

IN THE COURT OF APPEALS OF THE STATE OF OREGON

1000 FRIENDS OF OREGON
FRIENDS OF WASHINGTON COUNTY
and LISA PERSE

Petitioners

LAND CONSERVATION AND
DEVELOPMENT COMMISSION and
CITY OF McMinnville

Respondents

Agency Nos. 06WK-TASK001709 and
08WK-TASK001760

CA A154579

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RESPONDENTS ANSWERING BRIEF

Petition for Judicial Review of the Final Order
of the Land Conservation and Development Commission

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

Respondent Land Conservation and Development Commission ("LCDC") accepts petitioners' statement of the case, except to the extent that the facts are supplemented in the argument below.

Summary of Argument

LCDC reviewed and approved an amendment to the City of McMinnville's Urban Growth Boundary (UGB) in the manner of periodic review. ORS 197.626. On appeal, petitioners argue first that LCDC erroneously interpreted the law in approving the city's UGB amendment and that the city's decision was not supported by substantial evidence. LCDC did not err. LCDC properly determined that the city's analysis of what lands could accommodate the city's need for urban lands complied with the statutory priorities set forth in ORS 197.298 and the Goal 14 locational factors. Contrary to petitioners' assertion, the regulatory scheme that governs UGB amendments does not require the city to apply ORS 197.298 or the Goal 14 locational factors to lands that cannot accommodate the needed housing the city determined it will require over the next twenty years.

Moreover, LCDC correctly concluded that the city had an adequate factual base to support its UGB expansion decisions. An "adequate factual base" standard of review is analogous to this court's substantial-evidence review of an administrative order in a contested case. Thus, this court's task on judicial review is not to reweigh the evidence and substitute its judgment for that of the city, but to determine whether LCDC properly found that the city predicated its decision to

expand its UGB on an “adequate factual base.” Here, the city analyzed what lands were suitable for the housing types for which it was required to plan. The city’s analysis was based on a fact, and a reasonable person could decide that those facts supported the decisions that the city made concerning what lands were suitable for future urbanization. This court should therefore affirm LCDC’s decision approving the city’s analysis.

Petitioners also argue that LCDC erred in approving the City’s UGB expansion areas for parks and in accounting for the City’s high-density housing needs and corresponding amount of expansion area. LCDC concurs in and adopts the City’s briefing on those issues.

ANSWER TO FIRST ASSIGNMENT OF ERROR¹

LCDC correctly interpreted applicable statutes, statewide land use planning goals, and LCDC rules when it approved the City’s proposed UGB expansion.

¹ Pursuant to ORAP 5.77, LCDC adopts the city’s brief describing the adequacy of the factual base—and thus substantial evidence—supporting its UGB amendment decisions, with the following qualification: With regard to the city’s summary of the needed housing statutes, LCDC notes that the need factors of Goal 14 (2000) also related to the city’s determination of the adequacy of land to accommodate the amount of land needed. In addition, the statutory provisions of ORS 197.296(6) and 197.296(7) regarding the extent to which a local government is required to consider measures directed at providing needed housing types or density, and ORS 197.296(9), which requires local governments to “* * * ensure that land zoned for needed housing is in locations appropriate for the housing types identified [as needed] under [ORS 197.296(3)] and is zoned at density ranges that are likely to be achieved by the housing market * * *,” are relevant to a local government’s UGB decision.

LCDC also adopts the city’s answers to petitioners’ second and third assignments of error.

LCDC also correctly found that the City's UGB expansion decisions were supported by an adequate factual base, and thus, by substantial evidence.

Preservation of Error

Petitioners' argument regarding OAR 660-004-0020(2)(b)(C) on p 45 of the opening brief was not preserved before the commission. LCDC agrees that petitioners adequately preserved their other arguments for review.

