

NATURE OF THE DECISION

Petitioner appeals city decisions that (1) deny petitioner’s application for a comprehensive plan map amendment and zone change and (2) reject petitioner’s appeal of a planning commission denial of a related subdivision application.

FACTS

The subject property is a .97-acre parcel located at the intersection of Ferry Street and 7th Street. Property to the south and east is zoned Single Family Residential (R-1) and developed with single family dwellings. To the north is property zoned Limited Density Residential (R-2) and developed with dwellings. To the west is vacant property zoned Commercial.

On July 1, 2002, petitioner filed an application to amend the plan map designation for the subject property from commercial to residential, and to change the zoning from Commercial to R-2. Petitioner also filed a subdivision application for seven single-family residential lots. The city planning commission conducted hearings on the applications, and requested that staff provide additional information on the city’s inventory of commercial and R-2 zoned property. After receiving additional evidence, the planning commission voted to recommend that the request for plan amendment and zone change be denied. Based on that recommendation, the planning commission issued an order denying petitioner’s subdivision application. Petitioner appealed the subdivision denial to the city council.

On February 3, 2003, the city council held a public hearing on the planning commission recommendation and petitioner’s appeal. On February 11, 2003, the city council issued orders denying the requested plan amendment and zone change, and affirming the planning commission denial of petitioner’s subdivision application. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Amendments to the city’s comprehensive plan map are governed by criteria set forth
3 at Dayton Land Use and Development Code (LUDC) 7.3.110.03, which require in relevant
4 part that the proposed map amendment comply with applicable statewide planning goals and
5 be consistent with applicable goals and policies in the comprehensive plan.¹ The city denied
6 the requested plan amendment because, in the city’s view, it was inconsistent with Statewide
7 Planning Goal 9 (Economic Development) and not compelled by Statewide Planning Goal 10
8 (Housing).² Further, the city found that the requested amendment was inconsistent with
9 language in the Economics element of the comprehensive plan.³

¹ LUDC 7.3.110.03 provides in relevant part:

“Plan map amendment proposals shall be approved if the applicant provides evidence substantiating the following:

- “A. Compliance is demonstrated with the Statewide Land Use Goals that apply to the subject properties or to the proposed land use designation. * * *
- “B. Consistency with the applicable goals and policies in the Comprehensive Plan is demonstrated.
- “C. The Plan does not provide adequate areas in appropriate locations for uses allowed in the proposed land use designation and the addition of this property to the inventory of lands so designated is consistent with projected needs for such lands in the Comprehensive Plan.
- “D. The Plan provides more than the projected need for lands in the existing land use designation.”

² The city adopted the following findings addressing Goals 9 and 10:

“Goal 9, Economic Development: Approximately one-acre of commercial land will be removed from potential use. The City currently has vacant land and buildings within the existing downtown area. However, this action would remove one of the larger vacant Commercial-zoned properties from City’s inventory and reduce development options for the community.

“Goal 10, Housing: The new proposal provides additional opportunity to provide for housing within the community. However, there is no evidence the additional residential land is necessary to meet identified housing needs.

“* * * * *

1 The city’s findings explain that the subject property is one of the few large vacant
2 commercial-zoned parcels in the city, and that petitioner had failed to establish a need for
3 additional lands for housing. According to the city’s findings, the property must retain its
4 commercial zoning in order to preserve future commercial development options for the
5 community.

6 Petitioner argues that the city erred in focusing exclusively on the perceived need for
7 large vacant parcels, and in ignoring the total acreage or quantity of commercial-zoned lands
8 within the city limits, including vacant and redevelopable lands of any size. In addition,
9 petitioner argues that the city should have considered lands outside city limits but within the
10 urban growth boundary (UGB) that potentially could be zoned commercial if annexed to the
11 city. Finally, petitioner contends that the undisputed evidence demonstrates that the city has
12 an abundance of commercial-zoned property within the city, and therefore the city’s findings

“The request does not require an exception to the Statewide Land Use Goals and there are no Administrative rules that apply to this request. Generally, the proposal is either consistent with the Goals or the Goals do not directly apply to the request. However, the proposal is inconsistent with Goal 9 as it reduces the amount of vacant commercial land and fails to meet an identified housing need (Goal 10).” Record 11-12.

