



Oregon

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Department of Land Conservation and Development

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April 22, 2010



Bob Andrews, Mayor
City of Newberg
414 E. First Street
P.O. Box 970
Newberg, Oregon 97132

**RE: LCDC Remand of City of Newberg Urban Reserve Area
Commission's Order 10-Remand-001778**

Dear Mayor Andrews:

On July 21, 2009, the Land Conservation and Development Commission (LCDC) held its continued hearing on the appeals to the Director's remand of the City's Urban Reserve Areas. At this meeting the Commission heard oral argument from the City of Newberg, the Department, the parties that appealed the Director's remand decision, and objector Grace Schaad. The Commission deliberated and took action to remand the City's URA designations.

Enclosed you will find the attached LCDC Order 010-Remand-001787. Page nine of the order describes the six-areas the City of Newberg needs to address.

You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review no later than **Monday June 21, 2010** (60 days) from the service of this final order. Judicial review is pursuant to the provisions of ORS 183.482 and 197.650(1)d.



If you have any questions please feel free to contact your periodic review team leader and regional representative, Steve Oulman at (503) 373-0050 extension 259 or steve.oulman@state.or.us .

Yours truly,



Richard Whitman
Director

cc: Barton Brierley, Planning and Building Director, City of Newberg
Ken Friday, Planning Division Manager, Yamhill County
Sid Friedman, Objector, 1000 Friends of Oregon
Ilsa Perse, Objector, Friends of Yamhill County
Grace Schaad, Objector
Amy and Lee M Does, Objector
Mike and Cathy Stuhr, Objector
Shetterly, Irick and Ozias, Attorneys
Steve Shipsey, Assistant Attorney General, DOJ (*email*)
Larry French, DLCDC Periodic Review Specialist (*email*)
DLCDC Staff (Rob Hallyburton, Darren Nichols, Gloria Gardiner-*emails*)
Steve Oulman (*email*)

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**BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON**

6 **IN THE MATTER OF URBAN**) **COMMISSION'S**
7 **RESERVE AREAS FOR**) **REMAND ORDER**
8 **THE CITY OF NEWBERG**) **010-REMAND-001787**

10 This matter came before the Land Conservation and Development Commission
11 (Commission) pursuant to ORS 197.626, which provides that cities with a population of 2,500 or
12 more that designate urban reserves under ORS 195.145(1)(a) shall submit the designation to the
13 Commission in the manner provided for periodic review under ORS 197.628 to 197.650. The
14 City of Newberg (City) submitted its designation of new urban reserve areas (URAs) to the
15 Department of Land Conservation and Development (Department) for review pursuant to ORS
16 197.626 and OAR 660-025-0175(1)(c). The Director remanded the submittal to the City for
17 further consideration of identified land needs and lands selected for inclusion in the URAs. Four
18 parties appealed the Director's decision to the Commission. The Commission fully considered
19 the City's submittal and the written record; oral argument and written comments, objections and
20 exceptions of the parties; and the Director's remand order and reports of the Department, and
21 now enters the following findings, conclusion, and order.

22
23

Findings of Fact

24 In July 2008, the Newberg City Council and Yamhill County each adopted new URA
25 designations for the City of Newberg. On August 28, 2008 Newberg submitted its Findings
26 Report to the Department. The City supplemented the submittal on September 19, 2008 with an
27 index of oversized maps and again on October 22, 2008 with other material that was part of its
28 record, but that was inadvertently left out of the August submittal.

29 The Department received valid objections pursuant to OAR 660-025-0140(2) from:

- 30 • 1000 Friends of Oregon, and the Friends of Yamhill County
31 • Mike and Cathy Stuhr
32 • Amy and Lee Does
33 • Grace Schaad

1 On April 10, 2009, pursuant to OAR 660-025-0150(1)(b), the Director issued Order No.
2 001767 remanding the City's decision for further consideration consistent with OAR chapter
3 660, division 21. The order concluded that the City erred by not providing sufficient justification
4 for inclusion of large, flat parcels for industrial, commercial and institutional uses, and by not
5 justifying a "livability" need for the same type of lands. The order also concluded that the City
6 misapplied the priorities for selecting which lands to include as urban reserves as a result of its
7 reliance on specific identified land needs. In DLCD Order No. 001767, the Director either
8 sustained or rejected each of the valid objections pursuant to OAR 660-025-0140(6).

