010). The Court of Appeals' decision in *Foland* does not apply in this case.

Petitioners' argument that the City has impermissibly attempted to amend Policy E6 is solely based on its own interpretation of the requirements of that policy. The fact that the policy is subject to different interpretations is irrelevant, so long as the interpretation adopted by the City Council is plausible. *Siporen*, 349 Or at 266. Petitioners attempt to avoid the deferential standard of review owed to the City's interpretation of its own land use regulations by labeling the City's interpretation of Policy E6 as inconsistent with the express language of the policy. As the Court of Appeals has declared, the deferential standard of review "cannot be avoided by labeling what is in substance, an argument that challenges the correctness of a governing body's interpretation as one that relates instead to whether a reviewable interpretation was made." *Alliance for Responsible Land Use*, 149 Or App at 267, 942 P2d at 840.

Petitioners' substantive arguments also fail. Policy E6 requires the City to adopt a program, but does not include any deadlines by which the program must be adopted. Record at 21. Ordinance No. 211A repealed the existing septic ordinance and replaced it with an educational program. Record at 13. The ordinance requires implementation of that program within a time certain - one year from the date of adoption of Ordinance No. 211A. Record at

13. Ordinance 211A adopted a program to improve septic system maintenance for the benefit of all residents. That is all Policy E6 requires.

Petitioners argument that the City has not demonstrated that Ordinance No. 211A will improve maintenance of septic systems for the benefit of all residents is unfounded as discussed in detail in the City's responses to Petitioners' subassignment of error 1a and second assignment of error. Response at 5-6, 8, 19-20. This subassignment of error should be denied.

In the third subassignment of error Petitioners argue that Ordinance No. 211A is inconsistent with Policy E6 because the policy requires a program for maintenance of septic systems and Ordinance No. 211A adopts an educational program. Petitioners' argument misses the mark. An educational program can certainly encourage septic system maintenance. Record at 13. To the extent an interpretation of Policy E6 is even required to show that an educational program can improve septic system maintenance, the City Council has made that interpretation, and the Council's interpretation is plausible and entitled to deference. Record at 13, 15 and 88. Petitioners' interpretation, that an educational program cannot improve septic system maintenance, is implausible and inconsistent with the text of the policy. This subassignment of error should be denied.

For all the reasons stated above, Petitioners' first assignment of error should be denied.

V. RESPONSE TO SECOND ASSIGNMENT OF ERROR

In this second assignment of error, Petitioners argue that the Board may remand or reverse the City's decision under the authority of ORS 197.835(9)(a)(C) because certain of the City's findings are not supported by substantial evidence. Petition at 20. The substantial evidence requirement of ORS 197.835(9)(a)(C) does not apply to legislative decisions.

Friends of Umatilla County v. Umatilla County, 58 Or LUBA 12, 15 (2008) (the City is not required to make findings to support its legislative decisions as long as the record contains evidence to support the decision). Petitioners cite no other authority for their requested relief. Therefore, this assignment of error must be denied.

A. Standard of Review

Petitioners' second assignment of error alleges that the City's findings supporting the adoption of Ordinance No. 211A are inadequate because they are not supported by substantial evidence in the whole record. Petition at 20. Petitioners cite to ORS 197.835(9)(a)(C) and a LUBA opinion reviewing a quasi-judicial land use decision for the proposition that the City's findings are inadequate and not supported by substantial evidence. Petition at 21.

Petitioners cite an incorrect legal standard in their challenge of the City's findings. To the extent Petitioners argue that "that the level of scrutiny that LUBA should apply to the city's findings in support of the legislative land use decision that is the subject of this appeal should be the same level of scrutiny that LUBA applies to findings supporting quasi-judicial land use decisions," LUBA has rejected that argument. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122, 133 (2008).

Adoption of Ordinance No. 211A is a legislative land use decision. Record at 16; *Carver v. Deschutes County*, 58 Or LUBA 323, 328 (2009) (applying the criteria enunciated in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-603, 601 P2d 769, 775 (1979)). Petitioners do not argue otherwise.

