BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH MEYER,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2010-004

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Joseph Meyer, Roseburg, filed the petition for review and argued on his own behalf.

Paul Meyer, Roseburg, filed the response brief and argued on behalf of respondent.

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

REMANDED 07/02/2010

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals the county's adoption of an ordinance amending the county's comprehensive plan to adopt amended population projections for the county and urban areas within the county.

BACKGROUND

ORS 195.036 and OAR 660-024-0030(1) require the county to establish and maintain a population forecast for the county and for the urban areas within its boundaries.[1] The county last adopted a population forecast for the county in 2000, based on a forecast prepared in 1998 that forecast the county's population through 2020. We discuss that 1998 forecast in detail later in this opinion. In 2009, the county updated the 1998 population forecast to forecast the population for the county and its urban areas through 2030. The county forecast projects that the county will have a population of 139,626 people at the end of the forecast period in 2030.

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[1] ORS 195.036 provides:

> "The coordinating body under ORS 195.025(1) shall establish and maintain a population forecast for the entire area within its boundary for use in maintaining and updating comprehensive plans, and shall coordinate the forecast with the local governments within its boundary."

OAR 660-024-0030(1) provides in relevant part:

> "Counties must adopt and maintain a coordinated 20-year population forecast for the county and for each urban area within the county consistent with statutory requirements for such forecasts under ORS 195.025 and 195.036. Cities must adopt a 20-year population forecast for the urban area consistent with the coordinated county forecast, except that a metropolitan service district must adopt and maintain a 20-year population forecast for the area within its jurisdiction. In adopting the coordinated forecast, local governments must follow applicable procedures and requirements in ORS 197.610 to 197.650 and must provide notice to all other local governments in the county. The adopted forecast must be included in the comprehensive plan or in a document referenced by the plan."

ASSIGNMENT OF ERROR

The Goal 2 requirement for an adequate factual base requires that a legislative land use decision such as a decision to adopt a population forecast be supported by substantial evidence. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff'd* 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Where the evidence in the record is conflicting, if a reasonable person could reach the decision the county made in view of all the evidence in the record, the choice between conflicting evidence belongs to the county. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995).

A. OAR 660-024-0030

In a subassignment of his first assignment of error, petitioner argues that the county's decision violates OAR 660-024-0030(2), which provides:

> "The [population] forecast must be developed using commonly accepted practices and standards for population forecasting used by professional practitioners in the field of demography or economics, and must be based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA). The forecast must take into account documented long-term demographic trends as well as recent events that have a reasonable likelihood of changing historical trends. The population forecast is an estimate which, although based on the best available information and methodology, should not be held to an unreasonably high level of precision."

According to petitioner, the county's forecast is not based on "current, reliable and objective sources and verifiable factual information" and further does not take into account "documented long-term demographic trends" as required by the rule. As such, petitioner argues, the forecast is not supported by an adequate factual base. Petitioner argues that the county has failed to follow the direction in OAR 660-024-0030(2) that the county must take into account the historical trend of population increases, and instead uses seven assumptions

from its 1998 forecasting model that result in higher population numbers and growth rates than are borne out by either the historic population trends or the Oregon Office of Economics Analysis (OEA) forecast, which forecast lower growth rates based on fifteen assumptions that were rejected by the county in 1998.[2] As an example, petitioner points to the county's 1998 population forecast that projected a population of 125,670 people in 2010, whereas the estimated 2010 population of the county as set forth in the Center for Population Research and Census (CPRC) estimate from Portland State University is 108,223 people, significantly lower than the county's forecasted population. Petitioner also points to the county's actual growth rate from 1990 to 2010, which is less than half the growth rate predicted in the county's 1998 population forecast. Given the directive of the rule and all of the information available to the county to evaluate the accuracy of the county's 1998 forecast, petitioner argues, it was unreasonable for the county to ignore that information and rely on its 1998 forecast model assumptions to continue to project growth rates that were not borne out by actual figures in the years covered by the 1998 model.

Also according to petitioner, the county erred in failing to rely on the 2004 OEA population forecast for the county without explaining why it disregarded that forecast in light of the rule's language that refers to the "most recent long-range forecast for the county published by the [OEA]." We understand petitioner to argue that the rule requires the county to rely on the most recent OEA forecast and that the county erred in failing to take that forecast into account.