Standard of Review

LCDC's decision is a final order subject to judicial review under ORS 183.482. ORS 197.650. If this court finds that LCDC has erroneously interpreted the law and that a correct interpretation compels a particular action, it may set aside or modify the order, or remand to LCDC for appropriate action under a correct interpretation of law. ORS 183.482(8)(a). This court will defer to the agency's interpretation of its own rule as long as the interpretation is plausible and not inconsistent with the rule's text, context, or any other source of law.

Don't Waste Oregon Waste Oregon Comm. v. Energy Facility Siting Council, 320 Or 132, 142, 881 P2d 119 (1994) (stating principle). This court shall remand the order if it finds that the agency has acted inconsistently with "an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency[.]" ORS 183.482(8)(b)(B)..

Moreover, this court shall set aside or remand an agency order that is not supported by substantial evidence. ORS 183.482(8)(c). "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that same finding." ORS 183.482(8)(c), *City*

of *West Linn v. Land Conservation & Devel Comm'n*, 201 Or App 419, 119 P3d 285 (2005). However, this court does not “review the record on [its] own to determine whether [the local government’s] decisions, in fact, satisfied that standard.” *City of West Linn*, 201 Or App at 428-29. Rather, this court’s role “is to determine whether [LCDC] applied the correct legal test in deciding whether [the local government’s] decision is supported by substantial evidence.” *Id.* at 429 (quoting *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 21, 38 P3d 956 (2002)). Finally, “[i]f an agency’s finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence.” *Armstrong v. Asten-Hill Company*, 90 Or App 200, 206, 752 P2d 312 (1988).

LCDC reviews periodic review work task submittals for consistency with the applicable state statutes, statewide land use planning goals and administrative rules, and for substantial evidence in the record. OAR 660-025-0040. Because the city’s submittal embodies both basic findings of fact and inferences drawn from those facts, substantial evidence review involves two related inquiries: “(1) whether the basic fact or facts are supported by substantial evidence, and (2) whether there is a basis in reason connecting the inference to the facts from which it is derived.” *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271, 639 P2d 90 (1981). Where substantial evidence in the record supports the city’s adopted findings concerning compliance with the statewide land use planning goals and the LCDC’s administrative rules, LCDC nevertheless must determine whether the findings lead to a correct conclusion under the statewide land use

planning goals and rules. *Oregonians in Action v. LCDC*, 121 Or App 497, 504, 854 P2d 1010 (1993).

ARGUMENT

A. Introduction

1. The Applicable Statutes, Statewide Planning Goals, and Rules

Periodic review is the process by which local comprehensive plan and land use regulations are reviewed for compliance with statewide land use planning goals and “to ensure that the [local] plans and regulations make adequate provision for economic development, needed housing, transportation, public facilities and services and urbanization.” ORS 197.628. As a city with a population of more than 10,000 outside of a metropolitan organization, McMinnville must conduct its periodic review every 10 years. ORS 197.629(1)(b). In addition, when a city with a population of 2,500 or more adds more than 50 acres to its UGB, it must submit that decision to LCDC for review “in the manner provided for periodic review under ORS 197.628 to 197.650.” ORS 197.626. McMinnville added almost 1,200 acres to its UGB, most of which is for residential use. (Rec 338).

The periodic review process involves two phases. Under phase one, the city evaluates its existing plans and regulations, and if necessary, develops “a work program to make needed changes to the comprehensive plan and land use regulations.” ORS 197.633(1). For phase two, the city submits its completed work program, which is usually divided into “work tasks,” to the director of the Department of Land Conservation and Development (“DLCD”). ORS 197.633(1) and (4)(b). The director of DLCD may approve or remand the completed work

program, or refer the work tasks to LCDC for a decision. ORS 197.633(4)(b).

