



*Growing McMinnville*  
**MINDFULLY**

**McMinnville Growth Management and  
Urbanization Plan, 2003 – 2023**

City of McMinnville  
Remand Order 12-WKTASK-001814

**LEGAL DOCUMENTS**

December, 2020

**Attachment 5**

- Court of Appeals Decision
- Court of Appeals Record (link)
- LCDC Remand Order
- Chegwyn Conservation Easement

**FILED: July 13, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, FRIENDS OF YAMHILL COUNTY  
and ILSA PERSE,  
Petitioners,

v.

LAND CONSERVATION AND DEVELOPMENT COMMISSION  
and CITY OF MCMINNVILLE,  
Respondents.

Land Conservation and Development Commission  
06WKTASK001709, 08WKTASK001760

A134379

Argued and submitted on September 28, 2010.

Mary Kyle McCurdy argued the cause and filed the briefs for petitioners.

Steven Shipsey, Assistant Attorney General, argued the cause for respondent Land Conservation and Development Commission. On the brief were John R. Kroger, Attorney General, Jerome Lidz, Solicitor General, and Denise G. Fjordbeck, Attorney-in-Charge Civil/Administrative Appeals.

Jeffrey G. Condit argued the cause for respondent City of McMinnville. With him on the brief was Miller Nash LLP.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Landau, Judge pro tempore.

SERCOMBE, J.

Reversed and remanded.



1 begin by describing the legal framework for regulation of the future uses of land around  
2 an incorporated city and the periodic review planning process used to adopt those  
3 regulations. ORS 197.175(1) requires cities and counties to exercise their planning and  
4 zoning responsibilities in accordance with state land use statutes and special rules (goals)  
5 approved by LCDC. ORS 197.175(2) specifically directs that each city and county  
6 "adopt, amend and revise comprehensive plans in compliance with goals approved by  
7 [LCDC]." The LCDC goals, in turn, set out substantive standards for the content of  
8 comprehensive plans. However, a city or county can take an "exception" to the  
9 application of a goal to particular property regulated by the comprehensive plan.

10 We recently described the relationship of the goals and the exception  
11 process in [Waste Not of Yamhill County v. Yamhill County](#), 240 Or App 285, 287-89, 246  
12 P3d 493 (2010), [adh'd to as modified on recons](#), 241 Or App 199, \_\_\_ P3d \_\_\_ (2011):

13 "Some of those goals require plans to restrict the use or development of  
14 different types of resource lands, *e.g.*, Goal 3 (Agricultural Lands), OAR  
15 660-015-0000(3), and Goal 4 (Forest Lands), OAR 660-015-0000(4).  
16 When a city or county wishes to adopt a property-specific plan provision  
17 that is inconsistent with a goal requirement, it approves an exception to that  
18 goal requirement as part of the comprehensive plan. \* \* \*

19 "ORS 197.732(2) [and Goal 2, Part II] \* \* \* describe[ ] three types  
20 of exceptions: for physically developed land that is not available for the  
21 goal use; for land that is 'irrevocably committed' to a nongoal use; and for  
22 land needed for a use not allowed by a goal policy. The latter type of  
23 exception, a 'reasons' or 'need' exception is allowed by ORS 197.732(2)(c)  
24 [and Goal 2]:

25 "'A local government may adopt an exception to a goal if:

26 ""\* \* \* \* \*

27 ""(c) The following standards are met:

1           "(A) Reasons justify why the state policy embodied in the  
2 applicable goals should not apply;

3           "(B) Areas that do not require a new exception cannot reasonably  
4 accommodate the use;

5           "(C) The long term environmental, economic, social and energy  
6 consequences resulting from the use at the proposed site with measures  
7 designed to reduce adverse impacts are not significantly more adverse than  
8 would typically result from the same proposal being located in areas  
9 requiring a goal exception other than the proposed site; and

10           "(D) The proposed uses are compatible with other adjacent uses or  
11 will be so rendered through measures designed to reduce adverse impacts."

12 Thus, when a city amends its comprehensive plan, including any amendment to its UGB,  
13 the city must justify the change as being consistent with the LCDC goals, except to the  
14 extent that compliance with a goal is excused by an exception to its application.

15           Goal 14 (Urbanization), OAR 660-015-0000(14), provides particular  
16 standards for setting or changing a UGB:<sup>1</sup>

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

20           "(1) Demonstrated need to accommodate long-range urban  
21 population growth requirements consistent with LCDC goals;

22           "(2) Need for housing, employment opportunities, and livability;

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<sup>1</sup> The provisions of Goal 14 were amended by LCDC on April 28, 2005. The amendments allow local governments "that initiated an evaluation of the [UGB] land supply prior to April 28, 2005, and consider[ed] an amendment of the UGB based on that evaluation" to apply the former version of Goal 14 to that amendment. The city applied the former version of Goal 14. All references to Goal 14 and its implementing regulations in this opinion pertain to the former Goal 14 and the regulations in effect prior to the goal amendments, unless otherwise noted.

1                   "(3) Orderly and economic provision for public facilities and  
2 services;

3                   "(4) Maximum efficiency of land uses within and on the fringe of  
4 the existing urban area;

5                   "(5) Environmental, energy, economic and social consequences;

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

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

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

15 The referenced Goal 2 standards for exceptions are to the exception standards noted  
16 above. \_\_\_ Or App at \_\_\_ (slip op at 2-3).

17                   ORS 197.298 supplements the Goal 14 criteria used to justify a UGB  
18 change. The statute requires that land be added to a UGB in a priority sequence:

19                   "(1) In addition to any requirements established by rule addressing  
20 urbanization, land may not be included within an urban growth boundary  
21 except under the following priorities:

22                   "(a) First priority is land that is designated urban reserve land under  
23 ORS 195.145, rule or metropolitan service district action plan.

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

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

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

8           (2) Higher priority shall be given to land of lower capability as  
9 measured by the capability classification system or by cubic foot site class,  
10 whichever is appropriate for the current use.

11           (3) Land of lower priority under subsection (1) of this section may  
12 be included in an urban growth boundary if land of higher priority is found  
13 to be inadequate to accommodate the amount of land estimated in  
14 subsection (1) of this section for one or more of the following reasons:

15           (a) Specific types of identified land needs cannot be reasonably  
16 accommodated on higher priority lands;

17           (b) Future urban services could not reasonably be provided to the  
18 higher priority lands due to topographical or other physical constraints; or

19           (c) Maximum efficiency of land uses within a proposed urban  
20 growth boundary requires inclusion of lower priority lands in order to  
21 include or to provide services to higher priority lands."

22           Thus, ORS 197.298(1) requires that the statutory priorities be applied to  
23 UGB amendments "[i]n addition to any requirements established by rule addressing  
24 urbanization," *i.e.*, Goal 14 and its implementing administrative rules. The priority  
25 statute directs the application of different, but somewhat analogous, factors in approving  
26 UGB changes than those mandated by Goal 14. This case raises questions about the fit  
27 between Goal 14 and ORS 197.298: whether Goal 14 is applied to the classification of  
28 lands as eligible for prioritization under ORS 197.298, how Goal 14 works in  
29 determining whether higher-priority land is "inadequate to accommodate the amount of



1 land needed," and the ways the two policies are otherwise integrated in their application.

2 One final legal setting is worthy of discussion at this point. The plan  
3 amendments in this case arose in the context of "periodic review" of the city's  
4 comprehensive plan. The statutes that define the periodic review process provide context  
5 to an understanding of the demands of Goal 14 and ORS 197.298 when a UGB is  
6 changed as part of a plan update.

7 Once a local comprehensive plan has been approved or "acknowledged" by  
8 LCDC as consistent with the statewide planning goals, ORS 197.628(1) requires that the  
9 plan and implementing land use regulations be periodically updated

10 "to respond to changes in local, regional and state conditions to ensure that  
11 the plans and regulations remain in compliance with the statewide planning  
12 goals adopted pursuant to ORS 197.230, and to ensure that the plans and  
13 regulations make adequate provision for economic development, needed  
14 housing, transportation, public facilities and services and urbanization."

15 ORS 197.296 specifies particular work tasks for larger cities during  
16 periodic review to accommodate demand for new housing. A locality must "demonstrate  
17 that its comprehensive plan \* \* \* provides sufficient buildable lands within the urban  
18 growth boundary \* \* \* to accommodate estimated housing needs for 20 years." ORS  
19 197.296(2). To do this, ORS 197.296(3) requires that a local government shall

20 "(a) Inventory the supply of buildable lands within the urban growth  
21 boundary and determine the housing capacity of the buildable lands; and

22 "(b) Conduct an analysis of housing need by type and density range,  
23 in accordance with ORS 197.303 and statewide planning goals and rules  
24 relating to housing, to determine the number of units and amount of land  
25 needed for each needed housing type for the next 20 years."



1 downtown area and along major roads, infill and redevelopment of underutilized land,  
2 and creation of "neighborhood activity centers" (NACs), in order to intensify land uses in  
3 the UGB expansion areas.

4 The plan described NACs as follows:

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

12 "These activity centers would be selected due to their location, distribution,  
13 proximity to vacant buildable lands, ability to accommodate higher  
14 intensity and density development, and their context and ability to foster the  
15 development of a traditional, or complete, neighborhood. The selected  
16 Neighborhood Activity Centers should be equally spaced around the edge  
17 of the McMinnville urban area, with the downtown area serving as the  
18 geographic center or hub."

19 (Boldface in original.) After further specifying those technical parameters for an NAC,  
20 which require a high degree of comprehensive master planning and a defined amount of  
21 land, the plan concludes that

22 "Neighborhood Activity Centers should not be located in areas that are  
23 heavily parcelized, or characterized by numerous individual ownerships.  
24 Priority should be given to locations that consist primarily of large vacant  
25 parcels in order to maximize the ability to realize such development in a  
26 cost effective, comprehensively planned manner."

27 The city determined that the NAC form of development would facilitate the construction  
28 of new medium-density to high-density housing, as compared with the low-density  
29 residential development pattern of the past, and decrease the quantity of land that needed  
30 to be added to the UGB by approximately 225 acres.

1           With those assumptions, the city determined that it needed to expand the  
2 UGB by 1,188 gross acres, including 890 buildable acres. The city concluded that this  
3 was necessary to accommodate a need for 537 acres for residential use (341 acres for  
4 low-density residential development and 106 acres for medium-density and high-density  
5 residential use), 193 acres for office and commercial uses, and 314 acres for parks in  
6 order to serve an estimated population of 44,055 by 2023.<sup>2</sup> The plan and its findings  
7 quantified needs for additional land supply, both inside and outside of the existing urban  
8 growth boundary, by land use type (*e.g.*, single-family detached housing, manufactured  
9 dwellings, row/townhouses, and apartments) and zoning designation.

10           The adopted UGB changes designated four parts of the added land for  
11 neighborhood activity centers (Three Mile Lane, Southwest, Northwest, and Grandhaven  
12 NACs). For the most part, those boundary changes captured prime agricultural land.  
13 Another area of agricultural land was added, a good part of which had already been  
14 developed as a city park (Norton Lane). The city also proposed to add four exception  
15 areas to the boundary to meet residential needs (Fox Ridge Road, Redmond Hill Road,  
16 Riverside South, and Lawson Lane). The city decided, however, not to add five  
17 exception areas (Westside Road, Bunn's Village, Old Sheridan Road, Riverside North,  
18 and Booth Bend Road) for various reasons.

19           The findings adopted to justify those actions evaluated a number of  
20 considerations in applying ORS 197.298(1) to nine alternative exception areas, including

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<sup>2</sup> The remaining acres were needed for institutional and governmental uses.

1 potential for annexation, costs of water service, transportation circulation issues,  
2 consistency with a compact urban form (distance from commercial services and schools),  
3 compatibility with adjacent land uses, and environmental concerns. The findings  
4 analyzed whether the exception areas would be suitable for an NAC. Both the plan and  
5 the adopted findings concluded that the five excluded exception areas would be  
6 insufficient to meet that need:

7 "These sub-areas are, in summary, extensively parcelized; held in multiple  
8 ownerships; require costly extension or upgrades to existing public utilities  
9 to support urban density development; are located some distance from  
10 existing public utilities, schools, and other services; in some cases, located  
11 adjacent to heavy industrial development and rail; and have extensive  
12 amounts of rural residential development in locations and patterns that  
13 make higher density development impracticable or [un]timely."

14 The findings further explained, "Absent supporting urban residential development, it is  
15 not appropriate that these sub-areas be considered for other identified residential land  
16 needs, such as schools, parks, and churches, or for commercial land needs." The plan  
17 assumed that future low-density residential land need could be satisfied by land within  
18 the existing UGB. The findings then evaluated the included exception areas and five  
19 parcels of high-quality agricultural land (Norton Lane, Three Mile Lane, Northwest,  
20 Grandhaven, and Southwest properties) for consistency with the Goal 14 locational  
21 factors.<sup>3</sup>

22 The city presented the MGMUP amendments and supporting

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<sup>3</sup> Another agricultural area, West Hills South, was analyzed but not proposed to be added to the UGB at that time.

1 documentation to the Department of Land Conservation and Development (DLCD or  
2 department) for approval as a completed work task.<sup>4</sup> Petitioners 1000 Friends of Oregon  
3 and Friends of Yamhill County objected to the city's submissions and appealed the  
4 director's decisions on those objections to LCDC. After a hearing, the commission  
5 approved inclusion of three exception areas in the UGB (Riverside South, Fox Ridge  
6 Road, and Redmond Hill), and remanded the proceeding to the city for an evaluation of  
7 adding lower-quality agricultural land, as well as, among other things, consideration of  
8 parkland needs and the exclusion of floodplain areas from the proposed UGB. On  
9 remand, the city adopted ordinances to remove floodplains from three expansion  
10 subareas, adjust slightly the calculations of needed lands, change the boundaries of the  
11 added areas, correct implementing zoning, justify its parklands assumptions, and  
12 otherwise respond to the remanding directives. In particular, the city added some lower-  
13 quality agricultural land (Fox Ridge North and West Hills South), and adopted new  
14 findings to justify its exclusion of other lower-quality agricultural lands.

15           Ultimately, the city determined that it needed to add 663 gross acres to the  
16 UGB for residential land needs to be developed at a higher density (6.3 dwellings/acre)

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<sup>4</sup> Under the periodic review process, when a work task is completed, the actions are submitted to the DLCD director for approval. ORS 197.633(4). The director can approve or remand the work task, or refer the work task to LCDC. *Id.* If the director approves completion of the work task, the action is final unless an interested party files an objection to the approval. If a work task is referred or appealed, LCDC will consider the matter under a process set out by its rules. ORS 197.633(5). *See also* ORS 197.633(2) (required rulemaking for periodic review process); OAR ch 660, div 25 (periodic review rules).

1 than allowed under low-density residential zoning. It proposed to add four NAC areas to  
2 meet 488 acres of that need, two additional parcels of agricultural land to address 175  
3 acres of that need (Norton Lane and West Hills South), and the three previously approved  
4 exception areas to be developed for residences at lower densities (Riverside South, Fox  
5 Ridge Road, and Redmond Hill Road).

6           And so, the city sought DLCD approval of the retooled UGB amendments.  
7 Petitioners filed extensive and particular objections to the submission with the DLCD  
8 director. In general, petitioners asserted that the city zoning map and regulations did not  
9 adequately implement the plan directives, the large size of the proposed UGB expansion  
10 was not justified, and the expansion improperly included prime agricultural land instead  
11 of available exception areas and areas of poorer soils. Petitioners argued that those  
12 actions were inconsistent with ORS 197.298, Goal 14, and the Goal 2 exception criteria.  
13 Petitioners objected to particular city findings that ruled out individual exception areas  
14 and lower-quality agricultural lands, complaining either that the findings lacked factual  
15 support or were insufficient to explain the particular decision under all applicable  
16 decisional standards. The objections were not sustained by the DLCD director, who  
17 approved the UGB changes.

18           Petitioners appealed to LCDC. Petitioners took issue with DLCD's  
19 response to their objections. They complained that the DLCD report did not respond to  
20 their objections and that DLCD otherwise erred in sustaining factual findings and making  
21 legal determinations about the various parcels included and excluded from the proposed

1 UGB change. Among the many specific assertions, petitioners argued that the NAC  
2 designations over-allocated needed amounts of commercial land and parkland, the  
3 boundary expansion excluded over 225 buildable acres of exception lands, and the  
4 relevant legal standard was "whether exception areas can accommodate the use at all, not  
5 whether they can do so as efficiently or beneficially as farmland." Specifically,  
6 petitioners alleged that "the city's identified land needs are not limited to pedestrian- and  
7 transit-oriented development in neighborhood activity centers" and added that,  
8 "[u]nder ORS 197.298, resource land cannot be included in a UGB instead  
9 of exception land if the exception land can reasonably accommodate some  
10 portion of identified needs. It cannot be excluded simply because it cannot  
11 meet one type of identified land need."

12 Petitioners reiterated that the exclusion of parcels with lower-quality agricultural lands  
13 could not be justified because of their inability to accommodate an NAC when "the city  
14 has [a] specific, identified land need for low density housing that exceeds the capacity of  
15 all the exception areas it has included within the UGB."

16 Following a hearing, the commission upheld the department's approval of  
17 the plan amendments. Petitioners sought review in this court. After petitioners filed their  
18 opening brief, LCDC withdrew its original order for reconsideration.

19 The order on reconsideration generally approved the exclusion of the  
20 exception areas because "they could not accommodate the identified land need  
21 (MGMUP, pp. 6-5 to 6-10)"<sup>5</sup> based on physical constraints, location relative to existing

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<sup>5</sup> The referenced part of the MGMUP is a summary of the analysis of alternative sites for a UGB expansion. It describes the city's "identified land needs" as needs for "an



1 and planned facilities, surrounding uses, market demand, and "[e]xisting development  
2 patterns and other factors affecting urbanization." LCDC more particularly justified the  
3 failure to include particular exception areas because the area could not (1) be served with  
4 public facilities under ORS 197.298(3)(b); (2) "reasonably accommodate the need for  
5 pedestrian- and transit-oriented development in a neighborhood activity center"; (3)  
6 "accommodate residential use"; or (4) "reasonably accommodate the need for a compact,  
7 pedestrian-friendly urban area." As to the omitted lower-quality resource land, West  
8 Hills was excluded because it could not "reasonably accommodate the city's identified  
9 need [for 'medium- or high-density housing']" and because of topographic constraints to  
10 the supply of water under ORS 197.298(3)(b). The resource area north of Fox Hills Road  
11 was left out because, "pursuant to Goal 2, the city did not need to consider lands under  
12 ORS 197.298 that could not reasonably accommodate its identified need." The resource  
13 land near the airport was determined to not "accommodate an identified need due to  
14 safety issues." Based on these and other extensive findings, LCDC concluded that "the  
15 city has adequately justified those areas included and excluded from the UGB based on  
16 relevant criteria." The LCDC order is before us on review.

