

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

SIMNITT NURSERIES, MONTECUCCO)
FARMS, JERRY SIMNITT, JR., and)
EDWARD MONTECUCCO,)
Petitioners,)

vs.)

CITY OF CANBY,)
Respondent,)

and)

NORTHWOOD INVESTMENTS, INC.,)
Intervenor-Respondent.)

LUBA No. 93-203

FINAL OPINION
AND ORDER

Appeal from City of Canby.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Preston Gates & Ellis.

John H. Kelley, City Attorney, Canby, filed a response brief and argued on behalf of respondent.

Steven L. Pfeiffer and Michael C. Robinson, Portland, filed a response brief. With them on the brief was Stoel Rives Boley Jones & Grey. Michael C. Robinson argued on behalf of intervenor-respondent.

HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 07/06/94

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision approving a request
4 to amend the City of Canby Urban Growth Boundary (UGB) to
5 include a 30.19 acre parcel. The decision also changes the
6 existing Canby Comprehensive Plan (CCP) map designation for
7 the property from Agricultural to Low Density Residential
8 (LDR).

9 **MOTION TO INTERVENE**

10 Northwood Investments, Inc., the applicant below, moves
11 to intervene in this appeal on the side of respondent.
12 There is no objection to the motion, and it is allowed.

13 **FACTS**

14 The subject 30.19 acres is an island of "rural" land
15 located just inside the Canby UGB. The acknowledged CCP
16 projects a city population of 20,000 in the year 2000. At
17 the time the CCP was acknowledged, sufficient land was
18 included within the UGB and planned for residential use to
19 accommodate a projected population of 20,000 persons.
20 However, the challenged decision determines, for several
21 reasons, that the UGB does not contain sufficient land to
22 accommodate 20,000 persons.

23 **PRELIMINARY MATTERS**

24 Petitioners' motion for permission to file a reply
25 brief is granted.

1 The parties dispute whether we may take official notice
2 of certain Land Conservation and Development Commission
3 (LCDC) acknowledgment and periodic review orders and related
4 staff reports. In view of our disposition of this appeal,
5 it is unnecessary to resolve the parties' dispute.

6 **DECISION**

7 Because the challenged decision is an amendment of the
8 city's acknowledged comprehensive plan, it must comply with
9 relevant statewide planning goals and any applicable
10 provisions of the city's comprehensive plan. Goal 14
11 (Urbanization) is the most directly applicable goal.
12 Establishment or change of a UGB must be based on
13 consideration of the following factors specified in Goal 14:

14 "(1) Demonstrated need to accommodate long-range
15 urban population growth requirements
16 consistent with LCDC goals;

17 "(2) Need for housing, employment opportunities,
18 and livability;

19 "(3) Orderly and economic provision for public
20 facilities and services;

21 "(4) Maximum efficiency of land uses within and on
22 the fringe of the existing urban area;

23 "(5) Environmental, energy, economic and social
24 consequences;

25 "(6) Retention of agricultural land as defined,
26 with Class I being the highest priority for
27 retention and Class VI the lowest priority;
28 and,

29 "(7) Compatibility of the proposed urban uses with
30 nearby agricultural activities."

1 Goal 14 also requires that amendments to an acknowledged UGB
2 must satisfy the requirements for a goal exception. See
3 ORS 197.732(1); Statewide Planning Goal 2 (Land Use
4 Planning), Part II(c); OAR 660-04-010(1)(c)(B).

5 Goal 14, factors 1 and 2 are referred to as "need"
6 factors; whereas factors 3 through 7 are referred to as
7 "locational" factors. We turn first to the city's findings
8 addressing the Goal 14 need factors.

9 **A. Goal 14 Need Factors**

10 There are essentially two ways to demonstrate a
11 proposed amendment adding land to an acknowledged UGB is
12 needed under Goal 14 factors 1 and 2. First, the projected
13 population within the UGB for the planning period can be
14 increased. Second, the various land use planning
15 assumptions that are used in conjunction with that projected
16 population to determine the amount of land that must be
17 included within the UGB can be changed. See BenjFran
18 Development v. Metro Service Dist., 17 Or LUBA 30, 42
19 (1988), aff'd 95 Or App 22 (1989).

20 The challenged decision does not change the city's
21 projected population. Instead, it takes the second approach
22 and attempts to show the land available within the UGB for
23 residential development is no longer adequate for the CCP's
24 projected population of 20,000 people.¹ The findings

¹As previously noted, the CCP projects a year 2000 population of 20,000 people. Although some of the city's findings cite evidence presented by

1 explain that although the UGB originally included sufficient
2 residentially designated land to provide housing to
3 accommodate the projected population of 20,000, the housing
4 that currently can be accommodated on that residentially
5 designated land is 157 housing units short of what is
6 needed.

7 For purposes of this opinion, we accept the city's
8 findings that approximately 12 acres within the UGB are no
9 longer available for residential development because they
10 have either been used for bicycle paths or are subject to
11 protection as wetlands. These 12 acres would have
12 accommodated approximately 39 residential units, if
13 developed for residential use in accordance with the CCP.
14 The city also concludes an additional 118 residential units
15 will not be developed for the reason that certain
16 residentially designated lands are not available to meet
17 projected residential needs because "[1]and within the city
18 limits has not been zoned to implement the densities
19 anticipated in the CCP." Record A.47.

