BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JERRY HILDENBRAND, NANCY HILDENBRAND,
and BARBARA SPREADBURY,
Petitioners,

vs.

CITY OF ADAIR VILLAGE,
Respondent,

and

J.T. SMITH COMPANIES, INC.,
Intervenor-Respondent.

LUBA No. 2008-125

FINAL OPINION
AND ORDER

Appeal from City of Adair Village.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was Goal One Coalition.

No appearance by the City of Adair Village.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Michael C. Robinson and Perkins Coie LLP.

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

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

AFFIRMED 12/17/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city ordinance that amends a comprehensive plan policy. In this opinion we refer to that policy as Plan Policy 4.

INTRODUCTION

Plan Policy 4 played a role in a 2006 decision by the city to amend the city's urban growth boundary (UGB). That prior UGB amendment was appealed to LUBA. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007) (*Hildenbrand I*). LUBA's decision was appealed to the Court of Appeals, which reversed LUBA's decision in part. *Hildenbrand v. City of Adair Village*, 217 Or App 623, 177 P3d 40 (2008) (*Hildenbrand II*). The city's initial UGB amendment was ultimately remanded to the city to correct errors identified by both LUBA and the Court of Appeals. In its decision in *Hildenbrand II*, the Court of Appeals interpreted Plan Policy 4 and concluded that LUBA and the city had misinterpreted that policy. We briefly discuss LUBA's and the Court of Appeals' decisions in *Hildenbrand I* and *Hildenbrand II* and the city's decisions following *Hildenbrand I and II*, before turning to petitioners' assignments of error in this appeal.

A. LUBA's Decision in *Hildenbrand I*

The UGB amendment that was at issue in *Hildenbrand I* expanded the city's UGB to include an additional 142.7 acres. That decision was based, in part, on a city finding that an additional 118 acres of land were needed for residential development to accommodate an anticipated population increase of 1,909 people. The city's determination that 118 acres would be needed for residential purposes was based on the estimated population increase and assumptions regarding the average household size of that population increase and the area of land that would be need for housing for each household. The city assumed that the average household size of that population would be 2.75 people and that 6,000 square feet of land would be needed per household unit. The 118 acres were assigned the city's R-3 zoning

district, which allowed row houses to be developed on 1,200 square foot lots, duplexes on 7,600 square foot lots and single family dwellings on lots with a minimum lot size of 3,800 square feet. The R-3 zone also imposed a maximum lot size of 200 percent of the minimum lot size.[1] Based on that R-3 zoning, petitioners argued to LUBA that the city's assumption that the 118 acres would develop with an average lot size of 6,000 square feet was unreasonable and was not supported by substantial evidence. Petitioners contended the R-3 zoned land would be developed with lots that were on average smaller than 6,000 acres, so that fewer than 118 acres would be needed to house the anticipated 1909 people.

The applicant argued to LUBA in *Hildenbrand I* that the city properly relied on Plan Policy 4 in assuming that the 118 acres would develop with an average lot size of 6,000 square feet. Before it was amended by the decision that is before us in this appeal, Plan Policy 4 stated:

> "In order to provide for the efficient utilization of residential lands, the City will provide for new minimum lot sizes that result in an overall average lot size of 6,000 feet." Record 84.

Citing *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005), LUBA concluded that the city's reliance on Plan Policy 4 to assume that development on the 118 acres would have an average lot size of 6,000 square feet was appropriate.

B. *Hildenbrand II*

On appeal, the Court of Appeals first suggested that Plan Policy 4 might be directed at "the content of future zoning legislation" and simply have no bearing on how densely R-3 zoned land would or must develop after it is included in the UGB. The Court of Appeals then concluded that even if Plan Policy 4 does apply in the case of a UGB amendment, it

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[1] In their petition for review in this appeal, petitioners claim that the R-3 zone imposes a maximum lot size of 6,000 square feet for single family dwellings. However, 200 percent of the 3,800 square foot minimum lot size for single family dwellings in the R-3 zone results in a maximum lot size 7,600 square feet for such housing.

