

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF YAMHILL COUNTY,
5 LEE DOES, AMY DOES,
6 and GRACE SCHAAD,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF NEWBERG,
12 *Respondent.*

13
14 LUBA No. 2010-034

15
16 FINAL OPINION
17 AND ORDER

18
19 Appeal from City of Newberg.

20
21 David O. Black Jr., Portland, filed the petition for review and argued on behalf of
22 petitioners. With him on the brief was Opton and Galton.

23
24 Terrence D. Mahr, City Attorney, Newberg, filed the response brief and argued on
25 behalf of the respondent. With him on the brief was Corinne C. Sherton.

26
27 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
28 participated in the decision.

29
30 REMANDED

11/08/2010

31
32 You are entitled to judicial review of this Order. Judicial review is governed by the
33 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city ordinance that amends the city’s comprehensive plan housing element.

INTRODUCTION

The challenged decision adopted revisions to the Housing Element and Land Need and Supply section of the Newberg Comprehensive Plan (NCP). The revisions to the NCP were the result of the city’s evaluation of its urban growth boundary (UGB) to determine whether the UGB contains enough land to meet the city’s future residential needs and were based in part on the results of a Buildable Lands Inventory (BLI). The evaluation identified a need for an additional 1,100 acres of land to meet the city’s residential land needs by the year 2030, and an additional 634 acres of land by the year 2040, based on the city’s proposed residential densities for various housing types. The revisions also identified a need for an additional 339 acres of land for institutional needs by 2030 and an additional 207 acres by 2040. Finally, the revisions identified a need for more affordable housing within the city and provided seven possible actions the city could take to address that need.

REPLY BRIEF AND MOTION TO STRIKE

Petitioners move to file a reply brief to respond to new matters raised in the response brief. The reply brief is allowed.

In the response brief, the city requests that the Board take official notice of an excerpt from a 2010 Land Conservation and Development Commission (LCDC) order that is attached as Appendix E to the response brief. That order remands the city’s designation of an urban reserve area. Petitioners move to strike Appendix E to the response brief and all references to Appendix E that are found in the response brief. Petitioners argue that the remand order “is not relevant to the issue at hand, as a factual or legal matter.” Motion to Strike 1.

1 Petitioners do not dispute that the remand order is an official act of LCDC, and as
2 such, we may take official notice of the remand order under Oregon Evidence Code (OEC)
3 202(2).¹ The motion to strike is denied.

4 **FIRST ASSIGNMENT OF ERROR**

5 OAR 660-024-0050(1) provides that in evaluating a UGB, a local government must
6 include “vacant and redevelopable land” located within the UGB in its analysis of whether
7 there is already adequate development capacity to accommodate 20-year residential land
8 needs under OAR 660-024-0040. Although “redevelopable land” is not defined in OAR 660
9 Division 24, which concerns urban growth boundaries (UGBs), it is defined in OAR 660-
10 008-0005(6), the administrative rule that implements Statewide Planning Goal 10 (Housing),
11 as:

12 “* * * land zoned for residential use on which development has already
13 occurred but on which, due to present or expected market forces, there exists
14 *the strong likelihood* that existing development will be converted to more
15 intensive residential uses during the planning period.” (Emphasis added.)

16 **A. Redevelopable Land**

17 In their first subassignment of error, we understand petitioners to argue that the city
18 failed to include all potentially redevelopable land within the UGB in its analysis of land
19 need because it only included “infill land” in its analysis. We understand petitioners to
20 define “infill land” to mean land on which dwellings are located on over-size lots but where
21 there remains existing capacity for partition and additional residential development. We
22 understand petitioners to contend that infill land is a narrower concept than redevelopable

¹ OEC 202(2) provides in relevant part:

“Law judicially noticed is defined as:

“ * * * * *

“(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.”

1 land because the city failed to consider land that could be redeveloped by removing existing
2 structures and replacing them with more intensive residential development such as multi-
3 family dwellings.