The director's decision may also be appealed to LCDC. *Id.*

Here, the city began its periodic review process in 1993. Rec. 391. The city analyzed its residential and employment needs to the year 2023 and concluded through its McMinnville Urban Growth Management Plan (MGMUP) and Economic Opportunities Analysis (EOA) that it needed an additional 890 acres of buildable land² to meet those future needs. The city adopted its MGMUP and EOA in two ordinances and submitted those ordinances to DLCD as Task 1 along with an amendment to its UGB on October 14, 2003. (Ordinance 4795, Rec 1609-1611; Ordinance 4796, Rec 911-918). LCDC held hearings and issued an order partially approving and partially remanding the city's submittal on December 6, 2004. (ER 2). In response to the remand, the city performed additional analysis

² "Buildable land" means:

[R]esidentially 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. Publicly owned land is generally not considered available for residential uses. Land is generally considered "suitable and available" unless it:

(a) Is severely constrained by natural hazards as determined under Statewide Planning Goal 7;

(b) Is subject to natural resource protection measures determined under statewide Planning Goals 5, 15, 16, 17, or 18;

(c) Has slopes of 25 percent or greater;

(d) Is within the 100-year flood plain; or

(e) Cannot be provided with public facilities.

OAR 660-008-0005(2).

and held more public hearings. (Rec 6, 313-366) It adopted Ordinances 4840 and 4841, which addressed the issues on remand, and submitted those ordinances to DLCD in January 2006. (ER 2). The director approved the city's Task 1 and UGB amendment on May 31, 2006. (ER 2). Shortly thereafter, petitioners appealed that decision to LCDC. (ER 2). LCDC held a public hearing, and on November 8, 2006, approved the city's Task 1 and UGB amendment submittal by order (04-WKTASK-001645). (ER 3). Petitioners appealed LCDC's decision to this court. LCDC withdrew its order on November 20, 2007, finding that issues raised in petitioners' brief merited reconsideration. LCDC then issued an order on reconsideration, 08-WKTASK-001760, approving the city's submittal. That order is the subject of this appeal.

LCDC amended Goal 14 on April 28, 2005. However, by the terms of the amendment, the new Goal 14 text does not apply to a decision to amend an urban growth boundary that was initiated before the effective date of the amendment to Goal 14 unless the local government elects to apply the new Goal. In this case, the city did not elect to apply the new goal or the corresponding LCDC rules implementing Goal 14 at OAR 660-024. As a result, this city's decision is subject to Goal 14 as it existed before the 2005 amendments, and is not subject to OAR 660-024, which implements the new goal.

2. Factual Background

McMinnville is a fast-growing rural community in Yamhill County, roughly 35 miles from Portland and 25 miles from Salem. (Rec 1647). Its population was approximately 28,500 residents in 2003 - the 15th most populated

city in Oregon. The city of McMinnville estimates that its population will continue to grow, adding about 15,000 people by 2023. (Rec 923).

The city plans to manage its growth within the natural and manmade edges that physically define McMinnville, such as the rivers and creeks to the north, east, and southeast; Highway 18 to the southwest; and the hills to the west. (MGMUP, Rec 924, 969). The city determined that if it continued to adhere to its past land use practices, the city would require more than 1,000 acres of buildable land to accommodate its future needs. In an attempt to minimize that expansion by approximately 225 acres, the city aims to encourage compact, transit- and pedestrian-friendly development, rather than decentralized and inefficient commercial strip development. (Rec 923, 940, 969).

The city plans to accomplish that in large part through a system of "Neighborhood Activity Centers" (NACs). (Rec 924). NACs are to be compact, pedestrian-friendly neighborhoods, reminiscent of traditional, pre-World War II neighborhoods. (Rec 987-88). The city's MGMUP describes NACs as follows:

Under this concept, neighborhoods are each centered or organized around an activity center that would provide a range of land uses within walking distance of neighborhoods—preferably within a one-quarter mile area—including neighborhood-scaled [commercial and civic uses]. Surrounding the activity center (or **focus area**) are **support areas**, which include the highest-density housing within the neighborhood, with housing densities progressively decreasing outward.

These activity centers would be selected due to their location, distribution, proximity to vacant buildable lands, ability to accommodate higher intensity and density development, and their context and ability to foster the development of a traditional, or complete, neighborhood. The selected Neighborhood Activity Centers should be equally spaced around the edge of the

McMinnville urban area, with the downtown area serving as the geographic center or hub.

