

**DLCD/LCDC Phase 2 UGB rulemaking work group  
September 9, 2008 meeting**

Issues related to recent case law

Problem #1: Piecemeal acknowledgment of land need analysis and UGB evaluation through the post-acknowledgment plan amendment process.

After LUBA's *Madras* decision, over 200 of the 240 cities with acknowledged plans<sup>1</sup> may "lock in" a housing need analysis or other UGB element before LCDC reviews the final UGB decision. Despite the fact that a UGB evaluation is an iterative process, the *Madras* decision allows most cities to use their preliminary need assumptions and conclusions despite later change in those assumptions and conclusions due to measures such as rezoning surplus parcels, increasing planned densities, adopting minimum or average densities, and changing the housing mix, which are taken to increase the ability of the UGB to accommodate the city's identified 20-year land need.

Potential rulemaking solutions

- Define "amend the urban growth boundary" in ORS 197.626 to include adoption of preliminary studies, analyses, plan elements, etc., such as buildable land inventory, housing need analysis, and employment opportunities analysis<sup>2</sup>. This puts the relevant components of a UGB evaluation before LCDC "in the manner of periodic review," whether the city adopts them one at a time or all at once.
- Cities may submit UGB components individually to LCDC for some type of non-binding preliminary opinion on compliance with the goals, before they adopt them as post-acknowledgment plan amendments. This would give cities some level of certainty early in the process, before they spend significant time, money, and political capital doing the rest of the UGB analysis.
- Elements of a UGB amendment that were previously adopted by plan amendment may be reviewed *de novo* and declared invalid by LCDC during review of the completed UGB proposal.

Problem #2: Designating urban reserves before determining whether the UGB has a 20-year supply of land.

Urban reserve designation uses the same priority criteria for selecting lands as used in adding land to a UGB.<sup>3</sup> This means, for example, that higher priority exception lands must generally be included before lower priority resource lands. Land in an urban reserve – all of it -- is first priority for addition to the UGB. A city does not have to

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<sup>1</sup> Cities outside Metro with populations less than 25,000.

<sup>2</sup> The first element, a coordinated population forecast, would not be included because it may be used for planning purposes other than a UGB amendment.

<sup>3</sup> In fact, ORS 197.298 was intentionally modeled on OAR 660, division 21, the urban reserve rule.

distinguish between different urban reserve parcels on the basis of soil capability because the ORS 197.298 priority hierarchy does not apply when land is taken from the urban reserve and added to the UGB. This allows a city to pick and choose which urban reserve parcels it wishes to add to the UGB. It may bring in high-value resource land before exception land. Because the 50-year land supply in urban reserves is significantly larger than a 20-year supply in a UGB, urban reserves are not only more likely to contain resource lands, but they are more likely to contain a *larger amount* of resource lands, and *more high-value* resource lands, than could be added to the UGB under the ORS 197.298 hierarchy. This gives a city more resource lands to choose from when later amending its UGB. A city that designate urban reserves before updating its 20-year land supply in the UGB may –intentionally or unintentionally -- avoid the ORS 197.298 hierarchy in selecting land for the UGB.

Potential rulemaking solution

- Urban reserves may be designated only within [time period] after a UGB evaluation or amendment has been adopted and acknowledged, and shall be based on a 10 to 30 year supply of needed land beyond the 20-year supply determined in the acknowledged UGB action.

DLCD v. City of McMinnville (LUBA 2001)