"LUBA has observed many times [that] there is no statute, goal or rule that generally requires that legislative decisions must in all cases be supported by findings that demonstrate compliance with the applicable criteria." *Friends of Umatilla County v. Umatilla County*, 58

Or LUBA 12, 15 (2008). There simply "must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Id.* (citing *Citizens Against Responsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956, 958 n 6 (2002)). The City is free to demonstrate that a challenged decision complies with applicable legal standards by providing arguments in its briefs and citations to facts in the record. *Redland/Viola/Fischer's Mill Community Planning Organization v. Clackamas County*, 27 Or LUBA 560 (1994); *Port of St. Helens*, 58 Or LUBA at 132 ("Even if the findings that support a legislative land use decision are defective in some way, respondents are free to cite material in the record that demonstrates applicable criteria were applied.").

Because Petitioners do not provide a basis upon which the Board can grant their requested relief, this assignment of error should be denied. Even if Petitioners had applied the correct standard of review, this assignment of error should be denied because there is evidence in the record that supports the City's findings.

B. The Record Supports the City's Finding of No Correlation between Septic Effluent and the Condition of Siltcoos and Woahink Lakes

Petitioners argue that the City's findings regarding Ordinance No. 211A's compliance with Dunes City Comprehensive Plan Policies B8, E1, E3, and E4 are inadequate because they all include the following assertion:

> Samples have been collected from Siltcoos and Woahink Lakes; however, there has been no correlation established between water quality and erosion or septic system effluent.

Petition at 22.

As noted above, Petitioners' challenge to the City's findings is without merit because the City was not required to adopt findings at all. *Friends of Umatilla County*, 58 Or LUBA

at 15. Even if the findings are inaccurate or conclusory, the Board may not choose to reverse or remand the City's decision unless there is no evidence in the record to support the decision. *Id*; *Port of St. Helens*, 58 Or LUBA at 132. Here, the record contains ample evidence to support the City's decision.[2]

Petitioners argue that the City's findings are deficient because the City "neither points to samples that have been collected, nor does it point to studies or empirical data demonstrating that there is no correlation between water quality and erosion or septic system effluent." Petition at 22. The only plausible reading of the challenged findings is that the City determined that no specific connection has been shown between leaking septic systems in Dunes City and the pollution of Siltcoos and Woahink Lakes. In other words, the findings indicate that there is no direct evidence that leaking septic systems are polluting Siltcoos and Woahink Lakes. The finding regarding compliance with comprehensive plan Policy B8 explicitly articulates the City's position when it states, that Ordinance No. 211A is "consistent with this policy because no correlation has been established between septic system effluent and *the water quality of Siltcoos and Woahink Lakes.* Record at 19. (Emphasis added).

The challenged findings do not indicate, as Petitioners appear to assume, that there is no correlation *at all* between leaking septic systems and surface water pollution. Petitioners' argument effectively builds a straw man which they then knock down using cites from the record and the City's comprehensive plan. However, Petitioners' interpretation of the City's findings is inaccurate. The Council found that it had not been presented with direct evidence that leaking septic systems are polluting Siltcoos and Woahink Lakes. Petitioners do not

[2] Significantly, Petitioners also do not argue that Ordinance No. 211A is inconsistent with the City's comprehensive plan policies. Petitioners only challenge the adequacy of the City's *findings*, which as noted above, the City was not required to make. *Friends of Umatilla County*, 58 Or LUBA at 15.

challenge that finding. Instead, Petitioners spend a lot of time and effort combing through the record and the City's comprehensive plan to find evidence that supports the correlation between septic system effluent and pollution of surface waters generally, as well as the *possibility* that a leaking septic system could contaminate Siltcoos or Woahink Lakes. However, nowhere do the Petitioners refute the City's findings by pointing to direct evidence in the record that leaking septic systems located in Dunes City have contaminated Siltcoos or Woahink Lakes.

The record contains specific evidence to support the Council's finding that no direct correlation between leaking septic systems and pollution of Siltcoos and Woahink Lakes has been shown to exist.