(Rec 957-58) (emphases in original). Thus, to work, NACs must be suitable for medium- and high-density residential uses clustered around centralized commercial areas. NACs also must be separated from each other and from the downtown area. Accordingly, when the city looked for potential expansion areas outside of its existing UGB, it sought to identify those areas that were suitable for future NACs, the cornerstone of the city's growth management plan.³ (Rec 993).

B. LCDC correctly interpreted applicable statutes, statewide land use planning goals, and LCDC rules in approving McMinnville's UGB expansion.

Petitioners argue that in approving the city's inclusion of areas zoned Exclusive Farm Use (EFU) over certain exception areas and EFU-zoned areas with poorer soils, LCDC erroneously interpreted applicable law. Petitioners assert that the regulatory scheme governing UGB amendments required the city to apply the priorities in ORS 197.298 and the Goal 14 locational factors to all lands. Petitioners are mistaken. As explained below, in amending a UGB, ORS 197.298 and the Goal 14 (2000) locational factors do not apply to all lands, but rather only to those lands that are suitable for the housing types and densities that the city has determined are needed—in this case, NACs.

ORS 197.298 provides:

³ The city ultimately identified four NACs: Grandhaven, Three Mile Lane, Southwest, and Northwest. (Rec 988).

In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities:

(a) First priority is land that is designated urban reserve land under ORS 195.145, rule or metropolitan service district action plan.^[4]

(b) If land under paragraph (a) of this subsection is inadequate to accommodate the amount of land needed, second priority is land adjacent to an urban growth boundary that is identified in an acknowledged comprehensive plan as an exception area^[5] or nonresource land. Second priority may include resource land that is completely surrounded by exception areas unless such resource land is high-value farmland as described in ORS 215.710.

(c) If land under paragraphs (a) and (b) of this subsection is inadequate to accommodate the amount of land needed, third priority is land designated as marginal land pursuant to ORS 197.247 (1991 Edition).^[6]

(d) If land under paragraphs (a) to (c) of this subsection is inadequate to accommodate the amount of land needed, fourth priority is land designated in an acknowledged comprehensive plan for agriculture or forestry, or both.

By its terms, ORS 197.298 applies in addition to other requirements for inclusion of land within urban growth boundaries: "*In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities * * **"⁷

⁴ The City of McMinnville has no urban reserve lands. Rec 1038.

⁵ An "exception area" is land for which an exception to one or more statewide planning goals has been taken. OAR 660-004-0000(2).

⁶ McMinnville has no marginal lands. Rec 1038.

⁷ Because the Statewide Land Use Planning Goals are established by LCDC by rulemaking, they are among the rules that must be considered in addition to ORS 197.298, ORS 197.225, ORS 197.230, ORS 197.235. The city's

Footnote continued...

ORS 197.298(1) (emphasis added); *see also, Residents of Rosemont v. Metro*, 173 Or App 321, 332-33, 21 P3d 1108 (2001) (ORS 197.298 applies *in addition to and does not supersede* Goal 14) (emphasis added); *City of West Linn v. LCDC*, 201 Or App 419, 439, 119 P3d 285 (2005) (same).

Thus, as this court has held, ORS 197.298 must be harmonized with other regulatory requirements addressing urbanization, which include Goal 14 (2000), Goal 2 and its implementing rules, and ORS 197.732.⁸ Those goals and rules were all in place at the time that ORS 197.298 was enacted, and the legislature was therefore presumptively aware of their requirements. Accordingly, those goals and rules are part of the context of the statute. *Beaver State Sand and Gravel v. Douglas County*, 187 Or App 241, 250, 65 P3d 1123 (2003) (LCDC's rules serve as context for later legislative enactments). The analysis proposed by petitioners would have this court perform the prioritization analysis in a manner that supersedes other goals, rules, and statutes, contrary to the express direction of ORS 197.298.