4 The BLI explains that in assessing redevelopable land, the city considered both
5 “[t]hat portion of a lot not developed for other uses, including a portion of a non-residential
6 or multi-family lot not used or required for landscaping, lot coverage, parking, setbacks, or
7 other uses” (i.e. infill) and “* * * lot[s] without generally sound structures * * *” that could
8 be removed and replaced with more intensive development. Record 263.

9 The OAR 660-008-0005(6) definition of “redevelopable land” specifically
10 encompasses land on which the city determines there is a “strong likelihood” that the lots
11 will be redeveloped more intensively. The city responds that the city in fact considered the
12 potential for residential development on both infill land and on land where there is a strong
13 likelihood that existing structures will be replaced with more intensive development. In
14 considering whether land is redevelopable by removing existing structures and replacing
15 them with more intensive development, the city explains that it based its assessment of
16 whether a “strong likelihood” for redevelopment exists in part on the arrangement of existing
17 development. Record 122-123. We understand the city to have concluded that there is not a
18 strong likelihood that redevelopment will occur on any lands within the city, due to the
19 arrangement of existing development and market factors.² We think the city’s response is
20 adequate to demonstrate that the city included all “redevelopable land” in its analysis.

² The staff report at Record 122-23 states:

“[T]he inventory does factor in the potential for removal of existing development and replacement with new dwellings. Redevelopment could mean removing an existing house and replacing it with a new house. While this may or may not be desirable, it is a zero net-sum game in terms of development capacity, since it only adds a dwelling by taking one away. Redevelopment could mean removing an existing house and replacing it with two or more. The buildable land inventory does factor in the probability of this happening. In the example above, the 0.45 acre lot could be redeveloped by removing the existing house and placing new dwellings. The ‘development capacity’ gained still must be decreased by the loss of the

1 This subassignment of error is denied.

2 **B. Highway Corridor**

3 In their second subassignment of error, petitioners argue that the city erred in
4 excluding more land than warranted from its inventory of “buildable land,” which is defined
5 in OAR 660-008-0005(2) in relevant part as:

6 “* * * residentially designated land within the urban growth boundary,
7 including both vacant and developed land likely to be redeveloped, that is
8 suitable, available and necessary for residential uses. * * *”

9 According to petitioners, the city excluded the entire width of a study corridor for a future
10 highway from consideration as buildable land, when the city should have excluded only the
11 much narrower anticipated right of way for the highway. The city responds, and we agree,
12 that the inventory excluded only land in the right of way, and not all the land in the study
13 corridor. Record 47, 264.

14 This subassignment of error is denied.

15 **C. Park Land**

16 In their third subassignment of error, petitioners argue that the city erred in
17 overestimating the amount of land that will be needed for parks because it only considered
18 land as suitable for park land if that land also qualifies as “buildable land.” According to

one existing house. In some cases the arrangement of existing development indicates there is not a ‘strong likelihood that existing development will be converted to more intensive residential uses during the planning period,’ thus such lots are appropriately excluded from the buildable land inventory. Note that one of strategies in the Newberg Affordable Housing Action Plan is to encourage retention of existing affordable house through such things as maintenance and rehabilitation, so Newberg should use caution in considering such demolition. The final possibility is removal of some non-residential use in a residential zone, such as a church, and replacement with dwellings. This too, however, is a zero-net sum game, as that use would simply have to be replaced with a new church or other use, which likely could be placed in residential land. Newberg simply is not a community with much developed but unused land available for redevelopment, with great amounts of non-conforming uses in residential zones, nor one where market forces would force push such changes to any great extent. The ambitious redevelopment factor used would cover any development capacity gained if this occasionally happened.”

1 petitioners, limiting its consideration in this way eliminated wetlands, riparian areas, sloped
2 areas, and floodplains, all lands that could be suitable for some parks.

3 The city responds that the inventory identified the city’s park land needs as needs for
4 ball fields, playgrounds, and picnic shelters, and determined that lands that are difficult to
5 build structures on or otherwise have development constraints will not meet those identified
6 needs. Record 169, 298, 450-51. While we agree with the city that playgrounds, ball fields
7 and picnic shelters could be difficult to develop on wetlands, in riparian areas or on sloped
8 areas, the city does not explain why it is inherently difficult to develop those types of park
9 uses in floodplains, which do not contain the same development constraints as the other
10 category of lands that the city excluded.