9 Pursuant to OAR 660-025-0150(4), four parties filed valid appeals of
10 DLCD Order No. 001767:

- 11 • City of Newberg
- 12 • 1000 Friends of Oregon, and the Friends of Yamhill County
- 13 • Mike and Cathy Stuhr
- 14 • Amy and Lee Does

15 On May 14, 2009 the Department submitted a report to the Commission responding to
16 the appeals, pursuant to OAR 660-025-0160(2) and (3).

17 On May 26, 2009 the City of Newberg, and Mike and Cathy Stuhr each filed written
18 exceptions to the Department's report to the Commission pursuant to OAR 660-025-0160(4).

19 The Commission heard the appeal on June 5, 2009. During that meeting the Commission
20 heard oral argument from the City, the Department, those parties that appealed the Director's
21 decision, and from objector Grace Schaad in accordance with OAR 660-025-0085(5) as required
22 by OAR 660-025-0160(1). The Commission continued this agenda item to a special meeting set
23 for July 21, 2009, and exercised its discretion to request new information pursuant to OAR 660-
24 025-0160(5) and OAR 660-025-0085(5)(d) by asking the parties to submit up to 10 additional
25 pages of argument.

26 On July 7, 2009, the Department submitted a Supplemental Report to the Commission to
27 clarify the Department's views on the urban reserve rule and how it believed the City applied the
28 rule. The early submission of this report allowed the parties to respond to the Department in
29 their additional written argument.

30 On July 14, 2009, 1000 Friends of Oregon and the Friends of Yamhill County filed an
31 objection to portions of a PowerPoint presentation made by the City of Newberg to the

1 Commission on June 5, 2009. The objection was to the characterization of a list of industries as
2 “Targeted Industries,” and to a list of “Typical Lot Size Requirements for Firms in Selected
3 Industries.” As set forth below, the Commission determines that land need for urban reserves
4 may not be based on land uses with specific site needs, including particular “target” industries.
5 As a result, the Commission has not considered the portions of the PowerPoint presentation
6 objected to by 1000 Friends. The Commission therefore, denies the objection on the basis that
7 the materials presented are not relevant to the Commission's decision.

8 All four parties that appealed the Department’s order submitted additional written
9 testimony to the Commission prior to the July 21, 2009 meeting, including responses to the
10 Department’s July 7, 2009 Supplemental Report.

11 On July 21, 2009 the Commission held its continued hearing on the appeals to the
12 Director’s remand of the City’s URAs. At this meeting the Commission heard oral argument
13 from the City, the Department, the parties that appealed the Director’s remand decision, and
14 objector Grace Schaad. The Commission deliberated and took action to remand the City's URA
15 designations, as reflected in this written order.

16 17 Record Objection

18 1000 Friends of Oregon and the Friends of Yamhill County filed an objection to three
19 documents included in the City of Newberg’s supplemental record filing, on the basis that the
20 materials were not included in the local record. After reviewing the objection and the city's
21 response, the Department concurred with the objection. The Commission heard argument
22 concerning the objection, and decided to sustain it.

23 24 Scope and Standard of Review

25 The Commission reviewed the City’s submittal for compliance with the applicable goals,
26 administrative rules and statutes. OAR 660-025-0040(1). For submittals under ORS 197.626
27 that are reviewed in the manner of periodic review under ORS 197.628 to 197.650, “compliance
28 with the goals” means the submittal “on the whole, conform[s] with the purposes of the goals
29 and any failure to meet individual goal requirements is technical or minor in nature.”

30 ORS 197.747.

1 In determining compliance with the Goal 2 requirement that land use decisions have an
2 adequate factual base, the Commission considers whether the submittal is supported by
3 substantial evidence. The City’s submittal is a legislative decision, but nevertheless the Goal 2
4 requirement for an adequate factual base means that the decision must be supported by
5 substantial evidence. *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999). Substantial
6 evidence exists to support a finding of fact when the record, viewed as a whole, would permit a
7 reasonable person to make that finding. ORS 183.482(8)(c) and *Dodd v. Hood River County*,
8 317 Or 172, 179, 855 P2d 608 (1993); *City of West Linn v. LCDC*, 201 Or App 419, 431, 119
9 P3d 285 (2005). Where the evidence in the record is conflicting, if a reasonable person could
10 reach the decision the City made in view of all the evidence in the record, the choice between the
11 conflicting evidence belongs to the City. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184
12 (1994), *aff’d* 133 Or App 258, 890 P2d 455 (1995).