³ The city adopted the following findings addressing its comprehensive plan:

“Economics: *In general, Plan policies call for the diversification of the City economy, specifically through designating sufficient land for commercial and industrial use. The City should promote the central business district. Adequate facilities are also required. A completed Buildable Lands Inventory indicated 18.45 acres are required to meet the commercial land needs to 2015. There are 34.72 acres of Commercial land in Dayton. However, the Council agreed with the Planning Commission noting this parcel represents one of three large, vacant Commercial zoned sites remaining in the City. The Plan change would severely reduce commercial development options within the community if the map amendment is approved.*” Record 13 (emphasis in original).

“The proposed application would allow a Plan designation that is consistent with the land use pattern within the area. However, this action will eliminate the third largest vacant commercial property from the City’s inventory, thereby reducing development options within the community. There is no identified need to establish a residential designation as testimony indicated there is more than adequate residential land within the UGB to meet the City’s housing requirements. For these reasons, the Plan Map Amendment fails to comply with the decision criteria.” Record 14.

1 that the proposed map amendment does not comply with Goal 9 and the Economic element
2 of the comprehensive plan is not supported by substantial evidence.

3 The city responds that its analysis did not focus exclusively on large vacant parcels
4 and ignore other vacant or redevelopable commercial-zoned lands within the city. According
5 to the city, it considered all of the commercial-zoned land within the city, and its findings
6 concede that the city has more than sufficient total *acreage* of commercial-zoned lands
7 within the city to meet its identified commercial land needs. However, the city argues that
8 total acreage of commercial-zoned lands is not the exclusive consideration under Goal 9 and
9 the economic policies in the city’s comprehensive plan, and that the city permissibly took
10 into account the supply of large vacant commercial properties in the city. The city further
11 argues that nothing in Goal 9 or any other authority requires the city to consider whether
12 lands currently outside city limits may be annexed and designated for commercial uses when
13 it considers an application to redesignate land that is currently designated for commercial
14 uses.

15 Goal 9 requires in relevant part that comprehensive plans for urban areas “[p]rovide
16 for at least an adequate supply of sites of suitable sizes, types, locations, and service levels
17 for a variety of industrial and commercial uses consistent with plan policies.” We agree with
18 the city that it is consistent with the “suitable sizes” language of Goal 9 for the city to
19 preserve the limited supply of large vacant commercial properties in the city. Conversely,
20 the city may conclude that it is inconsistent with Goal 9 and plan policies implementing Goal
21 9 to allow one of the few large sites in the city to be removed from its commercial lands
22 inventory, notwithstanding an apparent abundance of smaller commercial-zoned parcels. As
23 the city’s findings explain, the loss of one of the few large commercial sites in the city would
24 “severely reduce” future commercial development options, and hence reduce the potential
25 “variety” of commercial uses in the city.

1 It is true that Goal 9 does not *require* the city to make land available for every
2 specific kind or variety of economic use. *See Home Depot U.S.A., Inc. v. City of Portland*,
3 169 Or App 599, 10 P3d 316 (2000), *rev den* 331 Or 583 (2001) (rejecting an argument that
4 Goal 9 prohibits the city from adopting amendments that limit the land available for “large
5 format retail uses”). However, a corollary of the holding in *Home Depot* is that local
6 governments have considerable discretion in shaping the economic future of their
7 community. Here, the city made an initial choice in compiling its Goal 9 commercial lands
8 inventory to include one of the few relatively large commercial sites in the city. Given the
9 undisputed scarcity of such sites in the city, we see no error in the city’s view that Goal 9
10 authorizes it to protect that choice.

11 The city also argues, and we agree, that the city did not err in failing to consider lands
12 outside city limits within the UGB that might be designated for commercial uses, once
13 annexed into the city. The city’s comprehensive plan map designates land outside city limits
14 within the UGB for residential, industrial and open spaces uses, but does not appear to
15 designate any land outside city limits for commercial uses. Dayton Comprehensive Land
16 Use Plan (DCLUP) 3. Petitioner cites no authority that requires the city to speculate as to
17 whether lands designated for noncommercial uses outside the city limits might be
18 redesignated for commercial uses, if annexed into the city.