11 This subassignment of error is sustained.

12 **D. Suitable and Available Land**

13 In their fourth subassignment of error, petitioners argue that the city erred in
14 excluding from consideration as “buildable land” “* * * [l]ots or portions of lots that,
15 because of odd shape, topography, irregular placement of buildings, or limited accessibility
16 could not be readily developed if urban services were available.” Record 264. Petitioners
17 argue that the city’s exclusion of those lands is inconsistent with the definition of “buildable
18 land” at OAR 660-008-0005(2), which provides:

19 “Land is generally considered ‘suitable and available’ unless it:

20 “(a) Is severely constrained by natural hazards as determined under
21 Statewide Planning Goal 7;

22 “(b) Is subject to natural resource protection measures determined under
23 statewide Planning Goals 5, 15, 16, 17, or 18;

24 “(c) Has slopes of 25 percent or greater;

25 “(d) Is within the 100-year flood plain; or

26 “(e) Cannot be provided with public facilities.”

1 The rule contains a presumption that land is “buildable land” unless it possesses one
2 or more of the characteristics listed in the rule, in which case the city may exclude it from the
3 definition of buildable land. However, the qualifier “generally” does not suggest that the five
4 characteristics listed in the definition are the exclusive set of characteristics that a city can
5 consider in determining whether land is “suitable and available.” The city may conclude that
6 other lands with other limiting characteristics are not “suitable and available,” and hence not
7 “buildable land,” if the city explains why those characteristics render those lands not suitable
8 or available for residential development, and that explanation is supported by an adequate
9 factual base.

10 The city responds that the characteristics that it considered including shape,
11 topography, placement of buildings and access issues, were all reasonable bases to conclude
12 that land is not “suitable” for residential land needs. The city cites to evidence that all of the
13 irregularly shaped lots that the city excluded were in fact undevelopable for other reasons in
14 addition to their shape. Record 263, Response Brief App. 7. We agree with the city that the
15 exclusion of irregularly shaped lots is supported by an adequate factual base.

16 However, nearly all land has some development constraints, and the city does not
17 explain why the other factors that it listed – topography, placement of buildings, and access
18 issues -truly render the excluded land undevelopable for residential uses. For example, the
19 city does not explain how excluding land due to “topography” relates to or differs from the
20 portion of the rule identifying land that has slopes of 25% or greater as unbuildable land, or
21 explain how the placement of buildings or access constraints make land unbuildable. We
22 agree with petitioners that there is not an adequate factual base in the record to support the
23 city’s exclusion of land from the inventory based on topography, location of buildings, or
24 access issues.

25 This subassignment of error is sustained, in part.

1 **E. Vacant Land**

2 In their fifth subassignment of error, petitioners argue that the city erred in excluding
3 from its inventory of “buildable land” some lands that do not contain structures but which are
4 in use as large lots that are used in part as yards, yards in use in connection with development
5 on adjacent lots, parking areas, landscaped areas, and storage areas for nearby structures.
6 According to petitioners, all of those types of lands should be classified as “vacant land” or
7 evaluated for redevelopment potential.

8 The city responds that many of the types of lands identified are in fact “developed”
9 because they are dedicated to a developed use. As an example the city points out that the
10 NCP and the city’s development code require adequate off-street parking, and that the NCP
11 contains a requirement that the city provide adequate recreational resources. We agree with
12 the city that it was not error for the city to exclude parking areas, landscaped areas or storage
13 areas that are developed or in use in conjunction with developed areas from its inventory of
14 buildable land.

15 Regarding the city’s exclusion of some lots which are in use in conjunction with
16 developed uses as yards, the city points out that on balance it counted some lots that are
17 developed and that contain large yards as potential infill development, and that the inventory
18 as a whole classified more land as buildable than as developed. The city explains that even
19 when the city could have classified existing lots that are smaller than one-half acre as fully
20 developed, it considered many lots with houses that are smaller than one-half acre as
21 buildable. Petitioners do not point to any specific lot that is used as a yard that was wrongly
22 excluded from the inventory of vacant land. We agree with the city that it was not error for
23 the city to exclude some large yards from its inventory of buildable land and that its decision
24 to do so is supported by an adequate factual base.

