BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOME BUILDERS ASSOCIATION
OF LANE COUNTY,
Petitioner,

11/29/18 PM 1:00 LUBA

and

1000 FRIENDS OF OREGON,
HOUSING LAND ADVOCATES,
EUGENE AREA CHAMBER OF COMMERCE,
WALKABLE EUGENE CITIZENS
ADVISORY NETWORK, and AARP OREGON,
Intervenors-Petitioners,

vs.

CITY OF EUGENE,
Respondent.

LUBA Nos. 2018-063 and 2018-064

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos PC.

Mary Kyle McCurdy, Portland, filed a petition for review and argued on behalf of intervenor-petitioner 1000 Friends of Oregon.

Scott N. Hilgenberg, Portland, filed a petition for review and argued on behalf of intervenor-petitioner Housing Land Advocates. With him on the brief were Jennifer M. Bragar and Tomasi Salyer Martin.

Micheal M. Reeder, Eugene, filed a petition for review on behalf of intervenors-petitioners Eugene Area Chamber of Commerce, Walkable Eugene Citizens Advisory Network, and AARP Oregon.

RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

REMANDED 11/29/2018

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals two ordinances, Ordinances 20594 and 20595, that amend the Eugene Code in order to implement amendments to an existing statute.

MOTION TO DISMISS INTERVENORS-PETITIONERS

Neither intervenor-petitioner Chris Wig (Wig) nor intervenor-petitioner John Hoops (Hoops) filed a petition for review. The city moves to dismiss Wig and Hoops from the appeal. Wig and Hoops do not object to the motion. The city's motion is granted. Intervenors-petitioners Wig and Hoops are dismissed as intervenors-petitioners.

REPLY BRIEF

Petitioner Homebuilders Association of Lane County (HBA) and intervenor-petitioner Housing Land Advocates (HLA) each move for permission to file a reply brief to respond to alleged new matters raised in the city's response brief. The city does not object to the reply briefs. The reply briefs are allowed.

MOTION TO STRIKE

HBA moves to strike page 5 line 17 from the city's brief, which HBA argues is not supported by the record. The city does not object to the motion. Page 5 line 17 is stricken from the city's response brief and LUBA will not consider the information contained in that part of the brief.

BACKGROUND

We briefly set out the legal and factual background that led to the city's adoption of the challenged ordinances.

In 2017, the Oregon legislature enacted Senate Bill 1051 (SB 1051), at Oregon Laws 2017, Chapter 745, sections 1-14. As relevant here, SB 1051, section 6 amended ORS 197.312 to add subsection (5), which now provides:

> "(a) A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.
>
> "(b) As used in this subsection, 'accessory dwelling unit' means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling."

SB 1051, section 12 provides for a delayed operative date for the amendments to ORS 197.312(5), until July 1, 2018. SB 1051, section 13(3) provides that the provisions of ORS 197.312(5) "apply to permit applications for accessory dwelling units submitted for review on or after July 1, 2018."

In January, 2018, the city began a process to amend the Eugene Code (EC) to implement the changes to ORS 197.312(5), and held hearings on the proposed changes to the EC between February and June 2018. In June 2018, the city adopted two ordinances, Ordinance 20595 and Ordinance 20594 (the Ordinances). We briefly summarize only the changes to the EC effectuated by

1 the Ordinances that are relevant to these appeals, before we turn to the parties'
2 assignments of error.

3 Section 1 of Ordinance 20595 amended the phrase "secondary dwelling"
4 in the EC to change it to "Dwelling, Accessory" and adopt a definition for the
5 new phrase. Section 1 of Ordinance 20594 then replaced the term "secondary
6 dwelling" where it was previously used in the EC with the term "accessory
7 dwelling."

