

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 JERRY L. HILDENBRAND, NANCY A. HILDENBRAND,  
5 KEN IMAMURA, JOEL K. IMAMURA, H. PETTER EILERS,  
6 KAY G. EILERS, DONNA D. ROTH, KENNETH W. ROTH,  
7 KEVIN L. ARMSTRONG, CAROL J. HUNTINGTON,  
8 MICHAEL C. HUNTINGTON, MILLICENT A. BURTON-FUNK,  
9 KENNETH H. FUNK II, BRUCE THOMSON,  
10 SHAWN BARRETT and DANIEL BARRETT,

11 *Petitioners,*

12  
13 vs.

14  
15 CITY OF ADAIR VILLAGE,

16 *Respondent,*

17  
18 and

19  
20 JT SMITH, INC.,

21 *Intervenor-Respondent.*

22  
23 LUBA No. 2007-092

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25 JERRY L. HILDENBRAND, NANCY A. HILDENBRAND,  
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31 SHAWN BARRETT and DANIEL BARRETT,

32 *Petitioners,*

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34 vs.

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36 BENTON COUNTY,

37 *Respondent.*

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39 and

40  
41 JT SMITH, INC.,

42 *Intervenor-Respondent.*

43  
44 LUBA No. 2007-093

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1 FINAL OPINION  
2 AND ORDER  
3

4 Appeal from City of Adair Village and Benton County.  
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6 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of  
7 petitioners. With her on the brief was the Goal One Coalition.  
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9 No appearance by City of Adair Village.  
10

11 No appearance by Benton County.  
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13 Roger A. Alfred, Portland, filed the response brief and Michael C. Robinson argued  
14 on behalf of intervenor-respondent. With him on the brief were Michael C. Robinson and  
15 Perkins Coie LLP.  
16

17 RYAN, Board Member; HOLSTUN, Board Chair participated in the decision.  
18

19 BASSHAM, Board Member, did not participate in the decision.  
20

21 REMANDED

08/31/2007

22  
23 You are entitled to judicial review of this Order. Judicial review is governed by the  
24 provisions of ORS 197.850.

**NATURE OF THE DECISION**

In these consolidated appeals, petitioners appeal decisions by the City of Adair Village and Benton County (together, respondent) expanding the city’s urban growth boundary (UGB) to include approximately 142.7 additional acres, and changing the comprehensive plan and zoning designations for the properties.

**MOTION TO INTERVENE**

J.T. Smith, Inc., the applicant below, moves to intervene on the side of respondent in the appeals. There is no opposition to the motion and it is granted.

**FACTS**

In March, 2006, intervenor submitted an application to expand the city’s UGB and to amend the city’s comprehensive plan and zoning maps to allow for residential development on a large portion of an approximately 169-acre property, and to allow for new athletic fields on the remaining portion of the property. The property is resource land zoned Exclusive Farm Use. The property is located south of the city and includes 24 acres of property owned by Santiam Christian School directly adjacent to the school.

The city and county planning commissions held joint public hearings on the applications in June and July, 2006. Thereafter, the applicant amended its application to decrease the amount of land proposed to be included in the UGB to approximately 142 acres. The city council and the county board of commissioners held joint public hearings on the amended proposal, and following deliberation, approved the amended application. This appeal followed.

**SECOND ASSIGNMENT OF ERROR**

In their second assignment of error, petitioners maintain that respondent failed to demonstrate a need for the UGB expansion under Goal 14 (Urbanization).

1           **A.     First Subassignment**

2           Statewide Planning Goal 14 (Urbanization) and OAR 660-024-0040 require that,  
3 prior to expanding a UGB, a local government must demonstrate the need for the expansion,  
4 through a demonstrated need for various urban uses.<sup>1</sup> As part of that analysis, the local  
5 government must demonstrate that the need cannot reasonably be accommodated on land that  
6 is already inside the UGB. Goal 14 (Urbanization); OAR 660-024-0050(1).<sup>2</sup>

7           In their first subassignment of error, petitioners argue that the city and county  
8 impermissibly determined that 19 acres of land already located within the UGB cannot  
9 reasonably accommodate projected urban land needs. The findings state in relevant part:

10           “\* \* \* According to the OTAK analysis, there are approximately 19 acres of  
11 buildable underdeveloped and vacant land within the existing UGB, as  
12 depicted on the aerial photo.