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increased percentage of multi-family, or single-family attached, housing," in general, and neighborhood activity centers, in particular, and for "314 acres of public parkland, 96 acres for public school use, and 106 acres for future commercial development." The summary further notes the "identified residential land needs as they are described in the 'McMinnville Residential Land Needs Analysis' (and the revisions to that document), and the 'Urbanization Element Update.'" The residential land needs analysis describes generic residential land needs.

1 III. CONTENTIONS OF THE PARTIES

2 Petitioners raise three assignments of error. We reject the second and third  
3 assignments of error without further discussion. The remaining assignment of error  
4 raises a number of general concerns about whether the city properly applied Goal 14 and  
5 ORS 197.298 to sort through potentially eligible property for inclusion in the UGB.  
6 Those concerns are that the city initially erred in amending the UGB and LCDC erred in  
7 upholding the UGB decisions because (1) the city did not apply the Goal 14 standards  
8 completely or consistently when it assessed exception areas by, on the one hand, using a  
9 particular factor to rule out some land with a disqualifying characteristic, but, on the other  
10 hand, including land in the boundary with that same quality; and (2) the city ruled out  
11 some land for consideration by defining its land needs too particularly at the front end of  
12 the ORS 197.298 prioritization--*i.e.*, land needed for use as an NAC or for particularized  
13 residential land needs--so that less exception land was available for the city's particular  
14 needs and more agricultural land was included in the boundary than otherwise would  
15 have been included had the city's needs been defined more generically.

16 As to the latter contention, respondents argue that ORS 197.296(3)(b)  
17 requires the city to determine "housing need by type and density range, in accordance  
18 with ORS 197.303 and statewide planning goals and rules relating to housing." To the  
19 extent that need cannot be met by zoning changes inside the UGB, then land can be  
20 added to the UGB under ORS 197.298 to address those particular housing needs.  
21 Respondents claim that that is what the city did.

1 LCDC defends its decision more specifically. The commission contends  
2 that Goal 14, in general, and its incorporated Goal 2 exception factors can be used to  
3 define even more particular land needs at the front end of the ORS 197.298 analysis.  
4 Thus, LCDC asserts that the city defined the NAC land form as the need to be evaluated  
5 under the priorities statute and relied on the desired characteristics of an NAC site as  
6 reasons to rule out higher-priority land in order to resort to lower-priority land under ORS  
7 197.298. Petitioners disagree and counter that, even if an NAC does qualify as a generic  
8 or specific land need under ORS 197.298, the land added through the NACs does not  
9 satisfy all of the city's quantitative needs for additional residential land and a more  
10 rigorous application of ORS 197.298 is required to justify bringing agricultural land into  
11 the boundary for that non-NAC need.

12 Petitioners also dispute the sufficiency of LCDC's findings on their  
13 objections to the city's rationale for not including particular exception areas in the UGB  
14 (Old Sheridan Road, Riverside North, and Booth End Road) or not adding lower-quality  
15 agricultural land (West Hills, north of Fox Ridge Road, north of McMinnville Airport,  
16 and various smaller tracts) before including prime agricultural land. The city and LCDC  
17 respond that the locational factors in Goal 14 were properly applied to categorize those  
18 exception and lower-value agricultural lands as insufficient.

19 Many of the general differences between the parties stem from their  
20 different understandings about how ORS 197.298 works to sort land available for  
21 inclusion within a UGB. In petitioners' view, the priorities statute works to categorize

1 land as available to meet broadly defined land use needs (in this case, for residential land  
2 of any kind). Higher-priority land qualifies to meet that need unless urban services  
3 cannot be provided to the land because of physical constraints. Goal 14 is then applied to  
4 the prioritized and available land to determine the specific urban growth areas.

5           According to respondents, however, ORS 197.298 is applied--especially  
6 during the periodic review process--to determine the adequacy of land for more particular  
7 land use needs (in this case, for higher-density residential uses). Higher-priority land  
8 qualifies to meet that need unless it is determined to be unsuitable under the Goal 14  
9 locational factors and the Goal 2 exceptions criteria. Goal 14 is then applied to  
10 corroborate the inclusion of higher-priority land and to justify any further selection  
11 among land of a lower-priority class.

12           We ultimately conclude that neither party has it quite right. For the reasons  
13 stated below, we agree that ORS 197.298 does provide the first cut in the sorting process  
14 and that Goal 14 is then applied to justify the inclusion or exclusion of the sorted lands  
15 and any remaining choices about what land to include in the boundary. Goal 14 also  
16 plays a role in identifying the types of land that are subjected to the priorities statute.  
17 Goal 14 is used in evaluating the adequacy of available land under ORS 197.298(1), but  
18 in a more particular way than suggested by respondents. We reach those initial  
19 conclusions based on an analysis of the text and context of ORS 197.298.

#### 20           IV. STATUTORY CONSTRUCTION ANALYSIS

21           Our determination of the legislature's intent in enacting ORS 197.298 is

1 guided primarily by the text and context of the statute, in light of any pertinent legislative  
2 history. [State v. Gaines](#), 346 Or 160, 171-72, 206 P3d 1042 (2009). In the analysis of the  
3 text of the statute, we give words of common usage their "plain, natural, and ordinary  
4 meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143  
5 (1993). That textual analysis, of course, is assisted by our prior construction of the  
6 statutory terms. [Waite v. Dempsey](#), 203 Or App 136, 141, 125 P3d 788 (2005). The  
7 context of a statute includes the entire enactment of which it was a part, [State v. Ortiz](#),  
8 202 Or App 695, 699-700, 124 P3d 611 (2005), as well as related statutes on the same  
9 subject, *State v. Carr*, 319 Or 408, 411-12, 877 P2d 1192 (1994).

10 A. *Step One: Determine the land needed under ORS 197.298(1)*

11 The first issue concerns how to categorize land needs that arise from  
12 periodic review for purposes of the application of ORS 197.298 to a large-scale  
13 expansion of a UGB. LCDC and the city argue that ORS 197.298 can be applied to  
14 prioritize areas of potential UGB expansion based upon the functional needs of  
15 particularly intended land uses (*i.e.*, an NAC). Petitioners, by contrast, suggest that the  
16 statute is applied to broad, generic types of land use needs that are identified during  
17 periodic review (*e.g.*, 250 acres for residential uses) and that adequacy determinations  
18 under ORS 197.298(1) are less particular in focus.

19 Again, the descending priorities in ORS 197.298(1) are applied to  
20 determine whether the priority land is "inadequate to accommodate the amount of land  
21 needed." The first step is to determine the "amount of land needed." That determination

1 is necessarily made by the application of Goal 14, which provides that "[e]stablishment  
2 and change of the boundaries shall be based upon considerations of the following factors:

3 (1) Demonstrated need to accommodate long-range urban population growth  
4 requirements consistent with LCDC goals; (2) Need for housing, employment  
5 opportunities, and livability \* \* \*." In [Residents of Rosemont v. Metro](#), 173 Or App 321,  
6 328, 21 P3d 1108 (2001), we explained that

7 "[w]e held in *Baker v. Marion County*, 120 Or App 50, 852 P2d 254, *rev*  
8 *den*, 317 Or 485 (1993),] that factors 1 and 2 of Goal 14 are interdependent  
9 and that, if one of the factors is not fully satisfied, or is less determinative,  
10 that factor must still be considered and discussed in deciding if a need for  
11 expansion of a UGB has been shown under factors 1 and 2 of Goal 14."

12 (Footnote omitted.) In the context of periodic review, Factor 1 pertains to a  
13 determination of overall land need in order to accommodate population growth. Factor 2  
14 requires subcategorization of that need at least to specify separate quantities of land  
15 needed for "housing, employment opportunities, and livability." Because different types  
16 of land use consume different amounts of land (*e.g.*, the dwellings/acre densities for low-,  
17 medium-, and high-density residential development), determining the amount of land  
18 needed to be added to a UGB during periodic review under Factors 1 and 2 necessarily  
19 requires differentiation of land use types according to their land consumption attributes.  
20 The coordinated application of ORS 197.298 with Goal 14 ("[i]n addition to any  
21 requirements established by rule addressing urbanization") implies that ORS 197.298 is  
22 applied during periodic review to the quantified land use needs identified by the  
23 operation of Factors 1 and 2 of Goal 14.

1           That application of ORS 197.298 is more directly required by ORS 197.296  
2 during the periodic review process. That statute prompts a quantification of the amounts  
3 of land needed for specific residential purposes prior to UGB amendments that result  
4 from the periodic review process.<sup>6</sup> As part of that process, ORS 197.296(3) requires an  
5 analysis of "housing need by type and density range \* \* \* to determine the number of  
6 units and amount of land needed for each needed housing type for the next 20 years." If  
7 those needs cannot be met within the existing UGB through rezonings or infill, then the  
8 locality must "[a]mend its urban growth boundary to include sufficient buildable lands to  
9 accommodate housing needs." ORS 197.296(6)(a). The statutory direction to amend the  
10 UGB "to accommodate housing needs" that are classified "by type and density" strongly  
11 implies that the next step--the operation of ORS 197.298--works on those same  
12 inventoried needs. Thus, for purposes of periodic review, ORS 197.298 works on types  
13 of land uses that generate the need for specific quantities of land as a result of the  
14 application of the need factors of Goal 14 and related statutory directives, including ORS  
15 197.296.<sup>7</sup> We reject petitioners' general contention that LCDC erred in applying ORS

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<sup>6</sup> The 1995 Legislative Assembly adopted the initial versions of ORS 197.296 and ORS 197.298 as part of one law. Or Laws 1995, ch 547. In construing the meaning of a statute, we have looked at the context of related statutes in the same chapter in which a provision has been codified, *Morsman v. City of Madras*, 203 Or App 546, 561, 126 P3d 6, *rev den*, 340 Or 483 (2006), and at other provisions of the bill enacting that statute, *Ortiz*, 202 Or App at 699-700.

<sup>7</sup> LCDC did not approve any addition to the McMinnville UGB because "[s]pecific types of identified land needs cannot be accommodated on higher priority lands" under ORS 197.298(3)(a). We need not apply that part of the statute to dispose of the contentions in this review proceeding. ORS 197.298(3)(a) does have contextual

1 197.298(1) to evaluate the city's need for higher-density residential land, as opposed to all  
2 residential needs.<sup>8</sup>

3 B. *Step Two: Determine the adequacy of candidate lands under ORS*  
4 *197.298(1) and (3)*

5  
6 1. *General scheme characteristics--the tension between ORS 197.298*  
7 *and Goal 14*

8  
9 The next step is somewhat more complicated--the application of ORS  
10 197.298(1) and (3), together with Goal 14, to locate and justify the inclusion of land to  
11 fill that quantified need. ORS 197.298(1) provides that its prioritization scheme, which  
12 allows for bringing prime resource land into the UGB as a last resort, is "[i]n addition to

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relevance, however, in contrasting the types of "[s]pecific \* \* \* land needs" under ORS 197.298(3) with the types of land use needs identified at the front end of ORS 197.298 as the statute is applied during the periodic review process. The text of ORS 197.298(3) suggests that its "specific types" pertain to need for land of a particular quality or situation, such as size, site characteristics, service levels, or proximity to other land uses, that occurs only on lower-priority land. For example, ORS 197.712(2)(c) requires comprehensive plans to "provide for at least an adequate supply of sites of suitable sizes, types, locations and service levels for industrial and commercial uses consistent with plan policies." That more discrete land need is in contrast to the more generic land use needs identified during periodic review and used in making adequacy determinations under ORS 197.298(1).

<sup>8</sup> We need not decide the relationship of the current Goal 14 to ORS 197.298. The land need portion of Goal 14 now requires that a UGB change be based on

"(2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2).

"In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need."



1 any requirements established by rule addressing urbanization"--a plain reference to Goal  
2 14 (Urbanization) and its implementing rules. As noted above, Goal 14 sets out seven  
3 factors for changing a UGB: two "need" factors relate to determining the need for  
4 additional land ("[d]emonstrated need to accommodate long-range population growth"  
5 and "[n]eed for housing, employment opportunities, and livability") and five "locational"  
6 factors relate to justifying the selection of land to satisfy those determined needs (either  
7 inside the existing UGB or at specific locations outside the UGB) based on public  
8 facilities and services, efficiency of land uses, consequences of any allowed development,  
9 retention of agricultural land for farm use, and compatibility of development with nearby  
10 agricultural activities.<sup>9</sup>

11 In prior decisions concerning the application of Goal 14 to UGB changes,  
12 we have required that all five locational factors be considered together and balanced in  
13 assessing the alternative locations for a UGB change. In [\*Citizens Against Irresponsible\*](#)  
14 [\*Growth v. Metro\*](#), 179 Or App 12, 17, 38 P3d 956 (2002), we concluded that the  
15 locational factors in Goal 14 "do not stand alone but represent \* \* \* several factors to be  
16 considered and balanced when amending a UGB. \* \* \* No single factor is of such  
17 importance as to be determinative in a [ ] UGB amendment proceeding, nor are the

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<sup>9</sup> The incorporated Goal 2 exception standards also require an analogous assessment of the reasons for a UGB change (comparable to Goal 14, Factors 1 and 2); why areas that do not require an exception to Goal 14 (*i.e.*, areas already inside the UGB) "cannot reasonably accommodate the use"; the long-term environmental, economic, social, and energy consequences of expanding at a particular location, as opposed to other possible locations; and the compatibility of development allowed by the expansion with adjacent uses.

1 individual factors necessarily thresholds that must be met." Similarly, in [1000 Friends of](#)  
2 [Oregon v. Metro](#), 174 Or App 406, 409-10, 26 P3d 151 (2001), we noted that

3 "the locational factors are not independent approval criteria. It is not  
4 necessary that a designated level of satisfaction of the objectives of each of  
5 the factors must always be met before a local government can justify a  
6 change in a UGB. Rather, the local government must show that the factors  
7 were 'considered' and balanced by the local government in determining if a  
8 change in the UGB for a particular area is justified. It is within a local  
9 government's authority to evaluate the Goal 14 factors and exercise its  
10 judgment as to which areas should be made available for growth."

11 In other words, under Goal 14, an expansion of a UGB to include agricultural land could  
12 be justified if considerations of the cost of public facilities, land use efficiency, and  
13 environmental, energy, economic, and social consequences and compatibility with nearby  
14 land were favorable.

15 By contrast, ORS 197.298 appears to operate less flexibly. Under the  
16 priorities statute, prime agricultural land can be included within a UGB *only if* urban  
17 reserve land, nonresource land, exception land, and marginal land are "inadequate to  
18 accommodate the amount of land needed" for identified urban uses.

19 So, which scheme ultimately controls the choice of where to expand a  
20 UGB--the flexible Goal 14 or the more rigid ORS 197.298? Our case law--in a very  
21 imprecise way--suggests that the answer may be either or both.

22 We have previously determined that Goal 14 interacts with ORS 197.298 in  
23 two ways. First, the two operate *independently* to justify a UGB expansion. Compliance  
24 with ORS 197.298 does not absolve the independent and separate requirement to apply  
25 the Goal 14 factors to a proposed UGB change. In *Residents of Rosemont*, two cities

1 challenged Metro's decision to expand the Portland-area UGB in order to address a need  
2 for housing in a particular part of the metropolitan area. An issue on review was whether  
3 a subregional need for housing could qualify under the Goal 14 need factors as a basis for  
4 expanding the UGB without considering that need in the context of the overall regional  
5 need for housing. We held that it could not, at least in the context presented. We also  
6 concluded that compliance with the criteria in ORS 197.298 did not excuse the separate  
7 application of Goal 14 to the UGB amendment:

8 "Those priority concerns [in ORS 197.298] do not purport to be the  
9 exclusive considerations governing the location of UGBs, and ORS  
10 197.298(3) does not purport to excuse compliance with Goal 14's  
11 requirements for the establishment or change of UGBs. ORS 197.298  
12 specifically provides that the priorities for UGB inclusion that it sets forth  
13 are '[i]n addition to any requirements established by rule addressing  
14 urbanization.' Metro contends that it is impossible to implement the  
15 requirements of ORS 197.296 and 197.298 *and* the requirements of Goal  
16 14. Because of that, it asserts that the provisions must be read together.  
17 The problem with that argument, however, is that, because ORS 197.298  
18 specifically provides that its requirements are *in addition* to the  
19 urbanization requirements of Goal 14, which are particularly directed to the  
20 establishment and change of UGBs, it cannot be said that the statute was  
21 intended to supersede Goal 14."

22 173 Or App at 332-33 (emphases in original). *See also 1000 Friends of Oregon*, 174 Or  
23 App at 412-14 (compliance with ORS 197.298 in justifying a UGB change does not  
24 excuse the need to separately apply Goal 14, Factor 6 (retention of agricultural land), to  
25 the proposed change).