"does not prescribe a 6,000 square foot lot density for any particular development or part of the city." 217 Or App at 631. The Court of Appeals went on to explain that if Plan Policy 4 applies to a decision to bring additional land inside the UGB,

> "the policy arguably requires that development allowed by an urban growth boundary amendment not result in an average city lot size that is less compliant with the 6,000 square foot standard. The policy does not dictate that the average size of the lots in all new development must be 6,000 square feet. It requires that lot sizes in new development be arrayed in a way that brings the citywide average lot size closer to the 6,000 square foot standard. If the rest of the city had developed with 10,000 square foot lots, then lots smaller than 6,000 square feet would need to be added to reach an average lot size of 6,000 square feet. But that calculation was not made by the city and county. The adopted findings do not determine what residential density will be required in the expansion area in order to meet the purported plan standard. The plan policy provides no guidance for any assumed residential density without that context." 217 Or App at 631-32.

Under the Court of Appeals' interpretation of Plan Policy 4, the city could not rely on Plan Policy 4 to support its assumption that the 118 acres that it added to the UGB to meet residential land needs would develop with lots that average 6,000 square feet. Indeed, to apply Plan Policy 4 to the disputed UGB amendment, the city would be required first to determine what its existing city-wide average lot size is and then determine whether the R-3 zoning that the city applied to the 118 acres would bring it closer to the 6,000 square-foot city-wide average called for by Plan Policy 4. Then the city would be required to determine whether all of the 118 acres that were included in the UGB for residential purposes would be needed, if those acres developed at the anticipated density under R-3 zoning or whatever zoning is required to comply with Plan Policy 4.

C. The City's Decisions in Response to *Hildenbrand I and II*

In the decision that is before us in this appeal, the city amended Plan Policy 4. The text of amended Plan Policy 4 is set out below:

> "In order to provide for the efficient utilization of lands in urban growth boundary expansion areas and to meet the city's identified and acknowledged land needs, such expansion areas shall be planned and zoned to result in an average of six point five (6.5) dwelling units per net residential acre. For

> purposes of this policy, a 'net residential acre' shall consist of 43,560 square feet of residentially designated buildable land, after excluding present and future rights-of-way, restricted hazard areas, public open spaces and restricted resource protection areas." Record 13.

Unlike prior Plan Policy 4, which the Court of Appeals interpreted to express a city-wide policy of ultimately achieving a 6,000 square foot average lot size in the city, amended Plan Policy 4 applies specifically to UGB expansion areas and seeks to achieve 6.5 dwelling units per net residential acre in "expansion areas." In other words, rather than attempt to readopt the UGB amendment and attempt to demonstrate that adding 118 acres to the UGB for residential development under R-3 zoning is both consistent with prior Plan Policy 4 and the city's assumption that those acres would develop with an average density of 6,000 square feet per dwelling unit, the city determined that it would first amend Plan Policy 4 to remove the city-wide density standard expressed in prior Plan Policy 4 and replace it with a new density standard that applies specifically to UGB expansion areas.

The city adopted a second decision following LUBA's decision in *Hildenbrand I* and the Court of Appeals' decision in *Hildenbrand II*. In that decision the city adopted a UGB amendment to add a total of 127.5 acres of land to the city's UGB. In adopting that decision the city presumably applied amended Plan Policy 4 and has justified any assumptions that it made in determining how many acres are needed to meet future residential needs. Petitioners have appealed that decision to LUBA. *Hildenbrand v. City of Adair Village*, ___Or LUBA ___ (LUBA Nos. 2008-191 and 2008-202).[2]

ASSIGNMENT OF ERROR

Petitioners' arguments in support of its single assignment of error are difficult to follow, because petitioners appear to fail to appreciate that the city elected not to attempt to justify a 142.7-acre UGB amendment based on the interpretation of prior Plan Policy 4 that the Court of Appeals adopted in *Hildenbrand II*. Rather, as we explain above, the city

[2] Benton County also adopted that UGB amendment, and the county's decision was appealed as well.

elected to adopt this decision to amend Plan Policy 4 before proceeding with the UGB amendment.