The county responds that it was reasonable for the county to rely on the same forecasting model and assumptions that were relied on when it adopted the 1998 forecast, because it prevailed in aprior LUBA appeal that challenged the model and its assumptions. In *DLCD v. Douglas County*, 37 Or LUBA 129 (1999), DLCD challenged the county's

[2] The OEA assumptions are summarized at Record 100-102 and at Record 987-90. The county's assumptions are set out at Record 994.

assumptions and methodology supporting the county's projection, which differed from the Oregon Office of Economics Analysis (OEA) projection. The county's model began with the official US census population for the year 1990, and projected total births, deaths, and migration figures for the years 1991 to 1997. DLCD argued that the county's assumptions about population could not reasonably be relied on because they had been proven incorrect before the projection was even adopted by comparing the county's assumed population for the years 1991-1996 with the official state estimated population for each of those years that is produced by the Center for Population Research and Census (CPRC).

We concluded that the county's population projection model and assumptions, though different from the OEA model, were supported by an adequate factual base and that the county could reasonably rely on the county's population estimates for certain years rather than relying on official state estimate of the population for the same years. We explained:

> "Although the issue is a close one, we agree with the county that a reasonable person could rely on the county's population figures for 1991 to 1997, notwithstanding that those figures differ from the official state estimates for those years.* * * [T]he county's figures are based on the 1990 U.S. Census Bureau figures, which both parties agree are authoritative. Further, petitioner does not challenge the county's method of calculating births, deaths and migration patterns for the years 1991 to 1997, but merely contends that the county's totals for those years are not reliable, because they differ from the corresponding CPRC figures. * * * [T]he CPRC figures are credible but not infallible. As the county explained, the CPRC estimates are themselves partially based on projections, and contain a small but significant margin of error that increases every year. A reasonable person could conclude that the county's figures for 1991 to 1997, when adjusted to cover the same period of time, are close enough to the corresponding CPRC figures as to be essentially consistent with each other. Consequently, we conclude that the county's 1991 to 1997 figures are supported by an adequate factual base." *Id*. at 137.

In a footnote, we summarized the differences between the county's model and the OEA model:

> "The relevant major differences between the two projections can be summed up as follows: (1) the OEA projection gives greater weight to county population and economic data from the 1980s than the county's model, when the county experienced economic difficulties related to the timber industry;

> (2) the OEA projection assumes that the state economic growth will converge with the national average over time, while the county assumes the state economy will continue to exceed the national average; and (3) the OEA projection assumes that the county's economic growth will continue to lag behind the state's, while the county assumes that it will converge with the state rate of growth over time." *Id*. at 133 n 3.

As we explained in the quoted portion of the opinion above, the issue was a "close one." We concluded that it was reasonable for the county to give less weight to population and economic data from the 1980s, when a severe recession produced economic difficulty and out-migration, than the OEA forecast gave to the 1980s data, and to assume that the recession of the 1980s was an atypical event that the county would recover from in the projection years.

According to the county, "[t]he [population forecast] model foundations (assumptions and analysis) have not changed as reviewed in [*DLCD v. Douglas County*]. Like OEA in 2004, Douglas County updated its model using data inputs from federal and state sources. * * * There were no changes to the forecast model. The 2009 update was achieved via updating model inputs using federal, state and local data sources."[3] Response Brief 7, 9-10.

We understand the county's position to be that because it prevailed in *DLCD v. Douglas County* in relying on a model that contained assumptions that differed from the OEA forecast assumptions, it is entitled to continue to rely on those same assumptions in 2009 without evaluating whether the assumptions remain valid and without evaluating whether historical data calls the accuracy of those assumptions into question. We disagree. As explained above, the county's 1998 model contained assumptions that deemphasized population data from the 1980s when the county experienced unprecedented out-migration due to the collapse of the timber industry. That model also assumed that the county would grow at rates that were higher than the OEA forecast and that its growth rate would

[3] The 1998 population forecast contains seven assumptions and also contains an explanation of the county's rejection of sixteen OEA forecast assumptions. Record 59.

eventually converge with the statewide growth rate, based on some locational factors identified by the county. We determined that we could not say that those assumptions were unreasonable, especially given that the county was not required to employ any particular methodology in making its projections.

However, two important things have changed in the intervening years between the 1998 forecast and the 2009 update. First, in 2007, LCDC adopted OAR 660-024-0030, quoted above, which provides some guidance and direction to counties in preparing their population forecasts. Second, actual population figures are now available to compare against the figures produced by the 1998 model and its assumptions in order to assess the previous model's accuracy in predicting future growth. While we disagree with petitioner to the extent he argues that the rule *requires* that the county rely on the OEA forecast, we agree with petitioner that the rule requires the county to review whether its assumptions remain accurate, in light of actual population growth and the OEA forecast, which is cited in the rule as the prime example of "current, reliable and objective sources and verifiable factual information." That is not to say that a county that chooses to develop a forecast that differs from the OEA forecast will be unable to defend that forecast. However, in the present case, the county cannot merely rely on assumptions that were found to be valid and reasonable in 1998 without explaining why those assumptions are valid and reasonable in 2009. As an example, the county explains in its response brief that its 1998 model "reasonably assume[d] that [the county] will be in a much better position to market its ready access to [Interstate 5], its lower land and housing prices, and its unused acknowledged urban carrying capacity as the comparative disadvantages of currently faster growing I-5 communities continue to increase." Response Brief 26. In addition, as explained above, in its 1998 model the county assumed that the collapse of the timber industry and its resultant population loss to the county was an unusual event that would not be repeated, and consequently gave less weight to the county's 1980s population numbers than the OEA forecast did. When we reviewed

