

Jeffrey G. Condit, P.C.
Admitted in Oregon and Washington
jeff.condit@millernash.com
503.205.2305 direct line

June 20, 2017

Mr. Matt Brinkley
Planning Director
City of Medford
Lausmann Annex
200 S. Ivy Street
Medford, Oregon 97501

Subject: May 17, 2017, Letter from 1000 Friends of Oregon

Dear Matt:

You asked me to respond to some of the legal issues raised in the above-noted letter prepared by Greg Holmes of 1000 Friends of Oregon.

At the threshold, Mr. Holmes's general comments makes it sound as if the Medford City Council added significant additional lands to the UGB at the behest of property owners, as compared to the "general defensible" proposal forwarded by the Planning Commission. In point of fact, the difference between the Planning Commission's recommendation and Council's final decision is 138 additional acres of land for future development, for a total of 1,658 acres of buildable land for residential and employment as compared to the Planning Commission's recommended 1,520 acres. This addition stems entirely from Council's disagreement with the Planning Commission over whether it could rely on the numbers in the 2010 Housing Element. The findings adopted by Council fully explain the basis for their decision on this issue.¹ See Findings at 64-67.

LCDC's Urban Growth Boundary Administrative Rule, OAR 660-024-0040(1), states that the twenty-year need determinations "are estimates which, although based on the best available information and methodologies, should not be held to an unreasonably high level of precision." (Emphasis added.) The rule recognizes that these

¹ We note that the Supplemental Findings submitted by the City at the May 17, 2017, hearing address the 1000 Friends argument that the Housing Element somehow double-counts acres as buildable land.

Mr. Matt Brinkley
June 20, 2017
Page 2

studies are basically snapshots in time and are derived from numerous assumptions and derivations based on past growth and projected future growth. They are by no means precise arithmetic equations. Rather, they must be based on the best available information and methodology at the time that they were prepared. *See Zimmerman v. LCDC (Scappoose)*, 274 Or App 512, 524-25, 361 P3d 619 (2015) ("a city is not required to restart its analysis each time new information becomes available"). Indeed, once such analyses have been adopted as part of a city's background planning documents, as the Housing Element has, then the city must rely on those documents under Goal 2. *See D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 21-23, 994 P2d 1205 (2000). Council's findings explain why it is reasonable to rely on the Housing Element.

Indeed, the small difference in acreage between the Planning Commission's recommendation and Council's final decision is of even less significance in this case. All of the land that the City considered for inclusion in the UGB has been designated urban reserve as part of the regional planning process. The City and Jackson County have thus already made the decision that this land will eventually be included in the UGB and urbanized. This is not a situation where the City has passed over higher priority lands in favor of lower priority farm and forest lands. If a City assumption does turn out to be inaccurate over the 20-year planning period, the sole consequence is that it will be longer before the City can justify another UGB amendment.

Compliance with Goal 10. Mr. Holmes first argues that there is no indication that the City can achieve the 6.6 units per acre required by the Regional Plan adopted pursuant to the regional problem-solving process. That is not correct, as set forth in your June 19, 2017, UGB Amendment Supplemental Findings to the Jackson County Board of Commissioners.

Mr. Holmes also argues that the City fails to address the Goal 10 requirement for providing affordable housing. Mr. Holmes does not cite a particular provision or case or otherwise explain how the City's UGB amendments violate the Goal. What Goal 10 requires is for the City to determine the needed housing types and provide for sufficient land and a mix of densities to meet those needs over the planning period. OAR 660-008-0010. See also OAR 660-024-0020. The Housing Element and the Regional Plan include these determinations. Goal 10 also requires the City to adopt specific plan designations to accommodate the various housing types. OAR 660-008-0020. The City has done so. Mr. Holmes fails to explain why these actions are not sufficient to comply with Goal 10.

Mr. Matt Brinkley
June 20, 2017
Page 3

Failure to Close the Record. Mr. Holmes argues that the City failed to close the record and therefore allowed information to be submitted outside of the public hearing process that influenced Council's deliberations and decision.

Large-scale UGB amendment proceedings are legislative, not quasi-judicial, proceedings, and the City has treated it as legislative decision throughout the process. Ex parte contact rules do not apply to legislative proceedings; indeed, members of the community are free to lobby Council outside of the public hearing process and to submit information directly to Council, which Council can consider or not consider such information as it sees fit. Mr. Holmes cites no authority for his proposition that that this is a violation or is otherwise improper in a legislative context. No such authority exists. The sole question is whether the evidence relied on by Council in making its decision provides an adequate factual basis to support the decision under Goal 2.