Before land is prioritized under ORS 197.298, a determination must be made whether any additional land is needed. This is so because ORS 197.298 refers to the amount of land *needed*; if land in one category is inadequate to meet that need, priority then goes to the next category. ORS 197.298(1)(a), (b), (c), and

(...continued)

comprehensive plan amendments and implementing ordinances, required for expansion of the UGB, must comply with the goals. ORS 197.250.

⁸ ORS 174.010 requires that where multiple statutory provisions govern a particular subject, effect must if possible be given to all.

(d); *see also*, *City of West Linn*, 201 Or App at 440 (“statutory reference to ‘inadequate’ land addresses suitability, not just quantity, of higher priority land.”). The type of need and the amount of land needed is determined under other statutes and rules.

Goal 14,⁹ the urbanization goal, is the goal that provides for the identification of land need:

To provide for an orderly and efficient transition from rural to urban land use.

Urban growth boundaries shall be established to identify and separate urbanizable land from rural land. Establishment and *change of the boundaries shall be based upon considerations of the following factors:*

- (1) *Demonstrated need to accommodate long-range urban population growth requirements* consistent with LCDC goals;
- (2) *Need for housing, employment opportunities, and livability;*
- (3) Orderly and economic provision for public facilities and services;
- (4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
- (5) Environmental, energy, economic and social consequences;

⁹ As noted above, because the city initiated its periodic review and UGB expansion under *former* Goal 14, that version of the goal applies here rather than the current Goal 14 (which was amended in 2005). (ER 5). Likewise, OAR 660, division 24, which clarifies the procedures and requirements for UGB adoption and amendments in the current Goal 14, does not apply. OAR 660-024-0000(1) and (2).

(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,

(7) Compatibility of the proposed urban uses with nearby agricultural activities.

The results of the above considerations shall be included in the comprehensive plan. In the case of a change of a boundary, a governing body proposing such change in the boundary separating urbanizable lands from rural land, shall follow the procedures and requirements as set forth in the Land Use Planning goal (Goal 2) for goal exceptions.^[10]

(Emphasis added). The first two factors contained in Goal 14 are “need factors.”

These factors principally concern the amount of land that is needed within a UGB.

Residents of Rosemont v. Metro, 173 Or App 321, 327, 21 P3d 1108 (2001); *Baker v. Marion County*, 120 Or App 50, 53, 852 P2d 254, rev den 317 Or 485 (1993).

The need factors are interdependent, and must be considered together. *Baker*, 120 Or App at 54.

The “needs” referred to in Goal 14, Factors 1 and 2 include the need to accommodate forecasted population growth, and need for housing, employment opportunities, and livability. However, even if a necessity for land to accommodate one or more of these needs is demonstrated, enlargement of the UGB is not necessarily allowed. The final phrase of Goal 14 quoted above requires that Goal 2 also be applied to determine whether there are alternatives to expansion of the UGB. Goal 2 and ORS 197.732 require that the city first consider whether the identified need can be accommodated within the existing

¹⁰ The Goal 2 requirements have been codified at ORS 197.732.

UGB. In this case, for example, the city was able to trim the amount of land to be added by increasing density and infill of lands within the existing UGB. Rec 955-57. As this court has held, an urban growth boundary can generally be expanded only to include land that is actually needed. *City of Salem v. Families for Responsible Government*, 64 Or App 238, 243, 668 P2d 395 (1983), *rev'd on other grounds* 298 Or 574 (1985).