13 Because the City’s submittal embodies both basic findings of fact and inferences drawn
14 from those facts, substantial evidence review involves two related inquiries: “(1) whether the
15 basic fact or facts are supported by substantial evidence, and (2) whether there is a basis in
16 reason connecting the inference to the facts from which it is derived.” *City of Roseburg v.*
17 *Roseburg City Firefighters*, 292 Or 266, 271, 639 P2d 90 (1981). Where substantial evidence in
18 the record supports the City’s adopted findings concerning compliance with the goals and the
19 Commission’s administrative rules, the Commission nevertheless must determine whether the
20 findings lead to a correct conclusion under the goals and rules. *Oregonians in Action v. LCDC*,
21 121 Or App 497, 504, 854 P2d 1010 (1993).

22 The City and the Department agreed at the hearing on June 5, 2009 that the standard for
23 the Commission's review of evidentiary issues is the substantial evidence standard.

24 25 Conclusions of Law

26 **1. The Purposes of Urban Reserves**

27 Because the parties challenge the Department’s characterization of the “primary” purpose
28 of urban reserves under OAR chapter 661, division 21, the Commission first addresses the
29 purpose of the urban reserves for the benefit of the parties as the City proceeds on remand.
30

1 The Commission concludes that the Department correctly identified that the urban reserve rule
2 was adopted to protect exception and other areas adjacent to and nearby urban growth boundaries
3 from further parcelization over the planning period in order to maintain the opportunity for such
4 lands to become urbanized over time. To the extent the parties argue otherwise, the Commission
5 rejects that contention. However, the Commission agrees that consistent with that purpose,
6 urban reserves also are intended to facilitate long-range planning for urban growth, including the
7 cost-effective provision of public facilities and services to urban areas when the lands are later
8 included within the UGB.

9 The Commission originally adopted the urban reserve rule (OAR chapter 660, division
10 21) in 1992 to address the concern over suburban development at the urban periphery. The
11 concern was that low density development just outside of UGBs would preclude cities from
12 including these areas within UGBs at the densities contemplated in their comprehensive plans.
13 The rule required seven local governments to adopt urban reserves because of their above
14 average growth rate and significant amount of exception areas in the vicinity of their UGBs. The
15 next year, in 1993, the legislature enacted a statutory provision allowing local governments to
16 cooperatively designate urban reserve areas “[t]o ensure that the supply of land available for
17 urbanization is maintained.” ORS 195.145(1). That enactment defined “urban reserve” to mean
18 “lands outside an urban growth boundary that will provide for: (a) Future expansion over a long-
19 term period; and (b) The cost-effective provision of public facilities and services within the area
20 when the lands are included within the urban growth boundary.”¹

21 This statute expressly provided statutory authority for the urban reserve rule and
22 reinforced the purpose of establishing urban reserves. The first step in interpreting statutory
23 language is to examine its text and context. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042
24 (2009). Oregon courts have held that the Commission’s rules provide context for statutory
25 interpretation when they predate the enacting of the statute. *Lane County v. LCDC*, 325 Or
26 569,578, 942 P2d 278 (1997), *Beaver State Sand and Gravel v. Douglas County*, 187 Or App
27 241, 247, 250, 65 P3d 1123 (2003). Therefore, the 1992 urban reserve rule provides context for
28 the statute and, because the Commission does not find these two purposes to be inconsistent, the

¹ In 1993, the statutory definition of “urban reserve area” was codified in ORS 195.145(4). In 2007, the definition became “urban reserve” and was moved to ORS 195.137(2).

1 purpose provided in the statute is a refinement, not a replacement, of the original purpose of the
2 rule. The purpose for division 21 is stated in OAR 660-021-0000, which provides:

3 “This division authorizes planning for areas outside urban growth boundaries to be
4 reserved for eventual inclusion in an urban growth boundary and to be protected from
5 patterns of development that would impede urbanization.”
6

7 The Commission interprets OAR 660-021-0000 to be an overarching, inclusive statement of
8 purpose. Consistent with the primary purpose of protecting areas, including exception areas,
9 outside an urban growth boundary from patterns of development that would impede urbanization
10 is that such protected areas provide for future expansion over a long-term period. In addition, by
11 limiting further development until the areas are brought into the urban growth boundary, urban
12 reserves keep the cost of public facilities and services from escalating further as a result of the
13 spread or intensification of inefficient development patterns.