19 The foregoing resolves petitioner’s evidentiary argument, which is based on his view
20 that the relative abundance of commercial-zoned acres of land within the city *necessarily*
21 means that the proposed redesignation of the subject property to allow residential uses is
22 consistent with Goal 9. Because the city, and we, have rejected that view, petitioner’s
23 evidentiary argument does not provide a basis for reversal or remand.

24 The first assignment of error is denied.

1 **SECOND ASSIGNMENTS OF ERROR**

2 Petitioner argues that the city misconstrued Goal 10 in concluding that the proposed
3 plan map redesignation to allow residential uses is inconsistent with that goal. According to
4 petitioner, a plan amendment that adds more residential land to the city’s buildable lands
5 inventory cannot be inconsistent with Goal 10, which requires in relevant part that the city
6 “provide for the housing needs” of its citizens.

7 We tend to agree with petitioner, at least as an abstract proposition, that a plan
8 amendment that adds land to the residential buildable lands inventory cannot be inconsistent
9 with Goal 10. However, contrary to petitioner’s argument, we do not understand the city to
10 have concluded that the proposed residential plan designation is *inconsistent* with Goal 10.
11 Instead, we understand the city’s findings to conclude that the proposal was not *compelled* by
12 Goal 10, *i.e.*, there is no identified need for additional residential land within the city. *See* n
13 2 (“[T]here is no evidence the additional residential land is necessary to meet identified
14 housing needs,” and the proposal “fails to meet an identified housing need (Goal 10).” We
15 address below petitioner’s evidentiary challenge to the conclusion that there is no need for
16 additional residential lands within the city. However, we disagree with petitioner that the
17 city found that adding residential land to the city is inconsistent with Goal 10 or that the city
18 otherwise misconstrued Goal 10.

19 The second assignment of error is denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 Petitioner argues that the city erred in concluding that there is no evidence of a need
22 for residential land within the city, for purposes of LUDC 7.3.110.03(C). *See* n 1.
23 According to petitioner, there is substantial evidence in the record of an immediate need for
24 R-2 zoned land within the city.

25 The city has one plan designation for residential uses, and three residential zones that
26 implement that plan designation: R-1, R-2 and R-3. The R-1 zone allows detached single-

1 family dwellings. LUDC 7.2.102. The R-2 zone permits detached single family dwellings,
2 duplexes, and multiple-family units up to a density of 12 units per acre. LUDC 7.2.103. The
3 R-3 zone allows multiple family dwellings up to a maximum density of 20 units per acre.
4 LUDC 7.2.104. Petitioner cites to evidence that there are only eight vacant parcels zoned R-
5 2 in the city, but that given their relatively small size and other development restraints,
6 development of these vacant R-2 lots would yield only eleven or so multiple-family units.
7 Petitioner cites to evidence that the city will require an additional 93 multiple family units to
8 meet projected housing needs through the year 2015. Therefore, petitioner argues, the city
9 lacks an adequate inventory of lands zoned for multiple-family dwellings, and the city
10 accordingly erred in concluding that there is no need for additional land zoned R-2 within the
11 city.

12 The city's findings under LUDC 7.3.110.03(C) and (D) state in relevant part that "the
13 Buildable Lands Inventory clearly indicated the City has more than sufficient land within the
14 UGB to meet anticipated residential land needs. Therefore, there is no identified need to
15 convert this site to residential uses." Record 13-14. In addition, the city's decision relies on
16 a staff report that concludes, in relevant part, that any lack of lands available for multiple-
17 family dwellings within the city may be remedied over time by annexing additional lands
18 within the UGB. Record 254. However, petitioner argues that the city erred in considering
19 lands outside the city limits and within the UGB in concluding that there is no need for
20 additional residential land. According to petitioner, the relevant question under
21 LUDC 7.3.110.03(C) in the context of the present application is the need for *land zoned R-2*
22 *within the city limits.*

23 The city responds, and we agree, that petitioner misstates the relevant question under
24 LUDC 7.3.110.03(C). LUDC 7.3.110.03(A) through (D) are criteria applicable to
25 comprehensive plan map amendments, and are concerned with comprehensive plan map

1 designations, not the particular zones that may be adopted to implement those designations.⁴
2 Thus, the proper question under these criteria is whether there is a need to designate
3 additional land for residential uses, not whether there is a need for additional land zoned R-2.
4 The above-quoted city finding is directed at the proper inquiry imposed by
5 LUDC 7.3.110.03(C). Stated differently, the relative scarcity of land zoned R-2 within the
6 city is not sufficient to establish that the city lacks enough land designated Residential in the
7 comprehensive plan. Petitioner cites to no evidence that the amount of land designated
8 Residential on the city comprehensive plan map is insufficient to meet projected needs.