DLCD's challenges to those assumptions in *DLCD v. Douglas County*, we could not say based on that record that no reasonable decision maker would use those assumptions. However, that does not mean that those assumptions remain valid or that there is substantial evidence supporting those assumptions or all future population forecasts that are produced with those assumptions, regardless of more recent information.

In addition, the rule requires the county to evaluate historical data in preparing its forecast. The 2009 forecast does not appear to acknowledge the rule's requirements or attempt to evaluate the forecasting model and assumptions in light of that historical data. Rather, the county appears to take the position that it need not perform such an evaluation because the 1998 model assumptions were upheld in *DLCD v. Douglas County*. That position is incorrect.

Finally, the county also points to the last phrase of the rule that states that the forecast "* * * should not be held to an unreasonably high level of precision." However, that phrase must be read in context with the remainder of the rule, which requires the county to base its forecast on reliable data and take into account long term trends and events that might affect or explain those trends. As far as we can tell, the county has done neither.

This subassignment of error is sustained.

B. Growth Rate

The adopted forecast sets forth a range of growth rates, with the low growth rate projected to be 1.05% and the high growth rate, which the county adopted, to be 1.3%. In a subassignment of error, petitioner argues that the county erred in adopting the high growth rate without explaining why the high rate is the most accurate projection, and that the projected growth rate is not "based on current, reliable and objective sources and verifiable factual information" as required by OAR 660-024-0030.

The county responds that the board of commissioners' conclusion that "* * * the needs of Douglas County are recognized by the adoption of the high range as a preferred

alternative from the range of reasonable population" is consistent with the county's approach in adopting the 1998 forecast, discussed above. The county also responds that the county considered data from various state agencies, including the Oregon Health Department, the Oregon Employment Department, and OEA, and the federal Census American Community Survey using the assumptions contained in the 1998 model and the board of commissioners concluded that a growth rate of 1.3% was preferred.

We see no particular problem in the county's calculation of a range of growth rates prior to selecting a growth rate from that range, as long as the range of growth rates is calculated consistent with the directive of the rule, and supported by an adequate factual base. However, if the county is relying on the 1998 model and assumptions to calculate a growth rate to apply to its forecast, as appears to be the case, then for the reasons explained above, the county has failed to demonstrate that that approach is appropriate in current circumstances. For that reason, on remand, the county must adopt findings to explain how the assumptions that it relies on in forecasting its population to 2030 are reliable or justified today and how those assumptions justify the county's presumed rate of growth.

This subassignment of error is sustained.

C. City Forecasts

In this subassignment of error, petitioner challenges the growth rates that the county's forecast assigns to each city located within the county. Petitioner argues that the record indicates that the county received comments from various cities on its original proposed growth rates for those cities and that the county adjusted the growth rates for those cities in the final adoption of the forecast based on the desires of the cities for higher rates rather than on "current, reliable and objective sources and verifiable factual information" or "long term demographic trends" as required by OAR 660-024-0030. According to petitioner, as an example, the historic growth rate for the City of Roseburg from 1980-2008 is 1.15% and for 2000-2008 it is .4%, but the county adopted a 2% growth rate for Roseburg. Similarly,

according to petitioner the City of Canyonville's 20-year historic growth rate is .6% but the county's forecast assigned Canyonville a growth rate of 1.75% after receiving feedback from the city. Petitioner complains that the county and various cities engaged in a bargaining process whereby the county opened negotiations with a preferred growth rate, the city countered that opening growth rate with its preferred growth rate, and the county and the city then agreed to essentially split the difference.

The county responds by explaining the process that was used to develop the 1998 forecast city growth rates. Response Brief 31-32. The county then explains that the 1998 forecast growth rates were provided to the city, along with updated population information and a proposed growth rate. Response Brief 33. The county explains that "[t]he process used the City's adopted comprehensive plan forecast rate, historical growth rates and recent economic events. The County coordinated with each City to consider the coordinated rates from 1996 (adopted in [1998]) and the packet of information provided. The discussion considered the County's proposal that was (in most cases) to reduce the City's coordinated rate. * * *" *Id*. at 35.

