IN THE COURT OF APPEALS OF THE STATE OF OREGON

HOUSING LAND ADVOCATES,
Petitioner,

v.

LAND CONSERVATION AND DEVELOPMENT COMMISSION, METRO, CITY OF HILLSBORO, CITY OF WILSONVILLE, CITY OF BEAVERTON, and CITY OF KING CITY,
Respondents.

Land Conservation and Development Commission No. 20UGB001910

Court of Appeals No. A173406

PETITIONER HOUSING LAND ADVOCATES' REPLY BRIEF

October 5, 2020

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I. STATEMENT OF THE CASE

Petitioner relies on its statement of the case in its opening brief.

II. STATEMENT OF THE FACTS

Petitioner relies on its statement of the facts in its opening brief.

III. PRESERVATION OF ERROR

The parties agree Petitioner preserved its assignment of error.

IV. ARGUMENT IN REPLY

This reply brief addresses issues raised in the answering briefs in the order in which they are presented. LCDC asks for undue deference. Neither respondent points to additional evidence or reasoning by either Metro or LCDC addressing quantity, location, serviceability, development potential, or other relevant characteristics of any, much less all, of the region's existing single-family neighborhoods excluded from Metro's "cannot reasonably accommodate" analysis.

Finally, Metro introduces the novel, bold, and flatly wrong idea that the 1995 Needed Housing Amendments give it a pass around the Urbanization Goal.

Taken together, Respondents' briefs ask the Court to sanction the erosion of Oregon's state land use statutes and goals designed to achieve efficiency, equity, and affordability in meeting urban housing needs while protecting Oregon's valuable resource lands. Petitioner asks the Court to decline that request.

A. REPLIES TO LCDC BRIEF

At page 19, LCDC's brief seriously misstates LCDC's reading of Goal 14. It should be restated as follows:

> LCDC concluded that a Metro charter amendment forbidding Metro from requiring increased densities in existing single-family neighborhoods excuses Metro from considering that "significant" source of capacity and demonstrating with substantial evidence and substantial reasons, as required by Goal 14 and OAR 660-024-0050(4), that Metro "cannot reasonably accommodate" anywhere within the existing Metro UGB the three-percent remnant of a projected 20-year-need for single-family housing which provides the sole basis for the proposed UGB expansion.

1. Standard of Review

a. Interpretive Deference

As explained in Petitioner's opening brief, the proposed plausibility standard of deference is inconsistent with governing Oregon Supreme Court decisions involving LCDC's interpretation of state land use goals and statutes. Pet.Br. 14-17. Neither LCDC nor Metro explains why this Court should reject or disregard Oregon Supreme Court decisions reviewing LCDC interpretations of land use goals and statutes. Moreover, in this case, LCDC is asking for deference not to a formal interpretive rule but to an ad hoc interpretation which,

if actually articulated in a rule, would effectively amend, and therefore violate, the Urbanization Goal.[1]

b. Substantial Evidence

As explained at Pet.Br. 6-17, 34-35, and 37-39, LCDC failed to apply the correct legal test to the evidentiary record when it allowed Metro to categorically exclude, on the sole basis of a Metro Charter provision, an admittedly "significant" source of additional capacity within the existing UGB.

This is the kind of error that LCDC made in *1000 Friends v LCDC ("Lane County")*, 305 Or 384, 752 P2d 271 (1988) discussed at Pet.Br. 16, 28, and 43, where the Supreme Court found that LCDC erred in its substantial evidence review because it reviewed the evidence under a faulty substantive test. Closer to home, this Court found in *Rosemont*, 173 Or App 321, that LCDC erred when it allowed Metro to categorically exclude from its "reasonable capacity" analysis four of the five "subregions" of its existing UGB. In *Rosemont* the petitioners argued that it was

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[1] LCDC's track record on interpreting Goal 14 is spotty, to say the least. *See, e.g., 1000 Friends v. LCDC ("McMinnville")*, 244 Or App 239, 259 P3d 1021 (2011); *1000 Friends v. LCDC ("Woodburn II"),* 260 Or App 444*,* 317 P3d 927 (2014); *West Linn v. LCDC*, 201 Or App 419, 119 P3d 285 (2015); *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001); *1000 Friends v. Wasco County*, 299 Or 344, 703 P2d 207 (1985); *1000 Friends v. LCDC*, 292 Or 735, 642 P2d 1158 (1982); and *Willamette University v. LCDC*, 45 Or App 355, 608 P2d 1178 (1980).