13           “\* \* \* However, the [county] and [city] find that there is no evidence in the  
14 record to support a finding that these lands can reasonably accommodate  
15 [needed housing], because there is no evidence to establish that these lands  
16 are available for development or that there is willingness on behalf of the  
17 private property owners to develop their land for needed housing. For  
18 example, one of the vacant parcels identified in the OTAK analysis is a 4.48-  
19 acre parcel that is owned by the Prince of Peace Community Church, for the

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<sup>1</sup> OAR 660-024-0040(1) provides:

“The UGB must be based on the adopted 20-year population forecast for the urban area described in OAR 660-024-0030, and must provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period consistent with the land need requirements of Goal 14 and this rule. The 20-year need determinations are estimates which, although based on the best available information and methodologies, should not be held to an unreasonably high level of precision.”

<sup>2</sup> OAR 660-024-0050(1) provides in relevant part:

“When evaluating or amending a UGB, a local government must inventory land inside the UGB to determine whether there is adequate development capacity to accommodate 20-year needs determined in OAR 660-024-0040. For residential land, the buildable land inventory must include vacant and redevelopable land, and be conducted in accordance with OAR 660-007-0045 or 660-008-0010, whichever is applicable, and ORS 197.296 for local governments subject to that statute. \* \* \*”

1 construction of a future church and is therefore unavailable for residential  
2 development, as is the land in the proposed expansion area.” Record 26-27.

3 Petitioners do not dispute the evidentiary support for the city’s finding that the 4.48  
4 acres of land owned by the church are proposed to be used for church purposes and therefore  
5 almost certainly will not be developed for residential use. Absent such a challenge, we  
6 conclude that respondent properly excluded those 4.48 acres of land from the analysis of  
7 available land within the UGB for needed housing.

8 However, we agree with petitioners that the findings regarding the remaining  
9 approximately 14.5 acres are inadequate. In finding a lack of evidence that the remaining  
10 acreage is available for development, the city and county impermissibly shifted or avoided  
11 the burden placed on them by Goal 14 and the applicable administrative rules. *See* n 2. In  
12 order for the city and the county to disregard the remaining acreage of buildable land within  
13 the UGB, respondent must demonstrate that no portion of the identified housing can  
14 reasonably be accommodated on those 14.5 acres. Merely citing the absence of evidence that  
15 the properties are currently available for residential development is not adequate to  
16 demonstrate that no part of the city’s needed housing can be met on land already inside the  
17 UGB.

18 The first subassignment of error is sustained.

19 **B. Second Subassignment of Error**

20 In their second subassignment of error, petitioners challenge the city’s and county’s  
21 findings of a need for additional residential land. Specifically, petitioners challenge the  
22 city’s and county’s finding of a need for an additional 118 acres of residential land based on  
23 an assumed average household size of 2.75 persons and an assumed lot size of 6000 square  
24 feet. Petitioners argue that there is not substantial evidence in the record to support the  
25 assumptions.

26 Intervenor answers that the assumptions used by the city and county are based on  
27 policies set forth in the City of Adair Village Comprehensive Plan (Plan). Section 9.300 of

1 the Plan requires the city to utilize a household size of 2.75 persons for future planning, and  
2 Section 9.800 of the Plan expresses a policy of providing “new minimum lot sizes that result  
3 in an overall average lot size of 6,000 square feet.” Those Plan provisions were adopted by  
4 the city in February, 2006. It is appropriate for the city and county to rely on assumptions  
5 included in the city’s acknowledged comprehensive plan policies in computing the acreage  
6 for the proposed UGB expansion. *See 1000 Friends of Oregon v. City of Dundee*, 203 Or  
7 App 207, 216, 124 P3d 1249 (2005) (an acknowledged comprehensive plan and information  
8 integrated into that plan must serve as the basis for land use decisions).

9 The second subassignment of error is denied.

10 **C. Third Subassignment of Error**

11 In their third subassignment of error, petitioners argue that the city and county failed  
12 to demonstrate a need under Goal 14 and OAR 660-024-0040(1) for an additional 24 acres of  
13 land for recreation and open space. As explained above, the proposed UGB amendment  
14 contains approximately 24 acres adjacent to the Santiam Christian School. That acreage is  
15 proposed to be designated open space and used by the school as athletic fields. Petitioners  
16 argue that the city and county failed to analyze the *city’s* need for additional land for schools  
17 as required under Goal 14 and its rules, but instead improperly analyzed the *school’s* need  
18 for more land.