In her written testimony submitted to the Council, Councilor Mills admits "we do not have a specific study that says leaking septics contribute to the detriment of water quality in Woahink and Siltcoos Lakes . . . ." Record at 66. In addition, Darlene Beckman noted in her testimony to the City Council that, "there have never been any specific data on the lakes within Dunes City that scientifically proves that improperly working septic systems have impacted our lakes' quality . . . we should not continue to demand that the citizens of Dunes City pay for mandatory septic inspections and septic tank pumping when there has been no verifiable evidence that improperly functioning systems are impacting our water quality." Record at 82, 310.

The bulk of the testimony cited by Petitioners focuses on the *potential* for septic effluent to contaminate surface waters, or on contamination of other lakes. Nothing in the record shows a direct connection between leaking septic systems in Dunes City and contamination of Siltcoos and Woahink Lakes.

Petitioners include several statements about how nutrient levels in the two lakes decreased during the time that Ordinance No. 203, the previous septic maintenance ordinance, was in effect. These statements are presumably offered to show that the maintenance required by Ordinance No. 203 helped control leaking systems, which prevented effluent containing unwanted nutrients from entering the lakes. Record at 24-25. However, none of the testimony cited by Petitioners reveals any direct evidence that septic effluent is the cause of the increased nutrient levels or that the maintenance requirements of Ordinance No. 203 prevented effluent containing unwanted nutrients from entering the lakes.

In fact, Mark Chandler, who according to his own testimony has been monitoring the waters of Siltcoos and Woahink Lakes since 2002, was very clear with the Council that "[w]e certainly can't draw a straight line between adoption of the Septic Ordinance and the drop in nutrient levels." Record at 81. When Councilor Sathe asked Mr. Chandler whether "there was any exact proof that the septic ordinance had reduced the phosphorus or if that reduction was the result of people not using phosphorus fertilizer any more [sic]," Mr. Chandler replied that "there is no way to draw that direct conclusion." He added that "the efforts the City has taken to reduce the nutrient levels in the lake has probably had a positive effect but there is no way to say [if] 20% of it was from the septic ordinance or 40% of it was from the phosphate reduction ordinance. There is no way to make that kind of correlation." Record at 87-88.

In addition, Paul Floto, a Dunes City resident commented:

> "There has been a lot of erroneous science in this. People have talked about phosphate levels dropping in the last few years as if that had something to do with the septic systems. Human waste has almost no phosphates. Phosphates get into lakes from phosphate fertilizer which Dunes City banned several years ago. It gets into water from laundry detergents which have soluble phosphates and Oregon banned those two or three years ago and it gets into lakes from birds. So, the fact that

> phosphates have dropped that says nothing about the septic systems it says that banning phosphate fertilizer and phosphate detergent has gotten rid of the phosphates."

Record at 87. *See also*, Record at 276 and 307.

Petitioners note that John Stead, a Dunes City resident submitted written testimony citing to a 1972 study that "26% of all tanks within 100 feet of the lake were performing unsatisfactorily (Lane County, 1978). Where systems had failed, sewage was coming to the ground surface very near the lake and in winter almost certainly drained there. . ." Record at 62. It is possible that the reference to the "the lake" is a reference to Siltcoos or Woahink Lake. However, the "Coastal Lakes Watershed Analysis" from which Mr. Stead quotes in his testimony was not entered into the record in its entirety, so it is impossible to know. Paul Floto, another Dunes City resident testified before the Council that, "[t]here was a study cited from the early 70s claiming that 36% of septic systems have failed *that was an estimate somewhere else that had nothing to do with the septic systems around this lake* and the systems around the lake have already been fixed and they weren't failing anywhere near that rate." Record at 87. (Emphasis added). By his references to the study "from the early 70s" and the claim that "36% of septic systems have failed" it appears that Mr. Floto was talking about the study cited by Mr. Stead[3], and indicated that the conclusions regarding failing septic systems actually applied to septic systems located near a different lake.