8 Section 5 of Ordinance 20594 amended EC Table 9.2740, "Residential
9 Zone Land Uses and Permit Requirements," to authorize accessory dwellings as
10 permitted uses in the areas zoned for detached single family dwellings in which
11 they had not been previously permitted: the Agricultural (AG), Medium Density
12 Residential (R-2), Limited High-Density Residential (R-3), High Density
13 Residential (R-4), Elmira Road Special Area Zone (S-E), Blair Boulevard
14 Historic Commercial Area (S-HB), Jefferson Westside Special Area (S-JW
15 Zone), and Chambers Special Area (S-C) (R-2 Subarea) zones. Record 28. We
16 refer to these zones collectively as the New Zones.

17 Ordinance 20594, section 6 amended the Special Use Limitations for Table
18 9.2740 that are found in EC 9.2741 to (1) provide that accessory dwellings are
19 subject to the standards in EC Table 9.2750, "Residential Zone Development
20 Standards," and EC 9.2751, "Special Development Standards for Table 9.2750,"
21 and (2) prohibit new accessory dwellings on alley access lots. Section 7 amended
22 the standards in EC Table 9.2750 to subject accessory dwellings to the existing

provisions in EC 9.2751(17), the special development standards for EC Table 9.2750.

Section 15 of Ordinance 20594 amended EC 9.3615(2) to allow in the S-JW Zone "[a]n additional (interior, attached or detached) residential structure that is used in connection with or that is accessory to a single family dwelling" as an "additional 'One-Family Dwelling' and not as an 'Accessory Dwelling.'"

With each of the Ordinances, the city council adopted findings that address the Statewide Planning Goals, various provisions of the Eugene Springfield Metro Plan, and applicable refinement plans. *See* n 11.

These appeals followed.

HBA's FIRST, SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR/HLA'S FIRST ASSIGNMENT OF ERROR/1000 FRIENDS' FIRST AND SECOND ASSIGNMENTS OF ERROR[1]

The central theme in these assignments of error is that the city's implementation of SB 1051 is not consistent with ORS 197.312(5). That is so, we understand Petitioners to argue, because while the Ordinances nominally allow accessory dwellings in all areas of the city where they are required to be allowed, some of the standards that apply to accessory dwellings effectively nullify that first city action, because the standards prohibit accessory dwellings

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[1] We sometimes refer to HBA, HLA and 1000 Friends of Oregon (1000 Friends) collectively in this opinion as Petitioners.

1 on certain types of lots, are not limited to "regulations relating to siting and
2 design," and/or are not "reasonable," within the meaning of ORS 197.312(5)(a).
3 As we explained above, the Ordinances (1) amended the EC to allow
4 accessory dwellings in zones in which accessory dwellings were not previously
5 allowed, and (2) incorporated for accessory dwellings in the New Zones the
6 existing standards that applied to accessory dwellings in the zones in which they
7 were previously allowed.

8 **A. The Ordinances Amended the EC to Allow Accessory Dwellings**

9 In its first, second and third arguments under the first assignment of error,
10 HBA argues that SB 1051, section 12 required the city, before July 1, 2018, to
11 evaluate the existing EC standards that previously applied to all accessory
12 dwellings in all zones in the city and eliminate existing standards for accessory
13 dwellings that are not "reasonable local regulations relating to siting and design,"
14 as that phrase is used in ORS 197.312(5)(a). HBA asks LUBA to remand the
15 Ordinances in order for the city to "complete its homework assignment from the
16 legislature." HBA Petition for Review 2.
17 We understand the city to respond that nothing in SB 1051, section 12
18 required the city to evaluate all existing provisions of the EC and potentially
19 amend, or eliminate, existing standards applicable to accessory dwellings that are
20 not "reasonable local regulations relating to siting and design." That is so, the
21 city argues, because SB 1051, section 13 specifies the remedy for when a city

1 fails to implement the provisions of ORS 197.312(5): the provisions of ORS
2 197.312(5) apply directly to applications for a permit.

