

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND
5 CONSERVATION AND DEVELOPMENT

6 *Petitioner,*

7
8 and

9
10 FRIENDS OF YAMHILL COUNTY,
11 COMMUNITY DEVELOPMENT LAW
12 CENTER and 1000 FRIENDS OF OREGON,

13 *Intervenors-Petitioner,*

14
15 vs.

16
17 CITY OF McMinnville,

18 *Respondent.*

19
20 LUBA No. 2001-093

21 ORDER ON MOTION TO DISMISS

22 This matter is before us on intervenors-petitioner’s (intervenors’) motion to dismiss.¹
23 The decision at issue involves the City of McMinnville’s post-acknowledgement plan
24 amendment (PAPA) of the Residential Land Need Analysis (needs analysis) in the city’s
25 comprehensive plan. The city amended its comprehensive plan to reflect a new needs
26 analysis based on a three-year study conducted with the aid of numerous consultants.
27 According to the city, the decision “provides population, residential land supply, and
28 residential need forecasts and will serve as the foundation for future discussions and actions
29 of the City as regard residential land need and growth management in McMinnville.” Record
30 2. To accommodate expected demand through the year 2020, the needs analysis that is
31 adopted by the challenged decision concludes that it *may* be necessary to expand the city’s
32 urban growth boundary (UGB) to include 449 additional acres for housing needs, and 412
33 additional acres for parks, schools, and other public services. The decision is a legislative

¹ Petitioner joins in the motion to dismiss.

1 decision designed to address the requirements of ORS 197.296(3), but the decision does not
2 address ORS 197.296(4) or (5).²

² ORS 197.296 provides in relevant part:

“Amendment of urban growth boundary or comprehensive plan to include sufficient buildable lands within boundary; analysis and determination of residential housing patterns.

“(1)(a) The provisions of this section apply to local government comprehensive plans for lands:

“(A) Within any urban growth boundary for a city with a population of 25,000 or more;

“* * * * *

“(2) At periodic review or any other legislative review of the urban growth boundary, comprehensive plans or functional plans shall provide sufficient buildable lands within urban growth boundaries established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years.

“(3) As part of its next periodic review pursuant to ORS 197.628 to 197.650 following September 9, 1995, or any other legislative review of the urban growth boundary, a local government shall:

“(a) Inventory the supply of buildable lands within the urban growth boundary;

“(b) Determine the actual density and the actual average mix of housing types of residential development that have occurred within the urban growth boundary since the last periodic review or five years, whichever is greater; and

“(c) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the amount of land needed for each needed housing type for the next 20 years.

“(4) If the determination required by subsection (3) of this section indicates that the urban growth boundary does not contain sufficient buildable lands to accommodate housing needs for 20 years at the actual developed density that has occurred since the last periodic review, the local government shall take one of the following actions:

“(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for 20 years at the actual developed density during the period since the last periodic review or within the last five years, whichever is greater. As part of this process, 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;

1 Intervenors move to dismiss the appeal on three separate grounds: (1) the decision is
2 not final; (2) the Land Conservation and Development Commission (LCDC) has jurisdiction
3 pursuant to ORS 197.626; and (3) LCDC has jurisdiction pursuant to the statutes and rules
4 governing periodic review. We will address each argument below.

5 **FINAL DECISION**

6 Intervenors argue that by addressing only ORS 197.296(3) and leaving subsections
7 (4) and (5) for later decisions, the city has not made a “final” decision subject to LUBA
8 review.³ *See E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702, 705 (2000) (land

“(b) Amend its comprehensive 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 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.

“(5) Using the analysis conducted under subsection (3)(c) of this section, the local government shall determine the overall average density and overall mix of housing types at which residential development of needed housing types must occur in order to meet housing needs over the next 20 years. If that density is greater than the actual density of development determined under subsection (3)(b) of this section, or if that mix is different from the actual mix of housing types determined under subsection (3)(b) of this section, the local government, as part of its periodic review, shall adopt measures that demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years.”

³ ORS 197.015(10)(a)(A) defines “land use decision” as:

“A final decision or determination made by a local government * * * that concerns the adoption, amendment, or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

1 use decisions must be *final* decisions); *CBH Company v. City of Tualatin*, 16 Or LUBA 399,
2 405 n 7 (1988) (same).

3 Intervenor's rely on our unpublished decision in *Partnership For Sensible Growth v.*
4 *Metro*, ___ Or LUBA ___ (LUBA No. 99-184, January 25, 2000), to contend that the city's
5 decision under ORS 197.296(3) is an interlocutory decision, rather than a final, appealable
6 land use decision. In *Partnership For Sensible Growth*, we considered whether a Metro
7 resolution adopting a draft update to Metro's Urban Growth Report, as part of the needs
8 analysis required by ORS 197.296(3), was a final land use decision. We concluded that the
9 resolution was not a land use decision as defined by ORS 197.015(10)(a)(A) because it did
10 not adopt, amend, or apply a statewide planning goal, comprehensive plan provision, or land
11 use regulation. We also stated that a decision designed to satisfy ORS 197.296(3) is an
12 interlocutory decision and that a final decision would not occur until the procedures of ORS
13 197.296(4) and (5) were completed. Slip op 8.