Given the fact that the 1972 study cited by Mr. Stead did not establish a direct link between leaking septic systems and the contamination of Siltcoos or Woahink Lakes, the fact that Mr. Floto indicated that the study actually referenced another lake entirely, and the fact that the referenced study is approximately 40 years old, it was reasonable for the Council to

[3] In his oral testimony, Mr. Stead cited the same study as finding that 36% percent of the tanks around the lake performed unsatisfactorily. Record at 85.

conclude that the cited study did not show a direct correlation between the septic systems located in Dunes City and pollution of Siltcoos and Woahink Lakes.

As these statements show, there is evidence in the record to support the City's finding that no direct link has been shown between septic effluent and the contamination of Siltcoos and Woahink Lakes. Where the City's findings are supported by evidence in the record, it is of no moment that Petitioners can pick through the record and find allegedly contrary evidence.

As noted above, the City was not required to adopt the challenged findings, as long as the City's decision is supported by evidence in the record. *Friends of Umatilla County*, 58 Or LUBA at 15. Even though the City was not required to adopt the challenged findings, a review of the record demonstrates that ample evidence exists in the record to support the City's finding that "[s]amples have been collected from Siltcoos and Woahink Lakes; however, there has been no correlation established between water quality and erosion or septic system effluent." Petitioners' first subassignment of error should be denied.

C. The City's Finding that Ordinance No. 211A Improves Upon Existing Code Requirements for the Benefit of All Residents is Supported by Evidence in the Record

In this second subassignment of error, Petitioners argue that the City's findings addressing comprehensive plan policies B8, E1, E3, E4, and E6 are inadequate and not supported by substantial evidence. As noted previously, Petitioners have applied an incorrect standard of review to the City's decision. Because the challenged decision is legislative in nature, the City is not required to adopt findings at all, and must only point to sufficient

evidence in the record to allow LUBA to perform its review function. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12, 15 (2008).[4]

The findings challenged by Petitioners in this second subassignment of error all provide that Ordinance No. 211A will improve upon the existing septic system maintenance requirements for the benefit of all residents of Dunes City. Considerable evidence exists in the record to show that Dunes City residents were unhappy with the existing septic maintenance requirements. Given the evidence in the record, the Council concluded that a non-mandatory educational program would provide a greater benefit to the residents of Dunes City and would improve upon the existing mandatory one-size-fits-all septic maintenance ordinance. Record at 21.

The record is replete with written and oral testimony supporting the Council's finding that "the existing requirements [sic] for mandatory septic system pumping does not benefit all of the residents . . . ." Record at 21; 82 ("we should not continue to demand that the citizens of Dunes City pay for mandatory septic inspections and septic tank pumping when there has been no verifiable evidence that improperly functioning systems are impacting our water quality. We would support passage of Ordinance No. 211A . . ."); 83 ("[b]een around Dunes City for a little over 41 years and I don't think I ever seen [sic] anything that has raised the kind of anger and consternation that Ordinance 203 has. . .I think it is too much of a one size fits all solution. It doesn't recognize the difference between a family with 10 people who live here all the time and a married couple of [sic] a single person who is here 3, 4, 6 months out of the year."); 86; 90; 274; 276; 313 ("if this were up to a vote, the citizens would eliminate the septic ordinance."). Even Petitioner Oregon Coast Alliance admits that

[4] Again, Petitioners do not challenge Ordinance No. 211A's compliance with comprehensive plan policies B8, E1, E3, E4, and E6. Petitioners only challenge the adequacy of the City's *findings* regarding those policies, which as noted above, the City was not required to make. *Friends of Umatilla County*, 58 Or LUBA at 15.

"the mandatory pumping requirement is controversial among some Dunes City residents." Record at 52.

There is ample evidence in the record to support the Council's conclusion that the repeal of the existing septic maintenance program and creation of an education program by Ordinance No. 211A would improve upon the existing system and benefit the residents of Dunes City. This subassignment of error should be denied.

A review of the record reveals evidence to support the City's decision. This assignment of error should be denied.

VI. RESPONSE TO THIRD ASSIGNMENT OF ERROR

Petitioners' third assignment of error alleges that the City's findings regarding Goal 6 are "inadequate and not supported by substantial evidence because the findings are conclusory and without a rationale, explanation, or evidence to support them." Petition at 31.