3 The city also argues that ORS 197.646(3) provides recourse in the situation
4 when a city does not amend its land use regulations to implement a new land use
5 statute: "the new requirements apply directly to the local government's land use
6 applications."[2] As the city explains it, the city council did not intend in adopting
7 the Ordinances to "fully" implement SB 1051. Stated differently, the city council
8 did not intend to comprehensively and legislatively evaluate the standards that
9 apply to all accessory dwellings in all zones in the city to determine whether those
10 standards are "reasonable local regulations relating to siting and design" of
11 accessory dwellings within the meaning of ORS 197.312(5). Instead, we
12 understand the city to argue, it intends to evaluate whether specific standards
13 comply with SB 1051 on a case-by-case basis, in the context of individual
14 applications for accessory dwellings, and also to undertake a comprehensive
15 legislative evaluation in the future.

16 To the extent that HBA argues that SB 1051, section 12 required the city
17 to amend its land use regulations to implement SB 1051 by July 1, 2018, we
18 disagree with that argument. SB 1051 itself is silent regarding any requirement,

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[2] The city also points out that ORS 197.646(3) provides that a remedy for a city's failure to timely amend its land use regulations to implement a new land use statute is to petition the Land Conservation and Development Commission (LCDC) for enforcement pursuant to ORS 197.319 to 197.335.

much less a deadline, for a city to amend its land use regulations to comply with its provisions.[3] SB 1051, section 12 provides for a delayed "operative date" of July 1, 2018. That delayed operative date provides a grace period before which the provisions of SB 1051 did not apply, and after which, the statute applies directly and cities are required to "allow" accessory dwellings in areas required by the statute. But SB 1051 does not direct cities as to the mechanism by which to allow accessory dwellings.

Similarly, while ORS 197.646(1) requires the city to amend its land use regulations to implement SB 1051, ORS 197.646(2)(b) requires LCDC to establish by rule the time period within which a local government must amend its code to implement a new land use statute "if the legislation does not specify a time period for compliance[.]" LCDC has not adopted any rules specifying a time period for implementation of SB 1051. Accordingly, to the extent HBA argues that the city improperly construed SB 1051 in failing to evaluate and adopt

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[3] Because other legislation relating to land use has included direction to a local government to amend its land use regulations and deadlines for implementations of the amendments, the legislature clearly knows how to impose that requirement. *See, e.g.*, Oregon Laws 2018, Chapter 15, section 5 ("A county shall amend its land use regulations to conform to the requirements of sections 2, 3 and 4 of this 2018 Act"); Oregon Laws 2010, Chapter 84, section 5 ("A county shall amend its land use regulations to conform to the requirements of sections 2, 3 and 4 of this 2010 Act"); Oregon Laws 2009, Chapter 850, section 16 ("On or before December 31, 2010, a county shall amend its land use regulations to conform to the amendments to ORS 215.213 by section 1 of this 2009 Act or ORS 215.283 by section 2 of this 2009 Act, whichever is applicable").

amendments to the EC that implement all of the provisions of SB 1051 by July 1, 2018, we disagree with that argument.

However, even if neither SB 1051 nor ORS 197.646(2)(b) compelled the city to adopt legislation to implement SB 1051 by any particular date, the city in fact amended its land use code to at least *partially* implement SB 1051, and those amendments like any other are subject to review for consistency with applicable law. We therefore turn to Petitioners' arguments that the challenged amendments are inconsistent with applicable law, including SB 1051.

B. Reasonable Regulations Relating to Siting and Design – Existing EC Standards

In various assignments of error, Petitioners argue that several existing EC standards are inconsistent with the ORS 197.312(5) requirement to "allow" accessory dwellings, because those existing standards prohibit accessory dwellings on certain types of lots.[4] In Petitioners' view, ORS 197.312(5) creates an unrestricted entitlement to an accessory dwelling on any lot that is zoned for a detached single-family dwelling. In the city's view, that ORS 197.312(5) allows cities to "subject" accessory dwellings "to" siting regulations means that not every lot that is zoned for a detached single-family dwelling is entitled to site an accessory dwelling on that lot.

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[4] These arguments are included in HBA's fourth, fifth, sixth, seventh, eighth and ninth arguments in its first assignment of error and HBA's fourth assignment of error; HLA's first assignment of error at HLA Petition for Review 19-23; and 1000 Friends' first and second assignments of error.

