

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 DALE BAKER,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 MARION COUNTY,) LUBA No. 92-174
11)
12 Respondent,) FINAL OPINION
13) AND ORDER
14 and)
15)
16 JUDY FICEK, TOM BEDELL, ROBERT)
17 PAYNE and the BUTTEVILLE)
18 HOMEOWNERS ASSOCIATION,)
19)
20 Intervenors-Respondent.)

23 Appeal from Marion County.

25 Don Kelley, Silverton, filed the petition for review
26 and argued on behalf of petitioner. With him on the brief
27 was Kelley & Kelley.

29 Robert C. Cannon, Marion County Counsel, Salem; Jane
30 Ellen Stonecipher, Assistant Legal Counsel, Salem; and
31 Wallace W. Lien, Salem, filed the response brief. Jane
32 Ellen Stonecipher argued on behalf of respondent. Wallace
33 W. Lien argued on behalf of intervenors-respondent.

35 KELLINGTON, Referee; HOLSTUN, Referee, participated in
36 the decision.

37
38 AFFIRMED 02/16/93

40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the Marion County Board
4 of Commissioners denying his application for an urban growth
5 boundary (UGB) amendment.

6 **MOTION TO INTERVENE**

7 Judy Ficek, Tom Bedell, Robert Payne and the Butteville
8 Homeowners Association move to intervene on the side of
9 respondent. There is no objection to the motion, and it is
10 allowed.

11 **FACTS**

12 The subject property is 10.25 acres in size and is
13 zoned and planned AR. Land to the north, west and south is
14 also zoned AR and consists of homesites and small farms.
15 The city limits of the City of Woodburn are to the east of
16 the subject parcel.

17 A seven lot residential subdivision has previously been
18 approved by the county on the subject property.

19 After petitioner obtained county approval to subdivide
20 the subject property, the owner of the adjacent property
21 located within the city limits to the east of the subject
22 property obtained city approval to subdivide that property
23 (adjacent subdivision). However, the previously approved
24 subdivision on the subject property creates access problems
25 for the adjacent subdivision.

26 Petitioner submitted applications to the City of

1 Woodburn for annexation, plan and zone changes and a UGB
2 amendment to allow subdivision of the subject property into
3 more than seven lots, and to provide additional access to
4 the adjacent subdivision. The city approved petitioner's
5 applications. However, pursuant to an intergovernmental
6 agreement with Marion County, the UGB amendment also
7 required county approval. After a public hearing, the
8 county denied petitioner's request for approval of a UGB
9 amendment. This appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 "The Marion County Board of Commissioners erred in
12 concluding there is surplus of over 600 acres [of
13 land] planned for residential use within the
14 Woodburn Urban Growth Boundary."

15 The challenged decision determines the proposal fails
16 to comply with the seven Goal 14 factors, applicable to the
17 establishment and change of UGBs. At issue under this
18 assignment of error is the county's determination that
19 petitioner failed to establish compliance with Factor 1
20 concerning the existence of a demonstrated need for the
21 change of the UGB. Factor 1 provides as follows:

22 "Establishment and change of the [UGB] shall be
23 based upon consideration of the following factors:

24 "(1) Demonstrated need to accommodate long-range
25 urban population growth requirements
26 consistent with [Land Conservation and
27 Development Commission (LCDC)] goals;

28 " * * * * ."

29 The challenged decision includes the following findings

1 of noncompliance with this standard:

2 "** * * Any UGB expansion must be justified by the
3 need to accommodate population growth within the
4 entire UGB. The City staff report * * * shows in
5 excess of 600 acres planned for low density
6 residential development within the UGB. There is
7 also approximately 220 acres of land designated
8 high density residential that must also be
9 considered when determining whether there is a
10 need for additional residential land to meet the
11 long-range population growth needs of the City.
12 There is not a demonstrated need for additional
13 residential land to meet the long-range population
14 growth needs of the City of Woodburn.

15 "** * * * *

16 "The [board of commissioners] fin[d] that there is
17 no justification to approve the amendment to the
18 [UGB]. There is adequate undeveloped
19 residentially designated land currently within the
20 boundary." Record 10-11.

21 Petitioner challenges the evidentiary support for the
22 county's determination that the UGB includes 600 acres
23 planned for low density residential use, and 220 acres
24 planned for high density residential use. Among other
25 things, petitioner cites a letter from City of Woodburn
26 staff (city staff letter) stating that several residentially
27 zoned parcels within the UGB may, at some point in the
28 future, be converted to nonresidential uses.

29 To overturn on evidentiary grounds a local government's
30 determination that an applicable approval standard is not
31 met, a petitioner may not simply show that there is
32 substantial evidence in the record to support his position.
33 Rather, the "evidence must be such that a reasonable trier

1 of fact could only say petitioner['s] evidence should be
2 believed." (Emphasis supplied.) Morley v. Marion County,
3 16 Or LUBA 385, 393 (1987); McCoy v. Marion County, 16
4 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7
5 Or LUBA 42, 46 (1982). Petitioner must demonstrate that he
6 sustained his burden of proof of compliance with all
7 applicable standards, as a matter of law. Jurgenson v.
8 Union County Court, 42 Or App 505, 600 P2d 1241 (1979);
9 Consolidated Rock Products v. Clackamas County, 17 Or LUBA
10 609, 619 (1989). We conclude that petitioner's evidence
11 does not meet this heavy burden.