Petitioners' third assignment of error should be denied. The challenged land use decision is governed by the City's comprehensive plan, not by Goal 6. ORS 197.175(2)(d). The statewide planning goals do not directly apply to the City's decision because Dunes City Comprehensive Plan Policy E6 is a specific policy that provides an independent basis for the challenged land use regulation and because Ordinance No. 211A is not a development ordinance. ORS 197.835(7)(b); *Swyter v. Clackamas County*, 40 Or LUBA 166, 177 (2001). Finally, Petitioners have not challenged the City's finding that the statewide planning goals are not applicable to the adoption of Ordinance No. 211A and are therefore foreclosed from a challenge based on Goal 6. Record at 18; *Rogue Valley Association of Realtors v. City of Ashland*, 35 Or LUBA 139, 170-71, (1998), *aff'd*, 158 Or App 1, 970 P2d 685 (1999). Thus, the City was neither required to make findings of compliance with Goal 6, nor to adopt an exception. To the extent Petitioners argue that the City's adopted findings are inadequate,

the City was not required to make findings at all, because the City's decision is supported by evidence in the record. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12, 15 (2008). For all these reasons, Petitioners' third assignment of error should be denied.

A. Goal 6 does not Apply to the Challenged Decision

Petitioners' third assignment of error should be denied because Goal 6 does not apply directly to the City's adoption of Ordinance No. 211A. Where a city has adopted an acknowledged comprehensive plan, the city's land use regulations must comply with the requirements of that comprehensive plan, rather than the statewide planning goals. ORS 197.175(2)(d)-(e). Although Petitioners do not cite to ORS 197.835(7)(b), the City also notes that ORS 197.835(7)(b) is not applicable to the challenged decision because Dunes City Comprehensive Plan Policy E6 is a specific policy that provides an independent basis for the challenged land use regulation.[5] Where the City's comprehensive plan includes specific policies, such as Policy E6 "or other provisions that provide the basis for regulation, the statewide planning goals do *not* apply." *Rogue Valley Association of Realtors v. City of Ashland*, 35 Or LUBA 139, 169 (1998), *aff'd*, 158 Or App 1, 970 P2d 685 (1999) (emphasis in original).

Dunes City Comprehensive Plan Policy E6 requires the City to "adopt a program to improve the maintenance of septic systems for the benefit of all residents," which the City has done by adopting Ordinance No. 211A. The "specific policies" requirement of ORS 197.835(7)(b) does not require that the comprehensive plan policy that forms the basis for the regulation "specify exactly how the [comprehensive plan policy] is to be implemented."

[5] ORS 197.835(7)(b) requires LUBA to reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if "the comprehensive plan does not contain specific policies or other provisions which provide a basis for the regulation, and the regulation is not in compliance with the statewide planning goals.").

Rogue Valley Association of Realtors, 35 Or LUBA at 170 (citing *Cuddeback v. City of Eugene*, 32 Or LUBA 418, 422-23 (1997)).

Policy E6 is both specific and direct. The policy requires the City to adopt a program to improve maintenance of septic systems for the benefit of all residents, which the City has done through the adoption of Ordinance No. 211A. *Cf.*, *Melton v. City of Cottage Grove*, 28 Or LUBA 1, 6, *aff'd*, 131 Or App 626, 887 P2d 359 (1994); *Ramsey v. City of Portland*, 23 Or LUBA 291, 299, *aff'd*, 115 Or App 20, 836 P2d 772 (1992) (citing examples of comprehensive plan provisions that were neither specific nor direct).

Because the City's specific comprehensive plan policy E6 provides the basis for the City Council's adoption of Ordinance No. 211A, Goal 6 does not apply to the City's decision and the City was not required to adopt findings regarding Goal 6.