1 Petitioners also argue that some EC standards that apply to accessory
2 dwellings are not "regulations relating to siting and design."[5] Finally, Petitioners
3 further argue that some EC standards that apply to accessory dwellings and which
4 are "regulations relating to siting and design" are not "reasonable."[6] *See* n 7.
5 The city responds, initially, that Petitioners are precluded from challenging
6 existing EC standards that the city applied to the New Zones because the
7 Ordinances do not amend those existing standards.[7] According to the city,
8 because the city did not intend to fully implement SB 1051 with the adoption of
9 the Ordinances, but only intended to amend the EC to "allow" accessory
10 dwellings in compliance with ORS 197.312(5), the existing standards in the EC
11 are not subject to challenge at or review by LUBA for a determination of whether
12 those existing standards are "reasonable local regulations relating to siting and

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[5] These arguments are included in HBA's second assignment of error; HLA's first assignment of error at Petition for Review 25-26; and 1000 Friends' second assignment of error.

[6] These arguments are included in HBA's third assignment of error; HLA's first assignment of error at Petition for Review 27-32; and 1000 Friends' second assignment of error.

[7] Petitioners challenge EC 9.2741(2), which prohibits accessory dwellings on alley access lots; EC 9.2751(17)(a) and EC 9.2775(4), which prohibits attached accessory dwellings on flag lots, and on lots under a certain size and with certain dimensions; EC 9.2775(4)(c), which prohibits accessory dwellings on flag lots that were created before August 29, 2014; and EC 9.2751(17)(c)(1)-(2), which provides that in some neighborhoods in the city, accessory dwellings are prohibited on lots smaller than 7,500 square feet and that lack certain dimensions that provide for open space on the lot.

1 design." In support of its argument, the city cites *Volny v. City of Bend*, 37 Or
2 LUBA 493, *aff'd* 168 Or App 516, 4 P3d 768 (2000). In *Volny*, LUBA concluded
3 that when the city amended the transportation element of the city's
4 comprehensive plan, the city was not required to also adopt a transportation
5 systems plan in order to comply with the newly adopted Transportation Planning
6 Rule at OAR 660-012-0000 *et seq*, where that comprehensive plan amendment
7 was not intended to implement the Transportation Planning Rule.

8 Citing *Homebuilders Assoc. v. City of Eugene*, 41 Or LUBA 370, 388
9 (2002), HBA and HLA respond that in endeavoring to comply with SB 1051, the
10 city applied existing standards to a new use — accessory dwellings in the New
11 Zones — for the first time, and therefore those existing standards are subject to
12 review for compliance with ORS 197.312(5). In *Home Builders*, LUBA agreed
13 with the petitioners that the city's "carried-forward" provisions were subject to
14 review for compliance with the needed housing statutes that the legislation
15 intended to implement, even though the carried-forward provisions were either
16 unamended or slightly amended when they were carried forward. *Id.* That was so
17 because the city's action was intended to comply with new statutory
18 requirements. *Id.*

19 We agree with Petitioners that the existing EC standards that now apply to
20 accessory dwellings in the New Zones (which we refer to here as the carried-
21 forward provisions) are subject to review for compliance with ORS 197.312(5).
22 The city apparently intended to only partially implement SB 1051 and perhaps

1 thus limit review of the Ordinances to only the changes made, consistent with
2 *Volny*. That partial implementation approach might have had the effect of limiting
3 review over the carried-forward provisions had the city not also chosen to apply
4 the existing standards in the New Zones. However, having chosen to implement
5 ORS 197.312(5) and apply (carry forward) existing EC standards to accessory
6 dwellings in the New Zones for the first time, the city's action more closely,
7 although not completely, resembles the situation that occurred in *Home Builders*.
8 Had the city chosen to amend the EC to allow accessory dwellings in the New
9 Zones, but without importing existing standards applicable to accessory
10 dwellings, that action would have more closely resembled the situation in *Volny*.
11 But by applying existing EC standards for the first time in the New Zones, the
12 city in effect adopted those standards for the first time in the New Zones, and
13 accordingly we agree with HBA that they are subject to review for compliance
14 with ORS 197.312(5) as to the New Zones.

