

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

3
4 GMK DEVELOPMENTS, LLC and KEVIN WARNER,
5 *Petitioners,*

6
7 and

8
9 MIKE ADAIR, JOANNE ADAIR,
10 NORMAN LEE, PHYLLIS LEE and WAYNE LEE,
11 *Intervenors-Petitioners,*

12
13 vs.

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15 CITY OF MADRAS,
16 *Respondent,*

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18 and

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20 MADRAS LAND DEVELOPMENT COMPANY, LLC,
21 *Intervenor-Respondent.*

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23 LUBA No. 2008-003

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25 JOEL FULLER and WILLIWAW INC.,
26 *Petitioners,*

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28 and

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30 MIKE ADAIR, JOANNE ADAIR,
31 NORMAN LEE, PHYLLIS LEE and WAYNE LEE,
32 *Intervenors-Petitioners,*

33
34 vs.

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36 CITY OF MADRAS,
37 *Respondent,*

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39 and

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41 MADRAS LAND DEVELOPMENT COMPANY, LLC,
42 *Intervenor-Respondent.*

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44 LUBA No. 2008-005
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FINAL OPINION
AND ORDER

Appeal from the City of Madras.

Andrew H. Stamp, Lake Oswego, filed a joint petition for review and argued on behalf of petitioners GMK Developments, LLC and Kevin Warner. With him on the brief was Bruce W. White.

Bruce W. White, Bend, filed a joint petition for review and argued on behalf of petitioners Joel Fuller and Williwaw, Inc. With him on the brief was Andrew H. Stamp.

Edward J. Sullivan, Carrie A. Richter, Portland, represented intervenors-petitioners.

Robert S. Lovlien, Bend, filed the response brief and argued on behalf of respondent.

Megan D. Walseth, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief were Dana L. Krawczuk and Ball Janik LLP.

RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

HOLSTUN, Board Member, did not participate in the decision.

AFFIRMED

07/22/2008

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city amending the comprehensive plan to adopt the Madras Urbanization Report (MUR) as supporting, technical documents to the comprehensive plan.

FACTS

The city initiated a legislative process to establish urban reserve areas containing a fifty-year land supply. Accordingly, the city’s consultants evaluated housing types, densities and needs over a 20-year and 50-year planning horizon. That evaluation resulted in the MUR, an updated needs analysis and inventory for residential and employment land under Goal 9 (Economic Development) and Goal 10 (Housing). The MUR’s housing needs analysis identifies a need for housing of all types for all income levels, including high-end housing, at the end of the 50-year planning period. The MUR concluded that a portion of that identified need could be satisfied by a master planned community.

In December, 2007, the city amended its comprehensive plan to adopt the MUR as a background document, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners argue that the city’s decision violates Statewide Planning Goal 10 (Housing), Statewide Planning Goal 14 (Urbanization), and ORS 197.307(3)(a). Petitioners argue that the city erred in adopting the housing needs analysis without contemporaneously amending the urban growth boundary (UGB) or taking other action to remedy what petitioners argue is an identified shortfall in housing at the end of the planning period.

Petitioners’ argument is premised on several contentions. First, petitioners contend that our decision in *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001) (*McMinnville*), requires the city to contemporaneously amend its UGB when it adopted the MUR, and that

1 its failure to do so violates Goal 14. Second, petitioners contend that even if *McMinnville*
2 does not control in the present appeal, Goal 10 and the administrative rules implementing
3 Goal 10 found at OAR 660-008-0000 *et seq.* apply to the city’s decision to adopt the housing
4 needs analysis.

5 Intervenor-respondent (intervenor) and the city (together, respondent) respond that
6 *McMinnville* is inapposite to the present appeal, and that nothing in Goal 10 or its
7 administrative rules or ORS 197.307 requires the city to expand its UGB at the same time it
8 adopts the MUR. We address each argument in turn.

9 **1. Applicability of McMinnville**

10 Goal 10 requires in relevant part that housing needs analyses be “consistent with Goal
11 14 requirements.” ORS 197.296 requires certain cities to provide sufficient buildable lands
12 within their urban growth boundaries to accommodate a 20-year housing supply.¹ In

¹ ORS 197.296 provides in relevant part:

“(1)(a) The provisions of this section apply to metropolitan service district regional framework plans and local government comprehensive plans *for lands within the urban growth boundary of a city that is located outside of a metropolitan service district and has a population of 25,000 or more.*

“ * * * * *

“(2) At periodic review pursuant to ORS 197.628 to 197.650 or at any other legislative review of the comprehensive plan or regional plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, a local government shall demonstrate that its comprehensive plan or regional plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years. The 20-year period shall commence on the date initially scheduled for completion of the periodic or legislative review.