B. Petitioners' Allegation that the City "Conceded" that Goal 6 Applies to the Challenged Decision is Without Merit

Petitioners allege that the City has conceded that Goal 6 applies to the repeal of Ordinance No. 203 and the adoption of Ordinance No. 211A. Petition at 32. Petitioners base this conclusion on the Notice of Adoption of Ordinance No. 211A, sent by the City to the Department of Land Conservation and Development (DLCD). Record at 2, 11. The Notice of Adoption Form (Form 2) is a pre-printed form used to notify DLCD of a number of different land use actions, several of which require direct application of the statewide planning goals. To that end, the form includes check boxes to allow the City to indicate which of the statewide planning goals are applicable to the decision. Staff apparently checked the boxes for Goals 1, 2, and 6. Record at 2, 11. However, the form does not provide a method to indicate that the statewide planning goals applicable to the City's decision are applicable only through the specific policies included in the City's

comprehensive plan. Comprehensive Plan Policy E6 provides a specific criterion for adoption of Ordinance No. 211A. Notwithstanding the checked box on Form 2, Goal 6 does not directly apply to the City's decision and the City was not required to adopt findings regarding Goal 6. ORS 197.175(2)(d); ORS 197.835(7)(b).

C. Petitioners are Foreclosed from a Challenge Based on Goal 6

Petitioners have not challenged the City's findings that the statewide planning goals are inapplicable to the adoption of Ordinance No. 211A; therefore, LUBA should reject Petitioners' contention that Goal 6 is directly applicable to the City's adoption of Ordinance No. 211A. Record at 18. Where a city makes a finding that identifies certain comprehensive plan policies as the type of "specific policies" required by ORS 197.835(7)(b), and Petitioners do not assign error to that finding LUBA will reject the Petitioners' contention that the statewide planning goals apply directly to the challenged decision. *Rogue Valley Association of Realtors v. City of Ashland*, 35 Or LUBA 139, 170-71 (1998), *aff'd*, 158 Or App 1, 970 P2d 685 (1999). Here, although the City did not make an explicit finding that certain comprehensive plan policies constitute the type of "specific policies" required by ORS 197.835(7)(b), the City Council did expressly find that the statewide planning goals are inapplicable to the adoption of Ordinance No. 211A. Record at 18. The City of Ashland's finding in *Rogue Valley Association of Realtors*, that certain comprehensive plan policies constitute the type of "specific policies" required by ORS 197.835(7)(b), has the same effect as the City's finding in this matter – namely that the statewide planning goals do not directly apply to the challenged decision. Petitioners do not challenge the City's finding that the statewide planning goals are inapplicable. Therefore, like in the *Rogue Valley* case, LUBA should reject Petitioners' contention that Goal 6 applies to the City's decision.

D. Goal 6 is Inapplicable to the Challenged Decision because Ordinance No. 211A is not a Development Ordinance

Goal 6 provides in part that:

> All waste and process discharges *from future development*, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards.

(Emphasis added).

Goal 6 applies to future development. *Swyter v. Clackamas County*, 40 Or LUBA 166, 177 (2001) ("Because Goal 6 is directed at future development, petitioner's arguments [regarding existing site conditions] provide no basis for reversal or remand. . ."); *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52, 65, *aff'd*, 178 Or App 185, 35 P3d 1122 (2001) (environmental issues resulting from current site conditions as opposed to "future development" do not provide a basis for reversal or remand under Goal 6); *Marcott Holdings Inc. v. City of Tigard*, 30 Or LUBA 101 (1995) ("Goal 6 is limited by its terms to discharges from future development itself.").

Ordinance No. 211A is not a development ordinance. Ordinance No. 211A merely repeals former Ordinance No. 203 and replaces it with an educational program for septic system maintenance. Record at 13. Ordinance No. 211A governs maintenance of existing septic systems; it neither allows nor discourages development. Ordinance No. 203 also governed inspections of existing septic systems; it neither allowed nor discouraged development.

The installation and permitting of new septic systems is the purview of the Department of Environmental Quality (DEQ); the City has no authority to either allow or prohibit the installation of septic systems. ORS 454.605 through ORS 454.755; OAR ch 340,

div 71. Even Petitioners recognize that the City's septic ordinances neither allow nor prohibit development. Petition at 10 (Ordinance No. 203 "merely ensured compliance on a local level" with state laws governing maintenance of septic systems). Because Ordinance No. 211A does not control future development, Goal 6 is inapplicable to the City's adoption of Ordinance No. 211A.[6]

Because Goal 6 is not applicable to the adoption of Ordinance No. 211A, the City was not required to make Goal 6 findings, nor was the City required to adopt an exemption to Goal 6. Petitioners' third assignment of error should be denied.