26 Subsequently, though, we have held that ORS 197.298 is to be applied in an  
27 *integrated* way with Goal 14. In [City of West Linn v. LCDC](#), 201 Or App 419, 422, 119  
28 P3d 285 (2005), we reviewed an LCDC approval of another amendment to the Portland-

1 area UGB by Metro. In that case, the petitioner argued that the particular UGB  
2 expansion was inconsistent with ORS 197.298 because lower-priority resource land had  
3 been added without determining that there was inadequate land of higher priority  
4 anywhere in the region. We agreed with LCDC that the locational factors of Goal 14  
5 were relevant in determining whether land of a particular priority in ORS 197.298(1) is  
6 "inadequate to accommodate the amount of land needed." We reasoned that

7 "[t]he operative term is 'inadequate.' Whether there is adequate land to  
8 serve a need may depend upon a variety of factors. In particular, the  
9 adequacy of land may be affected by locational characteristics that must be  
10 taken into account under Goal 14. As LCDC correctly noted, ORS  
11 197.298(1) expressly provides that the priorities that it describes apply '[i]n  
12 addition to any requirements established by rule addressing urbanization,'  
13 such as the locational factors described in Goal 14. As a result, the fact that  
14 other, higher priority land may exist *somewhere* adjacent to the UGB does  
15 not necessarily mean that that land will be '[ ]adequate to accommodate the  
16 amount of land needed,' if using it for an identified need would violate the  
17 locational considerations required by Goal 14. In other words, the statutory  
18 reference to 'inadequate' land addresses suitability, not just quantity, of  
19 higher priority land."

20 *City of West Linn*, 201 Or App at 440 (emphasis in original). In [Hildenbrand v. City of](#)  
21 [Adair Village](#), 217 Or App 623, 634, 177 P3d 40 (2008), we summarized the holding in  
22 *City of West Linn* and stated that determining "whether there is 'inadequate' land to serve  
23 a need depends on not only the constraints identified by ORS 197.298(3), but also the  
24 criteria for locating an urban growth boundary expansion under Goal 14."

25 This relationship between the overlapping policies in Goal 14 and ORS  
26 197.298--that the policies are to be applied separately as well as together--creates, at the  
27 very least, some awkwardness in their application. Complete integration of the policies is

1 inconsistent with their independent viability. What might reconcile that tension,  
2 however, is if ORS 197.298 is not completely conflated with Goal 14--only partially  
3 integrated with the goal--in its application, and if Goal 14 is separately and fully applied  
4 to the candidate land identified under ORS 197.298 in order to determine if that land is  
5 suitable for inclusion in the UGB. We examine that possibility next.

6           2.       *Integration of Goal 14 and ORS 197.298*

7           We turn, then, to the adequacy assessment under ORS 197.298(1),  
8 specifically the factors used to determine when priority "land \* \* \* is inadequate to  
9 accommodate the amount of land needed." Petitioners contend that a jurisdiction can use  
10 lower-priority land for its land needs only when higher-priority land is not available to  
11 accommodate the need because of one of the limitations in ORS 197.298(3) (specific type  
12 of identified need, urban services unavailability due to topographical or physical  
13 constraints, needed to provide services to higher-priority land). The Goal 14 locational  
14 factors, according to petitioners, must be applied in the process of selecting among  
15 alternative locations in the same priority class. Respondents disagree and argue that all  
16 of the Goal 14 locational factors are used to determine if priority land is "inadequate to  
17 accommodate the amount of land needed" under ORS 197.298.

18           The parties agree, and we concur, that any necessary UGB amendment  
19 process for purposes of land development begins with the identification of buildable land  
20 that is contiguous to the existing boundary. ORS 197.296(6)(a) makes this step explicit  
21 for housing needs, requiring the locality to "[a]mend its urban growth boundary to

1 include sufficient buildable lands to accommodate housing needs." For this and other  
2 purposes, ORS 197.295(1) defines "buildable lands" as "lands in urban and urbanizable  
3 areas that are suitable, available and necessary for residential uses \* \* \* [including] both  
4 vacant land and developed land likely to be redeveloped." LCDC has further defined  
5 "suitable and available" buildable lands to exclude land that is severely constrained by  
6 natural hazards under Goal 7; subject to natural resource protection measures under Goals  
7 5, 15, 16, 17, or 18; severely sloped; within a floodplain; or to which public facilities  
8 "[c]annot be provided." OAR 660-008-0005(2).

9           The adequacy assessment under ORS 197.298(1), then, applies to land that  
10 could be developed. The candidate land, whether exception land or different types of  
11 agricultural land, must be "buildable." So, evaluating whether candidate land is  
12 "inadequate" under ORS 197.298(1) requires considering qualities other than whether the  
13 land is buildable.

14           *City of West Linn* established that Goal 14 is applied in the prioritization of  
15 land under ORS 197.298(1) to determine if land of a particular priority "is inadequate to  
16 accommodate the amount of land needed." 201 Or App at 440. However, petitioners  
17 read *City of West Linn* too narrowly in confining the Goal 14 analysis in ORS 197.298(1)  
18 to the selection of land within a single priority class of lands, rather than as general  
19 criteria on the inadequacy of land within that priority class to meet the need and allow  
20 resort to lower-priority land.

21           Rather, the question becomes whether all of the Goal 14 locational factors

1 are used to disqualify higher-priority land under ORS 197.298(1), or whether a more  
2 limited sorting occurs that leaves land available for the potential application of ORS  
3 197.298(3). Based on the text of both policies--including a comparison of the more  
4 specific locational criteria in ORS 197.298(3) with their Goal 14 analogues, and the  
5 textual dynamic within ORS 197.298 between subsections (1) and (3)--we conclude that  
6 the legislature likely intended the latter option.

7           In the context of expanding a UGB to include lower-priority land, ORS  
8 197.298(3) states more specific limitations than the analogous factors in Goal 14 do:  
9 Factor 3 of Goal 14 requires consideration of the "[o]rderly and economic provision for  
10 public facilities and services," but ORS 197.298(3)(b) prefers higher-priority land over  
11 resource land unless "[f]uture urban services could not reasonably be provided to the  
12 higher priority lands due to topographical or other physical constraints." Goal 14, Factor  
13 4, directs consideration of the "[m]aximum efficiency of land uses within and on the  
14 fringe of the existing urban area," whereas ORS 197.298(3)(c) inhibits urbanization of  
15 lower-priority land unless "[m]aximum efficiency of land uses within a proposed urban  
16 growth boundary requires inclusion of lower priority lands in order to include or to  
17 provide services to higher priority lands."

18           The particular limitations in ORS 197.298(3)(b) and (c) have no practical  
19 effect if the broader and less restrictive Goal 14 factor counterparts must be used to  
20 determine whether to include lower-priority land under ORS 197.298(1). If land is  
21 "inadequate" under Factor 3 because the relative cost of delivery of public facilities and

1 services to the area is high, then the more specific limitation in ORS 197.298(3)(b)--  
2 permitting an inadequacy conclusion only when public services cannot be extended  
3 because of topographic or physical constraints--has no independent force. Because ORS  
4 197.298(3) relates "only to the inclusion of land that comes within the priority concerns  
5 described in [ORS 197.298(1)]," *Residents of Rosemont*, 173 Or App at 332, it follows  
6 that ORS 197.298(1) must use different kinds of limitations to determine inadequacy than  
7 those set out in ORS 197.298(3). Otherwise, ORS 197.298(3) is redundant or incapable  
8 of application. We are constrained to construe ORS 197.298 in a way that gives effect to  
9 all of its terms. "As a general rule, we assume that the legislature did not intend any  
10 portions of its enactments to be meaningless surplusage." [\*State v. Stamper\*](#), 197 Or App  
11 413, 417, 106 P3d 172, *rev den*, 339 Or 230 (2005); *see also* ORS 174.010 ("In the  
12 construction of a statute, \* \* \* where there are several provisions or particulars such  
13 construction is, if possible, to be adopted as will give effect to all.").

14           It follows, then, that the more specific limitations in ORS 197.298(3)  
15 displace the application of their more generic and flexible Goal 14 counterparts in the  
16 application of ORS 197.298(1). That displacement gives meaning to ORS 197.298(3),  
17 which reads that it--as opposed to other factors--is applied to determine "if land of higher  
18 priority is \* \* \* inadequate to accommodate the amount of land estimated in subsection  
19 (1)." That explicit requirement precludes the application of any analogous, but less  
20 restrictive, suitability criteria under ORS 197.298(1) to make that same determination,  
21 *i.e.*, whether higher-priority land "is inadequate to accommodate the amount of land



1 needed." That limited use of Goal 14 in applying ORS 197.298(1) avoids the complete  
2 conflation of Goal 14 and ORS 197.298 and allows for the sequential application of ORS  
3 197.298(3).

4           Instead, the Goal 14 locational factors that are applied under ORS  
5 197.298(1) and *City of West Linn* are those that are *not* the counterparts to the ORS  
6 197.298(3) factors: Factor 5 ("Environmental, energy, economic and social  
7 consequences") and Factor 7 ("Compatibility of the proposed urban uses with nearby  
8 agricultural activities"). The application of Goal 14, Factors 5 and 7, at this point  
9 parallels the separate considerations for determining the location of a UGB amendment  
10 that are required by the Goal 2 exception criteria that are incorporated into Goal 14; that  
11 parallel reinforces the logic of a limited use of Goal 14 as part of the application of ORS  
12 197.298. Those Goal 2 considerations are:

13           "(3) The long term environmental, economic, social and energy  
14 consequences resulting from the use of the proposed site with measures  
15 designed to reduce adverse impacts are not significantly more adverse than  
16 would typically result from the same proposal being located in areas  
17 requiring a goal exception other than the proposed site; and

18           "(4) The proposed uses are compatible with other adjacent uses or  
19 will be so rendered through measures designed to reduce adverse impacts."

20 OAR 660-015-0000(2), Part II.<sup>10</sup> Thus, those specific Goal 2 exception criteria and their

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<sup>10</sup> The remaining exception criteria are less relevant in determining where a UGB should be expanded. The first criterion goes to the reasons for expanding the UGB and is satisfied through the general application of Goal 14, particularly Factors 1 and 2. OAR 660-004-0010(1)(d)(B)(i) (reasons factor for UGB change under former Goal 14 "satisfied by compliance with the seven factors of Goal 14"). The second criterion requires consideration of "[a]reas which do not require a new exception." In the case of a Goal 14 exception, that area is the land already in the UGB. *See* \_\_\_ Or App at \_\_\_ (slip

1 Goal 14 factor counterparts (Factors 5 and 7) are the relevant Goal 14 considerations in  
2 assessing the adequacy of land in a priority class under ORS 197.298(1).

3           Based upon the text and context of ORS 197.298, we conclude that not all  
4 of the Goal 14 locational criteria are applied under ORS 197.298(1) to determine if  
5 priority land "is inadequate to accommodate the amount of land needed." Instead, only  
6 the consequences and compatibility factors of Goal 2, Part II, and Goal 14 are applied.  
7 Whether the priority land is inadequate due to the unavailability of public facilities and  
8 services or because of land use efficiencies is determined by the separate application of  
9 ORS 197.298(3). Thus, we agree with petitioners' general claim that LCDC improperly  
10 applied ORS 197.298(1) in approving the city's resort to lower-priority land because of  
11 the relatively higher costs of providing a particular public facility or service to the higher-  
12 priority area.

13 C.           *Step Three: Determine which candidate lands should be included under*  
14           *Goal 14*

15           Goal 14 is independently applied, then, *after* land has been prioritized  
16 under ORS 197.298 as adequate to accommodate the identified need. ORS 197.298  
17 operates, in short, to identify land that *could* be added to the UGB to accommodate a  
18 needed type of land use. Thereafter, Goal 14 works to qualify land that, having been  
19 identified already under ORS 197.298, *should* be added to the boundary. This works in  
20 two ways--both to make choices among land in the lowest rung of the priority scheme  
21 and to justify the inclusion of the entire set of lands selected under ORS 197.298. Once

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op at 40).

1 candidate lands have been located under ORS 197.298 (*i.e.*, the higher-priority lands that  
2 have been identified as adequate to satisfy part of a land need and any remaining lower-  
3 priority lands that exist in quantities sufficient to accommodate the remaining need), the  
4 location of the boundary changes is determined by the full and consistent application of  
5 the Goal 14 locational factors, the Goal 2 exception criteria to those candidate lands, and  
6 relevant plan and ordinance criteria.

7           It is at this point in the analysis that cost efficiencies in the provision of  
8 public facilities and services become relevant. Considerations of Goal 14, Factor 3  
9 (provision of public facilities and services) and Factor 4 (efficiency of land uses), at this  
10 point--in combination with the other Goal 14 locational factors--may prompt the  
11 discarding of candidate land identified under ORS 197.298, and the selection of land  
12 otherwise consistent with the Goal 14 factors.

13           That application of all of the provisions in Goal 14 to the resulting UGB  
14 change is required under *Citizens Against Irresponsible Growth* and *1000 Friends of*  
15 *Oregon*. The application of Goal 14 to the land that results from the prioritization of  
16 ORS 197.298 allows the separate and full use of both policies in justifying a UGB change  
17 that is contemplated by the priorities statute ("[i]n addition to any requirements  
18 established by rule addressing urbanization, land may not be included within an urban  
19 growth boundary except under the following priorities") and our holdings in *Residents of*  
20 *Rosemont* and *1000 Friends of Oregon*.

21           With those principles in mind, we turn to petitioners' remaining

1 contentions.

2 V. JUSTIFICATION FOR THE PROPOSED CHANGES

3 A. *Standards of review*

4 We begin with our standards of review. ORS 197.650(1) provides that we  
5 review the LCDC order "in the manner provided in ORS 183.482." That part of the  
6 Administrative Procedures Act sets out the standards of review of a contested case order  
7 and provides:

8 "(a) The court may affirm, reverse or remand the order. If the court  
9 finds that the agency has erroneously interpreted a provision of law and that  
10 a correct interpretation compels a particular action, the court shall:

11 "(A) Set aside or modify the order; or

12 "(B) Remand the case to the agency for further action under a  
13 correct interpretation of the provision of law.

14 "(b) The court shall remand the order to the agency if the court finds  
15 the agency's exercise of discretion to be:

16 "(A) Outside the range of discretion delegated to the agency by law;

17 "(B) Inconsistent with an agency rule, an officially stated agency  
18 position, or a prior agency practice, if the inconsistency is not explained by  
19 the agency; or

20 "(C) Otherwise in violation of a constitutional or statutory  
21 provision.

22 "(c) The court shall set aside or remand the order if the court finds  
23 that the order is not supported by substantial evidence in the record.  
24 Substantial evidence exists to support a finding of fact when the record,  
25 viewed as a whole, would permit a reasonable person to make that finding."

26 ORS 183.482(8).

27 We recently explained that the requirements that an agency correctly

1 interpret the law, explain inconsistencies, and have evidentiary support for the decision  
2 implies that LCDC must "demonstrate in [its] opinion[ ] the *reasoning* that leads the  
3 agency from the *facts* that it has found to the *conclusions* that it draws from those facts."  
4 [\*1000 Friends of Oregon v. LCDC\*](#), 237 Or App 213, 225, 239 P3d 272 (2010)  
5 (*Woodburn*) (quoting *Drew v. PSRB*, 322 Or 491, 500, 909 P2d 1211 (1996)) (emphasis  
6 in *Drew*). See also *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271, 639  
7 P2d 90 (1981) (stating the test as "whether there is a basis in reason connecting the  
8 inference [of compliance with the decisional standard] to the facts from which it is  
9 derived"). In connection with substantial evidence review, we do not review the city's  
10 decision for evidentiary support. Rather, "[o]ur role is to determine whether [LCDC]  
11 applied the correct legal test in deciding whether [the city's] decision is supported by  
12 substantial evidence." *Citizens Against Irresponsible Growth*, 179 Or App at 21.<sup>11</sup>

13           Finally, the focus of our review is on the issues presented on appeal that  
14 have been preserved before LCDC. As we said in *Marion County v. Federation For*

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<sup>11</sup> In *City of West Linn*, we concluded, based on *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384, 404-05, 752 P2d 271 (1988), that an LCDC order approving a legislative UGB change under ORS 197.650 "implicates the substantial evidence standard that is described in [ORS 183.482]." 201 Or App at 428. More precisely, LCDC reviews UGB and periodic review submissions for "compliance with the statewide planning goals." ORS 197.628(1). Goal 2, in turn, requires that land use decisions have an "adequate factual base." LCDC's review of a legislative UGB change for an "adequate factual base" is synonymous with the requirement that a decision be supported by substantial evidence. Substantial evidence review of an LCDC periodic review order may directly occur when the commission requests and obtains new evidence for the periodic review submission and then makes factual findings on that enhanced record. See OAR 660-025-0160(5) (allowing supplement to periodic review record).

1 *Sound Planning*, 64 Or App 226, 237, 668 P2d 406 (1983), "[a] petitioner seeking  
2 judicial review under the terms of [ORS 197.650] must base the arguments on the  
3 objections (or comments) filed with DLCD; those objections will therefore frame the  
4 issues on appeal."<sup>12</sup> This requires objectors before LCDC to make an explicit and  
5 particular specification of error by the local government. ORAP 5.45(1) requires  
6 preservation of error in a lower court in order to consider the error on appeal. We apply  
7 that preservation requirement to administrative proceedings. [Veselik v. SAIF](#), 177 Or  
8 App 280, 288, 33 P3d 1007 (2001), *rev den*, 344 Or 121 (2002); *see also* [VanSpeybroeck](#)  
9 [v. Tillamook County](#), 221 Or App 677, 690, 191 P3d 712 (2008) (applying preservation  
10 requirements in proceedings to review LUBA orders). A party's claim of error by LCDC  
11 in its periodic review order, therefore, is limited to the commission's resolution of  
12 objections raised in the periodic review proceedings.

13 B. *The commission's defense*

14 We turn--at long last--to petitioners' contentions about the deficiencies in

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<sup>12</sup> Moreover, under ORS 197.633(2), LCDC is obliged to "adopt rules for conducting periodic review." The rules require persons who object to a work task submittal to file written objections with DLCD that "[c]learly identify an alleged deficiency in the work task sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the task submittal is alleged to have violated." OAR 660-025-0140(2)(b). OAR 660-025-0150(4)(d)(B) imposes that same specification of error requirement when an appeal is taken to LCDC from DLCD decisions on periodic review task completions. Objections that do not meet that standard "will not be considered by the director or commission." OAR 660-025-0140(3). If no objections are received, "the work task shall be deemed approved." OAR 660-025-0150(3)(a). Standing to appeal an LCDC periodic review order is limited to "[p]ersons who submitted comments or objections" to the agency. ORS 197.650.