25 This subassignment of error is denied.

26 The first assignment of error is sustained, in part.

1 **SECOND ASSIGNMENT OF ERROR**

2 OAR 660-024-0040(4) is one of the administrative rules governing the city's
3 amendment of its housing element, and provides in relevant part:

4 "The determination of 20-year residential land needs for an urban area must
5 be consistent with *the adopted 20-year coordinated population forecast for*
6 *the urban area * * *.*" (Emphasis added.)

7 In 1995 Yamhill County adopted a 20-year population forecast (from 1994 through 2014) for
8 the county and for each urban area within the county as part of the county's Transportation
9 System Plan.³ That forecast projects a 2014 population for the Newberg urban area of
10 30,656. In 2005, the city adopted a 35-year population forecast for the Newberg urban area
11 as a post-acknowledgement plan amendment to the NCP. That forecast projects a 2015
12 population of 28,559 and a 2040 population of 54,097. After adopting that forecast, the city
13 sent it to the county and requested that the county adopt it as the "coordinated population
14 projection" for the city's urban area. Record 399. The city takes the position that in 2007,
15 the county adopted the city's 2005 forecast as "the adopted 20-year coordinated population
16 forecast" referenced in OAR 660-024-0040(1) when the county approved an amendment to
17 the city's UGB that added approximately 29 acres to the UGB based on the 2005 city
18 forecast. In support of its argument, the city attaches copies of six pages of the county's
19 decision approving that UGB amendment to its brief, at Appendix 1 through 6.

³ OAR 660-024-0030(1) provides in relevant part:

"Counties must adopt and maintain a coordinated 20-year population forecast for the county and for each urban area within the county consistent with statutory requirements for such forecasts under ORS 195.025 and 195.036. Cities must adopt a 20-year population forecast for the urban area consistent with the coordinated county forecast * * *. In adopting the coordinated forecast, local governments must follow applicable procedures and requirements in ORS 197.610 to 197.650 and must provide notice to all other local governments in the county. The adopted forecast must be included in the comprehensive plan or in a document referenced by the plan."

1 According to petitioners, the 2005 city forecast has not yet been adopted by the
2 county as “*the* coordinated forecast,” for the city and therefore under OAR 660-024-0040 the
3 city cannot rely on the 2005 city forecast to evaluate its 20-year residential land needs.
4 Petitioners maintain that the county’s 2007 UGB amendment decision did not adopt the
5 city’s 2005 forecast as the county’s coordinated forecast.

6 We agree with petitioners that the 2007 county decision approving an amendment to
7 the city’s UGB based on the city’s 2005 forecast did not adopt that forecast as the county’s
8 coordinated forecast for the Newberg urban area. First, the decision itself approves an
9 application to amend the city’s UGB to add 29 acres, and nothing in the recitals or the
10 decision itself refers to the county’s approval or adoption of a coordinated population
11 forecast as part of that decision. The decision contains a list of items that the county is
12 approving, and none of those items mentions adoption of a coordinated population forecast.
13 Response Brief App. 3. Although there is a finding in the 2007 county UGB amendment
14 decision reciting that the city “received a population coordination letter from the County,
15 agreeing with the population forecast [in the NCP],” that language does not indicate that the
16 county intended the UGB amendment, to adopt the 2005 forecast as the coordinated
17 population forecast for the city.⁴

18 Second, another indication that the county 2007 UGB amendment decision was not
19 intended to and did not have the effect of adopting the city’s 2005 forecast as “the
20 coordinated forecast” for the city’s urban area, within the meaning of OAR 660-024-0030, is
21 that the 2007 UGB decision is not included in the county comprehensive plan or embodied in
22 a “document referenced in the [county’s comprehensive] plan” as those words are used in

⁴ That letter is an October 31, 2006 letter from the county planning director to the city planning director indicating that the county had received a copy of the city’s adopted 2005 forecast and would recommend that the forecast be “adopted in the next appropriate amendment to the [UGB] or Urban Reserve Area.” Record 399. That letter also states that the county planning director had notified other local governments about the city’s forecast and had not, as of the date of the letter, received any objections.