Once a need has been established, and it has been determined that some or all of the identified need cannot reasonably be accommodated within the UGB, the city must determine what adjacent lands *can* accommodate the stated need. Once again, the need is not simply for land; it is a need for particular forms of needed housing and for particular sites for employment opportunities. ORS 197.296(6)-(9); 197.307(3); 197.712(2)(c). In this case, the city has chosen to meet those needs through neighborhood activity centers, and has shown that this form of needed housing and employment requires utilizing some resource lands outside of the city's existing UGB. That step is allowed by ORS 197.732(1)(c)(B), which permits a local government to adopt a "reasons" exception if, among other things, "[a]reas which do not require a new exception cannot reasonably accommodate the use." *See also*, Goal 2, Part II(c) and OAR 660-004-0020(2)(a) and (b).¹¹ The

¹¹ OAR 660-004-0020(2) provides, in pertinent part:

The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:

(a) "Reasons justify why the state policy embodied in the applicable goals should not apply": The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to

Footnote continued...

factors that justify an exception must be satisfied before resource land can be considered for inclusion within the UGB, even where that resource land is effectively the only land that can accommodate the identified need.¹²

(...continued)

specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;

(b) "Areas which do not require a new exception cannot reasonably accommodate the use":

(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;

(B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. Under the alternative factor the following questions shall be addressed:

(i) Can the proposed use be reasonably accommodated on nonresource land that would not require an exception, including increasing the density of uses on nonresource land? If not, why not?

(ii) Can the proposed use be reasonably accommodated on resource land that is already irrevocably committed to nonresource uses, not allowed by the applicable Goal, including resource land in existing rural centers, or by increasing the density of uses on committed lands? If not, why not?

(iii) Can the proposed use be reasonably accommodated inside an urban growth boundary? If not, why not?

¹² Petitioners argue throughout their brief that the "cannot reasonably accommodate" language in LCDC's order comes from ORS 197.298(3). Petitioners further urge this court to remand LCDC's order because the order does not specifically cite the legal basis for its decision in each of its findings. (Pet Br 26, 31). This court should reject petitioners' invitation, because LCDC explained in its order, which petitioners cite in their brief (Pet Br 44-45), "*pursuant to Goal 2, the city did not need to consider lands under ORS 197.298 that could not reasonably accommodate its identified land need.*" (ER 28-29) (emphases added). The arguments in this brief provide further support for LCDC's decision.

Once the city has identified lands that are suitable for or could reasonably accommodate the stated need, ORS 197.298 comes into play to determine which of the suitable lands are actually included within the UGB. At this stage, as explained above, priority is given to urban reserve land, ORS 197.298(1)(a); to exception areas or nonresource lands, ORS 197.298(1)(b); to marginal lands, ORS 197.298(1)(c), and lastly to land zoned for farm or forest use, ORS 197.298(1)(d).

Under petitioners' argument, the city would be required to expand its UGB to include lands that are not suitable for or that cannot reasonably accommodate an identified need that justifies a UGB expansion. For example, under petitioners' reading of the statutes, if the city's stated need was for low-income multi-family rental housing with good access to public transit and employment, and the existing UGB were bordered by exception land that was miles from any transit or employment opportunities, the city would nonetheless have to include that unsuitable land within its UGB. When read in the context of other applicable statutes and rules, ORS 197.298 does not require such a result. The statute merely requires that, once a need has been established, the priority system must be applied to those lands that could reasonably accommodate that need. In this way, resource lands are not used unless there are no higher priority lands that can satisfy the stated need.

In *City of West Linn*, this court agreed with LCDC's construction of the regulatory scheme governing UGB amendments. 201 Or App at 440. In doing so, this court specifically noted that LCDC's construction "permits inclusion of lower

priority land as long as it is demonstrated that ‘available higher priority land cannot reasonably accommodate the use proposed for urbanization.’” *Id.* (emphasis added). This court relied on ORS 197.298(1), which provides that lower-priority land may be included in a UGB if higher priority land “is inadequate to accommodate the amount of land needed,” rather than Goal 2 and its implementing rules and ORS 197.732. *Id.* This court held that “the fact that other, higher priority land may exist *somewhere* adjacent to the UGB does not necessarily mean that that land will be “[]adequate to accommodate the amount of land needed,” because whether land is “inadequate” to serve a need depends not just on quantity but on the suitability of the land. *Id.* Although this court did not mention Goal 2 and its implementing rules or ORS 197.732 in its review of the city’s UGB expansion in *City of West Linn*, this court’s interpretation of “inadequate” as including suitability, incorporates the same reasons-exception concepts in that statute, goal, and rules. As a result, the *City of West Linn* court essentially determined, consistent with Goal 2 and its implementing rules and ORS 197.732, that a city is not required to apply ORS 197.298 to lands that cannot reasonably accommodate the proposed use.