1 LCDC's order and findings in light of the specific objections and exceptions they filed  
2 with the agency. Petitioners' assignment of error contends that (1) LCDC erroneously  
3 interpreted ORS 197.298, Goal 14, *former* ORS 197.732(1)(c)(B) (2005), *amended by* Or  
4 Laws 2007, ch 71, § 68, *renumbered as* ORS 197.732(2)(c)(B) (2007) ("[a]reas which do  
5 not require a new exception cannot reasonably accommodate the use"), and Goal 2, Part  
6 II(c), OAR 660-004-0020 (an administrative rule detailing the requirements for a  
7 "reasons" exception to a goal); (2) LCDC made a decision not supported by substantial  
8 evidence; and (3) LCDC acted inconsistently with an official agency position in adding  
9 agricultural land rather than other lands. Although petitioners' contentions are framed  
10 with respect to the exclusion of particular exception and higher-priority resource lands  
11 from the area of the proposed UGB change, their arguments attack the *manner* in which  
12 the city and LCDC applied ORS 197.298. Petitioners complain that the city defined the  
13 needed land--higher-density residential land--too specifically under Step One so that ORS  
14 197.298(1) was applied to allow the exclusion of some land that could be used for low-  
15 density residential needs and that lands were excluded under Step Two because of a  
16 single deficiency rather than an overall adequacy assessment based on balancing all of  
17 the considerations. Moreover, petitioners argue that various locational factors in Goal 14  
18 were not considered as part of Step Three in evaluating the alternatives for the UGB  
19 expansion.

20           In its brief, LCDC offers a broad justification for its order and joins the  
21 city's more specific defenses. LCDC explains that the city identified neighborhood

1 activity centers as a form of land need to which the prioritization scheme of ORS  
2 197.298(1) was then applied, and that the commission was correct in approving the  
3 exclusion of exception areas and higher-priority resource lands that could not  
4 accommodate NACs. LCDC further argues that, under the Goal 2 exceptions criteria, a  
5 broad test should be employed under ORS 197.298 to determine whether candidate lands  
6 are "inadequate to accommodate the amount of land needed." LCDC reasons that (1)  
7 ORS 197.298 is administered "[i]n addition to" Goal 14; (2) Goal 14 includes the  
8 "reasons" exception criteria in Goal 2; (3) ORS 197.298(1) incorporates the exceptions  
9 criterion in Goal 2 that "[a]reas that do not require a new exception cannot reasonably  
10 accommodate the use"; and, therefore, (4) the statute allows a broad assessment of  
11 whether land is "inadequate to [reasonably] accommodate" an identified land need.

12 LCDC's first defense--that the city appropriately identified a quantity of  
13 needed NAC land and applied ORS 197.298(1) to that quantified need--fails because that  
14 is not what the city did. The city did determine that the NAC mixed-use category of land  
15 use would use less land than the traditional low-density residential development for  
16 housing needs. But the city did not quantify the amount of any needed mixed-use  
17 category of commercial and residential land uses and then apply the ORS 197.298(1)  
18 priorities to that quantified mixed-use need. To recall, ORS 197.298(1) is applied to  
19 determine if land of a particular priority "is found to be inadequate to accommodate the  
20 *amount of land*" determined to be needed. (Emphasis added.) Here, the city quantified  
21 the need for categories of residential, commercial, industrial, parkland, and other land



1 uses and then applied the priorities to those quantitative needs. However, the city used  
2 the defined qualities of an NAC (*e.g.*, size, location to downtown, and urban form) as a  
3 basis to rule out higher-priority land under ORS 197.298(1), and, in doing so, proved the  
4 wrong point.

5 LCDC's argument that its order is justified because of the need for land for  
6 NACs is not supported by the order's reasoning or result. First, the order is unclear on the  
7 specifics of the identified need under ORS 197.298--whether the need is for residential  
8 land in general; higher-density residential land; mixed-use land for specified residential,  
9 commercial, and parkland needs; or NACs. The order upholds the exclusion of the  
10 Westside Road exception area from the UGB amendment under ORS 197.298(3)(b)  
11 (unavailability of services due to topographic or other physical constraints), rather than  
12 because the area is unsuitable for use as an NAC. Another part of the order approves  
13 exclusion of the Bunn's Village exception area under ORS 197.298(3)(b) as well as under  
14 ORS 197.298(1) for its unsuitability for "pedestrian- and transit-oriented development in  
15 a neighborhood activity center." LCDC determined that the Booth Bend Road exception  
16 area "cannot reasonably accommodate the identified need," but purports to identify the  
17 need as one for a "compact, pedestrian-friendly urban area." The city's failure to include  
18 the Old Sheridan Road exception area into the boundary change was approved because  
19 "this area cannot reasonably accommodate the identified need," yet that approval was  
20 made without any elaboration on the nature of that identified need. The Riverside North  
21 area was not included because "this area cannot reasonably accommodate residential

1 use." If ORS 197.298 is applied to address separate types of land needs, then the amount  
2 of each of those land needs must be quantified, and the land supply examined to see if it  
3 is "inadequate to accommodate [each] amount of land needed."

4           Second, the order, in fact, approves the inclusion of some of the lower-  
5 priority agricultural land (Norton Lane, West Hills South, and part of Fox Ridge North)  
6 ahead of some exception areas even though those agricultural areas were not designated  
7 as NACs. Thus, the adopted justification for the UGB amendments as well as the actual  
8 inclusion of agricultural land for general residential use suggests that lower-priority land  
9 was not added solely to meet the need for an identified quantity of land for mixed-use  
10 development. The adopted order fails to explain why the failure of an exception area to  
11 accommodate the need for an NAC justifies its exclusion from the expansion area when  
12 lower-priority land is being added to accommodate a less specific need for residential  
13 land. As we held in *Woodburn*, 237 Or App at 224-26, when an LCDC order fails to  
14 explain its reasoning for finding consistency with the standards for a UGB expansion, the  
15 order lacks substantial reason and becomes inadequate for judicial review. The failure of  
16 LCDC to consistently identify the needed categories and quantities of land uses--the  
17 fundamental premises of its justification of the UGB change under ORS 197.298--  
18 requires the same conclusion here.

19           LCDC's second point--that the "[a]reas that do not require a new exception  
20 cannot reasonably accommodate the use" criterion in the Goal 2 exception standards can  
21 be used to rule out higher-priority land under ORS 197.298(1), presumably no matter

1 how the need for residential land is described--also does not withstand scrutiny. As noted  
2 earlier, Goal 14 requires that a UGB change "follow the procedures and requirements as  
3 set forth in the Land Use Planning goal (Goal 2) for goal exceptions." The standards for  
4 such an exception include a determination that "[a]reas which do not require a new  
5 exception cannot reasonably accommodate the use." But that criterion applies to land  
6 that does not require an exception to Goal 14, *i.e.*, land already within the UGB or  
7 specially designated land in unincorporated communities outside of a UGB. [VinCEP v.](#)  
8 [Yamhill County](#), 215 Or App 414, 425, 171 P3d 368 (2007) ("areas which do not require  
9 a new exception" criterion under Goal 14 are "lands within urban growth boundaries and  
10 areas for which a Goal 14 exception has already been taken"). The exception standard  
11 requires an evaluation of whether land inside of a UGB can be developed in a way that  
12 eliminates or minimizes the need to expand a UGB. The criterion is not a factor to  
13 distinguish among lands that do require an exception to Goal 14--the exception and  
14 resource lands outside the UGB that could qualify for inclusion within the boundary.<sup>13</sup>  
15 So the second exception criterion, by its terms, is not relevant to classify exception and

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<sup>13</sup> DLCD understood that the second exception criterion did not require an alternatives analysis of lands outside the existing UGB. In its decision on petitioners' objections in the first LCDC proceeding, the department noted:

"It is not clear that [the alternative lands exception criterion] distinguishes between Goal 3 exception lands and resource lands outside of a UGB. Both require that the city follow the exceptions process for a UGB amendment and can be said to 'require a new exception.' The department understands this standard to mean that a UGB amendment is needed only if lands inside a UGB or rural lands for which an exception to Goal 14 has been taken cannot reasonably accommodate the use."

1 resource lands outside the existing UGB as suitable for growth.<sup>14</sup>

2           The order under review approves the city's decision not to include the North  
3 Fox Ridge Road resource area in the UGB because, "pursuant to Goal 2, the city did not  
4 need to consider lands under ORS 197.298 that could not reasonably accommodate its  
5 identified need." In other parts of the order, the exclusions are justified under a generic  
6 "reasonably accommodate" standard (presumably tied to Goal 2), rather than the more  
7 discrete accommodation standards of ORS 197.298(1) and (3). In those respects, LCDC  
8 erred in applying the wrong standards and misconstrued the applicable law. ORS  
9 183.482(8)(a).

10           We must next determine if those Step One and Step Two errors compel a  
11 different result under ORS 183.482(8)(a) (allowing remedy if "the agency has  
12 erroneously interpreted a provision of law and \* \* \* a correct interpretation compels a  
13 particular action"). We turn then to petitioners' specific contentions about the application  
14 of ORS 197.298. LCDC and the city defend the LCDC order by arguing that the

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<sup>14</sup> The reference to the Goal 2 exception requirements in Goal 14 was eliminated in the revision to Goal 14 adopted in 2005. In its place, the goal now requires that,

"[p]rior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary."

In addition, OAR 660-004-0010(1)(c)(C) now provides that,

"[w]hen a local government changes an established urban growth boundary applying Goal 14 as amended April 28, 2005, a goal exception is not required unless the local government seeks an exception to any of the requirements of Goal 14 or other applicable goals[.]"

1 exclusions are justified under ORS 197.298, no matter how the residential land need is  
2 defined--whether as a need for higher-density residential land or for land suitable for an  
3 NAC.

4 C. *Application of ORS 197.298*

5 Petitioners claim that LCDC erred in endorsing the exclusion of three  
6 exception areas--Old Sheridan Road, Riverside North, and Booth Bend Road--that should  
7 have been added to the boundary under ORS 197.298. They reason that those areas were  
8 excluded because they were unsuitable for medium-density and high-density housing, but  
9 that such a specification of need is inappropriate for the application of ORS 197.298.  
10 Rather, petitioners argue, the statute should have been applied to residential land needs as  
11 a whole. Moreover, the quantity of needed low-density residential land (341 acres)  
12 exceeded the buildable land added through the included exception areas, so petitioners  
13 reason that the other exception areas should have been brought into the boundary to meet  
14 low-density residential land needs. Finally, petitioners claim that there is no substantial  
15 evidence that the excluded exception areas could not accommodate some medium-density  
16 or high-density housing. More specifically, petitioners contest LCDC's findings on the  
17 excluded exception areas as well as the three excluded lower-quality resource lands tracts  
18 (West Hills, Fox Ridge Road North, and the area north of McMinnville Airport).

19 1. *Old Sheridan Road exception area*

20 In its findings on ORS 197.298(1), the city evaluated this exception area  
21 under factors that it also applied to other exception areas (annexation potential, ability to

1 develop with adequate internal transportation circulation, limited traffic access from  
2 Highway 18, consistency with compact urban form, and public safety issues). As stated  
3 earlier, considerations of the *general availability* of public facilities and services are  
4 immaterial as part of the Step Two application of ORS 197.298. The remaining  
5 determinations by the city are relevant under ORS 197.298(1) (comparative long-term  
6 environmental, economic, social and energy (EESE) consequences resulting from the use  
7 at the proposed site). The city's decision to exclude the Old Sheridan Road exception  
8 area was based upon a balancing of those determinations.

9           Petitioners objected to DLCD that the city's findings failed to establish that  
10 the Old Sheridan Road exception area could not accommodate a portion of the city's  
11 residential land needs. More specifically, petitioners claimed that the city findings  
12 showed that the comparative costs of providing city facilities and services to the area  
13 varied, depending upon the service, but were not prohibitive. Petitioners disputed that  
14 there was evidence in the record to support the city's findings that Old Sheridan Road  
15 provided the sole access to the area and that the area was distant from existing public  
16 utilities and schools.

17           DLCD did not resolve those objections under ORS 197.298(1). Instead,  
18 DLCD concluded that it "agrees with the city's findings that transportation facilities  
19 cannot reasonably be provided to this area under ORS 197.298(3)(b)." Again, ORS  
20 197.298(3)(b) allows resort to lower-priority land if "[f]uture urban services could not  
21 reasonably be provided to the higher priority lands due to topographical or other physical

1 constraints." LCDC appeared to affirm on that basis, largely because Highway 18 is a  
2 limited access highway.

3           On review, petitioners argue that ORS 197.298(3)(b) allows resort to lower-  
4 priority land only if a package of future urban services could not be reasonably provided.  
5 Petitioners contend that LCDC's findings failed to evaluate the entire suite of urban  
6 services in excluding the Old Sheridan Road exception area and that the deficiency in the  
7 provision of transportation facilities was not due to topographical or other physical  
8 constraints. Moreover, petitioners claim that there is no substantial evidence to support  
9 the finding of unavailable transportation facilities because local streets could be extended  
10 to the area. Respondents counter that LCDC approved the exclusion of Old Sheridan  
11 Road, in part, because lack of access to Highway 18 required prohibitively expensive  
12 road improvements to the area and congestion in other access points to the highway.

13           We disagree with petitioners' contention that a composite of urban services  
14 must to be considered under ORS 197.298(3)(b). Although the term "urban services" is  
15 not defined in the statute, a related term, "urban facilities and services" is defined under  
16 Goal 11 to include "police protection; sanitary facilities; storm drainage facilities;  
17 planning, zoning and subdivision control; health services; recreation facilities and  
18 services; energy and communication services; and community governmental services."  
19 OAR 660-015-0000(11). That definition does not include water supply systems or roads.  
20 Goal 12 separately deals with transportation facilities, a utility that is neither "urban,"  
21 being necessary to both rural and urban land uses, nor a "service." ORS 197.298(3), by

1 its plain text, refers only to those "urban services" that could be constrained "due to  
2 topographical or other physical constraints." Thus, the text of the provision refers to a  
3 service that is urban in character and that can be physically constrained in its provision.  
4 What is a constrained urban service is a matter of proof in a particular UGB amendment  
5 proceeding, but it surely does not mean the full panoply of urban facilities and services  
6 described in Goal 11.

7           We do agree, however, with petitioners' contention that inefficiencies in the  
8 provision of roads to a potential urbanizing area is not sufficient to exclude that area  
9 under ORS 197.298(3)(b). Transportation facilities are not an "urban service" under the  
10 statute. It may be that LCDC's order also implicitly rests upon excluding the Old  
11 Sheridan Road exception area from the category of candidate lands under ORS  
12 197.298(1). As noted earlier, however, any inefficiency in the provision of urban  
13 services and facilities is not material to the analysis under ORS 197.298(1). LCDC erred  
14 in approving the exclusion on either of those bases; it should have addressed whether the  
15 city's findings were otherwise factually and legally sufficient under ORS 197.298(1).

16           2.       *Riverside North exception area*

17           Petitioners next contend that the basis for excluding the Riverside North  
18 exception area--unsuitability for residential use due to "noise and odor associated with  
19 the adjacent sewage treatment plant, industrial use, and railroad"--was insufficient under  
20 ORS 197.298(3)(a) because residential use is not a "[s]pecific type[ ] of identified land  
21 need[ ]" under that statutory provision, but a more generic need that is subject to the



1 priorities of ORS 197.298(1). Petitioners argue that LCDC's findings are deficient in  
2 failing to assess whether the Riverside North exception area could be used to satisfy  
3 nonresidential land needs, in general, or for industrial uses, in particular, thereby allowing  
4 redesignation of existing industrial land within the UGB for residential uses. Petitioners  
5 finally assert that the city's decision to exclude Riverside North was inconsistent with its  
6 decision to include the Riverside South exception area, and that, in approving both  
7 actions, LCDC acted "inconsistently with official agency position or practice" and  
8 without substantial evidence.

9            Respondents argue that the incompatibility of any proposed residential use  
10 of the subarea with nearby industrial and institutional uses is a legitimate consideration in  
11 applying ORS 197.298(1). Based on the Step Two analysis noted earlier (that EESE  
12 considerations under Goal 2 and Goal 14, Factor 5, are applied under ORS 197.298(1)),  
13 we agree with respondents. We also agree with respondents' further contention that  
14 LCDC did not misconstrue the applicable law or fail to support its decision by substantial  
15 reason in not requiring redesignation of industrial land within the existing UGB for  
16 residential uses in order to add Riverside North for industrial purposes. Finally,  
17 petitioners' assertion that LCDC made inconsistent determinations on the Riverside South  
18 and Riverside North areas was not preserved, because petitioners never asserted to DLCD  
19 that the city was constrained to treat both areas in the same way.

20            3.        *Booth Bend Road exception area*

21            Again, the city adopted findings on the considered exception areas,

1 including the Booth Bend Road exception area, that evaluated those areas under ORS  
2 197.298(1) based upon a balancing of factors that included the area's potential for  
3 annexation, internal transportation circulation, urban form, public safety, the overall cost-  
4 effectiveness of the provision of urban facilities, and compatibility with adjacent uses,  
5 including agricultural uses. The city excluded the Booth Bend Road exception area  
6 because of limited potential for annexation, the cost-ineffectiveness of necessary road and  
7 sanitary sewer improvements, the lack of supportive neighborhood services and facilities,  
8 and incompatibility with adjacent agricultural uses.

9           Before LCDC, petitioners disputed the factual accuracy of some of the  
10 city's findings. LCDC overruled those objections because "this area is problematic since  
11 it would be an isolated extension of the UGB across the highway, making walking to  
12 nearby destinations difficult[,] such that it could not "reasonably accommodate the need  
13 for a compact, pedestrian-friendly urban area."

14           On review, petitioners argue that that specification of need is not a  
15 "[s]pecific type[ ] of identified land need[ ]" under ORS 197.298(3)(a) and, to the extent  
16 that the need arises as a consequence of the application of Goal 14, Factor 4 (efficiency  
17 of land uses on the fringe of urban areas), that consideration was not balanced with other  
18 Goal 14 factors in determining suitability under ORS 197.298(1). Moreover, petitioners  
19 assert that excluding the Booth Bend Road exception area because of its isolated location  
20 (south of Highway 18) is inconsistent with the inclusion of other areas south of the  
21 highway (Three Mile Lane and Lawson Lane areas). Respondents counter that the city's

1 findings appropriately considered urban form and conflicts with agricultural land in its  
2 ORS 197.298(1) analysis.