“(3) In performing the duties under subsection (2) of this section, a local government shall:

“(a) Inventory the supply of buildable lands within the urban growth boundary and determine the housing capacity of the buildable lands; and

“(b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules

1 *McMinnville*, LUBA addressed the question of whether the provisions of ORS 197.296
2 required the city when it adopted an update to its housing needs analysis to
3 contemporaneously take steps to remedy an identified housing shortfall, either by amending
4 its UGB or adopting measures to increase allowed densities, as set forth in ORS 197.296(4)
5 (since renumbered (6)). LUBA held that ORS 197.296(4) (now (6)) required the city to
6 contemporaneously take steps to remedy a shortfall that was identified in the adopted
7 housing needs projection.

8 Petitioners argue that the holding in *McMinnville* stands for the broad proposition that
9 once a housing needs analysis identifies a shortfall, Goal 10 and its implementing rules

relating to housing, to determine the number of units and amount of land
needed for each needed housing type for the next 20 years.

“ * * * * *

“(6) If the housing need determined pursuant to subsection (3)(b) of this section is greater
than the housing capacity determined pursuant to subsection (3)(a) of this section,
the local government shall take one or more of the following actions to
accommodate the additional housing need:

“(a) Amend its urban growth boundary to include sufficient buildable lands to
accommodate housing needs for the next 20 years. As part of this process,
the local government shall consider the effects of measures taken pursuant
to paragraph (b) of this subsection. The amendment shall include sufficient
land reasonably necessary to accommodate the siting of new public school
facilities. The need and inclusion of lands for new public school facilities
shall be a coordinated process between the affected public school districts
and the local government that has the authority to approve the urban growth
boundary;

“(b) Amend its comprehensive plan, regional plan, functional plan or land use
regulations to include new measures that demonstrably increase the
likelihood that residential development will occur at densities sufficient to
accommodate housing needs for the next 20 years without expansion of the
urban growth boundary. A local government or metropolitan service district
that takes this action shall monitor and record the level of development
activity and development density by housing type following the date of the
adoption of the new measures; or

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

1 require a city to remedy that problem before adopting the housing needs analysis. Intervenor
2 disputes that *McMinnville* stands for such a broad proposition. As intervenor explains:

3 “* * * it was only because ORS 197.296 required the city to take concurrent
4 action beyond the housing needs analysis * * * that LUBA determined that
5 ‘consistency with Goal 14 requirements’ [found at OAR 660-008-0005(4)(c)]
6 required the city to take further actions to expand its buildable land supply.
7 Because the city had not gone beyond the housing needs analysis to complete
8 the statutory process in ORS 197.296, LUBA could not determine whether the
9 city’s action was fully consistent with Goal 14 requirements.

10 “ * * * * *

11 “* * * the particular requirements of ORS 197.296 determined the outcome of
12 LUBA’s decision in [*McMinnville*]. Where, as here, ORS 197.296 does not
13 apply, a city’s housing needs analysis can be ‘consistent with Goal 14
14 requirements’ without a contemporaneous UGB amendment. * * *”
15 Intervenor-Respondent’s Brief 8-9.

16 We disagree with petitioners’ broad reading of *McMinnville*. Our decision in *McMinnville*
17 hinged on the fact that ORS 197.296(3) and (4) (now (6)) applied to the city’s decision to
18 adopt a housing needs update that identified a shortfall, and required a concurrent
19 amendment of the UGB or increased densities.² Petitioners concede that ORS 197.296 does

² In *McMinnville*, we held:

“The housing needs analysis required by ORS 197.296(3) identifies whether and to a limited, preliminary extent what actions the city must take under ORS 197.296(4) and (5). Where, as here, the city’s housing needs analysis identifies a significant deficit in the supply of buildable land, the city must take one or more actions under ORS 197.296(4) through (7). It is highly probable under the present circumstances that whatever actions the city takes under ORS 197.296(4)-(7) will implicate Goal 14. In our view, LCDC’s choice to require that the housing needs analysis required by ORS 197.296(3) be ‘consistent with Goal 14 requirements’ is essentially a choice to require that, in circumstances such as the present one, the city must complete the statutory process and adopt one or more of the actions described in ORS 197.296(4)-(7) to take the necessary actions to plan for the identified housing need and the identified deficit in the supply of buildable lands.

“ * * * * *

“In sum, because LCDC’s rules implementing the statute require that the city’s housing needs analysis *must* be consistent with Goal 14 requirements, the consequence in the present case is that the city committed reversible error in adopting a *final* comprehensive plan amendment that concludes that action will be required under ORS 197.296(4)-(7), but fails to complete

1 not apply to the city of Madras.³ Petition for Review 7. Where, as here, ORS 197.296 does
2 not apply, *McMinnville* is inapposite.