15 The problem that arises from our disposition of that issue, however, is that
16 the city's decision simply does not address, and the city adopted no findings,
17 evaluating whether the existing EC standards that the city carried forward are
18 "reasonable local regulations relating to siting and design" within the meaning of
19 ORS 197.312(5)(a). In other words, there is nothing in the Ordinances or in the
20 findings supporting the Ordinances for LUBA to review. While the meaning of
21 the phrase "reasonable local regulations relating to siting and design" is a
22 question of statutory interpretation, the legislative allowance for cities to

1 "subject" accessory dwellings "to" those regulations leaves with cities some
2 measure of local regulatory authority over accessory dwellings. In other words,
3 the reach of the regulatory allowance accorded cities under ORS 197.312(5) is
4 mostly, but not purely, a matter of state law, because it leaves cities to decide in
5 the first instance which of their "local regulations" are "reasonable" "siting and
6 design" standards that the cities can apply to accessory dwellings. Given that SB
7 1051 was recently enacted, there is scant legislative history for SB 1051 that
8 assists in resolving the questions presented in these assignments of error, and
9 there are no existing administrative rules that define or interpret its operative
10 terms, we think the better course at this point is to remand the Ordinances to the
11 city for the city to consider in the first instance whether the existing EC standards
12 that the city applied for the first time in the New Zones are "reasonable local
13 regulations relating to siting and design."[8] Therefore, except for the arguments
14 that we address below regarding the S-JW Zone, we do not consider Petitioners'
15 arguments regarding specific EC provisions that Petitioners argue are not
16 "reasonable local regulations relating to siting and design" because they are either
17 not "regulations relating to siting and design" or are not "reasonable." On
18 remand, the city should at a minimum address Petitioners' arguments and

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[8] The city council should also consider adopting findings addressing Petitioners' argument that minimum lot size requirements for accessory dwellings and alley access lot prohibitions on accessory dwellings are not "reasonable local regulations related to siting and design."

1 determine whether the existing EC standards that the city applied to the New
2 Zones fall within the statute's allowance for local regulation of accessory
3 dwellings.[9]

4 **C. The S-JW Zone Allows "An Additional One Family Dwelling"**

5 HBA's and 1000 Friends' petitions for review challenge the provisions of
6 Ordinance 20594, section 15.[10] That section amended EC 9.3615 to add section
7 (2), which allows in the S-JW Zone "an additional (interior, attached or detached)
8 residential structure that is used in connection with or that is accessory to a single
9 family dwelling" as an "additional 'One-Family Dwelling' and not as an
10 'Accessory Dwelling.'" According to HBA and 1000 Friends, EC 9.3615(2)
11 "bans" accessory dwellings in the S-JW Zone. HBA and 1000 Friends argue that
12 the S-JW Zone does not allow accessory dwellings, presumably focusing on the
13 language quoted above "and not as an 'Accessory Dwelling.'"

14 The city responds, and we agree, that accessory dwellings are allowed in
15 the S-JW Zone because EC 9.3615(2) now allows the exact type of dwellings that
16 SB 1051 defines as an "accessory dwelling." As the city puts it, "[w]hether it is
17 called an [accessory dwelling unit] ADU or an additional one-family dwelling is
18 irrelevant." Response Brief 32. Nothing in SB 1051 or elsewhere cited to our

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[9] On remand, the city should also consider whether ORS 197.831 applies to the Ordinances, and if so, whether the Ordinances are "capable of being imposed only in a clear and objective manner."

[10] HBA's fourth assignment of error; 1000 Friends' first assignment of error.

1 attention requires the city use the term "accessory dwelling unit" instead of a
2 synonymous term.