> " *** inconsistent with Statewide Planning Goal 14 for a planning body to expand its UGB based on a need for housing or other urban facilities in only a part of its territory, at least without considering "whether that need could be accommodated outside of the identified subregion."

Id. at 325.

Similarly, LCDC has now misinterpreted Goal 14 to approve Metro's categorical exclusion of a "significant" source of additional capacity from its demonstration of inability to reasonably accommodate a three-percent remnant of the need that underlies the proposed UGB expansion. Once again, Metro's misinterpretation of the goal standard has fatally infected its record-making, its fact-finding, its reasoning, and its conclusions. In accepting it, LCDC has carried the errors over to its own evidentiary review, reasoning, and conclusions.

This is not to suggest that the problem can be solved by rulemaking or by a remand for costly and futile ad hoc interpretive gymnastics. *See e.g., Woodburn II*, 260 Or App 444 (failure to produce acceptable interpretation of goal provision after remand); *see also* Footnote 1, *supra*. Nor would formal rulemaking do the job. It would take an amendment to Goal 14, at the very least,[2] to change the substance and role of the Goal's "cannot reasonably accommodate" requirement as proposed by the agency's brief in this case.

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[2] *1000 Friends v. LCDC,* 292 Or 735 (rejecting as contrary to statutes LCDC Urbanization Goal amendment categorically classing city land as urban).

2. ORS 197.296 does not modify Goal 14 or Goal 10.

LCDC misstates HLA's statutory argument. HLA does not contend that ORS 197.296 "mandate[s] that a local government accommodate all or a portion of a projected shortfall in residential housing need through more efficient use of land within a UGB." HLA contends only that ORS 197.296 does not override or water down the "cannot reasonably accommodate" prerequisite to expansion set by LCDC's own Urbanization Goal since it was first adopted in 1974.

LCDC inexplicably cites a rule that reinforces Petitioner's argument. OAR 660-024-0050(4) simply provides that

> "[i]f the inventory demonstrates that the development capacity of land inside the UGB is inadequate to accommodate the estimated 20-year needs determined under [the housing needs analysis], the local government must amend the plan to satisfy the need deficiency, either by increasing the development capacity of land already inside the city or by expanding the UGB, or both, and in accordance with ORS 197.296 where applicable. *Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB.*" (Emphasis added).

The rule correctly recognizes that nothing in ORS 197.296 has changed the substance or sequencing of Goal 14's "cannot reasonably accommodate" requirement. Petitioner agrees.

3. LCDC's errors are not technical or minor.

ORS 197.627[3] has no application here. LCDC's erroneous reading and application of a core prerequisite to expanding an UGB sidelines a "significant" source of additional capacity that, for all anyone can tell, would eliminate the sole basis for a 3,000-acre regional urban growth boundary expansion that, among other things, includes 831 acres currently zoned for exclusive farm use.[4] It is not a "minor or technical" flaw. *See Lane County,* 305 Or 384. LCDC's application of goals is qualitative as well as quantitative, and the test is not "mostly" accommodate projected needs as LCDC suggests.

4. What Metro has done is not probative of what else it can or cannot reasonably do to accommodate the remnant fraction of need.

As pointed out in Petitioner's Brief at pages 33-34 and 36-39, what Metro has done to accommodate a large part of the identified need constitutes neither evidence nor substantial reasons supporting findings or conclusions that it cannot reasonably accommodate a relatively small remnant of that need. A list of cashed checks says nothing about what is left in another checking account with an undisclosed but admittedly "significant" balance.

B. REPLIES TO METRO BRIEF

1. Standard of Review

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[3] Formerly ORS 197.747.
[4] Notice of proposed UGB amendment, ER-6.