14 Our discussion of ORS 197.296 in *Partnership For Sensible Growth* was *dicta* in the
15 context of the case.⁴ It was also incorrect, to the extent it can be read to conclude that a
16 decision addressing only the requirements of ORS 197.296(3) can never be a discrete,
17 separately appealable, final decision. As discussed later in this order, we see no reason under
18 the statute why the city may not comply with ORS 197.296 by adopting more than one land
19 use decision. To the extent *Partnership For Sensible Growth* suggests otherwise, we correct
20 the suggestion.

21 A final decision or determination made by a local government concerning the
22 amendment of a comprehensive plan is a land use decision subject to our review. ORS
23 197.015(10)(a)(A)(ii). The city's decision adopts a needs analysis as part of, and therefore

⁴ It was *dicta* because we had already concluded that the challenged resolution was not a land use decision subject to our jurisdiction, whether final or not. In addition, although our opinion does not emphasize the point, the update at issue in *Partnership For Sensible Growth* was an incomplete draft that, by its own terms, was not final.

1 amends, its comprehensive plan. It is final by its own terms. Therefore, the decision is a
2 land use decision subject to our review unless there is some other statutory provision that
3 prohibits or limits our review.

4 **ORS 197.626**

5 The city processed the decision as a PAPA pursuant to ORS 197.610 through
6 197.625. LUBA has jurisdiction to review PAPAs. Intervenors argue that the decision
7 should have been processed under ORS 197.626, which provides that LCDC has exclusive
8 jurisdiction over UGB amendments that include over 50 acres of land.⁵ Intervenors argue
9 that the adopted needs analysis will unquestionably require a UGB expansion of over 50
10 acres. According to intervenors, because the challenged decision has the effect of
11 committing the city to expanding its UGB by over 50 acres pursuant to ORS 197.296(4) and
12 (5), jurisdiction over the decision belongs with LCDC pursuant to ORS 197.626 and its
13 implementing rule, OAR 660-025-0175.⁶

⁵ ORS 197.626 provides:

“A city with a population of over 2,500 or more within its urban growth boundary that amends the urban growth boundary to include more than 50 acres or that designates urban reserve areas under ORS 195.145 shall submit the amendment or designation to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.644.”

⁶ OAR 660-025-0175 provides:

“(1) A city with a population of 2,500 or more within its urban growth boundary that amends the urban growth boundary to include more than 50 acres, or that designates urban reserve areas under ORS 195.145, shall submit the amendment, or the designation, to the [DLCD] for review with compliance for the statewide planning goals. The standards and procedures in this rule govern the local government process and submittal, and [DLCD] and [LCDC] review.

“(2) The local government shall follow the procedures and requirements for post-acknowledgement plan amendments in ORS 197.610, et seq., and any applicable statewide planning goals and administrative rules.

“(3) The local government shall submit its final decision amending its urban growth boundary, or designating urban reserve areas, to [DLCD] according to all the requirements for a work task submittal in OAR 660-025-0130 and 660-025-0140.

1 The city’s decision conducts the inventory and identification requirements of ORS
2 197.296(3), but does not purport to remedy any identified deficiency through the procedures
3 described in ORS 197.296(4) and (5). The decision expressly states that the measures
4 described in ORS 197.296(4) and (5) will be pursued at a later time and in a separate land use
5 decision.

6 “This report and the analysis contained within does not, and is not intended to,
7 address the requirements of ORS 197.296(4) and (5) relevant to actions that
8 the City may need to take to avoid or minimize an expansion of the current
9 [UGB]. These requirements of law will be satisfied by the City subsequent to
10 the completion and adoption of this analysis, and finding that the current
11 [UGB] contains insufficient land to accommodate the projected residential
12 land needs.” Record 8.

13 Intervenors may be correct that the city will ultimately amend its UGB to add more than 50
14 acres as a consequence of the challenged decision. However, the city is not attempting to do
15 so in the current decision. It is not possible to determine with certainty that the city will
16 amend its UGB by more than 50 acres to meet the identified need rather than satisfy all or
17 part of the identified need by requiring increased development density under ORS
18 197.296(4). Under ORS 197.626 and OAR 660-025-0175, it is a local government’s
19 decision to amend its UGB that triggers LCDC’s jurisdiction. As the city points out, the
20 legislative process involving a UGB amendment is a complex, lengthy, expensive, and often
21 controversial undertaking. Proceeding with the requirements of ORS 197.296(4) and (5)
22 based on a residential needs analysis that might be subsequently invalidated, along with any
23 actions that rely on that analysis, could result in a substantial waste of time and money. We
24 see no reason under the statute and rule why the city may not proceed under ORS 197.296(3)
25 to obtain finality regarding its needs analysis before proceeding under ORS 197.296(4) and
26 (5) to select the measures it chooses to meet the identified needs.