3 **2. Goal 10 and the Goal 10 Rules**

4 Petitioners also argue that even if *McMinnville* is not controlling, Goal 10 itself and
5 the rules and statutes that implement Goal 10 (collectively the Goal 10 Rules) required the
6 city to amend its UGB when the MUR projects a shortfall in land available to meet the
7 identified land needs.⁴ Goal 10 provides:

8 “Buildable lands for residential use shall be inventoried and plans shall
9 encourage the availability of adequate numbers of needed housing units at
10 price ranges and rent levels which are commensurate with the financial
11 capabilities of Oregon households and allow for flexibility of housing
12 location, type and density.”

13 OAR 660-008-0000 *et seq* implement Goal 10, and provide in relevant part:

14 “* * * The mix and density of needed housing is determined in the housing
15 needs projection. Sufficient buildable land shall be designated on the
16 comprehensive plan map to satisfy housing needs by type and density range as
17 determined in the housing needs projection. The local buildable lands
18 inventory must document the amount of buildable land in each residential plan
19 designation.” OAR 660-008-0010.⁵

the process set forth in the statute by taking action under those provisions.” *Id.* at 226-27
(emphases in original).

³ Madras has less than 7,000 residents. Record 35.

⁴ The parties disagree about whether the MUR identifies a shortfall of land for housing. Petitioners argue that the MUR identifies a shortage of residential and commercial land over the 20-year and 50-year planning horizon. Intervenor and the city contend that the MUR at most identifies a need for “public” and “semi-public” lands that were allocated to the “residential” category. Because of our resolution of the first assignment of error, we need not resolve the parties’ dispute about whether the MUR actually identifies a housing shortfall at the end of the planning period.

⁵ ORS 197.307(3)(a) similarly provides:

“When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing, including housing for farmworkers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.”

1 OAR 660-008-0005(4)(c) provides that the “housing needs projection” referenced in
2 the rule must be “consistent with Goal 14 requirements.” As petitioners explain Goal 10,
3 “[the goal] is not satisfied merely by identifying that a problem exists – Goal 10 requires the
4 local government to solve the problem as well.” Petition for Review 12. Petitioners also cite
5 Goal 14 and OAR 660-024-0040(1) in support of their contention that the city must provide
6 an adequate supply of land by designating sufficient buildable lands on its comprehensive
7 plan map to argue that amending the UGB simultaneously with the adoption of the MUR was
8 the only action the city could take to show compliance with Goal 10 after the MUR identified
9 a shortfall in certain types of housing.⁶

10 Intervenor responds that nothing in the language of Goal 10 itself, its implementing
11 rules, or the needed housing statutes found at ORS 197.303 to 197.307 mandate further
12 action beyond the housing needs projection when ORS 197.296 does not apply and a city
13 adopts a post-acknowledgement plan amendment that affects some aspects of the city’s Goal
14 10 program. As intervenor explains, absent applicability of ORS 197.296, the Goal 10 Rules
15 do not contain a process that requires action beyond adopting a housing needs projection;
16 those rules merely require that sufficient land be zoned for a variety of residential uses.

17 In response to petitioners’ reliance on the requirement in OAR 660-008-0005(4)(c)
18 that the housing needs projection must be “consistent with Goal 14 requirements,” intervenor
19 again distinguishes *McMinnville*, where we held that ORS 197.296 and the rules

⁶ OAR 660-024-0040(1) derives from Goal 14 and provides in relevant part:

“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.”

1 implementing that statute required the city to take further action under Goal 14, from the
2 present case. In the present case, intervenor argues, “consistency with Goal 14” means only
3 that the housing needs projection must be consistent with Goal 14 requirements that govern
4 housing needs determinations and inventories, such as those found in OAR 660-024-0050(1)
5 and (2).

6 We agree with intervenor that nothing cited to us in the language of Goal 10 or its
7 implementing rules require the city to contemporaneously adopt a UGB amendment to
8 remedy a projected shortfall in housing over a 20-year or 50-year period. As intervenor
9 explains:

10 “The Goal 10 rules are concerned with zoning land within a jurisdiction’s
11 boundaries to achieve an adequate mix and density of housing units, not with
12 expanding the jurisdiction’s boundaries. * * * Unlike ORS 197.296(3),
13 however, the Goal 10 rules do not equate the need for specific housing types
14 with land need requirements. A Goal 10 housing need may be, but is not
15 necessarily, met by increasing land supply. Moreover, a residential land need,
16 in Goal 14 terms, is a broader concept than a Goal 10 housing need because it
17 includes land for transportation and other facilities. * * *” Intervenor-
18 Respondent’s Brief 10.