3 1000 Friends also challenges the EC Table 9.3625 standards that prohibit
4 more than one dwelling on a lot that is less than 4,500 square feet, and argues
5 that that provision in EC Table 9.3625 is not a "reasonable local regulation
6 relating to siting and design." However, EC 9.3625 is not one of the "carried-
7 forward provisions," but one that applied in the S-JW zone prior to the adoption
8 of Ordinance 20594. Ordinance 20594 did not amend EC Table 9.3625 at all.
9 Accordingly, we agree with the city that because EC 9.3625 applied in the S-JW
10 zone prior to the adoption of Ordinance 20594, and was not amended by
11 Ordinance 20594, EC 9.3625 may not be challenged in this appeal of Ordinance
12 20594.

13 **D. Conclusion**

14 HBA's first assignment of error and HLA's first assignment of error are
15 sustained, in part. We do not reach HBA's second and third assignments of error,
16 portions of HLA's first assignment of error, or 1000 Friends' second assignment
17 of error.

18 HBA's fourth assignment of error and 1000 Friends' first assignment of
19 error are denied.

20 **HLA'S SECOND ASSIGNMENT OF ERROR**

21 In its second assignment of error, HLA argues that the city's findings are
22 inadequate to explain why the Ordinances are consistent with a number of Metro

1 Plan policies (the regional comprehensive plan for the cities of Eugene and
2 Springfield) and a number of policies of Envision Eugene, the city's
3 comprehensive plan.[11] Generally, legislative decisions such as the challenged
4 decision are not required to be supported by the detailed findings that are
5 typically required for quasi-judicial land use decisions. For legislative land use
6 decisions, the city may rely on findings as well as arguments in its brief and
7 accessible material in the record to establish that applicable legal standards are
8 satisfied. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n
9 6, 38 P3d 956 (2002).

10 **A. Metro Plan Policies A.13, A.17 and A.18**

11 HLA first argues that the city's findings regarding Metro Plan Residential
12 Land Use and Housing Element (Housing Element) Policies A.13, A.17, and
13 A.18 are "incorrect" because in three city zones the Ordinances applied standards
14 to the New Zones that prohibit accessory dwellings on lots that do not meet
15 minimum lots size or dimensional standards.[12] HLA Petition for Review 35.

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[11] Until recently, the cities of Eugene and Springfield shared an urban growth boundary (UGB) and a single regional comprehensive plan, the Metro Plan. Since creating separate UGBs, Eugene has adopted its own comprehensive plan, Envision Eugene, but the city has not yet adopted an Envision Eugene chapter that addresses Statewide Planning Goal 10 (Housing). According to the city, the Metro Plan's Housing apply in the city. Response Brief 39-40. Petitioners do not dispute this contention.

[12] The city adopted findings that the Ordinances are consistent with Housing Element Policies A.13, A.17, and A.18, which provide:

1 Accordingly, HLA argues, the city's finding that the Ordinances "[i]ncrease
2 overall density * * by creating more opportunities for effectively designed in-
3 fill" and "[p]rovide opportunities for a full range of choice in housing type,
4 density, size, cost, and location" in the city is not accurate. Housing Element
5 Policies A.17, A.19.

6 The city responds, and we agree, that Ordinances that allow accessory
7 dwellings for the first time in seven of the city's zones create infill development
8 and provide for more choice in housing, consistent with the applicable Housing
9 Element Policies. The city reasonably found that the Ordinances create more
10 opportunity for infill and provide opportunities for a full range of housing.

"A.13 Increase overall residential density in the metropolitan area by creating more opportunities for effectively designed in-fill, redevelopment, and mixed use while considering impacts of increased residential density on historic, existing and future neighborhoods.

" * * * * *

"A.17 Provide opportunities for a full range of choice in housing type, density, size, cost, and location.

"A.18 Encourage a mix of structure types and densities within residential designations by reviewing and, if necessary, amending local zoning and development regulations."