1 OAR 660-024-0030. *See* n 3. No party has argued that the 2007 UGB decision is included
2 or adopted by reference anywhere in the county’s comprehensive plan. While the UGB map
3 amended by the 2007 UGB decision is presumably part of the county comprehensive plan,
4 we do not believe that an amended UGB map is sufficient to adopt a coordinated population
5 forecast by inclusion or reference. In our view, the phrase “document referenced in the plan”
6 as used in the rule means background document or similar document, such as an inventory or
7 study, that is adopted by reference into the comprehensive plan.

8 Finally, the city argues that the county’s 2007 UGB amendment decision was not
9 appealed and is now deemed acknowledged under ORS 197.625(1), and thus may not now be
10 challenged by petitioners. However, the acknowledged status of the county’s 2007 UGB
11 amendment decision has no bearing on the relevant legal question, which is whether the
12 decision in fact adopted the city’s 2005 forecast as the county’s coordinated population
13 forecast. Petitioners’ argument that the county’s 2007 UGB decision did not have the intent
14 or effect of adopting the city’s 2005 forecast as the county’s coordinated forecast for the city
15 is not a collateral attack on the 2007 county decision.

16 As noted, the county adopted population forecasts as part of its TSP in 1995, and
17 projected populations through 2014. ORS 195.034(2) provides a remedy for a city that is
18 faced with a county population forecast that the city believes needs to be updated.⁵ It allows

⁵ ORS 195.034 was enacted in 2007 and provides in relevant part:

“ * * * * *

“(2) If the coordinating body has not adopted a forecast as required by ORS 195.036 or if the current forecast was adopted more than 10 years before the city initiates an evaluation or amendment of the city’s urban growth boundary, a city may propose a 20-year forecast for its urban area by:

“(a) Basing the proposed forecast on the population forecast prepared by the Office of Economic Analysis for the county for a 20-year period that commences when the city initiates the evaluation or amendment of the city’s urban growth boundary; and

1 a city to propose an alternative population forecast using the methodology and assumptions
2 set forth in ORS 195.034(2), if the county forecast was adopted more than ten years before
3 the date the city is evaluating its UGB. Under ORS 195.034(3), after a period of time, the
4 city's proposed forecast is deemed to be *the* coordinated forecast after certain notice
5 requirements are fulfilled and the city's forecast is adopted into the city's comprehensive
6 plan. However, the city's 2005 decision adopting a city forecast was not a decision under
7 ORS 195.034.

8 In addition, OAR 660-024-0030(4)(b) provides a method for a city and county to
9 jointly adopt a 20-year forecast.⁶ Under the rule, the county and the city can adopt a 20-year

“(b) Assuming that the urban area's share for the forecasted county population determined in paragraph (a) of this subsection will be the same as the urban area's current share of the county population based on the most recent certified population estimates from Portland State University and the most recent data for the urban area published by the United States Census Bureau.

“(3)(a) If the coordinating body does not take action on the city's proposed forecast for the urban area under subsection (1) or (2) of this section within six months after the city's written request for adoption of the forecast, the city may adopt the extended forecast if:

“(A) The city provides notice to the other local governments in the county; and

“(B) The city includes the adopted forecast in the comprehensive plan, or a document included in the plan by reference, in compliance with the applicable requirements of ORS 197.610 to 197.650.

“(b) If the extended forecast is adopted under paragraph (a) of this subsection consistent with the requirements of subsection (1) or (2) of this section:

“(A) The forecast is deemed to satisfy the requirements of a statewide land use planning goal relating to urbanization to establish a coordinated 20-year population forecast for the urban area; and

“(B) The city may rely on the population forecast as an appropriate basis upon which the city and county may conduct the evaluation or amendment of the city's urban growth boundary.”