14 The second step in determining the purpose of urban reserves, even if there is no
15 perceived ambiguity in the text, is consideration of pertinent legislative history. *Gaines*, 346 Or
16 at 172. No party presented legislative history to the Commission to support the notion that, in
17 *defining* “urban reserves” the legislature intended to supersede or alter the *purpose* of the urban
18 reserve rule expressed in OAR 660-021-0000. As a result, the Commission concludes that there
19 is no conflict between OAR 660-021-0000 and ORS 195.137(2).

20 **2. The Amount of Land Included in Urban Reserves**

21 OAR 660-021-0030(1) provides that:

22 “Urban reserves shall include an amount of land estimated to be at least a 10-year supply
23 and no more than a 30-year supply of developable land beyond the 20-year time frame
24 used to establish the urban growth boundary. Local governments designating urban
25 reserves shall adopt findings specifying the particular number of years over which
26 designated urban reserves are intended to provide a supply of land.”
27

28 The City of Newberg determined its long-term need for land (through 2040) by developing a
29 population forecast coordinated with Yamhill County, and assessing its need for land in several
30 categories along with the existing supply of land within the city's UGB. Based on this analysis,
31 the City determined that its total long-term need for land (through 2040) was for 1,665 acres. Of
32 this amount, however, a significant portion also was identified as being for uses with unique and
33 specific site requirements – particularly for large tracts of land and in some cases for relatively
34 flat lands.

1 The Department argued, based on the history of the urban reserve rule, that OAR 660-
2 021-0030(1) does not authorize a city's long-term land need to be based on specific siting
3 requirements for particular uses, and that (instead) the amount of land in a city's urban reserves
4 must be based on generalized long-term population and employment forecasts. The City
5 disagreed, but nevertheless agreed to a voluntary remand in order to revise its determination to
6 remove reliance of projected land needs of future uses with specific site requirements.

7 The Commission interprets OAR 660-021-0030(1) as requiring local governments to
8 make an estimate of its need for developable land over a 10 to 30 year planning period beyond
9 the 20-year time frame used to establish the UGB. This is to be an estimate, based on long-term
10 forecasts of overall population and employment needs for the planning period. The Commission
11 recognizes that the rule authorizes local governments to choose the length of the planning period
12 (within the specified limits), and that the longer the planning period the greater the amount of
13 land that is likely to be justified for inclusion in URAs.

14 **3. Determining Which Lands to Include in Urban Reserves**

15 The Commission concludes that the selection of which lands to include in an URA
16 involves a five-step process. The first three steps are under OAR 660-021-0030(2), which
17 provides that:

18 (2) Inclusion of land within an urban reserve shall be based upon the locational factors of
19 Goal 14 and a demonstration that there are no reasonable alternatives that will require
20 less, or have less effect upon, resource land. Cities and counties cooperatively, and the
21 Metropolitan Service District for the Portland Metropolitan Area Urban Growth
22 Boundary, shall first study lands adjacent to, or nearby, the urban growth boundary for
23 suitability for inclusion within urban reserves, as measured by the factors and criteria set
24 forth in this section. Local governments shall then designate, for inclusion within urban
25 reserves, that suitable land which satisfies the priorities in section (3) of this rule.

26 Under this rule, local governments must first determine what lands “adjacent to, or
27 nearby” the UGB they will study. The local governments are not necessarily required to study
28 all lands adjacent to the UGB for suitability as urban reserve areas, but they must include enough
29 lands so that they do not artificially force consideration of lower priority categories of land.
30 *D.S. Parklane Dev. v. Metro*, 994 P.2d 1205, 1216-1217 (Or. App., 2000).

1 Second, the local governments must demonstrate that there are no reasonable alternatives
2 that will require less, or have less effect upon, resource land. This alternatives analysis must
3 include examining whether additional infill and redevelopment inside the existing UGB (beyond
4 that contemplated in forecasting overall land need) is feasible, as well as locational alternatives
5 outside of the existing UGB that minimize the effects on resource land.