As LCDC does in its brief, Metro misstates this court's standard of review for LCDC interpretations of LCDC goals and statutes as review for plausibility. As explained at Pet.Br. 14-17, that is not the applicable standard under governing Oregon Supreme Court precedents, which call for little or no deference.

2. Metro misstates Petitioner's reading of statutes and goals.

Metro misstates Petitioner's arguments, introduces a radical new statutory claim, and then addresses only its own caricature of the issues. As a result, Metro's brief is largely irrelevant to the actual issues presented on this appeal.

Petitioner does not contend categorically that

> "the 'reasonably accommodate' language in Goal 14 requires Metro and other cities to amend local zoning to increase allowed density in single-family residential neighborhoods before they may decide to expand a UGB to meet an identified need for housing."

Metro Br. 3

On the contrary, Petitioner contends that the Urbanization Goal's "cannot reasonably accommodate" requirement precludes categorical exclusions such as the one made by Metro's charter amendment. Neither the Needed Housing Statutes nor the Urbanization Goal authorizes Metro and other cities to expand an existing Urban Growth Boundary without first demonstrating, based on substantial evidence and an adequate statement of reasons, that they "cannot reasonably accommodate" identified needs within the existing UGB.

Petitioner's claim is that Metro and LCDC cannot categorically exclude a "significant" source of relevant capacity, in this case Metro's existing single-family neighborhoods, from sharing the burdens while enjoying the benefits of state land use statutes and goals designed to further efficient, balanced, and equitable land conservation and development.

This doesn't mean that Metro or LCDC can solve their problem with magic words.[5] There may be facts and reasons which enable jurisdictions to demonstrate that apparently "significant" sources of relevant capacity cannot, in fact, reasonably accommodate identified needs. Such a demonstration must be made based upon substantial evidence and a thorough assessment addressing the substantive concerns reflected in the Urbanization Goal and other applicable goals, including, as most pertinent in this case, the Housing Goal. Just such an analysis underlies Metro's uncontested determination in this case that its existing UGB can reasonably accommodate projected needs for multifamily housing.

Petitioner has no doubt, that, for now and probably for some time to come, Metro will be unable to demonstrate that it "cannot reasonably accommodate" all

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[5] *Cf.* Nancy Marder, *Batson Revisited*, 97 Iowa LR (2012) 1585 ("Prosecutors quickly learned not to say that they had exercised a peremptory based on the race of the prospective juror. *** One judge made this point clear by compiling a list *** under the title *** *'20 Time-Tested Race-Neutral Explanations*.'"); and *Batson v. Kentucky,* 476 U.S. 79, 89 (1986) (peremptory juror challenges based on race violate Equal Protection Clause).

of its projected 20-year needs for single-family housing if it requires its constituent jurisdictions to reasonably increase densities in existing single-family zones consistent with its housing goal and other applicable statewide goals.

Someday, no doubt, Metro will be able to make such a demonstration. But in this legislative review neither Metro nor LCDC has pointed to any evidence in the record that would enable them, or this Court, to determine whether, when, where or how this "significant" source of additional capacity cannot reasonably accommodate the identified need.

Under these circumstances, the appropriate disposition is reversal. *See Oregon AFSCME Council 75 v. OJD-Yamhill County*, 304 Or App 794, 842, *rev. den.* 367 Or 75 (2020).

3. ORS 197.296 does not create a bypass around the Urbanization Goal.

Metro introduces for the first time since the adoption of HB 2709 in 1995 the startling proposition that ORS 197.296 creates a discretionary bypass around the Urbanization Goal's "cannot reasonably accommodate" requirement.

Not surprisingly, the Court will not find this novel theory in LCDC's brief, LCDC's findings, or even in Metro's findings. It is unsupported by the text, context, legislative history, case law, interpretive rules, and, to Petitioner's knowledge, anything in the pre- or post-1995 body of LCDC urban growth

boundary reviews. Still, it has been raised, and the Court should put it to rest to correctly decide this case and to avoid running the train off the tracks.