12 Respondents point out the parcels listed in the city
13 staff's letter may or may not eventually be converted to
14 nonresidential uses. Further, they cite evidence in the
15 record supporting the county's determination that at the
16 time of the challenged decision, there were 600 acres within
17 the UGB available for low density development and 220 acres
18 within the UGB available for high density development.
19 Respondents argue that even if the acreage cited in the
20 city's letter were not available for residential
21 development, there would still be a substantial amount of
22 acreage within the UGB available for residential
23 development.

24 The evidence cited by petitioner does not so undermine
25 the evidence relied upon by the county that a reasonable
26 decision maker would not rely upon the county's evidence.

1 See Younger v. City of Portland, 305 Or 346, 360, 752 P2d
2 262 (1988). Further, even with the city staff letter, there
3 is sufficient evidence for a reasonable decision maker to
4 determine, as the county did, that there is a substantial
5 amount of residentially zoned land within the UGB available
6 for residential development. Petitioner has not established
7 that there is a "[d]emonstrated need to accommodate
8 long-range urban population growth requirements consistent
9 with LCDC Goals" within the existing UGB, as a matter of
10 law.

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 "The Marion County Board of Commissioners further
14 erred in concluding that a sub-regional need for
15 additional residential land cannot justify an
16 expansion of an urban growth boundary in that the
17 Board of Commissioners failed to apply the
18 applicable law."

19 Under this assignment of error, petitioner argues the
20 county erroneously determined that the need he expresses for
21 residentially zoned land within the UGB may not be
22 established on the basis of a "subregional" area. Petition
23 for Review 7-8. Specifically, petitioner challenges the
24 following findings:

25 "[Petitioner] attempts to establish a need for
26 additional residential land by pointing out that
27 'West Woodburn' * * * is built out and no longer
28 contains any land available for residential
29 development. However, the UGB was adopted based
30 on the need to accommodate residential growth
31 within the entire city and not just "West

1 Woodburn" which in this case is an artificial
2 creation identifying a geographic sector of the
3 city solely for the purpose of justifying the UGB
4 expansion. Furthermore, even if an expansion of
5 the UGB based on [the needs of West Woodburn]
6 could be justified, it cannot be justified in this
7 case because there is an area of approximately 50
8 to 60 acres of land within the UGB located to the
9 east of [the subject property] designated for high
10 density residential development. This area is
11 undeveloped and available to meet the needs of the
12 population growth and residential development in
13 "West Woodburn." This indicates that there is no
14 shortage of residentially designated land in the
15 Woodburn UGB or West Woodburn sector." Record 9-
16 10.

17 Neither the comprehensive plan of the City of Woodburn
18 nor the comprehensive plan of Marion County include a
19 designated or recognized "subregion," of "West Woodburn."
20 However, even if they did, petitioner overlooks the
21 alternative findings quoted above, which determine that if
22 there were a "subregional" area of "West Woodburn" utilizing
23 the boundaries petitioner articulates, there are 50 acres of
24 vacant, available residential land located within the UGB in
25 that "subregion." There is substantial evidence in the
26 record to support the county's determination that there is
27 available, undeveloped, residential land within the "West
28 Woodburn" subregion petitioner articulates.¹

29 The second assignment of error is denied.

¹That there may be an application to change the zoning for some or all of this land to Commercial currently pending before the City of Woodburn does not make this land unavailable, as a matter of law, for the high density residential use for which it is planned and zoned. See Record 99.

1 **THIRD ASSIGNMENT OF ERROR**

2 "The Marion County Board of Commissioners erred in
3 concluding there has been no compliance with the
4 Goal 14 factors."

5 Under this assignment of error, petitioner argues the
6 county erred by determining the proposal fails to comply
7 with the second factor of Goal 14. The second factor of
8 Goal 14 requires that for a change to an established UGB,
9 the county must establish the existence of a:

10 "[n]eed for housing, employment opportunities, and
11 livability;

12 " * * * * ."

13 Petitioner argues that this factor is satisfied as
14 follows:

15 "A significant livability problem exists due to
16 the fact that the [subject] parcel is needed by
17 the City of Woodburn in order to appropriately
18 serve land already included in the UGB. Because
19 of the location of a creek, residents of [the
20 adjacent subdivision] have only one access out of
21 the subdivision. [The residents of the adjacent
22 subdivision] could be cut off from fire, police,
23 emergency and other transportation access if their
24 only access route became blocked or otherwise cut
25 off. * * *. " Petition for Review 11.

26 It may be that a need to provide access to the adjacent
27 subdivision might justify a change in the UGB in order to
28 annex land for a roadway to serve that adjacent subdivision.
29 However, such a need does not necessarily justify including
30 the entire 10.25 acres within the UGB under Goal 14, Factor
31 2.

32 Petitioner asserts that the proposal satisfies other

1 Goal 14 factors. However, in the absence of having
2 established an exception to Goal 14 or compliance with the
3 two "need" factors of Goal 14, petitioner has failed to
4 establish compliance with applicable standards as a matter
5 of law, and petitioner's additional arguments provide no
6 basis for reversal or remand of the challenged decision.

7 The third assignment of error is denied.

8 The county's decision is affirmed.