

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,                               )  
11    )  
12                        Respondent,                               )  
13    )  
14                and    )  
15    )  
16       JUDY FICEK, TOM BEDELL, ROBERT    )  
17       PAYNE and the BUTTEVILLE                                )  
18       HOMEOWNERS ASSOCIATION,                                )  
19    )  
20                        Intervenors-Respondent.                                )

LUBA No. 92-174  
  
FINAL OPINION  
AND ORDER

21  
22  
23       Appeal from Marion County.

24  
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.

28  
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.

34  
35       KELLINGTON, Referee; HOLSTUN, Referee, participated in  
36 the decision.

37  
38                       AFFIRMED   02/16/93

39  
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.<sup>1</sup>

29 The second assignment of error is denied.

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<sup>1</sup>That 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.