

February 23, 2016

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VIA EMAIL

Mayor Gary Wheeler
Medford City Council
City Hall
411 W 8th St
Medford, OR 97501RECEIVED
FEB 24 2016
PLANNING DEPT.**Re: City of Medford ("City") Urban Growth Boundary ("UGB") Amendment –
Response to Department of Land Conservation and Development ("DLCD")
Letter**

Dear Mayor Wheeler and Medford City Councilmembers:

This office represents Hillcrest Corporation ("Hillcrest"), the owner of approximately 246 acres of real property generally located east of Foothill Road and north of Hillcrest Road in the MD-4 urban reserve enclave surrounded by the City.

We have received and reviewed the letter from DLCD dated February 10, 2016 ("DLCD Letter"), which responds to Hillcrest's well-supported contention that the Housing Element of the City's Comprehensive Plan is acknowledged, and the City must rely upon this acknowledged Housing Element when making its pending UGB amendment decision. For the reasons explained below, the City Council should deny the contentions in the DLCD Letter.

1. The DLCD Letter misconstrues the decision in *DLCD v. City of McMinnville*.

For two reasons, the DLCD Letter erroneously relies upon LUBA's decision in *DLCD v. McMinnville*, 41 Or LUBA 210 (2001) ("*McMinnville*") to justify DLCD's 2011 attempt to reject the City's amended Housing Element on the grounds that it was "premature." First, in *McMinnville*, LUBA held that a city's decision to adopt a plan amendment with a residential land needs analysis is final, even if it is not accompanied by measures to address the identified need:

“* * * [T]he city’s decision in this case is a final land use decision subject to our jurisdiction because it amends the city’s comprehensive plan. We have difficulty conceiving of a *provisional* or *nonfinal* comprehensive plan amendment.”

McMinnville, 41 Or LUBA at 228 (emphasis in original). Although LUBA further concluded that, in that case, the city’s decision was legally incorrect, it did not change the fact that the city’s decision was final and ripe for review. In 2010, the City, like the City of McMinnville, adopted a residential lands analysis as a post-acknowledgment plan amendment (“PAPA”) without adopting contemporaneous measures to address the identified land need. As a result, like the City of McMinnville, the City’s decision was final and ripe for review. DLCD’s attempt in its 2011 letter to contend that the City’s decision was “premature” and that the decision could be rejected on this basis lacks merit.

Second, as the quoted passage from *McMinnville* states, LUBA has jurisdiction over appeals of PAPA decisions. To timely appeal a PAPA decision to LUBA, a party must file a Notice of Intent to Appeal with LUBA within 21 days after the decision is mailed. ORS 197.830(9). The City’s adoption of the amended Housing Element was a PAPA, but no party timely appealed that decision to LUBA. Therefore, the City’s decision was deemed acknowledged by operation of law. ORS 197.625(1)(a). Although DLCD issued a letter after the expiration of the appeal period advising that the City’s decision was incomplete, DLCD’s letter is without effect because DLCD does not have the authority under *McMinnville* or any other statute or rule to collaterally attack a final PAPA that was already deemed acknowledged by operation of law. Even if DLCD’s objection were timely, the City’s decision was final, as explained above, and therefore could not be rejected on incompleteness grounds anyway.

For these reasons, DLCD’s attempts to rely upon *McMinnville* to justify its actions are misguided and should be rejected by the City.

2. The City cannot informally revise its Housing Element as part of the UGB amendment process.

DLCD further contends that it is incorrect to assert that the City cannot now amend its Housing Element. Hillcrest agrees. To clarify, Hillcrest has not asserted that the City cannot formally amend its Housing Element pursuant to the procedures outlined in ORS

197.610 *et seq.* Rather, Hillcrest has correctly asserted that: (1) the City cannot deviate from its acknowledged Housing Element without formally amending it; and (2) the City has not yet taken any of the steps necessary to formally amend its Housing Element. Unless and until the City does so, it is bound to apply its Housing Element as it currently reads. Contrary to DLCD's assertion, the City cannot simply informally revise its Housing Element as part of the UGB amendment process. Finally, Hillcrest disputes the contention that "double-counting" of acreage has actually occurred in this case and that there is any need to revise the Housing Element analysis at all.

3. The City is vested to rely upon the population forecast in effect when it commenced its UGB amendment proceedings.

The DLCD Letter invites the City to reduce the size of its UGB expansion area on the basis of a recent population forecast, which projects slower growth than the forecast in effect at the time the City commenced its UGB amendment proceedings. The City is permitted to apply the population forecast in effect when it commenced its UGB amendment proceedings, even if a later forecast is issued. OAR 660-032-0020(5). The City has done so in this case, and in fact, has expended considerable time and resources in projecting its needs based upon that earlier population forecast. Applying a new population forecast at this time will require the City to repeat all of its earlier analytical steps. There is simply no reason to do this when the City has not committed any legal error in applying the population forecast to date.

4. Conclusion.

For these reasons, the City Council should reject the contentions in the DLCD Letter. In conducting its UGB expansion analysis, not only is it defensible for the City to rely upon its existing, acknowledged Housing Element, the City is legally bound to do so. Further, the City is vested to rely upon the population forecast in effect when it commenced its UGB expansion proceedings.

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Thank you for your consideration of the points in this letter.

Very truly yours,



Steven L. Pfeiffer



Seth J. King

cc: Jim Huber (via email)
John Adam (via email)
Lori Cooper (via email)
Client (via email)