19 Intervenor responds, and we agree, that the city’s findings demonstrate that the city  
20 correctly identified a city need for land for recreation and open space.<sup>3</sup> The findings explain

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<sup>3</sup> The city and county found in relevant part:

“Santiam Christian School \* \* \* is located within the city’s UGB. Currently it has only one athletic field that serves for practices. All outdoor athletic events must be played on facilities outside of [the city]. Football games are played in Adair Village, but on the school’s lone practice field, which makes them unplayable for state playoffs and must be played elsewhere. Soccer matches are played at [Lane Benton Community College]. Track events were also held at LBCC, but the school has recently learned that those facilities are no longer available and the school had to work a hurried agreement to hold those events at [a Corvallis middle school]. Baseball and softball must be played on leased fields in Adair County Park. The

1 that the current lack of available land for athletic events requires those events to take place in  
2 neighboring communities, and that bringing the land adjacent to the school into the UGB will  
3 fulfill an identified need to provide recreational facilities adjacent to the school that they  
4 serve.

5 Additionally, intervenor notes that the stated purpose of the Plan's Growth  
6 Management Policy 12 is to encourage the city's institutional uses to be integrated with the  
7 community, and specifically identifies Santiam Christian School as one of those institutions.  
8 Intervenor explains that the city's and county's decision is consistent with the city's policy to  
9 integrate Santiam Christian School with the community by holding athletic events in the  
10 community. We agree, and we think the city adequately identified a city need for the 24  
11 acres of recreational and open space lands. The city and Santiam Christian School can  
12 have shared needs, and we reject petitioners' contention that they cannot overlap or be the  
13 same.

14 The third subassignment of error is denied.

15 The second assignment of error is sustained, in part.

16 **FIRST ASSIGNMENT OF ERROR**

17 In their first assignment of error, petitioners argue that respondent erred in failing to  
18 impose a condition of approval requiring mitigation of effects on transportation infrastructure  
19 resulting from the proposed amendments to the comprehensive plan and zoning maps. Goal  
20 12 (Transportation) and OAR 660-012-0060(1) require a local government to implement  
21 certain measures to ensure that the land uses allowed under a proposed amendment to a land

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school has finally after many years of negotiations acquired the land immediately to the south of its campus from [the Oregon Department of Fish and Wildlife] with the hope of developing a portion of the land for its athletic fields, which will also provide the community with needed open space.

“\* \* \* [t]here is a need to provide recreational facilities adjacent to the school that they serve and not require children to ride buses to distant facilities or require parents to transport their children to those facilities. To develop these facilities next to the [SCS] a UGB expansion is needed.” Record 25.

1 use designation, if the proposed amendment would “significantly affect” transportation  
2 facilities.<sup>4</sup>

3 Intervenor prepared and submitted a traffic impact analysis (TIA) that concluded that  
4 the UGB expansion and map changes would significantly affect the intersection of Highway  
5 99 and Ryals Road, but that the UGB amendment would comply with OAR 660-012-0060 if  
6 mitigation described in the TIA was implemented. Record 232, 586. During the proceedings  
7 below, intervenor stated its willingness to implement the mitigation measures identified in  
8 the TIA. Record 280-281.

9 The city and the county adopted the TIA and incorporated it and related  
10 correspondence into the decisions, finding:

11 “The TIA considers whether any transportation facilities would be  
12 ‘significantly affected’ by the proposed facility within the meaning of the  
13 TPR. The TIA concludes that, with mitigation, affected transportation  
14 facilities will be adequate through the planning horizon year of 2026. Table B  
15 to Mr. Springs’ August 17, 2006 letter demonstrates that the intersection of  
16 Highway 99W and N.E. Ryals Road, with mitigation, will operate at a v/c  
17 ratio of 0.89 in the morning peak hour and a v/c ratio of 0.67 in the afternoon  
18 peak hour. The v/c ratio standard is the applicable standard adopted by  
19 ODOT for state transportation facilities.

20 “The Board and City Council find that Goal 12 and the TPR are satisfied. The  
21 [county] and [city] expressly adopt and incorporate into their findings the  
22 [TIA] dated June 16, 2006, as well as the supplemental correspondence from  
23 Mr. Springer dated August 17, 2006 regarding ‘Summary of Transportation  
24 Impacts and Mitigation Associated with the Proposed UGB Expansion in  
25 Adair Village.’ \* \* \*” Record 20-21.

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<sup>4</sup> OAR 660-012-0060(1) provides in part:

“Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. \* \* \*”



1 The findings do not expressly impose a condition of approval requiring that the mitigation  
2 described in the TIA will occur. Petitioners argue that without such a condition, the UGB  
3 and Plan amendment does not comply with OAR 660-012-0060.

4 Intervenor responds that by expressly incorporating the TIA and related  
5 correspondence describing the required mitigation into the decisions, the city and county  
6 effectively require that the described mitigation be implemented contemporaneously with or  
7 prior to the development allowed by the UGB and Plan amendment. We agree with  
8 intervenor.