3           We agree with petitioners that the application of ORS 197.298(1) requires  
4 more than the consideration of pedestrian circulation. LCDC erred in failing to address  
5 whether the city's findings about other ORS 197.298(1) considerations were sufficient  
6 and were supported by the record. The city's evaluation of the cost-effectiveness of the  
7 provision of public facilities and services is immaterial to the analysis under ORS  
8 197.298(1) during Step Two. In the same way, considerations of urban form under Goal  
9 14, Factor 4, are more appropriately deferred to Step Three, during the full application of  
10 Goal 14 to candidate lands identified under the priorities statute.

11           4.     *West Hills resource land area*

12           Following the initial remand of the MGMUP amendments by LCDC, the  
13 city analyzed resource areas with poorer soils for potential inclusion within the UGB.  
14 The city determined that an area in the West Hills west of Fox Ridge Road and Redmond  
15 Hill Road (exception areas included in the UGB in the initial LCDC proceedings) would  
16 be unsuitable. The findings in support of that conclusion identified a land need for  
17 medium- and high-density housing. The city reasoned that the sloped topography of the  
18 subarea would increase the cost of construction "anywhere from \$5,000 to \$15,000 per  
19 lot in additional development costs, depending on site-specific conditions"; the area was  
20 more likely to be developed with single-family residences; additional water distribution  
21 facilities and transportation access would be expensive; the area was too far from

1 commercial areas for feasible higher-density residential development; and development  
2 would be incompatible with nearby farm and forestry operations and with a compact  
3 urban form. The city concluded that the area should be excluded from the boundary  
4 change under ORS 197.298(3).

5 In their DLCD objections, petitioners agreed with the city's rationale for  
6 excluding the more steeply sloped portions of the subarea, but claimed that the more  
7 gently sloped portions adjacent to the current UGB would be suitable to accommodate  
8 identified land needs. Petitioners disagreed with the city's limitation of the identified  
9 need to higher-density residential use and with the city's adopted rationale for exclusion  
10 that relied upon the expense of water service, the feasibility and likelihood of higher-  
11 density housing in the area, and the expense of road extension and distance from  
12 commercial areas. After reiterating much of the city's findings, LCDC concluded that

13 "1000 Friends objects to the exclusion of this area, contending that the city  
14 erred in its findings and that the area can accommodate specific types of  
15 land needs \* \* \*. Specifically, that this higher priority area can  
16 accommodate low-, medium-, or high-density housing even with the  
17 constraints of slope, water service costs, transportation difficulties, and  
18 should therefore be included. The Commission finds that the city  
19 established both that the West Hills area could not reasonably  
20 accommodate the city's identified need and that under ORS 197.298(3)(b),  
21 the city could not reasonably provide water, a future urban service, due to  
22 the topographical constraint."

23 On review, petitioner argues that LCDC's determination applies only to the  
24 more steeply sloped part of the resource area and not to the more gently sloped area  
25 adjacent to the existing UGB. Petitioners further assert that the findings do not identify  
26 which land need could not be accommodated, that the reference in the findings to the

1 effects of inclusion of the territory on nearby agricultural land is inappropriate under  
2 ORS 197.298(1), and that water services can be extended to the lower portions of the  
3 resource area. Respondents claim that the city findings and LCDC restatement of those  
4 findings applied to the entire resource area and were sufficient under ORS 197.298(1).

5           We agree with petitioners in part. The city findings identified a need for  
6 higher-density housing. We concluded earlier that ORS 197.298(1) could be applied to  
7 prioritize land to satisfy that particular need. The city considered some relevant factors  
8 under ORS 197.298(1), including compatibility with adjacent agricultural land, in  
9 evaluating the resource area. However, LCDC relied upon the city's findings that applied  
10 Goal 14, Factor 3 ("[o]rderly and economic provision for public facilities and services"),  
11 in determining suitability under ORS 197.298(1). Because that factor is applied under  
12 Goal 14 to evaluate, but not determine, candidate lands (Step Three in the analysis),  
13 LCDC erred in its application of ORS 197.298 to the city's findings. Petitioners have not  
14 otherwise shown that LCDC incorrectly applied ORS 197.298 or misunderstood the  
15 substantial evidence test in approving the city's findings on this issue.

16           5.       *Area north of Fox Ridge Road*

17           A portion of the area north of Fox Ridge Road (Tax Lot 700) was added to  
18 the UGB. Petitioners argue that an additional corridor of land in this area should have  
19 been included (Tax Lots 100, 200, 300, and 400). The city determined that Tax Lot 100  
20 and portions of Tax Lot 200, although within the boundaries of the Northwest NAC,  
21 should be excluded from the UGB because of limited connectivity with the existing road

1 system and "the steep slopes in the southern portions of these two properties leave only  
2 perhaps a 200-foot wide buildable corridor extending across tax lots 700, 200 and 100."  
3 The city concluded that those properties should not be included in the boundary "as  
4 permitted by ORS 197.298(3)(a)."

5 In their DLCD objections, petitioners complained that the city failed to  
6 address the potential inclusion of Tax Lots 300 and 400 and that the city's factual findings  
7 on the soil composition, road connectivity, and buildable lands in the resource area were  
8 not supported by the record. LCDC reiterated the city's findings, concluding that,

9 "[f]or the reasons cited above, the city concluded that the needs identified  
10 in the MGMUP cannot be reasonably accommodated by the areas of Class  
11 III and Class IV soils within tax lot R4513-00100 or the northern portion of  
12 tax lot R4418-00200. The city, therefore, did not include these lands in its  
13 expanded UGB, purportedly under ORS 197.298(3)(a). The Commission  
14 concludes that the city erred in excluding the lands under ORS  
15 197.298(3)(a). However, pursuant to Goal 2, the city did not need to  
16 consider lands under ORS 197.298 that could not reasonably accommodate  
17 its identified need."

18 After noting petitioners' objections "to the exclusion of tax lot 100, the northern portion  
19 of tax lot 200, and land west of tax lot 100 from the proposed UGB" and their assertion  
20 that the city's findings on the soil composition of Tax Lots 100 and 200 were wrong,  
21 LCDC decided that

22 "[t]he Commission concludes that the city has established that the excluded  
23 lots will have limited future connectivity, are constrained by slope that  
24 leaves a limited building corridor, and would create an island of agricultural  
25 activity and cut off tax lots 1100 and 1000 from existing farm operations."

26 On review, petitioners claim that LCDC's findings addressed only part of  
27 the area they argued should have been included and failed to address Tax Lots 300 and

1 400. Petitioners also contend that the reasons for excluding two of the tax lots--road  
2 connectivity and cutting off farm parcels--are insufficient if the entire area is included.  
3 Respondents argue that LCDC affirmed the city's findings on the unsuitability of Tax  
4 Lots 100 and 200 under ORS 197.298 based on a number of relevant considerations  
5 (topography, relation to existing and future development, connectivity, and effect on  
6 agricultural operations) and that LCDC did not err in its construction of applicable law or  
7 application of the substantial evidence test in reaching those determinations.

8           We agree with petitioners that LCDC failed to address their core  
9 contention--that the city did not evaluate, in its adopted findings, whether a larger area of  
10 properties north of Fox Ridge Road, with lower-class soils, could reasonably  
11 accommodate the city's identified need for residential land instead of the lower-priority  
12 land added for that purpose, and that such an evaluation was necessary under ORS  
13 197.298(1).<sup>15</sup> LCDC should have determined whether the city's rationale for excluding  
14 Tax Lots 100 and 200 was based upon consequences and compatibility considerations  
15 relevant under ORS 197.298(1) and whether that rationale was legally sufficient without  
16 consideration of a larger area. Instead, LCDC sustained the city's determination  
17 "pursuant to Goal 2," using a broader and incorrect "reasonably accommodate" standard

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<sup>15</sup> On remand of the original UGB decision, DLCD directed the city to "identify areas with class 3 and 4 agricultural soils and either (1) include them in the UGB instead of areas with class 1 and 2 soils, if any, or (2) explain why they should not be included based on the standards in ORS 197.298(3)." The city identified the properties with Class III and IV soils that were within one mile of its 1981 UGB. It is not clear whether Tax Lots 300 and 400 fit within that parameter. The "discussion areas" map of alternative lands attached to petitioners' opening brief appears to exclude Tax Lots 300 and 400.

1 in the application of ORS 197.298. And, LCDC did not deal with petitioners' contention  
2 that the city's findings were insufficient under ORS 197.298(1) because the city did not  
3 address whether the consequences and compatibility concerns about bringing Tax Lots  
4 100 and 200 into the boundary should have been mitigated by including a differently  
5 configured area. That determination was necessary to LCDC's conclusion that the city's  
6 findings demonstrated its compliance with ORS 197.298(1).

7           6.       *Other resource land areas*

8           After the remand, the city considered including in the UGB three lower-  
9 quality agricultural tracts near the municipal airport: a 197-acre tract north of the airport  
10 that is bordered by farmland on three sides; a smaller 35-acre tract on Highway 18 that is  
11 situated south of the air museum, and surrounded by the existing UGB except along an  
12 access road; and a large tract east of the airport. The city made collective findings on  
13 those properties under ORS 197.298, although some of the collective findings appear to  
14 be specific to a particular, but unidentified, property (*e.g.*, "[t]his property is also  
15 immediately adjacent to the airport approach zone for Runway 17," "[t]his land \* \* \*  
16 would be bordered by actively farmed land on three of its four sides"). The findings note  
17 concerns with the effects of high-density housing on flight safety and use of adjacent  
18 agricultural land as the bases for excluding the properties from the boundary. The city  
19 concluded:

20           "For the above noted reasons, the City concludes that specific types of land  
21 needs as identified in the MGMUP cannot be reasonably accommodated on  
22 the lands north and east of the McMinnville Municipal Airport, on which  
23 are found predominantly Class III or Class IV soils. The City, therefore,



1 has not included these lands in its expanded urban growth boundary, as  
2 permitted by ORS 197.298(3)(a)."

3 In their DLCD objections, petitioners complained that the city findings  
4 made collective assessments about differently situated properties and that the smaller  
5 tract next to the museum could be used to satisfy low-density residential land needs.  
6 LCDC, after taking administrative notice of the airport master plan, concluded that  
7 "[d]evelopment of these lands at urban residential densities would be incompatible with  
8 the long range plans for the airport, \* \* \* and would potentially threaten the airport's  
9 viability." The commission reiterated some of the city's collective findings that were  
10 written as particular to one property. After noting petitioners' concern that the small tract  
11 adjacent to the air museum was not analyzed in the findings, LCDC concluded that "the  
12 city established that the area cannot reasonably accommodate an identified need due to  
13 safety issues related to the airport."

14 On review, petitioners argue that the smaller 35-acre parcel, which is  
15 composed of Class III soils, has particular priority under ORS 197.298(1)(b) (giving  
16 second priority to exceptions lands and "resource land that is completely surrounded by  
17 exception areas"). Petitioners claim that the city and LCDC did not address that property  
18 in particular, instead they lumped it with two other properties that have different  
19 compatibility issues. Finally, petitioners argue that, if the basis for excluding this parcel  
20 is its unavailability for high-density residential use, that basis does not excuse its  
21 potential use for low-density residential needs. Respondents counter that airport safety  
22 concerns are relevant issues under ORS 197.298(1) in the application of Goal 14, Factor

1 3 (orderly and economic provision of services), Factor 4 (maximum efficiency of land  
2 uses), and Factor 5 (EASE consequences).

3 LCDC's findings on this tract are inadequate for judicial review. As noted  
4 earlier, the ORS 197.298(1) consequences and compatibility factors apply differently,  
5 depending upon whether the quantified land need is for land to be used for low-density  
6 residential, mixed-use, or higher-density residential uses. The findings do not explain  
7 why the tract was evaluated for higher-density residential land needs alone. Moreover,  
8 the findings set out common compatibility concerns caused by proximity to a runway and  
9 flight paths for properties located in different areas and, presumably, with different  
10 compatibility issues. As such, the findings lack substantial reason because they do not  
11 articulate the ORS 197.298 evaluation for the smaller 35-acre parcel.

12 Finally, petitioners claim that they called the city's attention to other  
13 potential higher-priority resource lands (the Riverside area, land south of the airport, and  
14 land south of Three Mile Lane and west of Booth Bend Road), but that those sites were  
15 not evaluated, contrary to the then applicable version of OAR 660-004-0020(2)(b)(C),<sup>16</sup> a  
16 rule applicable to UGB changes made under the older version of Goal 14. Petitioners  
17 argue that LCDC erred in failing to remand the decision to the city for that consideration.

18 The above-cited rule set policy on how to comply with the reasons  
19 exception criterion in Goal 2, Part II(c), that "[a]reas which do not require a new

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<sup>16</sup> OAR 660-004-0020 was amended in 2011. Those amendments are not relevant to the contentions on review.

1 exception cannot reasonably accommodate the use." That rule stated that

2 "[s]ite specific comparisons are not required of a local government taking  
3 an exception, unless another party to the local proceeding can describe why  
4 there are specific sites that can more reasonably accommodate the proposed  
5 use. A detailed evaluation of specific alternative sites is thus not required  
6 unless such sites are specifically described with facts to support the  
7 assertion that the sites are more reasonable by another party during the local  
8 exceptions proceedings."

9 As we noted earlier, however, that exception criterion does not apply to  
10 evaluating land outside a UGB--all of which required a new exception to Goal 14 as  
11 applicable here--for inclusion in the boundary. Instead, it requires determining if land  
12 already inside the UGB--land which does not require a new exception--can reasonably  
13 accommodate the need. As such, OAR 660-004-0020(2)(b)(C) did not require the city to  
14 evaluate any particular alternative site proposed by petitioners.

15 Instead, the city applied particular criteria (*e.g.*, within one mile of the 1981  
16 UGB, composition of Class III or IV soils, and within prescribed geographic boundaries)  
17 to inventory the lands to be studied. Petitioners did not object to the city or LCDC that  
18 those inventory criteria were unlawful or that they had been misapplied to petitioners'  
19 suggested alternative resource lands areas. Thus, the commission did not err in failing to  
20 require the city to study those areas for inclusion.

21 D. *Application of Goal 14 locational factors*

22 Petitioners' first set of contentions relate to Step Two--the application of  
23 Goal 14 in determining whether the quantity of land in the priority class is inadequate  
24 under ORS 197.298(1). Petitioners claim that, in separately applying the locational

1 factors of Goal 14 to the areas proposed to be added to the UGB, the city and LCDC  
2 erred in failing to consider all of the available exception lands collectively and  
3 consistently and did not explain how the locational factors--in particular, Factors 3  
4 (public facilities and services), 4 (efficiency of land uses), and 7 (compatibility with  
5 agricultural activities)--were balanced to include some exception lands and not others.  
6 They assert that Factor 7 was not applied at all in the evaluation of the available  
7 exception areas, but was instead applied only to the already included territory.

8            Respondents protest that those arguments were not made to LCDC and that  
9 the commission is not obliged to determine on its own whether those particular  
10 deficiencies in the local decision existed. As we said before, petitioners' contentions  
11 must be particularly raised before LCDC in order to merit review in this court.  
12 Petitioners generally asserted below--in the midst of dozens of more specific objections--  
13 that "the city has not conducted a coordinated land priority analysis around the entire  
14 UGB perimeter." That is insufficient to raise the specific objection that the city failed to  
15 completely consider any particular Goal 14 factor in its evaluation of whether exception  
16 lands could reasonably accommodate an identified land need.

17            Petitioners next argue that LCDC erred in approving the city's Goal 14  
18 evaluation of both the low-value farmland that was excluded from the UGB and the high-  
19 value farmland that was included. Petitioners assert that the city and LCDC erred in  
20 failing to consider Factor 3 (public facilities and services) in comparing alternative lower-  
21 quality resource lands, made no findings about the availability of public services to the

1 Airport North and the Fox Ridge Road North resource areas, and inconsistently evaluated  
2 the public services factor in comparing the West Hills resource area with the higher-  
3 quality Southwest and Grandhaven areas. According to petitioners, LCDC and the city  
4 further erred in not balancing Factor 4 (efficiency of land uses) with other factors in  
5 evaluating alternative resource lands, instead subsuming that consideration in the  
6 application of ORS 197.298, and in applying Factor 4 to land outside of the "existing  
7 urban area." Petitioners also complain that Factor 6 (retention of agricultural lands) was  
8 applied in a cursory manner to available resource lands and that LCDC made no findings  
9 on that complaint.

10                   Some of those contentions were preserved; others were not. Before the  
11 agency, petitioners cited ORS 197.298 and Goal 14 as the bases for their contention that  
12 the city erred in excluding certain exception areas and higher-priority resource land.  
13 Much of the argument was framed around whether those properties could reasonably  
14 accommodate an identified land need, a contention apparently rooted in the requirements  
15 of ORS 197.298. As we concluded earlier, the relevant Goal 14 factors in the sorting of  
16 suitable higher-priority land under ORS 197.298(1) are Factor 5 (EASE consequences)  
17 and Factor 7 (compatibility with agricultural activities) and their analogues in the Goal 2  
18 exception criteria. We earlier determined the legal sufficiency of the city's consideration  
19 of exception lands and higher-priority resource lands under ORS 197.298(1); petitioners'  
20 restated Goal 14 contentions about the excluded exception and higher-priority resource  
21 lands raise no different and relevant claims.

1           Petitioners' remaining contentions concern Step Three, the application of  
2 Goal 14, Factor 7 (compatibility of proposed urban uses with agricultural lands) to the  
3 lands considered for inclusion in the boundary. The city's Factor 7 findings from 2003 on  
4 the Norton Lane, Three Mile Lane, Southwest, Northwest, and Grandhaven areas  
5 described adjacent agricultural land uses in general terms ("actively farmed land," "active  
6 farm use," "agricultural farm use," "actively farmed agricultural land," and "large-parcel  
7 farm operations") before concluding that,

8           "[t]he Council concludes that the proposed expansion areas will not create  
9 compatibility conflicts between uses. Much of the existing UGB is  
10 adjacent to resource lands that are currently in agricultural uses. Expansion  
11 of the UGB would not create new uses that would create new types of  
12 compatibility issues."