In the final step of the UGB amendment analysis, after ORS 197.298 has been applied to determine priority, the locational factors of Goal 14 (Factors 3 through 7 above) come into play. For example, if there is more non-resource land in a category than is needed for inclusion within the UGB, the city must consider efficiency (Factor 4), economical provision of public services (Factor 3), and other listed locational factors, and based on those factors, determine which of those

same-priority lands should in fact be included. Thus, the city must analyze each locational factor for all lands within the same priority category that can reasonably accommodate the identified need. But no single factor is determinative; the city must consider and balance all factors. *1000 Friends of Oregon v. Metro (Ryland Homes)*, 174 Or App 406,409-410, 26 P3d 151 (2001); *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 25, 994 P2d 1205 (2000).

In this case, the city identified a need for a particular form of housing and employment development. Specifically, the city has chosen to focus much of its future housing and employment needs in new Neighborhood Activity Centers (“NACs”). As explained above, the city identified lands that could accommodate NACs based on “location, distribution, proximity to vacant buildable lands, ability to accommodate higher intensity and density development, and their context and ability to foster the development of a traditional, or complete, neighborhood.” (Rec 957-58, 988). Moreover, the city determined that NACs must be equally spaced around the edge of the McMinnville urban area and away from downtown to create defined neighborhoods and prevent commercial-strip development. (Rec 993). Thus, once the city identified its need for NACs, it properly applied ORS 197.298 to those lands with the characteristics necessary to accommodate that need. The city need not consider lands that lack characteristics to reasonably accommodate NACs under the prioritization scheme of ORS 197.298 or the locational factors of Goal 14.

LCDC’s construction of the applicable statutes and rules gives meaning to ~~all consistent with ORS 174.010 and is the construction that this court should~~

adopt. As explained above, in specifically referencing LCDC's rules in ORS 197.298, and further by requiring that those rules be applied "in addition to" ORS 197.298, the legislature evidenced a clear intent that ORS 197.298 should not supersede Goal 2, Goal 14, their respective implementing regulations, and ORS 197.732. The legislature never intended that the priority scheme in ORS 197.298 trump all other considerations relevant to the expansion of an urban growth boundary.

Petitioners are correct in asserting that the protection of productive resource land is one of the basic principles underlying Oregon land use law. However, that principle is not the only principle. The statewide land use planning goals reflect different and often competing values, and none is entitled to absolute preeminence over the other goals. ORS 197.340(1).¹³ Goals 3 and 4 promote the conservation of resource land, while Goal 14 promotes orderly and efficient transitions from rural to urban use, recognizing that such transitions will occur. Goal 9 promotes the development of economic opportunities throughout the state. Goal 10 promotes the provision of adequate housing for all citizens. All of these values are also reflected in statute. The legislature provided that ORS 197.298 be applied in addition to these values, and not despite them.

¹³ "The Land Conservation and Development Commission, the Department of Land Conservation and Development, other state agencies and local governments shall give the goals equal weight in any matter in which the goals are required to be applied."

CONCLUSION

For all of the foregoing reasons, this court should affirm LCDC's construction of the statutes, statewide land use planning goals, and rules governing UGB amendments. For the additional reasons stated in the city's brief, this court should affirm LCDC's order.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 26, 2010, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on January 26, 2010 I directed the Respondent's Answering Brief to be served upon Mary Kyle McCurdy and Robert E. Stacy, Jr., attorneys for petitioners, and Jeffrey G. Condit, attorney for respondent City of McMinnville, by mailing two copies, with postage prepaid, in an envelope addressed to:

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