Even if failure to close the record were a procedural violation, such a violation is only grounds for reversal or remand if it prejudices a party's substantial rights. See, e.g., *Pinnacle Alliance Group LLC v. City of Sisters*, 73 Or LUBA 169 (2016). The County hearing process provides participants with an additional opportunity to submit evidence and testimony into the record to address Council's decision, an opportunity that Mr. Holmes has taken advantage of. To any degree that Council's failure to formally close the record was a procedural error, it did not prejudice the rights of any party.

Agricultural Buffers. Mr. Holmes finally claims that adjustments made by the City to the UGB boundary as a result of public testimony created an inefficient land use pattern, particularly since they increased the amount of land dedicated to agricultural buffers.² Mr. Holmes claims that the buffers should be considered "buildable" land, and therefore concludes that Council's decision includes an excess of buildable land.

At the threshold, as Mr. Holmes acknowledges, agricultural buffers are required by the Regional Plan adopted through the Regional Problem Solving process. See City of Medford Regional Plan, section 4.1.10; Regional Plan vol. 2, app'x III at 16 et seq. The Regional Plan requires the buffers to be located on urbanizable land in most cases, and requires that these requirements be adopted into the plans of participating

² Mr. Holmes claims that the amount of the buffers increased by 44 acres; the increase is approximately 10 acres, according to a GIS analysis conducted by City staff. See June 19, 2017, Supplemental Findings at 6.

Mr. Matt Brinkley
June 20, 2017
Page 4

jurisdictions. The City of Medford adopted section 10.802 as part of its land development code in order to comply with the Regional Plan. The Regional Plan and the Medford Land Development Code have been adopted and are deemed acknowledged.³

The buffers are designed to mitigate the impact of urbanization on adjacent agricultural land, including spray drift, trespass and vandalism, odor, dust, smoke and ash, water run-off, and noise. *See* Land Development Code section 10.802(E). The Code generally requires them to remain undeveloped and include vegetative buffers and screening. Land Development Code sections 10.802 (G) – (N). As noted in both the Regional Plan and the Code, the buffers are intended to be perpetual, except for the buffers protecting agricultural-zoned land in urban reserves, which could be converted at such time as the UGB is expanded in the future.

OAR 660-008-0005 defines "buildable land" as follows:

"(2) "Buildable Land" means residentially designated land within the urban growth boundary, including both vacant and developed land likely to be redeveloped, that is suitable, available and necessary for residential uses."

The buffer areas will not be "suitable or available" for residential uses during the current planning period. Some of the buffers might become "suitable and available" at the time of a future UGB amendment and thus become "buildable land" at that time. But for the current planning period, they are off limits. The City correctly excluded them as "unbuildable."

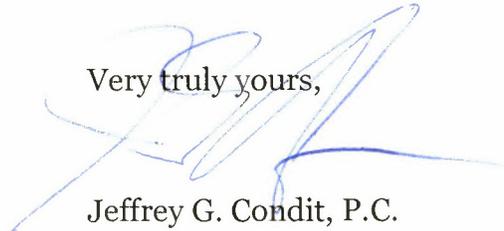
Nothing in the Regional Plan or section 10.802 indicates that the amount of the buffer areas should drive the location of the UGB, as Mr. Holmes suggests. The proposed location of the UGB adopted by Council complies with the Goal 14 factors for the reasons set forth in the City Findings. The buffers are merely a required mitigation measure designed to protect adjacent agricultural land once those locations have been determined. The tail does not wag the dog.

³ We note that Goal 14 boundary location factor 4 requires consideration of the compatibility of proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB, which is exactly what the agricultural buffers are designed to ensure.

Mr. Matt Brinkley
June 20, 2017
Page 5

Conclusion. A UGB amendment is a complex decision based on assumptions, prior decision-making, and input from the public over the course of years of process. The Medford City Council has considered all of the evidence and testimony over a long period and has made a reasonable decision based on the criteria and explained that decision in its findings.

Very truly yours,



Jeffrey G. Condit, P.C.

cc: Ms. Lori Cooper, City Attorney