13           Before LCDC, among other assertions, petitioners argued that the city's  
14 findings on the application of Factor 7 to four of those areas were (1) incomplete because  
15 the findings did not consider the particular agricultural activities of nearby land and  
16 compare compatibility conflicts among the considered resource lands; and (2) inaccurate  
17 because the findings do not examine the boundaries of the redrawn resource lands areas  
18 that were altered following remand. In its order, LCDC reiterated the city's findings and  
19 affirmed, without further analysis, that the city properly applied Factor 7. We agree with  
20 petitioners that LCDC erred in not requiring additional findings on Factor 7. The existing  
21 findings were not sufficiently descriptive of nearby agricultural uses to allow comparison  
22 among the candidate sites and were inaccurate as to the redrawn boundaries of the  
23 resource areas. We reject petitioners' remaining Goal 14 contentions.

1 VI. CONCLUSIONS

2 We conclude that the commission erroneously interpreted ORS 197.298 by  
3 failing to require that the city first separately quantify its needs for low-density residential  
4 land, higher-density residential land, and mixed-use land (Step One) and then apply ORS  
5 197.298(1) and (3) to each of those quantified needs (Step Two), and in permitting the  
6 city to exclude land from further consideration under ORS 197.298(1) for immaterial  
7 reasons. Further, correct application of ORS 197.298 would compel different actions by  
8 the commission in its evaluation of the city's justification for excluding particular  
9 exception and resource areas under ORS 197.298. Thus, a remand is appropriate under  
10 ORS 183.482(8)(a)(B) (allowing remand to an agency for "further action under a correct  
11 interpretation of the provision of law").

12 On remand, LCDC should respond to petitioners' contentions by making  
13 additional findings or taking appropriate action in its review of the city's submissions to  
14 (1) determine what particular and quantified land use needs are to be accommodated by  
15 any additional land to be added to the McMinnville UGB; (2) apply ORS 197.298 to  
16 determine the land available to accommodate those quantified land use needs; (3) apply  
17 Goal 14 to justify the inclusion of suitable land in any amended UGB; and (4) take any  
18 other necessary action under a correct interpretation of the governing standards, including  
19 a determination of whether the city's submission, "on the whole, conform[s] with the  
20 purposes of the goals and any failure to meet individual goal requirements is technical or  
21 minor in nature" under ORS 197.747.

1

Reversed and remanded.



Court of Appeals Record, please go to the link below:

<https://www.mcminnvilleoregon.gov/planning/page/court-appeal-records>

**BEFORE THE  
LAND CONSERVATION AND DEVELOPMENT COMMISSION  
OF THE STATE OF OREGON**

<b>IN THE MATTER OF PERIODIC REVIEW</b>	)	
<b>TASK 1 AND THE AMENDMENT OF</b>	)	<b>REMAND ORDER</b>
<b>THE URBAN GROWTH BOUNDARY</b>	)	<b>12-WKTASK-001814</b>
<b>FOR THE CITY OF MCMINNVILLE</b>	)	

This matter came before the Land Conservation and Development Commission (Commission) on February 28, 2012, on partial reversal and remand of the Commission's Order on Reconsideration of Approval Order 08-WKTASK-001760 from the Court of Appeals, pursuant to ORS 183.482 and ORS 197.650(1).

History and Summary of Task 1 and UGB amendment

The Department of Land Conservation and Development (department) approved the City of McMinnville's (city) periodic review work program on August 26, 1994. The city submitted Task 1, "Inventory of Commercial Lands", of its approved work program to the department for review pursuant to ORS 197.633 and OAR chapter 660, division 25. The city also submitted the amendment of its urban growth boundary (UGB) to the department for review pursuant to ORS 197.626, OAR 660-025-0040(1)(a), and OAR 660-025-0175(1). The Commission partially approved and partially remanded the submittal on December 6, 2004 by order 04-WKTASK-001645. In response to the remand, the city submitted Ordinances 4840 and 4841, the subject of the present matter.

Recitals

1. On January 17, 2006, the department received Ordinance 4840 from the city and on January 31, 2006, the department received Ordinance 4841 from the city in response to partial approval and remand order 04-WKTASK-001645. The department considered the submittal complete on January 31, 2006.
2. On January 23, 2006, the department received an objection from Mark Davis. On February 3 and February 17, 2006, the department received objections from 1000 Friends of Oregon, Friends of Yamhill County, and Ilsa Perse. The objections were timely filed.
3. On May 31, 2006, the department approved Task 1 and the UGB amendment by order 001696 and notified the city and the objectors.
4. On June 22, 2006, the department received an appeal of order 001696 from 1000 Friends of Oregon, Friends of Yamhill County, and Ilsa Perse.
5. On September 12, 2006, the Commission held a hearing on the appeal of the director's approval of a completed periodic review work task and an UGB amendment.

6. During the course of the September 12, 2006 hearing, the city requested that the Commission amend its periodic review work program to add Task 4, the rezoning of the West Hills and West 2<sup>nd</sup> Street areas from R-1 to R-2.

7. On November 8, 2006, the Commission issued Approval Order 06-WKTASK 001709, which approved the city's Task 1 and UGB amendment submittal, pursuant to OAR 660-025-0150 and 660-025-0160, and approved the city's request to amend its periodic review work program to add Task 4, the rezoning of the West Hills and West 2<sup>nd</sup> Street areas from R-1 to R-2.

8. On August 1, 2007, petitioners 1000 Friends of Oregon, Friends of Yamhill County, and Ilsa Perse filed their opening brief in the Court of Appeals on judicial review of the Commission's order. Petitioners' opening brief assigned error to the Commission's interpretation of certain statutes, statewide planning goals and prior Commission position thereon.

9. By order dated November 20, 2007, the Commission found that petitioners raised issues concerning the interpretation of law that merited reconsideration. The Commission also found that withdrawal of its approval order offered the most efficient means of resolving petitioners' concerns, to the benefit of the city, petitioners, and the Commission. Therefore, pursuant to ORS 183.482(6) and ORAP 4.35, the Commission withdrew Approval Order 06-WKTASK 001709 for reconsideration under the authority delegated to the director under OAR 660-002-0010(5).

10. In early 2008, the parties explored settlement. The city subsequently informed the petitioners and the department that it would no longer pursue settlement.

11. On November 17, 2008, the Commission issued Order on Reconsideration of Approval Order 08-WKTASK-001760, which approved Periodic Review Task 1, "Inventory of Commercial Lands" and the city's UGB amendment submittal, as illustrated in Figure 6 (Exhibit B) of Ordinance 4841, pursuant to OAR 660-025-0150 and 660-025-0160; and approved the city's request to amend its periodic review work program to add Task 4, the rezoning of the West Hills and West 2<sup>nd</sup> Street areas from R-1 to R-2 at the time of completion of the Transportation System Plan (Task 2 of the city's periodic review work program).

12. In 2009, the parties again explored settlement. In the fall of 2009, the city subsequently informed the petitioners and the department that it would no longer pursue settlement.

13. On October 13, 2009, petitioners filed a supplemental opening brief in the Court of Appeals on judicial review of the Commission's revised order (08-WKTASK-001760).

14. On June 9, 2010, the department issued order 001790 approving the city's Task 2 submittal regarding the Transportation System Plan.

15. On judicial review of the orders, the Oregon Court of Appeals reversed and remanded for reconsideration of the decision to add land to the UGB, but did not otherwise address 08-WKTASK-001760. *1000 Friends of Oregon v. LCDC*, \_\_ Or App \_\_, \_\_ P3d \_\_ (2011). The court directed the Commission to make additional findings regarding petitioners' contentions or take appropriate action in review of the city's UGB submittal to:

“(1) determine what particular and quantified land use need are to be accommodated by any additional land to be added to the McMinnville UGB; (2) apply ORS 197.298 to determine the land available to accommodate those quantified land use needs; (3) apply Goal 14 to justify the inclusion of suitable land in any amended UGB; and (4) take any other necessary action under a correct interpretation of the governing standards, including a determination of whether the city's submission, ‘on the whole conform[s] with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature’ under ORS 197.747.” Slip op at 60.

#### Findings of Fact

1. On July 13, 2011, the Court of Appeals filed its decision on judicial review of the Commission's Order on Reconsideration of Approval Order 08-WKTASK-001760.
2. On January 31, 2012 the State Court Administrator sent a copy of the appellate judgment to the Commission and the Court of Appeals decision became effective on that date pursuant to ORAP 14.05.

#### Conclusion

Based on the decision of the Court of Appeals, Work Task 1 is affirmed. The court directed the Commission to make additional findings regarding petitioners' contentions or take appropriate action in review of the city's UGB submittal. However, such determinations, for example the initial determination of the particular and quantified land use needs that are to be accommodated by any additional land to be added to the McMinnville UGB, are the purview of the city and not the role of this Commission. Therefore, under the court's direction, the only appropriate action is to remand the city's UGB submittal. On remand, the City of McMinnville must either determine its land use needs and apply ORS 197.298 and Goal 14 in the manner announced by the court's decision, or otherwise fulfill the requirements of accommodating its identified needs in compliance with the statewide planning goals and consistent with the court's decision.

THEREFORE, IT IS ORDERED THAT:

The Commission modifies its Order on Reconsideration of Approval Order 08-WKTASK-001760 to reverse the approval of the city's UGB amendment submittal, as illustrated in Figure 6 (Exhibit B) of Ordinance 4841, and to remand the city's UGB amendment submittal, as illustrated in Figure 6 (Exhibit B) of Ordinance 4841, for further findings consistent with the court's final opinion and order. On remand, the city may either (a) include the city's UGB amendment submittal, as illustrated in Figure 6 (Exhibit B) of Ordinance 4841, based on (1) findings of its particular and quantified land use need that are to be accommodated by any additional land added to the McMinnville UGB that are supported by substantial evidence; (2) application of ORS 197.298 to determine the land available to accommodate those quantified land use needs; (3) application of Goal 14 to justify the inclusion of suitable land in any amended UGB; or (b) fulfill the requirements of accommodating its identified needs, including by amending the city's UGB, in any other manner that complies with the statewide planning goals.

DATED THIS 29th DAY OF FEBRUARY, 2012.

FOR THE COMMISSION:



\_\_\_\_\_  
Jim Rue, Acting Director  
Department of Land  
Conservation and Development

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this final order. Judicial review is pursuant to the provisions of ORS 183.482 and ORS 197.650.

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Yamhill Soil and Water Conservation District  
2200 SW Second Street  
McMinnville, OR 97128

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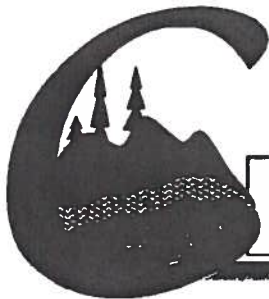
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### CONSERVATION EASEMENT - CHEGWYN PROPERTY

THIS CONSERVATION EASEMENT is made as of the 4th day of April, 2008 by Percy Charles Chegwyn who is herein after known as and referred to as Charles Chegwyn, whose address is 3471 Grandhaven Drive, McMinnville, Oregon 97128 ("Grantor"), in favor of the Yamhill Soil and Water Conservation District (YSWCD), which is a sub-division of Oregon state government qualified to receive this easement under ORS 271.715-271.795 and IRS Code §170(h), whose address is 2200 SW Second Street, McMinnville, OR 97128 ("Grantee").

\* This document is being re-recorded solely to correct the legal description.



Yamhill  
Soil & Water

Conservation District

Providing Natural  
Resource Leadership

2200 SW 2<sup>nd</sup> Street  
McMinnville, OR 97128  
(503) 472-1474 x102  
FAX (503) 472-2459  
yamhill.swcd@oacd.org  
www.yamhillswcd.org

Original  
**FILE  
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**After recording, return to:**

Yamhill Soil and Water Conservation District  
2200 SW Second Street  
McMinnville, OR 97128

**CONSERVATION EASEMENT**

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***Background and Parties' Intentions:***

1. Grantor is the sole owner in fee simple of certain real property comprising, in total, approximately 171 acres, located on the north side of the community of McMinnville in Yamhill County, Oregon hereinafter as (the "**Property**"). The Property is more specifically identified on Exhibits A, B, C attached hereto and made a part hereof (legal description (A), site location map (B) and an aerial photo (C) of the Property.
2. The Property possesses significant agricultural, open space, water quality protection, and educational opportunities, specifically:
  - A. **Soil Resources:** The majority of soils on the Property are classified as soils of statewide importance by the Natural Resources Conservation Service of the U.S. Department of Agriculture (see attached Exhibits D and D.1);
  - B. **Water Quality:** The Property contains significant native riparian areas and wetlands which protect water quality and mitigates flooding for properties below. The Oregon Department of Environmental Quality has listed the Yamhill River on the "Water Quality Limited" (applicable to Federal Clean Water Act 303-d rules) due to low summer flows that result in low dissolved oxygen, and high stream temperatures. The North Yamhill River also is listed for Fecal Coliform, E Coli, iron, and manganese.
  - C. **Native Plant Communities:** The Property contains approximately 35 acres of riparian forest in excellent condition with a diversity of native plants.

The foregoing attributes and values of the Property are referred to in this document collectively as the "**Conservation Values**".

3. The Property is in an area, close to the cities of McMinnville, Carlton, Salem, and Portland, which is undergoing increased pressure for development and, in the absence of this Conservation Easement, the

*Chegwyn Conservation Easement*

Property could be rezoned to allow development in a manner which would significantly impair or destroy the Conservation Values of the Property.

4. Grantor and Grantee recognize and acknowledge that the Conservation Values are of great importance to Grantee, the people of the City of McMinnville, Yamhill County and the State of Oregon.
5. Grantor intends that the Conservation Values be preserved and maintained by land use patterns that abide with applicable laws and that do not significantly impair or interfere with the Conservation Values. Grantor further intends, as owner of the Property, to convey to Grantee the right to preserve and protect the Conservation Values in perpetuity.
6. Grantee intends by accepting this grant to preserve and protect in perpetuity the Conservation Values for the benefit of this generation and generations to come.

***NOW, THEREFORE***, in consideration of the above and the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of Oregon and the United States, including without limitation ORS 271.715 to 271.795 and the IRS Code §170(h), Grantor hereby grants and conveys to Grantee a conservation easement in perpetuity over the Property to protect and preserve the Conservation Values of the Property upon the terms and conditions set forth herein ("**Easement**").

***Purpose.*** It is the purpose of this Conservation Easement to protect the Conservation Values, allowing the Property to remain forever in its agricultural, natural, scenic and open space condition and as a single unit of 170 acres as indicated in Exhibits A, B, & C.

1. ***Baseline Documentation Report.*** Grantor and Grantee, by their signatures below, acknowledge receiving duplicate originals of the Baseline Documentation Report dated July, 2006 ("**BDR**") kept on file by Grantee. The BDR will be used by the parties to assure that any future changes in the use of the Property will be consistent with the terms of this Easement. However, the BDR is not intended to preclude the use of other evidence to establish the condition of the Property at the time of the execution of this Easement if there is a controversy over the use or conditions of the Property and Conservation Values.
2. ***Rights of Grantee.*** To accomplish the purpose of this Easement the following rights are conveyed to Grantee by this Easement, and no other conveyance is intended or implied:
  - a. To preserve and protect the Conservation Values of the Property as expressly specified in Paragraph 4 below;
  - b. To enter upon the Property at reasonable times in order to monitor compliance with and otherwise enforce the terms of this Easement in accordance with Paragraph 4 herein; provided that, except in cases where Grantee determines that immediate entry is required to prevent, terminate, or mitigate a violation of this Easement, such entry shall be preceded by no less than one week's prior written notice to Grantor and provided further that Grantee shall not unreasonably interfere with Grantor's use and quiet enjoyment of the Property;
  - c. To prevent any activity on or use of the Property that is in conflict with the purpose of this Easement and to require the restoration of such areas or features of the Property that may be



*Chegwyn Conservation Easement*

damaged by any inconsistent activity or use, pursuant to the remedies set forth in Paragraph 9 herein; and

d. To conduct easement monitoring on an annual basis.

3. ***Prohibited and Restricted Uses.*** Certain activities and uses upon or within the Property are inconsistent with the Conservation Values of the Property and the purpose of this Easement and are therefore prohibited or restricted, except with the written consent of Grantee, not to be unreasonably withheld, and subject to the Reserved Rights in Paragraph 6. Without limiting the generality of the foregoing, the following uses of or activities on the Property, although not an exhaustive list of uses or activities, are prohibited or restricted:

- a. The legal or *de facto* subdivision of the property is not allowed. The Property may not be divided, partitioned, nor conveyed except as a single lot. More than two residences are prohibited and those shall remain in the current locations (C).
- b. Placement or construction of any additional buildings on the Property is prohibited unless needed for an ongoing agricultural activity. The eight existing structures on the Property, described and located in attached "C" Exhibits, may be repaired and replaced.
- c. Commercial activity not directly related to the farm or forest products harvested from the Property must be confined to within the walls of the permitted structures. The foregoing shall not restrict use of the Property for environmental educational purposes.
- d. Creation or expansion of rights-of-way and access easements including driveways, roads and utility lines is prohibited except as outlined in Reserved Rights.
- e. Altering or removing soil, including any excavation, mining, removal of topsoil, rock, sand, gravel, or similar materials, or manual change in the topography within the boundaries of the Property other than for normal agricultural operations is prohibited. This shall not prevent the installation or maintenance of underground utility systems, including water, electric, communication lines, sewer and sanitary lines or the construction or maintenance of ponds, or home construction, or as otherwise necessary or convenient for Grantor's exercise of the Reserved Rights, Paragraph 5.
- f. Parking abandoned vehicles or machinery, dumping or burning of trash, garbage waste, appliances or other material on the Property is prohibited. Composting of biodegradable material or use of such materials to improve gardens, pasture, etc. is allowed if in accordance with applicable laws and does not negatively impact riparian areas, intermittent streams, or wetlands, or any other Conservation Values.
- g. The storage of petroleum products, herbicides, pesticides, or other substances, beyond that needed for ordinary agricultural, domestic use and/or annual property management, which, if accidentally released would pose a danger to any of the Conservation Values, is prohibited.
- h. The use of pesticides or biological control agents in a manner inconsistent with their lawful uses in the State of Oregon or other applicable jurisdictions is prohibited.