ORS 197.296 (Pet. App-12-16) requires nothing inconsistent with the Urbanization Goal's longstanding requirement that a regional and local government must first demonstrate that its acknowledged UGB "cannot reasonably accommodate" projected needs before expanding its UGB. ORS 197.296(2)-(9) prescribes a methodology for determining existing capacity and identifies a list of measures, including increasing densities, to be considered in addressing any shortfalls. ORS 197.296(6)-(9) identify measures, including increasing densities and expanding urban growth boundaries that may or may not be necessary depending on circumstances, including whether identified needs "can reasonably be accommodated" within the existing UGB. In no way does it alter the jurisdiction's burden of demonstrating compliance with the Urbanization Goal's "cannot reasonably accommodate" requirement before choosing to expand its UGB.

The relevant context is examined at Pet.Br. 25-37 and in cases cited therein. ORS 197.296 requires Metro and local governments to assess and maintain adequate supplies of residential lands to meet identified needs for such lands over rolling 20-year planning periods. It identifies ways in which those needs can be addressed, consistent with applicable statewide land use goals and

statutes, including the Urbanization and Housing Goals. It doesn't change those goal requirements, either expressly or implicitly.

Petitioner does not conflate the baseline Buildable Lands Inventory (BLI) and Housing Needs Analysis (HNA) with the separate and subsequent process of addressing shortfalls. As it happens, Metro's BLI and findings based thereon candidly admit that increasing densities in Metro's existing single-family neighborhoods are a "significant" source of additional capacity. That omission could have been called out elsewhere as well.

This Court and LUBA have stressed that 1995 Or Laws Ch 547 (HB 2709), which enacted both the housing needs analysis requirements of ORS 197.296 and the expansion area priority requirements of ORS 197.298, must be read to harmonize with the requirements of the Urbanization Goal. *See, e.g.*, *1000 Friends of Oregon v. Metro*, 174 Or App 406, 412–414, 26 P.3d 151 (2001) (compliance with ORS 197.298 priorities does not excuse need to separately apply Goal 14, Factor 6, retention of agricultural land); and *McMinnville,* 244 Or App at 272, n. 14; *Rosemont,* 173 Or App 321.

4. Broad wording is not a blank check.

Metro suggests that the Urbanization Goal's "cannot reasonably accommodate" requirement is "highly discretionary" because it is "broadly worded." Not so. Oregon's statewide land use goals are all broadly worded. That has never meant that they are "highly discretionary." A long line of

decisions by Oregon's appellate courts, LUBA, and LCDC, demonstrate that, especially where reasons exceptions and UGB expansions are concerned.

The Urbanization Goal originally incorporated the "cannot reasonably be accommodated" language along with the Goal 2 exceptions process. Because of overlap, the Goal was revised in 2005. The amended Goal retains the "cannot reasonably be accommodated" language and its direction, reflected in the word "cannot," to strictly scrutinize UGB expansions, both to protect resource lands and to efficiently and equitably utilize existing urban lands.

In *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017), LUBA highlighted the retention and role of the "cannot reasonably be accommodated" prerequisite to UGB expansions:

> "***[P]rior Goal 14's awkward incorporation of the goal exception requirement as the mechanism for requiring consideration of alternatives was replaced by the underscored language [in the 2005 goal amendments] that expressly requires a demonstration that any identified land needs "cannot reasonably be accommodated on land already inside the urban growth boundary," before proceeding with a consideration of candidate rural sites for a UGB amendment to meet that need. ***"

There is no suggestion in the text, context, or history of this post-HB 2709 simplification and consolidation effort that there was ever an intent to weaken the longstanding "cannot reasonably accommodate" standard.

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/ / /

5. Zoning by plebiscite is not a bypass around statewide goals.

The "cannot reasonably accommodate" requirement of the Urbanization Goal is a keystone of the regulatory structure implementing that core policy of Oregon's land use statutes, goals, and rules. See, e.g., *Columbia Riverkeeper v. Port of St. Helens*, 70 Or LUBA 171, 193, (2014), note 9 and associated text. It cannot be bypassed by voter-adopted charter amendments that have never been vetted against statewide goals through Oregon's post-acknowledgement amendment process. See *Dan Gile v. McIver*, 113 Or App 1, 6, 831 P2d 1024 (1992) (Statutes and goals establish standards and procedures that make land use decisions "administrative" rather than "legislative."); ORS 197.175, 197.250-251, 197.610-651.