⁶ OAR 660-024-0030(4)(b) provides:

“A city and county may adopt a 20-year forecast for an urban area consistent with this section. The forecast is deemed to comply with applicable goals and laws regarding

1 forecast for an urban area according to the procedures set forth in the rule and using the
2 methodology and assumptions set forth in the rule. Either method is available to the city in
3 the present circumstances in order for it to proceed with an evaluation of its 20-year
4 residential land needs.

5 In sum, we agree with petitioners that the city erred in relying on the city's 2005
6 forecast, because the record does not establish that that city forecast has been adopted by the
7 county as "the adopted 20-year coordinated population forecast for the urban area" referred
8 to in OAR 660-024-0040(1).

9 The second assignment of error is sustained.

10 **THIRD ASSIGNMENT OF ERROR**

11 As noted, the challenged decision identified a need for more affordable housing
12 within the city. The decision explains that the city's Affordable Housing Ad Hoc Committee
13 developed the Affordable Housing Action Plan in May, 2009, and that plan identified seven
14 actions that the city could take to ensure that an adequate supply of affordable housing is
15 available. Record 31.⁷

population forecasts for purposes of the current UGB evaluation or amendment provided the
forecast:

- “(A) Is adopted by the city and county in accordance with the notice, procedures and requirements described in section (1) of this rule;
- “(B) Is based on OEA's population forecast for the county for a 20-year period commencing on the date determined under OAR 660-024-0040(2); and
- “(C) Is developed by assuming that the urban area's share of the forecasted county population determined in subsection (B) of this rule will be the same as the urban area's current share of county population based on the most recent certified population estimates from Portland State University and the most recent data for the urban area published by the U.S. Census Bureau.”

⁷ Those include:

“Amend [NCP] Goals and Policies

“Retain the existing supply of affordable housing

“Insure an adequate land supply for affordable housing

1 Petitioners argue that the city erred in failing to contemporaneously address the
2 identified need for more affordable housing by revising its planned mix of housing types,
3 minimum densities, and/or minimum lot sizes to meet the need for more affordable housing.
4 According to petitioners, Goal 10 (Housing) and the statute and rules that implement Goal
5 10, ORS 197.307(3)(a) and OAR 660-008-0000 *et seq* require that the city address the
6 identified need now.

7 Although petitioners neither cite nor rely on ORS 197.296, the city responds that
8 because it is exempt from compliance with ORS 197.296(6), it is not required to take
9 concurrent action to address the identified need. ORS 197.296(6) provides that if a local
10 government’s housing need is determined to be greater than its housing capacity, the local
11 government is required to:

12 “(a) Amend its urban growth boundary to include sufficient buildable lands
13 to accommodate housing needs for the next 20 years. * * *;

14 “(b) Amend its comprehensive plan, regional plan, functional plan or land
15 use regulations to include new measures that demonstrably increase
16 the likelihood that residential development will occur at densities
17 sufficient to accommodate housing needs for the next 20 years without
18 expansion of the urban growth boundary. * * *; or

19 “(c) Adopt a combination of the actions described in paragraphs (a) and (b)
20 of this subsection.”

21 ORS 197.296 applies to cities with a population of 25,000 or more. ORS 197.296(1). The
22 City of Newberg has a population of less than 25,000, and therefore ORS 197.296 does not
23 apply to the city of Newberg. Record 62.

“Change development code standards

“Amend the development fee schedule

“Develop and support public and private programs

“Strengthen economic development efforts.”

1 The Court of Appeals’ holding in *GMK Developments, LLC v. City of Madras*, 225
2 Or App 1, 199 P3d 882 (2008), addressed the relationship between ORS 197.296 and Goal
3 10. In *GMK*, the city adopted an urbanization report that identified an eventual shortfall of
4 buildable land over the course of a 50 year planning period. Petitioners argued that the city
5 was required to address the projected shortfall concurrently with its adoption of the
6 urbanization report as a part of the city’s comprehensive plan, by amending its urban growth
7 boundary.