As a general matter, we disagree with petitioner to the extent he argues in this subassignment of error that it was error for the county to consider comments from the cities regarding the county's proposed growth rate for those cities and to adjust that proposed growth rate based on those comments. The county is required to coordinate the forecast with the cities located within the county pursuant to ORS 195.036, and that necessarily requires considering the cities' comments. However, the county's ultimate task is to develop coordinated county/city population forecasts that are consistent with OAR 660-024-0030(2) and supported by an adequate factual base. If the county chooses to adopt a city forecast that is supported only by a city's undocumented preference for a particular growth rate, that city forecast is not supported by an adequate factual base. We note that with respect to city forecasts, the cities may have adopted their own population forecasts as part of their

comprehensive plans. If so, those forecasts could have some bearing on the county's projections for those cities, and might well provide an adequate factual base for the cities' projected populations.

With respect to the city forecasts and growth rates, we understand the county to have created the city 2009 population forecast numbers based on the 1998 forecast model and assumptions that were updated using recent data inputs. Record 129. For the reasons explained above, we rejected that approach. To the extent the county's projected growth rates for cities are derived from the 1998 forecast model without explaining why the 1998 model assumptions remain valid in 2009, we agree with petitioner that the city forecasts are not supported by an adequate factual base.

This subassignment of error is sustained.

D. Unincorporated Area Forecasts

The county estimated the 2030 population for unincorporated areas that are located within the urban growth boundaries of cities using the growth rate for the entire county (1.3%). Record 390. Petitioner argues that the county should have used the growth rate for the city adjacent to which the unincorporated area lies. Petitioner argues that the county erred in applying the county growth rate to those incorporated areas because the county growth rate is an average and is therefore lower than urban area growth rates (where most growth occurs) and higher than rural area growth rates. According to petitioner, use of the county growth rate is based on an assumption that although cities are expected to grow at higher rates, the unincorporated areas within those cities' UGBs will all grow at exactly the same county rate. Petitioner also points to a table contained in the county's forecast that includes a note explaining:

> "Urban Growth Boundaries (UGB) – The County has adopted an updated coordinated forecast for the Comprehensive Plan of each city. The coordinated forecast was applied to extend the 20 year forecast within city limits. The County high rate (1.29%) was applied to extend the 20 year forecast within the urban growth area (outside city limits but inside UBG) and

> update each jurisdiction's 20 year forecast. A summary of this analysis is shown in Table 10-3b. This process is consistent with the safe harbor found in OAR 660-024-0030(4)(a)." Record 390.

Petitioner argues that to the extent the county takes the position that OAR 660-024-0030(4)(a) sanctions this approach, the rule is not applicable.[4]

The county responds that it was reasonable to apply the county growth rate to unincorporated areas located within city UGBs. The support document for the population forecast explains "the 2009 update to the population element corrected any potential overestimation of the City UGB population by recognizing growth will occur primarily in city limits and secondarily in the UGB." Record 373. However, this explanation does not explain why, for example, it is reasonable to apply a 1.3% growth rate (the county rate) to the unincorporated areas within the City of Reedsport's UGB, for example, when the City of Reedsport's projected growth rate is 1%. We also agree with petitioner that to the extent the forecast attempts to rely on OAR 660-024-0030(4)(a) to apply the county rate to unincorporated areas, that portion of the rule applies only when a city is initiating an amendment to a UGB and provides a safe harbor for that city to use the county's forecast for an urban area. Those circumstances do not appear to be present here.

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[4] OAR 660-024-0030(4) provides in relevant part:

> "A city and county may apply one of the safe harbors in subsections (a), (b), or (c) of this section, if applicable, in order to develop and adopt a population forecast for an urban area:
>
> "(a) If a coordinated population forecast was adopted by a county within the previous 10 years but does not provide a 20-year forecast for an urban area *at the time a city initiates an evaluation or amendment of the UGB*, a city and county may adopt an updated forecast for the urban area consistent with this section. The updated forecast is deemed to comply with applicable goals and laws regarding population forecasts for purposes of the current UGB evaluation or amendment provided the forecast:
>
> "(A) Is adopted by the city and county in accordance with the notice, procedures and requirements described in section (1) of this rule; and
>
> "(B) Extends the current urban area forecast to a 20-year period commencing on the date determined under OAR 660-024-0040(2) by using the same growth trend for the urban area assumed in the county's current adopted forecast." (Emphasis added).

This subassignment of error is sustained.

The assignment of error is sustained.

The county's decision is remanded.