This is as it should be. Voter-approved exclusionary land use regulations perpetuate historic governmental redlining. See Marcilynn Burke, *The Emperor's New Clothes: Exposing the Failures of Regulating Land Use through the Ballot Box*, 84 Notre Dame LR 1453 (2009). In Oregon, exclusion by plebiscite has a long sad history which provides additional context. See Sarah J. Adams-Schoen, *Dismantling Segregationist Land Use Controls*, 43 No. 8 Zoning and Planning Law Reports NL 1 (2020). In 1859, John Bingham, future author of the Fourteenth Amendment, condemned Oregon's voter-adopted Black exclusion clause as "injustice and oppression incarnate" in his speech opposing Oregon statehood, since recognized as key to understanding the Fourteenth

Amendment. Cong. Globe, 35th Cong., 2d Sess. 981-985 (1859); Howard Jay Graham, *Segregation and the Fourteenth Amendment*, 3 Buffalo LR 1-26 (1953); Akhil Amar, *Bill of Rights: Creation and Reconstruction* (1998), 180-185.

Only by enforcing the "cannot reasonably accommodated" standard of the Urbanization Goal, in concert with the Housing Goal,[6] unencumbered by local nullification measures, can Oregon continue to redress this history.

LCDC understood this early on. In *Seaman v. Durham* 1 LCDC 283, 289-290 (1978), rejecting a Metro city's unilateral density reduction, it said

> "The Housing Goal clearly says that municipalities are not going to be able to **** pass the housing buck to their neighbors on the assumption that some other community will open wide its doors ***.
>
> "Goal 10 speaks of the housing needs of Oregon households, not the housing needs of Durham households. Its meaning is clear: planning for housing must not be parochial."

HB 2709 can and must be read to read to harmonize with such longstanding robust understandings of both Goal 10 and Goal 14.

6. Preemption is conceded if there is a conflict.

Respondents' response on this issue comes down to denying that there is a conflict. If there is a conflict, they implicitly concede preemption, as they must.

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[6] The Housing Goal is directly applicable. OAR 660-024-0020). It is also particularly "relevant context." *1000 Friends v. Jackson County*, 292 Or App 173, 187, 423 P3d 793 (2018).

See Pet.Br. 22-25 and *City of Damascus v. State of Oregon*, 367 Or 41, 64 (2020). The conflict is real. Metro's charter provision is preempted.

V. CONCLUSION

LCDC's reading of the Urbanization Goal condones a *de jure* and *de facto* internal UGB. It condones Metro's categorical exclusion of most of the residentially-zoned land in the state's largest metropolitan area. It perpetuates inefficiency, unaffordability, exclusion, and segregation in the Metro region by shielding it from identification, analysis, and correction. It ignores "significant" excess capacity, unnecessarily consumes farmland, and exempts many, perhaps most, Metro neighborhoods from sharing in the burdens, as well as the benefits, of Oregon's land use system.

Perhaps too much has been made of former Governor McCall's famous invitation to "visit but don't stay." Oregon's land use goals aspire to something more, expressed in a short poem, "Outwitted," by Edwin Markham, Oregon's first poet laureate:

> "He drew a circle and shut me out,
> "Called me rebel, heretic, lout.
> "But Love and I had the wit to win.
> "We drew a circle that took him in."

The Urbanization Goal, in concert with the Housing Goal, reflects Oregon's commitment to drawing circles that welcome as well as protect.

Accordingly, Petitioners respectfully ask the Court to reverse and remand LCDC's decision with instructions to deny the requested urban growth boundary expansion for lack of an adequate demonstration that Metro "cannot reasonably accommodate" the identified need for the proposed expansion.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that this brief complies the word-count as described in ORAP 5.05(1)(b)(ii)(E) and the word count is 3,298 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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CERTIFICATE OF FILING

I certify that on October 5, 2020, I filed the original of the **PETITIONER HOUSING LAND ADVOCATES' REPLY BRIEF** with the State Court Administrator at the following address via the Court's ECF filing system:

ATTN: Records Section
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