“(4) [DLCD] and [LCDC] review and decision on the submittal from the local government shall follow the procedures and requirements for review and decision of a work task submittal in OAR 660-025-0140 through 660-025-0160.”

1 **PERIODIC REVIEW**

2 Intervenor next argue that this appeal should be dismissed because the needs analysis
3 is or should be considered part of periodic review, and therefore jurisdiction to review the
4 decision belongs with LCDC. Intervenor point out that LCDC has been conducting periodic
5 review of the city’s comprehensive plan since 1994. According to intervenors, the remaining
6 work tasks under periodic review involve the city’s inventory of commercial lands, and the
7 city’s transportation system plan.

8 LCDC has “exclusive jurisdiction for review of the [periodic review] evaluation,
9 work program and completed work program tasks set forth in ORS 197.628 to 197.650.”
10 ORS 197.644(2). Where LCDC has exclusive jurisdiction under ORS 197.628 to 197.650,
11 ORS 197.825(2)(c) expressly provides that LUBA does not have jurisdiction. OAR 660-025-
12 0040, which implements ORS 197.644(2), describes the exclusive jurisdiction of LCDC
13 regarding periodic review:

14 “(1) The commission, pursuant to ORS 197.644(2), has exclusive
15 jurisdiction to review the evaluation, work program, and all work
16 program tasks for compliance with the statewide planning goals.
17 Pursuant to ORS 197.610, the commission has exclusive jurisdiction to
18 review the following land use decisions for compliance with the
19 statewide planning goals, if made by a city with a population of 2,500
20 or more inside its urban growth boundary:

21 “(a) Amendments to an urban growth boundary to include more
22 than 50 acres;

23 “(b) Plan and land use regulations that designate urban reserve
24 areas.

25 “(2) The Land Use Board of Appeals shall have exclusive jurisdiction over
26 land use decisions described in section (1) of this rule for issues that
27 do not involve compliance with the statewide planning goals, and over
28 all other land use decisions as provided in ORS 197.825.”

29 The rule is clear that LCDC has exclusive jurisdiction over work program tasks
30 involving compliance with the goals, and LUBA has jurisdiction over land use decisions with
31 respect to issues that do not overlap with LCDC’s jurisdiction. Under the rule, it is possible

1 for LCDC and LUBA to have concurrent jurisdiction over the same land use decision, albeit
2 each may have exclusive jurisdiction over different issues arising from the decision. In the
3 present case, intervenors have not established that the *issues* arising from the city’s decision
4 that may be presented in this appeal are such that they are within LCDC’s exclusive
5 jurisdiction.

6 Intervenor argue that the city’s residential needs analysis will affect completion of
7 the ongoing work program task with respect to the city’s commercial lands inventory and its
8 transportation system plan. According to intervenors, the needs analysis is integrally related
9 to and based upon information related to the city’s periodic review. However, we have
10 rejected arguments that PAPAs that could impact or may partially rely on information that is
11 included in a work program are therefore subject to LCDC’s exclusive review jurisdiction.
12 *Citizens for Florence v. City of Florence*, 35 Or LUBA 255, 261-64 (1998); *Brown v.*
13 *Jefferson County*, 33 Or LUBA 418, 439-442 (1997). The crucial question under ORS
14 197.644(2), ORS 197.825(2)(c), and OAR 660-025-0040(1) is whether the needs analysis
15 was adopted to implement the city’s work program or a work program task. If so, LCDC has
16 exclusive jurisdiction to “evaluate” the needs analysis “for compliance with the statewide
17 planning goals.” Intervenor have not demonstrated that the challenged decision was
18 adopted to implement the city’s work program or a work program task and the city contends
19 that it was not. Therefore, intervenors have not demonstrated that the issues that may be
20 presented in this appeal are issues over which we do not have jurisdiction under ORS
21 197.644(2), ORS 197.825(2)(c), and OAR 660-025-0040(1).

22 The motion to dismiss is denied.

23 **CONCLUSION**

24 Pursuant to the parties’ stipulation, this appeal had been suspended pending resolution
25 of intervenors’ motion to dismiss. The motion to dismiss has now been resolved. The record
26 in this matter is settled. Therefore, the petitions for review are due 21 days from the date of

1 this order, and the response brief is due 42 days from the date of this order. The Board's
2 final opinion and order is due 77 days from the date of this order.

3 Dated this 19th day of September, 2001.

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Tod A. Bassham
Board Member