6 Third, once the local governments have determined the amount of land need that the
7 existing UGB can accommodate, they must analyze which lands within the study area are
8 suitable for inclusion as urban reserves using the Goal 14 locational factors. Application of these
9 factors must be balanced and local governments may not rely on a *per se* threshold for any of the
10 factors to exclude lands. *Parklane*, at 1219. The Commission also interprets this rule to require
11 application of the locational factors sequentially, to adjacent and nearby lands within *each*
12 priority category before moving to the next (lower) priority categories. *Parklane*, at 1216.
13 Lands of lower priority are only included if the amount of suitable land in a higher priority
14 category is insufficient to meet the estimated land need over the planning period. This third step
15 concludes with the demonstration that there are no alternatives outside of the existing UGB that
16 will require less, or have less effect upon resource land. This demonstration is based, at least in
17 part, on the data and findings from application of the fourth Goal 14 locational factor:
18 “compatibility of the proposed urban uses with nearby agricultural and forest activities occurring
19 on farm and forest land outside the UGB.”

20 After completion of these three steps, the local governments will have determined a set of
21 lands that are suitable for inclusion in the proposed URAs. The priority categories described in
22 OAR 660-021-0030(3) are then used to determine which lands are selected.

23 OAR 660-021-0030(4) then provides an optional fifth step. Under this rule, the local
24 governments have discretion to adjust their initial analysis under OAR 660-021-0030(3) in two
25 ways. First, the local governments may remove lands that are otherwise suitable and in a higher
26 priority category if it shows that it is not reasonable to provide future urban services to those
27 lands after analyzing topographical and physical constraints. The Commission interprets OAR
28 660-021-0030(4)(a) as allowing local governments to consider costs of providing services to
29 exclude lands (due to topographical or other physical constraints), but also notes that the text of
30 the rule requires local governments to show that “ * * * *future* urban services cannot *reasonably*
31 be provided * * *.” (Emphasis added).

1 Given that such a showing must be made for the future planning period, typically 30 to 50 years
2 in the future, the Commission believes that this standard will normally be difficult to meet.

3 The second way in which OAR 660-021-0030(4) allows local governments to adjust their
4 initial analysis is by *including* lands that would not otherwise meet the requirements of 0030(3)
5 (e.g., by being in a lower priority category), if “[m]aximum efficiency of land uses within a
6 proposed urban reserve requires inclusion of lower priority lands in order to include or to provide
7 services to higher priority lands.” OAR 660-021-0030(4)(b). Typically, this exception to the
8 priorities is used when small amounts of resource lands must be crossed by roads or sewer
9 facilities in order to connect two or more areas in a higher priority category.

10 11 Ultimate Conclusions of Law

12 1. The Commission finds and concludes that the analysis that the City performed to determine
13 the amount of land needed for its URAs is inconsistent with the urban reserve rules, for the
14 reasons described above.

15 2. The Commission finds and concludes that the City's analysis of which lands to include in its
16 URAs is inconsistent with the urban reserve rules for the reasons described above.

17 18 Order

19 THEREFORE, IT IS ORDERED THAT:

20 1. The City's decision designating URAs is remanded to remove identification of specific
21 industrial, commercial, institutional, and livability needs.

22 2. The City's decision designating URAs is remanded to adopt findings based on the overall
23 acreage of land needed for the planning period.

24 3. The City's decision designating URAs is remanded to make new determinations regarding
25 inclusion or exclusion of specific study areas, consistent with this order.

26 4. The record objection of 1000 Friends and the Friends of Yamhill County to materials that
27 were not a part of the record before the City is sustained.

28 5. The completion date for the remand of the city's decision is December 31, 2011.

29 6. The Commission has considered every valid objection and exception. Except for those that
30 the Commission specifically sustained in this Order, all objections and exceptions are denied,
31 whether expressly addressed herein or not.

1 DATED THIS 22ND DAY OF APRIL, 2010.
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5 FOR THE COMMISSION:
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9 Richard Whitman, Director
10 Oregon Department of Land
11 Conservation and Development
12

13 NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained by
14 filing a petition for review within 60 days from the service of this final order. Judicial review is
15 pursuant to the provisions of ORS 183.482 and 197.650(1)d.
16

17 Copies of all exhibits are available for review at the Department's offices at 635 Capitol Street
18 NE, Suite 150, Salem.