9 The first assignment of error is denied.

### 10 **THIRD ASSIGNMENT OF ERROR**

11 In their third assignment of error, petitioners argue that the decision to expand the  
12 UGB onto resource land violates ORS 197.298.<sup>5</sup> ORS 197.298 identifies different

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<sup>5</sup> ORS 197.298 provides:

**“Priority of land to be included within urban growth boundary.**

“(1) In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities:

“(a) First priority is land that is designated urban reserve land under ORS 195.145, rule or metropolitan service district action plan.

“(b) If land under paragraph (a) of this subsection is inadequate to accommodate the amount of land needed, second priority is land adjacent to an urban growth boundary that is identified in an acknowledged comprehensive plan as an exception area or nonresource land. Second priority may include resource land that is completely surrounded by exception areas unless such resource land is high-value farmland as described in ORS 215.710.

“(c) If land under paragraphs (a) and (b) of this subsection is inadequate to accommodate the amount of land needed, third priority is land designated as marginal land pursuant to ORS 197.247 (1991 Edition).

“(d) If land under paragraphs (a) to (c) of this subsection is inadequate to accommodate the amount of land needed, fourth priority is land designated in an acknowledged comprehensive plan for agriculture or forestry, or both.

1 categories of land and assigns different priorities for inclusion of each category of land inside  
2 a UGB when there is a need to expand the UGB. As relevant here, land that is located  
3 adjacent to an urban growth boundary in an existing exception area is a higher priority for  
4 inclusion in a UGB than is resource land. ORS 197.298(1)(b) and (d). By “higher” priority,  
5 we mean that, all other things being equal, the exception area must be included in the UGB  
6 before resource land may be included.

7 Petitioners argue that decision ignores an existing exception area adjacent to the  
8 western edge of the city’s UGB across Highway 99W, known as the “Tampico Road”  
9 exception area. According to petitioners, that exception area could meet the identified need  
10 for additional housing and open space and must be included before resource land can be  
11 added to the UGB since it is given a higher priority under ORS 197.298. Petitioners also  
12 argue that, even if the city is found to have justified the need for the 24 acres adjacent to the  
13 Santiam Christian School to be brought into the UGB, under ORS 197.298, it cannot ignore  
14 the Tampico Road Area for the remaining 118 acres of needed land for housing.

15 Intervenor responds by pointing out that ORS 197.298(3) allows resource land to be  
16 included in a UGB ahead of exception lands where the exception areas are “inadequate” to

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“(2) Higher priority shall be given to land of lower capability as measured by the capability classification system or by cubic foot site class, whichever is appropriate for the current use.

“(3) Land of lower priority under subsection (1) of this section may be included in an urban growth boundary if land of higher priority is found to be inadequate to accommodate the amount of land estimated in subsection (1) of this section for one or more of the following reasons:

“(a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands;

“(b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints; or

“(c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.”

1 accommodate the amount of land needed for any of three separate reasons. *See* n 5.  
2 Intervenor notes that the findings explain that the city and county considered the Tampico  
3 Road exception area but concluded that the area was inadequate to meet the identified land  
4 need. First, the findings discuss the high costs of extending services such as water and sewer  
5 across Highway 99W due to the costs of boring under that highway. Second, the findings  
6 conclude that expansion of the UGB across Highway 99W would not accommodate certain  
7 land and transportation needs identified in the Plan, including the need for “compact  
8 community development” that does not “disrupt or bisect areas with a natural unity.” Record  
9 32. Third, the findings conclude that expanding the UGB across Highway 99W would be  
10 inconsistent with several growth management policies found in Section 9.100 of the Plan,  
11 including a policy that favors creating a “village center,” creating a network of streets that  
12 avoid reliance on Highway 99W for local trips, promoting alternatives to auto use through a  
13 system that facilitates safe bike and pedestrian travel, and promoting compact pedestrian  
14 friendly development within natural and man-made boundaries.

15       ORS 197.298(3) allows the city to include resource land within the UGB over  
16 existing exception areas if urban services cannot reasonably be provided due to physical  
17 constraints. Highway 99W physically separates the existing UGB from the Tampico Road  
18 exception area, and the evidence in the record indicates that due to the high cost of extending  
19 urban services across the highway, those services cannot be reasonably provided to that area.  
20 Coupled with the findings that inclusion of the Tampico Road exception area within the  
21 UGB would be contrary to adopted Plan policies, we think the findings are sufficient under  
22 ORS 197.298(3) to justify the inclusion of lower-priority resource land in the UGB rather  
23 than the higher priority Tampico Road exception area.

24       The third assignment of error is denied.

25       The decisions are remanded.