

City Attorney's Office Memo



TO: Mayor and City Council via Bill Hoke, City Manager Pro Tem
FROM: Lori Cooper, City Attorney
SUBJECT: Response to December 1, 2015 Perkins Coie letter re UGB issues
DATE: December 16, 2015

SUMMARY

DLCD declined to acknowledge the City's adopted Housing Element in early 2011, instead advising the City that DLCD would review the amended Housing Element in the manner of periodic review, as part of the ongoing urban growth boundary (UGB) amendment process.

State statutes and DLCD administrative rules support the process which DLCD is requiring the City to follow. The Housing Element will not be final until the UGB is adopted; therefore, it is appropriate, as a result of information brought to light during the public UGB amendment process, for information in the Housing Element to be adjusted.

FACTS

The amendment to Medford's comprehensive plan Housing Element was adopted by the City Council on October 21, 2010, and was submitted to DLCD as a post-acknowledgment plan amendment (PAPA). On January 5, 2011, DLCD rejected the City's submittal of the Housing Element, stating it did not comply with state law and regulation, and was therefore incomplete and premature. DLCD instructed that the Housing Element amendment would be treated as an amendment to the comprehensive plan "in the manner of periodic review," as a component to eventually be folded into the adoption of a UGB amendment. *See* Attachment A (Jan. 5, 2011 DLCD letter).

As part of the UGB amendment process, public commenters pointed out that 135 acres needed for "government" (also called "government administration") were counted twice – in the Housing Element and in the Economic Element. Another issue regarding offsets in acreage for parkland/golf course land was raised in the public comments, resulting in a staff determination that there was an excess of 18 acres included in the estimated land need for this category. The combination of the double counted 135 "government" acres and the excess of 18 parkland/golf course acres totals 153 acres.

On December 1, 2015, the Perkins Coie law firm submitted a letter into the record which asserts that the Housing Element was adopted and acknowledged as a PAPA, and as such, the City cannot deviate from the land need acres identified in that 2010 Housing Element. Perkins Coie argues that the City must not remove the 153 acres allocated to government uses which were identified in public comments as being excess acres.

ANALYSIS

As mentioned above, the City initially processed the Housing Element comprehensive plan amendment as a PAPA. However, DLCD rejected that submittal as incomplete and stated that it would treat the Housing Element amendment in the manner of periodic review.

The Perkins Coie letter claims that there is no legal basis for DLCD's position. However, in *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001), LUBA held that, pursuant to LCDC's rules implementing ORS 197.296, the city of McMinnville committed reversible error when it adopted a *final* comprehensive plan amendment before completing a UGB amendment.

As LUBA explained:

The housing needs analysis required by ORS 197.296(3) identifies whether and to a limited, preliminary extent what actions the city must take under ORS 197.296(4) and (5). Where, as here, the city's housing needs analysis identifies a significant deficit in the supply of buildable land, the city must take one or more actions under ORS 197.296(4) through (7). It is highly probable under the present circumstances that whatever actions the city takes under ORS 197.296(4)-(7) will implicate Goal 14. In our view, LCDC's choice to require that the housing needs analysis required by ORS 197.296(3) be 'consistent with Goal 14 requirements' is essentially a choice to require that, in circumstances such as the present one, the city must complete the statutory process and adopt one or more of the actions described in ORS 197.296(4)-(7) to take the necessary actions to plan for the identified housing need and the identified deficit in the supply of buildable lands.

The issue which Perkins Coie raises in its December 1 letter – that the Housing Element was adopted into the comprehensive plan and therefore is “locked in” and cannot be altered – presents a chicken-and-egg conundrum that has been vexing cities for years.

On the one hand, as Perkins Coie advocates, it is desirable to have finality and predictability regarding the amount of land required to meet housing needs. But on the other hand, state law and DLCD regulations require more. The determinations of need for housing and for residential lands must be made together, as the City has done; in addition, OAR 660-008-005(4), together with Goal 14 (urbanization), requires another step – addressing the need. One way of achieving that next step of addressing the need is adding land to the urban growth boundary, which the Council is currently wrestling with.

DLCD considers the buildable lands inventory, the housing and residential land needs analyses, and Goal 14 requirements (including eventual amendment of the UGB) as a “highly integrated single process” (*McMinnville* at 226), with each step being iterative and building on the previous step. Therefore, DLCD determined that the City's PAPA submittal for the amended Housing Element was incomplete because it did not accommodate the need for residential land, and because Jackson County had not yet concurred with the amendment as required by Goal 14 and the administrative rule which includes adoption of all supporting documents (such as the Housing Element) to a UGB amendment.