*Chegwyn Conservation Easement*

- i. Farm and other domestic animals shall not be permitted to negatively impact riparian areas or native vegetation, unless Grantee's approval is obtained for management of invasive species.
- j. Riparian areas will be preserved with no significant human-caused soil disturbance within 35 feet of the waterway.
- k. Agricultural fields consisting of approximately 100 acres as shown in attached Exhibit C: These fields will be preserved for agricultural activities.
- l. The approximately 35 acres of riparian forest and associated wetlands as shown on Exhibit C will remain intact to buffer the North Yamhill from the impacts of agricultural activities. This area may be managed in the future by an outside entity for public enjoyment as a nature park with the forest kept intact.
- m. Any use of the Property that conflicts with the purposes of this Easement is prohibited.

**4. Reserved Rights.** Grantors reserve to themselves, and to their personal representatives, heirs, successors, and assigns, all rights accruing from ownership of the Property including the right to engage in all uses of the Property not prohibited or restricted herein or by law. Without limiting the generality of the foregoing, and subject to the terms of Paragraph 4, the following rights are expressly reserved:

- a. The right to farm, raise crops and livestock. Agricultural uses and operations, including row crop farming, horticulture, grazing, animal husbandry and native agricultural plantings for habitat restoration and wildlife forage, are allowed provided that same are conducted in a manner consistent with the Conservation Values and as set forth in Paragraph 4.
- b. The cutting of trees for commercial and personal consumption, and native ecological enhancement, subject to the restrictions and prohibitions set forth in Paragraph 4.
- c. The maintenance of roads using methods (such as brush clearing and targeted herbicide use) that do not significantly impair the Conservation Values of the Property and as set forth in Paragraph 4 above.
- d. The use of existing roads to carry-out permitted uses as well as for general non-motorized use, as long as such use does not significantly impact the Conservation Values of the Property. Trails may be developed throughout the Property for the purpose of personal enjoyment and maintenance of the land consistent with respect for wildlife habitat, agricultural operations, and other natural environment preservation; provided that none of the Property may be used for recreational motorcycle, all terrain vehicles, or like recreational motorized vehicle riding.
- e. The use of legally authorized pesticide products and biological control agents registered with the State of Oregon for the control of weeds and other pests.

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- f. Development of border park areas suited to pedestrian use and to be managed by the City of McMinnville Parks Department along the edge of the property.
- g. The right to allow installation of public utility lines for water and sewer to be installed by the City in the above border park areas.
- h. Development of walking trails and amenities in the riparian forest green space areas to be managed by the McMinnville or Yamhill County Park Department.
- i. The right to allow establishment of a water line easement for a domestic water line on the east side of Grandhaven Drive in Chegwyn's field (as indicated in Exhibit C).
- j. Allow develop of a sewer line easement along the north side of Chegwyn along the Bonneville Powerline from the current "Hurl" property to Smith LLC land when it is developed.

**5. *Grantee's Approval.*** Where Grantee's approval is required by this Easement, Grantee is to grant or withhold its approval in writing within fifteen (15) days of receipt of Grantor's written request therefore. Grantee's approval may be withheld only upon a reasonable written determination by Grantee that the action as proposed would be inconsistent with the purposes of this Easement. Such written determination shall be subject to appeal in accordance with the provisions of Section 7 below or as otherwise may be permitted by law.

**6. *Arbitration.*** Any dispute between the parties, except for an action seeking an injunction, which cannot be resolved by the parties, will be settled by arbitration before a single arbitrator. The arbitrator will be selected by the parties after conferring, or attempting in good faith to confer, with one another; and if the parties cannot agree on an arbitrator, then either party may petition the Yamhill County Circuit Court for the appointment of an appropriate arbitrator. The arbitrator shall be either a former or retired judge or shall be an attorney with at least ten (10) years of experience in real estate transactions. Arbitration will occur in McMinnville, Oregon, in accordance with the arbitration rules of the Yamhill County Circuit Courts, or other arbitration rules to which the parties may agree. The arbitrator must conduct all proceedings and render a decision within sixty (60) days of appointment or as soon as reasonably possible thereafter. The arbitrator's decision will be final, subject only to the rights of appeal provided in ORS 36.355 through ORS 36.365 (or successor statutes), with the additional ground for exception that the arbitrator misapplied the law. Judgment upon the arbitration award may be entered in any court having jurisdiction. Nothing in this Agreement, however, will prevent a party from resorting to a court of competent jurisdiction in those instances where injunctive relief or other appropriate relief may be requested.

**7. *Grantee's Remedies.***

- a. Notice of Violation; Corrective Action. If Grantee determines that Grantor is in violation of the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantor of such violation and, when the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, a directive to restore the portion of the Property so injured.

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- b. Injunctive Relief. If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantee, or under circumstances when the violation cannot reasonably be cured within a thirty (30) day period, fail to begin curing such violation within the thirty (30) day period, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation as necessary, by temporary or permanent injunction, and to require the restoration of the Property to the condition that existed prior to such injury. Grantee's rights under this paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement.
- c. Emergency Enforcement. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values, Grantee may pursue its remedies under this paragraph without prior notice to Grantor or without waiting for the period provided for cure to expire, provided that notice of the circumstances and remedies pursued shall be given to Grantor simultaneously or immediately after Grantee takes such action to prevent or mitigate damage.
- d. Scope of Relief. Grantee shall be entitled to recover reasonable damages for violation of the terms of this Easement, including but not limited to damages for the loss of Conservation Values, including but not limited to the cost of undertaking any corrective action on the Property.
- e. Costs of Enforcement. If a suit, action, or other proceeding of any nature whatsoever (including without limitation any arbitration, administrative proceeding and any proceeding under the U.S. Bankruptcy Code) is instituted in connection with any controversy arising out of this Easement or to interpret or enforce any rights or obligations hereunder, the prevailing party shall be entitled to recover attorney fees and all other fees, costs, and expenses actually incurred as reasonably necessary in connection therewith, as determined by the arbitrator, court at trial or on any appeal or any petition for review, in addition to all other amounts provided by law.
- f. Grantee's Discretion. Enforcement of the terms of this Easement will be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantor shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.
- g. Acts Beyond Grantor's Control. Nothing contained in this Easement is to be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. Notwithstanding any provision to the contrary in this Easement, Grantor shall not be liable or responsible for acts of any trespassers on the Property.

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**8. Access.** No right of access by the general public to any portion of the Property is conveyed by this Easement.

**9. Costs, Liabilities, and Environmental Compliance.**

- a. **Upkeep and Maintenance.** Grantor retains all responsibilities and shall bear all cost and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including the maintenance of reasonably adequate comprehensive general liability insurance coverage if commercially available to Grantor. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any use permitted by this Easement, and all such activities or uses shall be undertaken in accordance with all applicable federal, state, and local laws, regulations, and requirements. Grantor shall keep the Property free of any liens arising out of any work performed for, or materials furnished to Grantor.
- b. **Remediation.** If, at any time, there occurs, or has occurred, an unlawful release in, on, or about the Property of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, soil, or harmful or threatening to human health or the environment, Grantor agrees to take all reasonable steps necessary to assure its containment and remediation, including any cleanup that may be required, unless the release was caused by Grantee, in which case Grantee shall be responsible therefore.
- c. **Control.** Nothing in this Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control: (1) over the day-to-day operations of the Property; or (2) over any of Grantor's allowable activities on the Property; or (3) as an "owner or operator" with respect to the Property within the meaning of The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"; 42 USC 9601 *et seq*).

**10. Taxes.** Grantor must pay, before delinquency and collection proceedings, all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Property by competent authority (collectively "taxes"), including any taxes imposed upon, or incurred as a result of this Easement, and will furnish Grantee with satisfactory evidence of payment upon Grantee's request.

**11. Representations and Warranties of Grantor.**

- a. **Fee Title.** Grantor represents and warrants that, after reasonable investigation and to the best of its knowledge; Grantor is the owner in fee simple of the Property and has the right to convey the Easement to Grantee.

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- b. **Environmental Matters.** Grantor represents and warrants to its actual knowledge without investigation:
- i. No substance defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or soil, or in any way harmful or threatening to human health or the environment exists or has been unlawfully released, generated, stored, deposited, disposed of, or abandoned on the Property, except for types and quantities of materials used for agricultural, forestry, animal husbandry or common household purposes;
  - ii. There are not now any underground fuel storage tanks located on the Property, whether presently in service or closed, abandoned, decommissioned, and Grantor has not removed any underground fuel storage tanks from the Property in a manner not in compliance with applicable federal, state, and local laws, regulations, and requirements;
  - iii. Grantor and the Property are in substantial compliance with all federal, state, and local laws, regulations, and requirements applicable to the Property and its use;
  - iv. There is no pending or threatened litigation involving or relating to the Property; and
  - v. No civil or criminal proceedings or investigations have been instigated at any time or are now pending, and no notices, claims, demands, or orders have been received, arising out of any violation or alleged violation of, or failure to comply with, any federal, state, or local law, regulation, requirement applicable to the Property or its use, nor do there exist any facts or circumstances that Grantor might reasonably expect to form the basis for any such proceedings, investigations, notices, claims, demands, or orders.

12. ***Representations and Warranties of Grantee.*** Grantee is a publicly supported organization and is an organization qualified to hold, monitor and manage this Easement under ORS 271.715-271.795 and IRS Code Section 170(h). Grantee's purpose includes, among other things, the preservation, protection or enhancement of land in its natural, scenic, and/or open space condition in perpetuity through the acquisition of title interests.

13. ***Hold Harmless.*** To the extent of any insurance coverage reasonably available and procured by Grantor to defend and indemnify Grantee, Grantor hereby releases and agrees to hold harmless, indemnify, and defend Grantee and its members, directors, officers, employees, and contractors and the heirs, personal representatives, successors, and assigns of each of them (collectively "Indemnified Parties") from and against any and all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys' fees, arising from: (1) injury to or death of any person, or physical damage to any property, resulting from any act, condition, omission of any duties of Grantor under this instrument, or other matter related to or occurring on or about the Property, to the extent caused by Grantor; (2) Grantor's violation or alleged violation of, or other failure to comply with, any state, federal, or local law, regulation, or requirement, including, without limitation, CERCLA, in any way affecting, involving, or relating to the Property; (3) the presence or release in, on, from, or about the Property, at any time, of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, soil, or in any way harmful or threatening to human health or the environment, to the extent caused by Grantor; and (4) Grantor's breach of its obligations under this Easement.

*Chegwyn Conservation Easement*

**14. *Extinguishment, Valuation, Condemnation, and Amendments.***

- a. **Extinguishment.** If circumstances arise in the future such as to render the purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Property subsequent to such termination or extinguishment, shall be determined, unless otherwise provided by Oregon law at the time, in accordance with Paragraph 15(b). Grantee shall use all such proceeds in a manner consistent with the conservation purposes of this grant.
  
- b. **Valuation.** This Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of Paragraph 15(a), the parties stipulate to have a fair market value determined by multiplying the fair market value of the Property unencumbered by the Easement (minus any increase in the value after the date of this grant attributable to improvements) at the time of extinguishment as determined by an appraisal by the ratio of the value of the Easement at the time of this grant to the value of the Property, without deduction for the value of the Easement, at the time of this grant. The values at the time of this grant shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this grant, pursuant to Section 170(h) of the Internal Revenue Code of 1954, as amended. For the purpose of this paragraph, the ratio of the value of the Easement to the value of the Property unencumbered by the Easement shall remain constant.
  
- c. **Condemnation.** If all or any part of the Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate, or other authority, so as to terminate this Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Property subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid out of the amount recovered. Grantee's share of the balance of the amount recovered shall be determined as set forth in 15(b). above.
  
- d. **Amendment.** If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee may jointly amend this Easement provided that (1) no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including ORS chapter 271 or Section 170(h) of the Internal Revenue Code of 1954, as amended, (2) any amendment shall be consistent with the purposes of this Easement, (3) any amendment shall not affect the perpetual duration of this Easement; and (4) any amendment shall be in writing and recorded in the official records of Yamhill County in McMinnville, Oregon.

**15. *Assignment.*** This Easement is transferable with Grantor's prior written consent, not to be unreasonably withheld, but Grantee may assign its rights and obligations under this Easement only to an organization that is a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable), and the

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applicable regulations promulgated there under, and authorized to acquire and hold conservation easements under ORS 271.715 to 271.795 (or any successor provision then applicable). As a condition of such transfer, Grantee shall require that the conservation purposes that this grant is intended to advance continue to be carried out and that such assignee assume all of Grantee's obligations under this Easement. Grantee agrees to give written notice to Grantor of an assignment at least twenty (20) days prior to the date of such assignment. The failure of Grantee to give such notice shall not affect the validity of such assignment nor shall it impair the validity of this Easement or limit its enforceability in any way.

16. In the event that the grantee becomes the property owner the easement shall not merge into title and this easement shall remain a separate property interest and continue into perpetuity under the terms set forth in this Conservation easement.
17. **Subsequent Transfers.** Grantor further agrees to give written notice to Grantee of the transfer of Grantor's interest in the Property by deed at least twenty (21) days prior to the date of such transfer. Such notice shall include the name, address, and telephone number of the prospective transferee. The failure of Grantor to perform any act required by this paragraph shall not impair the validity of this Easement or limit its enforceability in any way. Grantor further agrees to make specific reference to this Easement in any subsequent lease, deed, or other instrument by which any interest in the Property is conveyed. Prior to the time of transfer, Grantee shall meet with the prospective new-owner of the Property (that is, the successor to Grantor's interest hereunder) to review the Easement, the BDR, and other relevant information.
18. **Estoppel Certificates.** Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor, or any party designated to Grantor, any document, including an estoppel certificate, which certifies, to the best of the Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this Easement and otherwise evidences the status of this Easement. Such certification shall be limited to the condition of the Property as of Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's expense, within thirty (30) days of receipt of Grantor's written request therefore.
19. **Notices.** Any notice, demand, request, consent, approval or communication that either party desires or is required to give the other shall be in writing and either served personally or sent by first class mail, postage prepaid, to the parties and at the addresses first stated above on page 1 of this Easement, or to such other address as either party from time to time shall designate by written notice to the other.
20. **Recordation.** Grantee shall record this instrument in timely fashion in the official records of Yamhill County, Oregon and may re-record it at any time as may be required to preserve its rights in this Easement.
21. **General Provisions.**
  - a. Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of Oregon and the United States.



*Chegwyn Conservation Easement*

- b. Liberal Construction. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.
- c. Severability. If any provision of this Easement, or the application thereof to any person or circumstances, is found to be invalid, the remainder of the provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.
- d. Entire Agreement. This instrument, with its exhibits, sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with Paragraph 15(d).
- e. No Forfeiture. Nothing contained herein will result in a forfeiture of Grantor's title in any respect.
- f. Joint Obligation. The obligations imposed by this Easement upon Grantor, if more than one, shall be joint and several.
- g. Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. Unless specifically provided otherwise, the terms "Grantor" and "Grantee," wherever used herein, and any pronouns used in place thereof, shall include, respectively, the above-named Grantor and their personal representatives, heirs, successors, and assigns, and the above-named Grantee and its successors and assigns.
- h. Terminations of Rights and Obligations. A party's rights and obligations under this Easement shall terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.
- i. Captions. The captions in this instrument have been inserted solely for convenience of reference and shall have no effect upon construction or interpretation.
- j. Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

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TO HAVE AND TO HOLD unto Grantee, its successors, and assigns, forever.

IN WITNESS WHEREOF Grantor and Grantee have set their hands on the day and year first above written.

GRANTOR: (Charles Chegwyn) *P. Charles Chegwyn*

STATE OF OREGON County of Yamhill

This instrument was acknowledged before me this <sup>3rd JAL</sup> <sup>PCC</sup> 4th day of April, 2008.

*Lorie I. Atkinson*  
Notary Public for Oregon  
My Commission Expires: 2-4-09

GRANTEE

Yamhill Soil and Water Conservation District

By: *Jim LeTourneau*  
Jim LeTourneau, District Chair



STATE OF OREGON )  
 ) ss.  
County of Yamhill

This instrument was acknowledged before me this 4th day of April, 2008, by Jim LeTourneau as District Chair of the Yamhill Soil and Water Conservation District.

*Lorie I. Atkinson*  
Notary Public for Oregon

My Commission Expires: 2-4-09

List of Exhibits

- A. Legal Description
- B. Site Location Map
- C. Aerial Photo of property with Roadways, existing structures, agricultural fields, and riparian forest .
  - C.1 Description of structures.
- D. Soils Map
  - D.1 Soils inventory report



## EXHIBIT A

### LEGAL DESCRIPTION OF CHEGWYN FAMILY FARM

#### PARCEL 1:

West Half of the following described tract: Beginning at a point 111.81 feet North and 1938.30 feet West of the Northwest corner of the Madison Malone Donation Land Claim No. 40 in Township 4 South, Range 4 West of the Willamette Meridian, in Yamhill County, Oregon; thence South 03' 30" East 311.23 feet to a stake; thence East 718.11 feet; thence North 285.53 feet to a stake; thence North 89° 16' West 145 feet to a stake; thence North 16.50 feet to Southwest corner of F.W. Wallace tract; thence North 89° 16' West 573.33 feet to place of beginning.

#### PARCEL 2:

All of the East one-half of a certain lot, piece or parcel of land situated in the County of Yamhill, State of Oregon, and bounded and described as follows, to-wit: - Beginning at an iron pin set 111.81 feet North and 1938.30 feet West of the Northwest corner of the Madison Malone DLC in Township 4 South, Range 4 West, of the Willamette Meridian, in said County of Yamhill, State of Oregon; Thence South 00° 30' East 311.23 feet to a stake; Thence East 719 feet; Thence North 285.53 feet to a stake; Thence North 89° 16' West 145.09 feet to a stake; Thence North 16.50 feet to Southwest corner of F.W. Wallace land; Thence North 89° 16' West 573.33 feet to the place of beginning.