9 Similarly, the fact that the city projects a need for 93 multiple-family units by the
10 year 2015 does not assist petitioner. We note first that petitioner’s argument that the proper
11 question is whether the city has enough vacant land zoned R-2 appears to be based on the
12 unexplained assumption that only land zoned R-2 can help satisfy the projected need for
13 multiple-family dwellings. However, as discussed above, the R-2 zone is not the only zone
14 that allows multiple-family dwellings; indeed, R-3 appears to be the primary zone for
15 providing multiple-family dwellings. Petitioner does not cite us to any evidence regarding
16 the amount of vacant land in the city zoned R-3.

17 That problem aside, and even assuming the relative scarcity of lands zoned for
18 multiple-family dwellings within city limits, petitioner has not demonstrated that the city
19 erred in relying on lands within the UGB to remedy that scarcity over time. The city’s
20 comprehensive plan map designates most of the land outside city limits but within the UGB
21 for residential use. DCLUP 3. LUDC 7.3.110.03(C) requires the applicant to demonstrate
22 that “[t]he Plan does not provide adequate areas in appropriate locations for uses allowed in
23 the proposed land use designation * * *.” It seems entirely consistent with

⁴ Zoning map changes are addressed under LUDC 7.3.111. Unlike the criteria for comprehensive plan map amendments at LUDC 7.3.110, the zoning map change criteria at LUDC 7.3.111 do not appear to require a demonstration of need for the particular zone.

1 LUDC 7.3.110.03(C) to consider all lands designated Residential by “[t]he Plan,” including
2 areas within the UGB, in the context of a proposal to redesignate land from Residential to
3 another plan designation.⁵ Petitioner’s argument to the contrary is largely based on the
4 speculation that the city will fail to zone lands annexed into the city for multi-family
5 dwellings. However, the basis for that speculation is never explained.

6 The third assignment of error is denied.

7 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

8 Petitioner argues that the sole basis for denying the requested zone change and
9 subdivision was petitioner’s failure to establish compliance with plan amendment criteria.
10 Based on the preceding assignments of error, petitioner argues that the zone change denial
11 and subdivision denial should also be reversed or remanded. However, because we denied
12 the assignments of error directed at denial of the requested plan amendment, it follows that
13 the city did not err in denying the requested zone change and subdivision.

14 The fourth and fifth assignments of error are denied.

15 The city’s decision is affirmed.

⁵ Petitioner does not argue that the city’s approach under LUDC 7.3.110.03(C) is internally inconsistent with its approach under Goal 9, with respect to considering lands outside city limits but within the UGB. Perhaps that is because petitioner’s arguments are also inconsistent in that respect, but the other way: petitioner argues in the first assignment of error that the city *must* consider lands within the UGB for purposes of Goal 9, but argues in the third assignment of error that the city *cannot* consider lands designated Residential within the UGB for purposes of LUDC 7.3.110.03(C). In any case, we do not think the city’s approach is internally inconsistent. As noted, the plan map designates much of the UGB as Residential, and LUDC 7.3.110.03(C) requires consideration of whether the plan designates sufficient areas for the proposed designation. On its face, that requirement would seem to encompass designated lands within the UGB. Conversely, nothing in Goal 9 directed to our attention requires the city to consider the availability of lands within the UGB for commercial uses in the context of a proposal to redesignate commercial lands within city limits. Even if such a requirement is implied, nothing in Goal 9 requires the city to speculate that lands designated for noncommercial uses within the UGB will be redesignated for commercial uses when annexed to the city. As noted, the city’s plan does not designate any lands outside city limits for commercial uses. One could argue that, like LUDC 7.3.110.03(C), LUDC 7.3.110.03(D) must be read to require the city to consider whether the plan designates “more than the projected need” for uses allowed by the existing designation within the plan area, including the UGB. See n 1. However, petitioner does not make that argument and, in any case, the plan does not designate any lands outside city limits for commercial uses.