20 The findings explain that the inventory of
21 residentially planned land included within the UGB is
22 designated in the CCP as "Low-Density Residential," "Medium-
23 Density Residential," or "High-Density Residential." Record

the applicant that the city's population will exceed 20,000 people by the
year 2018, the challenged decision does not amend the CCP to provide that
the UGB should include sufficient residentially designated land to
accommodate more than 20,000 people. Record A.51.

1 A.48. The CCP assumes these three types of residentially
2 designated land will develop with "4.5 units per acre," "8.0
3 units per acre," and "12 units per acre," respectively. Id.
4 The findings go on to explain:

5 "Zoning implementation has not been consistent
6 with the inventory's assumptions. The CCP
7 assumed, for the basis of the calculations, that
8 land designated as [Low-Density Residential] LDR
9 would be implemented by the R-1 zone. The CCP
10 assumed that land designated as Medium-Density
11 Residential ('MDR') would be zoned R-1.5, and land
12 designated as High-Density Residential ('HDR')
13 would be zoned as R-2. However, the [City]
14 Council finds that much of the land designated as
15 MDR and HDR by the CCP is, in fact, zoned at LDR
16 levels.

17 "The October 6, 1993 memorandum from [the
18 applicant's representative] to the City Council
19 calculates the dwelling units lost. The result is
20 that 118 fewer dwelling units will be developed
21 than anticipated by the city. These lost housing
22 units represent a reduction of population capacity
23 of 249 within the UGB. * * *

24 "The [City Council] finds that this discrepancy
25 can be remedied in two ways. Either the UGB can
26 be expanded to include additional residential land
27 or the remaining vacant land inside the UGB can be
28 developed at greater densities than the CCP
29 currently allows. The council notes that the
30 second option would require various CCP map and
31 [Canby Zoning Ordinance] CZO map amendments. For
32 this reason, the [City Council] finds there is a
33 present demonstrated need to accommodate
34 long-range urban population growth consistent with
35 LCDC Goals." Record A.48-A.49.

36 We agree with petitioners that whatever the above
37 findings demonstrate, it is not "need" within the meaning of
38 Goal 14, factor 1. As far as we can tell, with the

1 exception of the potential loss of land to accommodate 39
2 residential units due to development of bicycle trails and
3 wetlands protection measures, the city has enough land
4 planned for low, medium and high density residential
5 development to satisfy its planned-for population of 20,000
6 persons.² There is a shortage of land for an additional 118
7 units only in the sense that if every residentially
8 designated acre within the UGB were currently developed
9 under existing zoning designations, there would be a 118
10 unit shortfall in the number of residential units needed to
11 accommodate the projected ultimate population of 20,000.
12 However, as petitioners correctly note, there is nothing
13 unusual about a city or county not immediately upzoning all
14 property within a UGB to match the development densities the
15 comprehensive plan assumes will ultimately occur.³ There is
16 no reason at this time for the city to assume the necessary
17 upzoning will not occur and that residential development in
18 the future will not occur at the densities provided for in
19 the CCP. Consequently, 118 units have not been "lost" and

²We do not understand the city to contend that lands planned for high or medium density residential development are in fact already developed for lower density residential development than planned for. The problem the city identifies in concluding there is a 118 unit shortfall is a discrepancy between planned residential density, and the residential density possible under the current zoning, for certain vacant residentially developable lands within the UGB.

³For example, OAR 660-08-025 specifically envisions that rezoning of lands within the UGB for maximum planned residential density may be deferred provided there is a sufficient rezoning process "to provide for needed housing."

1 there is no demonstrated need to add additional land to the
2 UGB to accommodate those 118 units.

3 Finally, the city's findings concerning Goal 14 factor
4 2, "[n]eed for housing, employment opportunities and
5 livability," refer to the findings concerning Goal 14 factor
6 1 and also note any loss of agricultural jobs due to
7 residential development of the site would be minor. The
8 findings further state the proposed UGB amendment would
9 improve livability by allowing more efficient roadway and
10 public services extensions and permitting the development of
11 a mini-park and the potential development of a neighborhood
12 park.

13 These brief, undeveloped findings are not sufficient to
14 demonstrate a need to add the disputed 30.19 acre parcel to
15 the UGB on the basis of Goal 14 factor 2.

16 Because the city at most has demonstrated a need for
17 sufficient residentially designated land to offset the
18 approximately 12 acres lost due to development of bicycle
19 trails and wetland protection measures, and the challenged
20 decision adds 30.19 acres, we remand the challenged
21 decision.⁴

⁴We also note the need the city attempts to identify, based on the fact that land within the UGB is designated HDR or MDR but currently is zoned at LDR levels, appears to be a need for additional MDR and HDR designated land, whereas the challenged decision amends the CCP to designate the 30.19 acres LDR.

1 **B. Petitioners' Remaining Arguments**

2 Prior decisions by this Board have concluded the need
3 factors must be satisfied to amend an acknowledged UGB. See
4 Baker v. Marion County, 24 Or LUBA 519, 525 (1993); 1000
5 Friends of Oregon v. Metro Service Dist., 18 Or LUBA 311,
6 324 (1989). The challenged decision does not purport to
7 approve the challenged UGB amendment solely on the basis of
8 the Goal 14 locational factors. Neither do respondents
9 contend in their briefs that the challenged UGB amendment
10 can be sustained irrespective of need, solely on the basis
11 of the Goal 14 locational factors. Because we conclude the
12 analysis applied by the city in concluding that the Goal 14
13 need factors are satisfied is fundamentally flawed, we do
14 not consider petitioners' lengthy remaining arguments.

15 The city's decision is remanded.