E. The City's Decision is Supported by Evidence in the Record

To the extent Petitioners argue that the City's adopted findings are inadequate to comply with Goal 6, as established above, Goal 6 is inapplicable to the City's decision. To the extent Petitioners argue that the City's adopted findings are inadequate to show compliance with the City's comprehensive plan policies, the City was not required to make findings at all. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12, 15 (2008). However, the findings made by the City are supported by evidence in the record. *Id.*[7]

Petitioners list the City's findings regarding comprehensive plan policies E1 through E6 and I-10 and argue that the findings are conclusory and "without any supporting evidence." Petition at 35. As discussed in great detail in the City's response to Petitioners'

---

[6] Goal 6 does not apply directly to the challenged decision, so Petitioners' reliance on the Board's decision in *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998), is misplaced. The land use decision at issue in that case was a comprehensive plan amendment to which the statewide planning goals directly apply. *Citizens for Florence*, 35 Or LUBA at 257. Here, the City's adoption of Ordinance 211A is subject to the specific provisions of the City's comprehensive plan rather than to the statewide planning goals, so Goal 6 does not directly apply to the City's decision. In addition, unlike the decision in Florence which would have changed a zoning designation specifically to allow development of a commercial facility, the City's adoption of Ordinance 211A neither allows nor prohibits development because the City does not have that authority.

[7] Petitioners do not challenge Ordinance No. 211A's compliance with comprehensive plan policies E1 through E6 and I-10. Petitioners only challenge the City's *findings* regarding those policies, which as noted throughout this response brief, the City was not required to make. *Friends of Umatilla County*, 58 Or LUBA at 15.

second assignment of error, the challenged decision is legislative in nature. The City is not required to adopt any findings in support of a legislative decision, so whether or not the findings adopted by the City are conclusory has no bearing on the applicable standard of review. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122, 132 (2008). ("Even if the findings that support a legislative land use decision are defective in some way, respondents are free to cite material in the record that demonstrates applicable criteria were applied."). The record need only contain some evidence to support the City's decision. Petitioners do not allege that the record does not contain evidence to support the City's decision; therefore Petitioners have not alleged an adequate basis for LUBA to reverse or remand the City's decision.

Finally, although Petitioners do not argue otherwise, the record contains evidence to support the City's decision. Record at 30, 47, 52, 66, 77, 81, 82, 83, 86, 87, 88, 90, 274, 276, 306, 307, 308, 309, 310, and 313.

For all these reasons, Petitioners' third assignment of error should be denied.

VII. CONCLUSION

For all the reasons set forth above, all of Petitioners' assignments of error should be denied. The City Council's interpretation of its comprehensive plan is plausible, the record includes evidence to support the challenged decision, and Goal 6 does not apply to the City Council's adoption of Ordinance No. 211A.

The City Council's decision should be affirmed.

DATED this 4th day of April, 2012.

SPEER HOYT LLC

By: _____
Lauren Sommers, OSB #065989
Of Attorneys for Respondent

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on **April 4, 2012**, I filed the original and four copies of this **Respondent's Brief** with the Land Use Board of Appeals, Public Utility Commission Building, 550 Capitol Street NE, Suite 235, Salem, OR 97301-2552, by first class mail.

I hereby further certify that on **April 4, 2012**, I served a true and correct copy of this **Respondent's Brief** by first class mail on the following persons:

Sean Malone
Attorney at Law
259 E. 5th Avenue, Suite 200-G
Eugene, OR 97401
Attorney for Petitioners Oregon Coast Alliance, Woahink Lake Association, and Suzanne Navetta

SPEER HOYT LLC

By: _____
Lauren Sommers, OSB #06598
Of Attorneys for City of Dunes City
Speer Hoyt LLC
975 Oak Street, Suite 700
Eugene, OR 97401
Telephone: (541) 485-5151
Fax: (541) 485-5168
Email: lauren@speerhoyt.com