Perkins Coie's December 1 letter contained two attachments - “Form 2 – Notice of Adoption” that the City sent to DLCD, as well as DLCD's “Notice of Adopted Amendment,” which spelled out procedures for interested parties to appeal the decision to LUBA. Perkins Coie argues that these documents prove that the Housing Element has been acknowledged by DLCD and is therefore final and cannot be altered without going through the PAPA process. As discussed above, the City did submit

the Housing Element to DLCD as a PAPA, which explains why DLCD, pursuant to established process, sent the Notice of Adopted Amendment to interested parties. However, this is a boilerplate form that is most likely automatically sent out by DLCD staff upon receiving a Notice of Adoption form from a local jurisdiction.

Subsequently, DLCD sent the January 5, 2011 letter to the City explaining that they would be treating the Housing Element amendment in the manner of periodic review, which made it clear that they would not be acknowledging the amended Housing Element as part of the comprehensive plan prior to the adoption of the UGB amendment. There is no evidence that DLCD has acknowledged the Housing Element. Therefore, contrary to what Perkins Coie asserts, the Housing Element is not final, and the City is not irrevocably bound to the information in that document.

Finally, the December 1 Perkins Coie letter cites two cases in support of its contentions, *D.S. Parklane Development, Inc., v. Metro* and *1000 Friends v. City of Dundee*. Both of these cases can be distinguished from the City's situation.

Parklane involved a challenge to Metro's designation of urban reserves. The Court of Appeals held that Metro violated Goal 2 by relying on an informal draft report of estimated land need. In our case, the Housing Element is not an informal draft report. It was formally adopted by the City Council after a public hearing. Even though it has not yet been acknowledged by DLCD, it is still a formal document that is properly being used in the UGB amendment process, as required by state law and regulation.

In the *City of Dundee* case, the Court of Appeals held that, in amending its comprehensive plan to permit a highway bypass, the city could not rely on a buildable land inventory that had not been incorporated into the comprehensive plan.

That case did not involve a UGB amendment, and therefore is not on point with our situation. As explained above, the UGB amendment process is an intricate dance which depends on numerous moving parts, one of which is a Housing Element which has been adopted by the City but won't become final until the UGB amendment process is complete. The Perkins Coie letter quotes a section of the *Dundee* decision which states that citizens must be able to rely on an acknowledged comprehensive plan and information integrated into that plan, rather than being "sandbagged" by government's reliance on new data that is inconsistent with the comprehensive plan.

The City is not "sandbagging" anyone in this process. The adopted (but not acknowledged) Housing Element is part of the UGB amendment record, and has been open to discussion throughout the lengthy UGB amendment process. The City is not relying on new data that is inconsistent with the comprehensive plan; rather, the City is being responsive to comments from the public by offering to possibly remove 153 acres from the Housing Element to account for lands which appear to have been double counted. The City is not being inconsistent with the comprehensive plan because the Housing Element is not yet officially part of the comprehensive plan.

CONCLUSION

It would not be reversible error for the City to exclude the 153 acres that have been identified as having been double counted. As explained above, there is a strong argument that state laws and regulations require DLCD to decline to acknowledge the Housing Element as an amendment to the comprehensive plan *prior* to the completion of the UGB amendment process. Adopting the Housing Element into the comprehensive plan without also adopting implementing measures to meet the future land need identified in the Housing Element does not comply with Goal 14.

Finally, it is important to remember that the Court of Appeals gives deference to LCDC's interpretation and application of its own rules, as long as that interpretation is plausible and is not inconsistent with the wording of the rule, its context, or any other source of law. *Zimmerman v. LCDC*, 274 Or. App. 512 (2014).

Although the City could have challenged DLCD's rejection of the Housing Element as a PAPA back in 2010, the City chose to proceed with the UGB amendment process in the manner instructed by DLCD. It would not be efficient or productive at this point to re-visit decisions made over 5 years ago as to which process to follow.

The City Council has considerable latitude in making its decision to amend the UGB, as long as it adheres to relevant laws and administrative regulations, and as long as the final decision is based on substantial evidence in the record and is explained in enough detail to show how that decision was reached.

At the end of this UGB amendment process, the City Council may decide to add all or part of the 153 acres back into the mix. But the justification for doing so does not have to be based on the assertions contained in the December 1 Perkins Coie letter.