19 And as intervenor correctly points out, even cities that are subject to ORS 197.296 are not
20 automatically required to satisfy an identified housing need by amending the UGB. Cities
21 may meet an identified need by higher density zoning districts and non-periodic review UGB
22 amendments that meet a portion of the identified need. ORS 197.296(6); OAR 660-024-
23 0060(2).

24 Because nothing in Goal 10 or the Goal 10 rules applicable to the city’s decision
25 required the city to amend its UGB contemporaneously with adopting the MUR, the first
26 assignment of error provides no basis for reversal or remand of the decision.

27 The first assignment of error is denied.

28 **SECOND ASSIGNMENT OF ERROR**

29 In the second assignment of error, petitioners argue that the city’s decision fails to
30 comply with Statewide Planning Goal 2 (Land Use Planning). Petitioners argue that the

1 city's adoption of a housing needs projection that concludes that the city does not have
2 sufficient buildable land to meet its projected land needs is inconsistent with the city's
3 existing comprehensive plan, which concludes that the city has sufficient buildable lands to
4 meet its land needs.⁷ In support of their theory, petitioners cite language from the Guidelines
5 for implementing Goal 2 and the definition of "comprehensive plan" set forth in ORS
6 197.015(5) to argue that the city erred in failing to amend the comprehensive plan to delete
7 provisions and assumptions that are no longer consistent with the MUR.⁸

8 Goal 2 requires land use decisions to be based on planning assumptions that are
9 contained in the comprehensive plan. *D.S. Parklane Development, Inc. v. Metro*, 165 Or
10 App 1, 22, 994 P2d 1205 (2000). Goal 2 also requires amendments to a comprehensive plan
11 to be supported by an adequate factual base demonstrating compliance with the applicable
12 statewide planning goals. Goal 2, Guideline C(1).

13 Intervenor responds that the city's decision both explicitly and implicitly found that
14 new data in the MUR is intended to supercede all inconsistent data in the comprehensive
15 plan. Intervenor further contends that because petitioners do not allege that the housing
16 needs projection violates any substantive goal or policy set forth in the city's comprehensive

⁷ Petitioners list several ways in which data in the MUR is inconsistent with data in the unamended comprehensive plan. Petition for Review 23-25.

⁸ Section C(2)(d) of the Guidelines for implementing Goal 2 provides that all the elements of a plan "should fit together and relate to one another to form a consistent whole at all times."

ORS 197.015(5) defines "comprehensive plan" as:

“* * * a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. ‘Comprehensive’ means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. ‘General nature’ means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is ‘coordinated’ when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. ‘Land’ includes water, both surface and subsurface, and the air.”

1 plan, and because petitioners do not challenge the content of the MUR as an adequate factual
2 base for determining compliance with the statewide planning goals, there is no basis for
3 reversal or remand of the decision.

4 The city adopted the MUR, which provides:

5 “The existing comprehensive plan includes dated text related to population,
6 employment and land needs. To ensure internal consistency, dated
7 information must be removed from the existing comprehensive plan text and
8 replaced with new information.” Record 163.

9 It is clear from the city’s decision that in adopting the MUR, the city intended to review and
10 update its Goal 9 and Goal 10 elements of the plan. We agree with intervenor that the city,
11 in adopting the MUR containing the above-quoted language as an amendment to its
12 comprehensive plan, signaled that new information in the MUR is intended to supercede and
13 replace all inconsistent data in the comprehensive plan. The MUR expressly contemplates
14 that such inconsistent data will be deleted and replaced with updated data from the MUR, at
15 some future point. Petitioners have not demonstrated any basis in Goal 2 or ORS 197.015(5)
16 to require the city to update the existing comprehensive plan contemporaneously with
17 adopting the MUR. While language in the guidelines to Goal 2 states that the comprehensive
18 plan should “form a consistent whole at all times,” the guidelines to the goals are not
19 mandatory approval criteria that must be satisfied in order to approve or deny a post-
20 acknowledgement plan amendment. *Downtown Comm. Assoc. v. City of Portland*, 80 Or
21 App 336, 340, 722 P2d 1258 (1986); ORS 197.015(9). Petitioners have not established that
22 the city’s adoption of the MUR violates any existing provision of the city’s comprehensive
23 plan or statewide planning goal or that it does not provide an adequate factual base for
24 demonstrating compliance with the goals. As such, the second assignment of error provides
25 no basis for reversal or remand of the decision.

26 The second assignment of error is denied.

27 The city’s decision is affirmed.