#### PARCEL 3:

Lot 7, GRANDHAVEN ORCHARD TRACTS and being a part of James T. Hembree Donation Land Claim in Township 4 South, Range 4 West of the Willamette Meridian, Yamhill County, Oregon, bounded as follows: Beginning at a point South 3' 30" East 311.23 feet from an iron pin set 111.81 feet North and 1938.30 feet West of Northwest corner of Madison Malone Donation Land Claim, said point being the Northwest corner of Lot 7 above named; thence South 3' 30" East along West line of said Lot 7, 303.36 feet to Southwest corner of said Lot; thence East 717.81 feet to Southeast corner of said Lot; thence North 303.36 feet along East line of said Lot to Northeast corner of said Lot; thence West 718.11 feet along North line of said Lot to place of beginning (containing 5 acres) subject to roadway now there, 20 feet wide, along the East end thereof.

#### PARCEL 4:

Lot 8, GRANDHAVEN ORCHARD TRACTS and being a part of the James T. Hembree Donation Land Claim in Township 4 South, Range 4 West of the Willamette Meridian, in Yamhill County, Oregon, bounded as follows: Beginning at a point South 3' 30" East 614.59 feet from an iron pin set 111.81 feet North and 1938.30 feet West of the Northwest corner of the Madison Malone Donation Land Claim, said point being the Northwest corner of said Lot 8; thence South 3' 30" East along the West line of said Lot 303.43 feet to Southwest corner of said Lot; thence East 717.50 feet to Southeast corner of said Lot; thence North 303.49 feet to the Northeast corner of said Lot; thence West along North line of said Lot 717.81 feet to place of beginning (containing 5 acres) subject to

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a roadway 20 feet wide over and along the East end thereof reserved for the use and benefit of S.C. Ford and his heirs and assigns and for the use and benefit of H. Chegwyn, his heirs and assigns.

**PARCEL 5:**

Lot 9, GRANDHAVEN ORCHARD TRACTS and being a part of the James T. Hembree Donation Land Claim in Township 4 South, Range 4 West of the Willamette Meridian, Yamhill County, Oregon, bounded as follows: Beginning at a point South 3' 30" East 918.02 feet from an iron pin set 111.81 feet North and 1938.30 feet West of the Northwest corner of the Madison Malone Donation Land Claim and said point being also at the Southwest corner of Lot 8 of said GRANDHAVEN ORCHARD TRACTS, and at Northeast corner of Lot 9; thence South 3' 30" East along West line of said Tract 9, 303.62 feet to Southwest corner of Lot 9; thence East along South line of said Lot 9, 717.20 feet to Southeast corner of said Lot 9; thence North 303.62 feet to the Northeast corner of said Lot 9 and Southeast corner of Lot 8; thence West along line between said Lots 8 and 9, 717.50 feet to place of beginning (containing 5 acres). Subject to a roadway 20 feet wide over and along the East end thereof.

**PARCEL 6:**

A part of the James T. Hembree Donation Land Claim in Township 4 South, Range 4 West of the Willamette Meridian, Yamhill County, Oregon, bounded as follows: Beginning at a point 457.28 feet South of the Northwest corner of the Madison Malone Donation Land Claim; thence West 1220 feet to center of 40 foot roadway; thence South along center of said roadway 178.52 feet; thence East 1220 feet to West line of said Malone Donation Land Claim; thence North 178.52 feet to place of beginning. (Containing 5 acres).

Together with easement in and to roadway 20 feet wide over and along West end of above described tract.

**PARCEL 7:**

Beginning at the Northwest corner of the Madison Malone Donation Land Claim, Notification No. 1225, Claim No. 49, Township 4 South, Range 4 West of the Willamette Meridian, Yamhill County, Oregon, said corner being at 1/4 post between Sections 9 and 10 in Township 4 South, Range 4 West of the Willamette Meridian; thence South along West line of said Claim and Section line 23.033 chains to a stake; thence East 12.240 chains to a stake; thence North 22.71 chains to a stake on North line of said Donation Land Claim; thence North 88°29' West along North line of said Claim 12.247 chains to place of beginning. (containing 28 acres).

**PARCEL 8:**

A tract of land in the James T. Hembree Donation Land Claim No. 46 in Township 4 South, Range 4 West of the Willamette Meridian in Yamhill County, Oregon, described as follows, to-wit:

Beginning at a stake at the North East corner of that tract of land conveyed by W.H. Adair to George J. Swift by Deed recorded June 18, 1912 in Book 63, Page 408, Deed Records, South 1506.02 feet from the North West corner of the Madison Malone Donation Land Claim No. 49; thence North 868.15 feet to a stake set at the Southeast corner of Lot No. 3 of "Grandhaven Orchard

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Tracts"; thence West 1220 feet to stake in the center of a 40 foot roadway; thence South along the center of said roadway 868.15 feet to the Northwest corner of said Swift tract; thence East 1220 feet to the place of beginning.

**PARCEL 9:**

Lot No. Ten (10) of "Grandhaven Orchard Tracts" and being a part of the Donation Land Claim of James T. Hembree and wife, in T. 4 S. R. 4 W. of the Willamette Meridian, in Yamhill County, State of Oregon, said Lot No. 10 containing Five acres, and said lot is bounded as follows: Beginning at a point South 03' 30" East 1221.64 feet from iron pin set 111.81 feet North and 1938.30 feet West of Northwest corner of the D.L.C. of Madison Malone and wife, in T. 4 S. R. 4 W. of the Willamette Meridian, in Yamhill County, Oregon, said beginning point being Northwest corner of said Lot No. 10; thence South 03' 30" East 303.75 feet; thence East 716.90 feet; thence North 303.75 feet; thence West 717.20 feet to place of beginning.

**PARCEL 10:**

A tract of land located in Sections 4, 9 and 10, Township 4 South, Range 4 West of the Willamette Meridian in Yamhill County, Oregon, being part of that tract of land described in deed from MARK C. SMITH to COLEMAN LLC and recorded in Instrument No. 200626897, Yamhill County Deed Records, Yamhill County, and being more particularly described as follows:

Beginning at an iron rod on the south line of Parcel 1 of said COLEMAN LLC tract that bears South 89°18' 37" East 828.50 feet (Basis of Bearings CS-12163) from an iron rod marking the most southerly southwest corner of said SMITH tract; thence North 00°07' 18" West 2492.42 feet to a point; thence East 982 feet, more or less to a point in the center of the North Yamhill River; thence downstream following the thread of said river 3790 feet, more or less to a point on the east line of the J. T. Hembree Donation Land Claim No. 46, said Township and Range, being also a point on the east line of said Section 9; thence South 32 feet, more or less along said east line to the northeast corner of that tract of land described in deed from J. F Hibbs and Bertha Hibbs to Carey Wallace and recorded December 1, 1894, in Book 31, Page 155, Deed Records; thence North 63°51' 18" West 484.29 feet to the northwest corner of said Wallace tract; thence North 61°58'26" West 1008.50 feet to an iron rod set in CS-11320 to mark the northwest corner of that tract of land described in deed to PALMER and recorded in Film Volume 173, Page 75, Deed Records; thence South 00°07' 18" East 1019.56 feet to a point on the north line of Parcel 2 of said COLEMAN LLC tract; thence South 89°18' 37" East 103.78 feet to the northeast corner of said Parcel 2; thence South 00°41' 23" West 16.50 feet to the southeast corner of said Parcel 2; thence North 89°18' 37" West 145.09 feet to the southwest corner of said Parcel 2; then North 00°41' 23" East 16.50 feet to the northwest corner of said Parcel 2, being a point on the south line of said Parcel 1; thence North 89°18' 37" West 573.30 feet to the point of beginning.

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*Chegwyn Conservation Easement*

Exhibit B: Site Location Map

Customer(s): P CHARLES CHEGWYN  
District: YAMHILL SOIL & WATER CONSERVATION DISTRICT

Field Office: MCMINNVILLE SERVICE CENTER

Assisted By: Michael Crabtree



Legend  
Chegwyn Property Lines  
— Oregon Highways



Image: nalp\_1-1\_1n\_s\_or071\_2005\_1.sid



*Chegwyn Conservation Easement*

**Exhibit C. 1 Description of Structures indicated on Exhibit Map C.**

C-1-1 Current Residence

C-1-2. Original Residence (now used for storage)

C-1-3. Garage for current residence

C-1-4. Blacksmith Shed

C-1-5. Apple Packing Shed

C-1-6. Animal Barn

C-1-7. Winter Livestock Shed and Storage

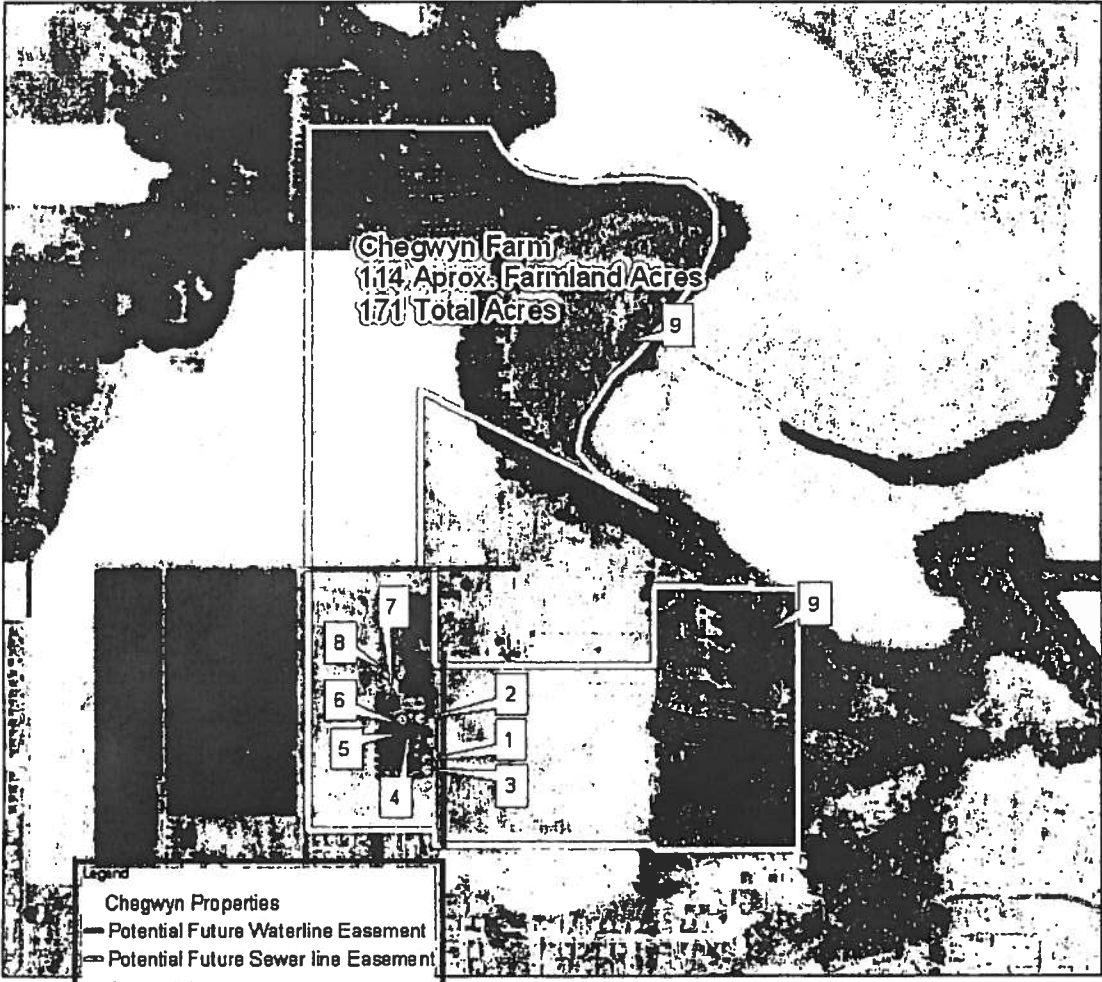
C-1-8. Farm Equipment Storage

# Chegwyn Conservation Easement

## Exhibit C: Chegwyn Farm

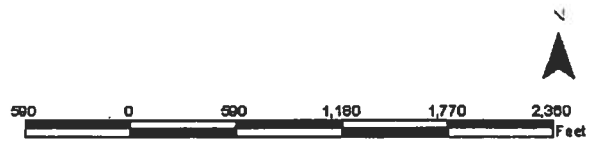
Customer(s): P CHARLES CHEGWYN  
 District: YAMHILL SOIL & WATER CONSERVATION DISTRICT

Field Office: MCMINNVILLE SERVICE CENTER  
 Assisted By: Michael Crabtree



- Legend**
- Chegwyn Properties**
- Potential Future Waterline Easement
  - Potential Future Sewer line Easement
- Points of Interest**
- 1: Current Residence
  - 2: Grandfather's Home 1912
  - 3: Garage
  - 4: Blacksmith Shop
  - 5: Apple Packing Shed
  - 6: Barn
  - 7: Winter Livestock Shed
  - 8: Farm Equipment Shop
  - 8: Riparian Forest

Image: nalp\_1-1\_1n\_s\_or071\_2005\_1.sid



(19/21)



*Chegwyn Conservation Easement*

**Exhibit D - 1 Soils Inventory Report For Chegwyn Property.**

<b>Map Unit</b>	<b>Map Unit Name</b>	<b>Acres</b>	<b>Percent</b>
Am	Amity Silt Loam	26.9	16%
Ck	Chehalis Silty Clay Loam	21.9	13%
Cs	Cove Silty Clay Loam	4.6	3%
Dc	Dayton Silt Loam	2.8	2%
Te	Terrace Escarpment	9.0	5%
Water	Open Water	3.6	2%
Wc	Wapato Silty Clay Loam	3.9	2%
WuB	Woodburn Silt Loam 0 – 7% slope	86.9	51%
WuC	Woodburn Silt Loam 7 – 12% slope	10.5	6%
	<b>Total</b>	<b>1 acres</b>	<b>100%</b>

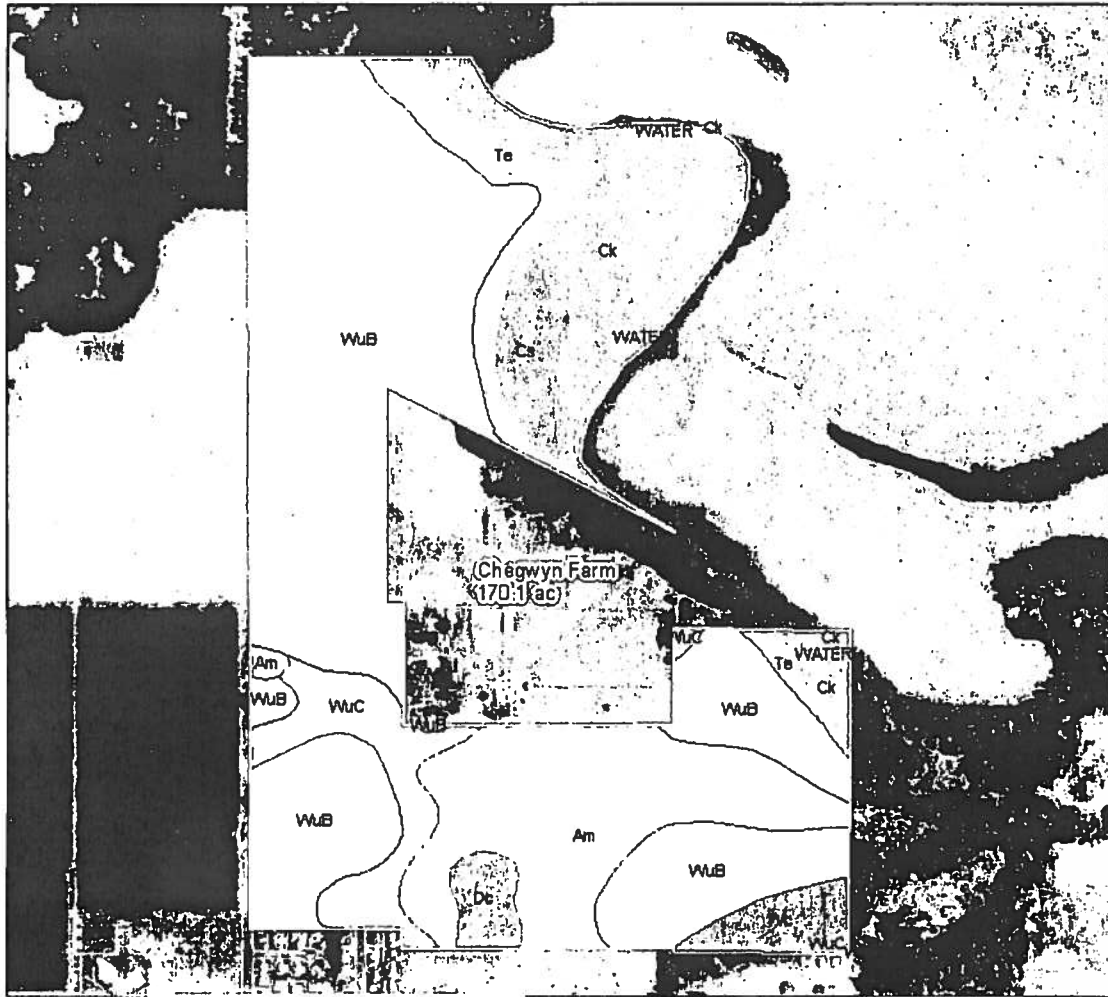
*Chegwyn Conservation Easement*

Exhibit D: Soils for Chegwyn Farm

Customer(s): P CHARLES CHEGWYN  
 District: YAMHILL SOIL & WATER CONSERVATION DISTRICT

Field Office: MCMINNVILLE SERVICE CENTER

Assisted By: Michael Crabtree



Chegwyn Property Lines

**Soils Map**

- AMITY SILT LOAM
- CHEHALIS SILTY CLAY LOAM, OVERFLOW
- COVE SILTY CLAY LOAM, THICK SURFACE
- DAYTON SILT LOAM, THICK SURFACE
- TERRACE ESCARPMENTS
- WAPATO SILTY CLAY LOAM
- WATER
- WOODBURN SILT LOAM, 0 TO 7 PERCENT SLOPES
- WOODBURN SILT LOAM, 7 TO 12 PERCENT SLOPES