8 The Court agreed with LUBA’s decision that nothing in the language of Goal 10,
9 OAR 660-008-0010 or ORS 197.307(3)(a) requires that a local government take any action
10 to increase the supply of available land in response to a need projected to occur 20 or 50
11 years in the future. The Court concluded that:

12 “[i]f Goal 10 already obligates local governments to amend urban growth
13 boundaries to accommodate projected housing needs, as petitioners suggest,
14 then ORS 197.296 is completely unnecessary and, in fact, a redundancy. * * *
15 The fact that the legislature enacted ORS 197.296 strongly suggests that the
16 existing regulatory framework was understood *not* to impose the requirements
17 that petitioners now contend that it independently does. Moreover, the fact
18 that the legislature expressly provided that the requirements of ORS
19 197.296(6) apply only to cities with a population of 25,000 or more strongly
20 suggests that the same requirements *not* apply to cities with smaller
21 populations.” *Id.* at 7 (emphasis in original).

22 The factual circumstances and arguments in the present appeal differ from the
23 circumstances and arguments in *GMK* in two respects. First, in the present appeal, the city
24 identified a current, unmet need for more affordable housing, whereas in *GMK* the
25 urbanization report identified a shortfall of buildable land 20 to 50 years in the future.
26 Second, in the present appeal, petitioners do not argue that the city should add land to the
27 UGB to address the need for affordable housing, as the petitioners argued in *GMK*. On the
28 contrary, they argue that the city should instead increase densities and minimum lot sizes to
29 address the shortfall, which may have the effect of decreasing the amount of land that is
30 needed to remedy the city’s identified shortfall of residential land.

1 However, in the present appeal, similar to the petitioners in *GMK*, petitioners argue
2 that the source of the obligation to address an identified housing need is Goal 10 and its
3 implementing statute and rules, an argument that that the Court rejected in *GMK*. Thus we
4 agree with the city that where ORS 197.296 does not apply, Goal 10 and its implementing
5 statute and rules do not require the city to concurrently address a current, unmet need for
6 more affordable housing when it conducts an evaluation of its residential land needs.

7 The third assignment of error is denied.

8 **FOURTH ASSIGNMENT OF ERROR**

9 In a section labeled “Recent Trends,” the BLI suggested a 25% increase in overall
10 residential densities compared to current density levels. In their fourth assignment of error,
11 petitioners argue that the city erred in relying on outdated data regarding density by housing
12 type to determine current density levels. According to petitioners, the analysis of “Recent
13 Trends” considered only density patterns from 1990 to 2004. Petitioners argue that if more
14 recent data after 2004 were considered, the base-line density might be different.

15 The city responds that there is no legal requirement that the city’s plan must include
16 an analysis of residential density over a particular period, that petitioners have not argued
17 that the data relied on is inaccurate, and that the conclusion that residential density should be
18 increased is supported by an adequate factual base. We agree with the city.

19 The fourth assignment of error is denied.

20 **FIFTH ASSIGNMENT OF ERROR**

21 In their fifth assignment of error, petitioners argue that there is not an adequate
22 factual base to support the city’s conclusion that the city has a need for a 30 to 50 acre high
23 school and academic campus. Petitioners argue based on a letter from DLCD that
24 commented that the acreages for schools appear to be too high, and guidelines published on
25 DLCD’s website dedicated to transportation growth management, that the city’s estimate for
26 needed acreage for schools is too high. Record 162-63.

1 The city responds that it based its determination of acreage needed for schools based
2 on estimates prepared by the city, the Newberg School District, a parks and recreation
3 district, and on a report from the Ad Hoc Committee on Newberg's Future that was presented
4 to the city in 2005 and that was incorporated into the NCP in 2005. Record 401-498. We
5 agree with the city that its determination of a need for 30-50 acres for a high school and
6 academic campus is supported by an adequate factual base.

7 The fifth assignment of error is denied.

8 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

9 These assignments of error challenge the number of new dwelling units that the city
10 projects will be needed between 2010 and 2040.