1 **B. Metro Plan Policies A.2, A.10, A.14, A.28, A.30, A.31, A.32, A.33,**
2 **and A.34.**

3 HLA next argues that the city failed to adopt findings addressing Housing
4 Element Policies A.2, A.10, A.14, A.28, A.30, A.31, A.32, A.33, and A.34.

5 The city responds that Policy A.2 does not apply to the city's decision to
6 adopt the Ordinances because the Ordinances do not amend the zoning of any
7 property within the city's UGB.[13] We agree with the city.

8 The city also responds that Policy A.10 is phrased in aspirational terms and
9 does not apply, and in the alternative, that the Ordinances are consistent with
10 Policy A.10 because the Ordinances "[p]romote higher residential density."[14]
11 Again, we agree with the city. Amendments to the EC that allow accessory
12 dwellings in the New Zones in which they were not previously allowed
13 "[p]romote higher residential density."

14 The city's response brief provides reasons why the city was not required
15 to consider any of the remaining Housing Element Policies in its decision to adopt
16 the Ordinances. We have reviewed HLA's arguments and the city's responses,

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[13] Housing Element Policy A.2 is "Residentially designated land within the UGB should be zoned consistent with the *Metro Plan* and applicable plans and policies; however, existing agricultural zoning may be continued within the area between the city limits and the UGB until rezoned for urban uses." (Emphasis in original.)

[14] Housing Element Policy A.10 is "Promote higher residential density inside the UGB that utilizes existing infrastructure, improves the efficiency of public services and facilities, and conserves rural resource lands outside the UGB."

1 and the cited Housing Element Policies can be grouped into two categories. The
2 first category includes policies that do not contain language that references the
3 city's zoning and development regulations. These are policies A.28, A.30, A.32,
4 and A.34.[15] We agree with the city that the city was not required, in adopting the
5 Ordinances that amend the EC, to consider these policies.

6 Policies A.14, A.31, and A.33, on the other hand, all contain language
7 referring to the city's review or consideration of local zoning and development
8 regulations.[16] We conclude that, where the Ordinances amend the local zoning

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[15] These policies are:

"A.28 Seek to maintain and increase the supply of rental housing and increase home ownership options for low- and very low-income households by providing economic and other incentives, such as density bonuses, to developers that agree to provide needed below market and service-enhanced housing in the community.

"A.30 Balance the need to provide a sufficient amount of land to accommodate affordable housing with the community's goals to maintain a compact urban form.

"A.32 Encourage the development of affordable housing for special needs populations that may include service delivery enhancements on-site.

"A.34 Protect all persons from housing discrimination."

[16] These policies are:

1 and development regulations even for the limited purpose of implementing SB
2 1051, it is not apparent why the city is not required to consider these policies in
3 amending the EC. The city cites nothing in the record indicating that the city
4 council considered whether the Ordinances are consistent with these policies.

5 **C. Envision Eugene Comprehensive Plan**

6 HLA also argues that the city's findings fail to address language in the
7 introduction section to the Envision Eugene Comprehensive Plan that describes
8 several values that guide the city's planning efforts: "2. Provide Housing
9 Affordable to all income levels; * * * 4. Promote compact urban development
10 and efficient transportation options." *See* n 11. HLA also argues that the city's
11 findings fail to address Envision Eugene Comprehensive Plan Economic
12 Development Chapter Policy 3.3, which states in part that one economic
13 development policy is to "[e]xpand[] Eugene's assets. Recognize and enhance

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"A.14 Review local zoning and development regulations periodically to remove barriers to higher density housing and to make provision for a full range of housing options.

"A.31 Consider the unique housing problems experienced by special needs populations, including the homeless, through review of local zoning and development regulations, other codes and public safety regulations to accommodate these special needs.

"A.33 Consider local zoning and development regulations impact on the cost of housing."