A. The R-3 Zone Provides for More Dense Development than Amended Plan Policy 4.

We first address the argument that petitioners present in the first two sentences of the first full paragraph on page five of the petition for review. Petitioners argue that the city's R-3 zone both allows and requires denser residential development than required by amended Plan Policy 4.[3] But even if R-3 zoning does allow denser development than amended Plan Policy 4 requires for areas added to the UGB, the challenged decision does not apply R-3 zoning or amend the city's UGB. Moreover, petitioners do not explain why amended Plan Policy 4, which calls for an average density per net residential acre that is less dense than the density of development that is possible or required under the city's existing R-3, necessarily results in an inconsistency between amended Plan Policy 4 and R-3 zoning. Amended Plan Policy 4 appears to be a *minimum* density requirement. If so, a zone that allows denser development than amended Plan Policy 4 is not inconsistent with such a minimum density policy. Even if amended Plan Policy 4 is not a minimum density policy, an R-3 zone that permits higher density residential development might be necessary to off-set any lower density residential zoning that might be applied in a UGB expansion area.

If there is a disconnect between (1) amended Plan Policy 4, (2) the R-3 zoning or any other zoning that the city may have applied to the area it subsequently included in its UGB and (3) the assumptions and justifications that that the city relies on to demonstrate that the land that was added to the UGB is needed under Statewide Planning Goal 14 (Urbanization) to serve the expected population increase, petitioners can argue that such a disconnect provides a basis for remanding the UGB amendment. However, that argument can be

[3] The parties have different ideas about the required minimum and maximum lot sizes in the R-3 zone and about what residential density is called for under amended Plan Policy 4. We need not resolve that disagreement here.

advanced only in the appeal of that subsequent UGB amendment, not the present appeal. Petitioners' argument about the different densities that are permissible or required under R-3 zoning and amended Plan Policy 4 provides no basis for reversal or remand of the decision that is before us in this appeal.

B. Amended Plan Policy 4 is Inconsistent with Goal 14 and the City Comprehensive Plan

The entire argument presented by petitioners in the final sentence of the first full paragraph on page 5 of the petition for review is set out below:

> "[T]he amended policy language is not consistent with either the purpose of the comprehensive plan's growth management policies themselves or the requirements of Goal 14."

Petitioners identify no comprehensive plan growth management policies and do not identify what the purposes of those policies might be. Neither do petitioners identify the requirements of Goal 14 that petitioners believe are inconsistent with the amended Plan Policy 4 to achieve an average of 6.5 dwelling units per net residential acre in UGB expansion areas. Petitioners' argument is not sufficiently developed to provide a basis for reversal or remand, and for that reason the argument is rejected. *Deschutes Development v. Deschutes Cty*., 5 Or LUBA 218, 220 (1982).

C. The Amendment of Plan Policy 4 was not Required by *Hildenbrand II*.

Petitioners' final argument is set out below:

> "The city's decision claims that the policy plan amendment is required by the Court of Appeals and LUBA decisions remanding the UGB expansion decision. But a close and careful reading of the Court of Appeals decision * * * reveals that the Court of Appeals remanded the decision for further justification, not for amendment of the policies purported to justify the decision[.]" Petition for review 5.

Responding to petitioners' first point, the city does not claim in the decision that is before us in this appeal that the amendment to Plan Policy 4 was *required* by the Court of Appeals or LUBA. The city either did not agree with that interpretation or did not wish to

continue with prior Plan Policy 4 as it was interpreted by the Court of Appeals and elected to amend Plan Policy 4 to state a policy that presumably is more closely aligned with the city's current goal for residential development densities in lands that are added to the UGB. Petitioners' second point is facially accurate, but petitioners' suggestion that the Court of Appeals intended to foreclose the possibility that the city might elect to amend Plan Policy 4, rather than proceed on remand under the Court of Appeals' interpretation of prior Plan Policy 4, is inaccurate. The Court of Appeals reviewed the version of Plan Policy 4 that was before it in *Hildenbrand II* and advised the city of what the text of prior Plan Policy 4 required. The issue of whether the city might instead amend Plan Policy 4 and proceed under that amended policy was not presented in *Hildenbrand II*. Nothing in *Hildenbrand II* precludes the city from applying the legal standards that govern comprehensive plan amendments and amending Plan Policy 4. Because the city elected to amend Plan Policy 4 rather than apply prior Plan Policy 4 on remand, the Court of Appeals' direction about how the city might go about applying prior Plan Policy 4 on remand has no obvious relevance in this appeal of the city's decision to amend Plan Policy 4.

Because petitioners identify no basis for remand of the city's decision to amend Plan Policy 4, petitioners' assignment of error is denied and the city's decision is affirmed.