- With a population over 25,000, McMinnville was (and is) subject to the buildable land inventory and housing needs analysis process and criteria in ORS 197.296.
- The city adopted a housing needs analysis as a post-acknowledgment plan amendment. The analysis found a deficit of land in the UGB, and concluded that the city might have to expand its UGB to meet 2000-2020 needs. The analysis did not include actually taking any actions to increase the ability of its UGB to accommodate its 20-year residential land need, thereby failing to complete the process set forth in ORS 197.296.
- Issue on appeal: Was it reversible error for McMinnville to fail to complete the statutory process before amending the comprehensive plan?
- LUBA’s decision: Yes. City’s ordinance is remanded.
- Basis for decision: ORS 197.296 does not itself address whether or not a city may adopt a series of final decisions that address different parts of the statute. However, housing needs projections are also subject to Goal 10 and its rules, OAR 660, divisions 7 and 8<sup>4</sup>. OAR 660-007-0005(5)(c) and OAR 660-008-0005(5)(c)<sup>5</sup> make Goal 14 applicable to residential needs analyses, including those performed under ORS 197.296; by stating that housing needs projections must be “consistent with Goal 14 requirements.” Consistency with Goal 14 cannot be determined until the city takes action to plan for the identified housing need and housing land supply deficit. By not taking such action, McMinnville only partially completed its legal requirements. Partial completion of a task that under applicable legal requirements must be fully completed requires remand.
- Key factor in the decision: The Goal 10 rules.

GMK Developments, et al v. City of Madras (LUBA 2008)

- The city adopted a buildable land inventory and housing needs analysis for 20-year (UGB) and 50-year (urban reserves) planning periods. This final plan amendment did not include taking any actions to (1) increase the ability of the city’s UGB to accommodate its 20-year residential land need, or (2) designate urban reserves to accommodate its 50-year residential land need.
- Issue on appeal: Was it reversible error for Madras to fail to complete the UGB amendment process before amending the comprehensive plan?
  - The petitioners relied on the *McMinnville* decision, and, in the alternative, Goal 10, OAR 660, divisions 8 and 24<sup>6</sup>, and the needed housing statutes<sup>7</sup>.

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<sup>4</sup> OAR 660, division 7 implements Goal 10 for Metro and the cities and counties within its boundaries. Division 8 applies to all other jurisdictions.

<sup>5</sup> This was the correct reference in 2001. LCDC’s March 2008 housekeeping amendments to Division 8 changed the citation of this rule to OAR 660-008-00005(4).

<sup>6</sup> LCDC adopted UGB amendment rules as OAR 660, division 24 in 2006.

<sup>7</sup> ORS 197.295 – 197.314.

- LUBA’s decision: No. Cities not subject to ORS 197.296<sup>8</sup> may adopt housing needs analyses as final plan amendments before taking action on a land supply deficit.
- Basis for decision: (1) LUBA stated that its *McMinnville* decision “hinged on” ORS 197.296. Because Madras is not subject to ORS 197.296 (its population is less than 25,000), *McMinnville* doesn’t apply. (2) Nothing in Goal 10 or its rules requires a city to amend its UGB at the same time it projects a future housing shortfall.

Siporen, et al v. City of Medford (LUBA 2007)

Tom Schauer, Code Analyst for the City of Grants Pass, has asked the group to consider one of the issues in this case during our discussion of the *McMinnville* and *Madras* decisions.

- The city denied Wal-Mart’s application for a retail store development. On remand from the first LUBA appeal, the city, in separate resolutions approved in part and remanded in part.
- The first issue on the 2<sup>nd</sup> appeal was whether the approval resolution was a final land use decision. The city and Wal-Mart argued that *McMinnville* supported their position that the city’s multiple decisions on the application were separately appealable to LUBA. LUBA differentiated between *McMinnville*, in which the city adopted a final plan amendment decision, and *Medford*, in which the city adopted an interim or temporary decision that wasn’t final until the city made its final decision on both aspects of the development application.
- During this discussion, LUBA suggested that McMinnville’s adopted residential land needs analysis would have legal effect for other, future UGB amendments, even if didn’t adopt the UGB amendment that was contemplated when it adopted the analysis. “In that sense they were independent comprehensive plan amendments and there is no reason why they should not be viewed as separately appealable decisions.” This discussion may be a preview of LUBA’s about-face on its *McMinnville* decision the following year in the *Madras* decision.

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<sup>8</sup> With fewer than 25,000 people and outside Metro’s boundaries.