1 special areas of strength and local assets that attract sectors such as tourism,
2 hospitality, and retirement living." Finally, HLA argues that the city erred in
3 failing to comply with Envision Eugene Comprehensive Plan, Administration
4 and Implementation Chapter, Policy 10.8 and 10.9 by evaluating data from the
5 city's growth monitoring program in adopting the Ordinances.[17]

6 The city responds that the city has not adopted a housing chapter for the
7 Envision Eugene plan, so there are no Envision Eugene plan policies that apply
8 to the city's decision. The city also responds that the city was not required to
9 consider the provisions from the introduction section to the Envision Eugene plan
10 cited by HLA because the introduction section explains the role of introductory
11 text, goals, and policies, and states that introductory text "is provided for general
12 explanatory purposes only." Response Brief 50. Finally, the city responds that
13 the city was not required to consider data collected from the city's newly
14 established growth monitoring program, even if that data existed, because
15 "[l]ocal data about growth could not override a directive from the Oregon
16 legislature" to allow accessory dwellings. Response Brief 53. We agree with the
17 city on all points.

18 HLA's second assignment of error is sustained, in part.

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[17] Policy 10.8 is to develop and maintain monitoring efforts to track "quality of life indicators" including creating walkable, compatible and affordable neighborhoods." Policy 10.9 is to develop and maintain a growth monitoring program to track official population forecasts, housing trends, economic development trends, and the rate of development of residential lands in the city.

1 **HLA'S THIRD ASSIGNMENT OF ERROR**

2 In its third assignment of error, HLA argues that the Ordinances are
3 inconsistent with the Fair Housing Act (FHA), 42 USC sections 3601-3619, and
4 the Americans with Disabilities Act (ADA), 42 USC sections 12101-12213. HLA
5 argues that the Ordinances will result in disparate impacts on access to housing
6 for individuals who possess protected characteristics (race, color, religion, sex,
7 disability, familial status, or national origin) under the FHA, and will result in
8 discrimination against disabled persons protected from discrimination under the
9 ADA, and therefore the Ordinances violate both federal laws.

10 The present appeal involves a facial challenge to a legislative decision. In
11 such a context, HLA must demonstrate that the Ordinances are facially
12 inconsistent with applicable law and are incapable of being applied consistently
13 with controlling law. *See Benson v. City of Portland,* 119 Or App 406, 410, 850
14 P2d 416, *rev den* 318 Or 24 (1993) (in considering a facial challenge to legislation
15 as inconsistent with applicable law the question is whether the legislation is
16 capable of any permissible applications that are consistent with law); *Children's*
17 *Alliance v. City of Bellevue*, 950 F Supp 1491, 1496 (WD Wash 1997) (explaining
18 the test for demonstrating a *prima facie* disparate treatment violation of the FHA
19 is whether an ordinance on its face expressly treats members of a protected class
20 differently than others who are similarly situated).

21 In support of its argument, HLA points to EC 9.2751(17)(c)(8), which
22 limits occupancy of an accessory dwelling in some cases to two persons, and EC

1 9.2751(17)(c)(4), which restricts the amount of space on a lot that may be used
2 for vehicle storage, and argues that such standards will disparately impact
3 protected classes. HLA also argues that the prohibitions in EC 9.2741(2) on
4 accessory dwellings on alley access lots, and in EC 9.2751(17)(c)(1) on accessory
5 dwellings on lots smaller than 7,500 square feet in some zoning districts, will
6 disparately impact protected classes.

7 The city responds, again, that HLA may not challenge unamended
8 standards that the Ordinances applied for the first time to the New Zones, and we
9 reject that response for the same reasons described above. As to the New Zones,
10 in which the accessory dwelling standards were applied for the first time, HLA
11 may challenge those standards in those New Zones.

12 However, HLA has not satisfied its burden to demonstrate that the
13 standards that the Ordinances applied for the first time in the New Zones are
14 incapable of being applied consistently with the FHA or the ADA under any
15 circumstances where they may be applied. HLA does not point to any evidence
16 in the record to support its claims, and its arguments do not establish that the cited
17 standards are incapable in all circumstances of being applied consistently with
18 the FHA or the ADA.

19 HLA's third assignment of error is denied.

20 The city's decision is remanded.