11 **A. Sixth Assignment of Error**

12 The city projected a future need for 11,972 dwelling units between 2010 and 2040,
13 based on an average household size of 2.76 persons and an assumed vacancy rate of 5.2%.
14 Record 27. According to petitioners, the city miscalculated the number of dwelling units
15 needed, with the result that it overestimated the land need by more than 100 acres.
16 Petitioners argue that under the city's forecasted population increase of 29,600 people, the
17 number of future needed dwelling units is actually 11,282 or 690 units less than the city
18 calculated. Petitioners argue that a population increase of 29,600 persons divided by 2.76
19 person per household results in 10,724 households, and applying a 5.2% vacancy factor
20 yields a total number of 11,282 needed dwelling units, not the 11,972 units the city
21 calculated. Assuming 6.8 dwellings per acre, petitioners calculate, this means that the city
22 overestimated its land need by approximately 100 acres.

23 The city responds that petitioners' calculation left out the year 2009 for population
24 estimates, even though the buildable lands inventory was prepared in 2009, and that one full
25 year of population growth changes the calculation and result. The city also responds that
26 petitioners' calculation fails to include the 49 dwellings that are projected to be displaced by

1 the bypass project discussed in the first assignment of error. Finally, the city responds that
2 petitioners' calculation errs in application of the assumed 5.2% vacancy rate.

3 In determining the future need for dwelling units, the city relied on a report prepared
4 in 2004 (the Johnson Gardner report) that projected the future need for dwelling units from
5 2004-2040, based on a population forecast prepared in 2004 that was eventually adopted by
6 the city in 2005. Record 25, 574-591. According to that report, "[t]he demand numbers
7 reflect an assumed structural vacancy rate of 5% for residential units within the UGB."
8 Record 532. That seems to us to say that the final projected number of dwelling units
9 already includes accommodation for the projected vacancy rate. However, because it is not
10 clear from the city's response or any of the record pages that the city cites, we elect not to try
11 to resolve the parties' disagreement about how the assumed vacancy rate should apply or was
12 applied in any calculation of dwelling units needed. We simply cannot tell from the record
13 how the numbers that appear at Record 25 were calculated.⁸ On remand, the city must
14 explain how it arrived at the numbers that are included in the table at Record 25.

15 In addition, if the report's projection of the number of future dwelling units needed
16 was based on the population projections that were eventually adopted by the city in 2005 as a
17 part of the NCP, for the reasons discussed in the second assignment of error, that forecast has
18 not been adopted by the county as the coordinated forecast and may not be relied on in
19 determining the city's future residential land needs until it or some other forecast is adopted

⁸ Although the number of projected dwelling units from 2010 - 2015 that is contained in the challenged decision does not appear in the Johnson Gardner report, the number of projected dwelling units needed from 2016 - 2020 and from 2021 - 2025 tracks exactly the number of dwelling units set forth in the Johnson Gardner report. *Compare* Record 25 and 532. The city does not explain how it calculated the number of dwelling units needed from 2010 - 2015, 2026 - 2030, 2031 - 2035, and 2036 - 2040, but we assume that the city extrapolated the numbers found at Record 532 based on the projected growth rate or on some other formula.

1 by the county as the coordinated forecast or the city adopts a forecast pursuant to ORS
2 195.034.

3 The sixth assignment of error is sustained.

4 **B. Seventh Assignment of Error**

5 In their seventh assignment of error, petitioners argue that the city's projected number
6 of new dwelling units is too high because it assumes that all new people living within the city
7 will need new dwelling units. According to petitioners, that projection fails to account for
8 population increases that are the result of annexation and expansion of the city's urban
9 growth boundary, which mainly include people who already have dwellings and thus who
10 will not require new buildable land. The city responds that the projected number of new
11 dwellings needed does not take into account population increases from UGB expansions
12 because those future expansions are entirely speculative and may not occur.

13 Because this assignment of error and the city's response rely on the 2005 city
14 population forecast that we have determined in the second assignment of error that the city
15 was not entitled to rely on, it would be premature to address this assignment of error.
16 Therefore we need not address it.

17 The county's decision is remanded.