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.	Court of Appeals No. A134379 Review of Order No. 06-WKTASK-001709 of the Land Conservation and Development Commission

RESPONDENT CITY OF MCMINNVILLE'S ANSWERING BRIEF

Jeffrey G. Condit, OSB #822238
MILLER NASH LLP
3400 U. S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204-3699
Telephone: (503) 224-5858

Attorneys for Respondent City of McMinnville

John Kroger, OSB #077207
Attorney General
Denise G. Fjordbeck, OSB #822578
Attorney in Charge
Civil/Administrative Appeals Unit
Department of Justice, Appellate Division
1162 Court Street NE
Salem, Oregon 97301
Telephone: (503) 378-4402

Attorneys for Respondent Land Conservation and Development Commission

Mary Kyle McCurdy, OSB #883530
1000 Friends of Oregon
534 SW Third Avenue, Suite 300
Portland, OR 97204
Telephone: (503) 497-1000

Attorneys for Petitioners

January 2010

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Table of AUTHORITIES
(Continued)

Page

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

Respondent City of McMinnville (the "City") generally accepts Petitioners' Statement of the Case, with the following additions and exceptions.

A. Summary of Response.

The State of Oregon Land Conservation and Development Commission's ("LCDC" or "Commission") approval of the City's proposed urban growth boundary ("UGB") expansion correctly interpreted applicable law and correctly applied the substantial evidence test. Petitioners' arguments misconstrue the law, misapply the substantial evidence test, and impermissibly ask this Court to substitute its judgment for that of LCDC and/or the City on issues of evidence and policy.

B. Summary of Facts.

As Petitioners note, the LCDC Order on appeal in this case, 06-WKTASK-001709 (the "2006 Order"), is the second time the City's proposed UGB amendment has come before the Commission. The City adopted its Comprehensive Plan text and map amendments addressing Work Task 1 and implementing its UGB amendment on October 14, 2003. Ordinance 4795 (Adopting the McMinnville Economic Opportunities Analysis), Rec. 1609-1611; Ordinance 4796 (Adopting the McMinnville Growth Management and Urbanization Plan ("MGMUP")), Rec. 911-918. These decisions were the culmination of over three years of consultant and staff work, community forums, and public hearings. Rec. 911. The City has been in periodic review for Work Task 1 since prior to 1994. Rec. 391.

The City submitted its decisions for periodic review on October 7, 2003. Rec. 909. Following public hearings on April 22 and September 10, 2004, LCDC issued a Partial Approval and Remand Order 04-WKTASK-001646 on December 3, 2004 (the "2004 Order"), which approved in part and remanded in part the City's decision. Rec. 389-398. The 2004 Order approved the City's Residential Lands Need

Analysis (except for parkland needs), approved certain rezones and portions of the UGB expansion, and remanded the rest of the decision. Rec. 395-396.

In response to the remand, the City conducted another round of staff and consultant analyses and public hearings and adopted Ordinances 4840 and 4841 amending the MGMUP, and submitted them for periodic review on January 31, 2006. See revised Order at ER-6, Rec. 313-366. LCDC issued its 2006 Order approving Work Task 1 and the UGB expansion on November 8, 2006. Rec. 6-8. LCDC withdrew this Order and issued a Revised Order Upon Reconsideration ("Revised Order") on November 17, 2008 (Revised Order attached at ER-1–38).

II. PETITIONERS' STANDING

The City agrees that Petitioners have standing in this matter.

III. INTRODUCTION

The primary issue in this case is whether the City appropriately located its UGB expansion. (Map of UGB expansion showing added resource and exception lands attached at ER-39.) In order to put its specific responses in context, the City begins by explaining the statutory framework and policy choices that guided its decision.

When a city over 25,000 in population undertakes a legislative review of its urban growth boundary, it must demonstrate that its comprehensive plan provides sufficient buildable lands within the urban growth boundary to accommodate estimated housing needs for 20 years. ORS 197.296(2).[1] In order to make this

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[1] ORS 197.296(2) states:

> "(2) At periodic review pursuant to ORS 197.628 to 197.650 or at any other legislative review of the comprehensive plan or regional plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, a local government shall demonstrate that its comprehensive plan or regional plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to

determination, a city must:

- inventory the supply of buildable lands within the existing urban growth boundary and determine the housing capacity of such lands; and

- conduct a housing needs analysis by type and density range pursuant to ORS 197.303[2] and Statewide Land Use Planning Goal 10 (housing) and determine the number of units and the amount of land needed for each needed housing type for the next 20 years. ORS 197.296(3).[3]

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accommodate estimated housing needs for 20 years. The 20-year period shall commence on the date initially scheduled for completion of the periodic or legislative review."

[2] ORS 197.303 states in pertinent part:

"**197.303 'Needed housing' defined.** (1) As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:

(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

(b) Government assisted housing;

(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and

(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions."

[3] ORS 197.296(3) states:

"(3) In performing the duties under subsection (2) of this section, a local government shall:

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

(b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules

If a city determines that its housing need is greater than its housing capacity pursuant to the above analysis, it is directed to adopt one of three strategies. A city must:

- amend its urban growth boundary to accommodate the need;
- amend its comprehensive plan or land use regulations to include new measures that "demonstrably increase the likelihood" that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years; or
- adopt a combination of the above two approaches.

ORS 197.296(6).[4]

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relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years."

[4] ORS 197.296(6) states:

> "(6) If the housing need determined pursuant to subsection (3)(b) of this section is greater than the housing capacity determined pursuant to subsection (3)(a) of this section, the local government shall take one or more of the following actions to accommodate the additional housing need:
>
> (a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years. As part of this process, the local government shall consider the effects of measures taken pursuant to paragraph (b) of this subsection. The amendment shall include sufficient land reasonably necessary to accommodate the siting of new public school facilities. The need and inclusion of lands for new public school facilities shall be a coordinated process between the affected public school districts and the local government that has the authority to approve the urban growth boundary;
>
> (b) Amend its comprehensive plan, regional plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary. A local government or metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures; or

Finally, a city must determine the overall average density and overall mix of housing types at which residential development of needed housing must occur during the 20-year planning period. ORS 197.296(7).[5] If the needed density or mix over the planning period is greater than the actual density or mix that has developed in the past as determined pursuant to ORS 197.296(5), then a city must take measures that "will demonstrably increase the likelihood" that residential development will occur at the needed mix and density. Id.

Due to a variety of demographic, economic, and social factors, the City determined that its future growth would have to occur at a density of 18% above the density at which it has historically developed in order to meet its housing needs over the 20-year planning period. Rec. 926-929. As required by ORS 197.296(7), the City determined to address this need by adopting policies that "allow the market to increase densities and to push it to do so in some instances." MGMUP Guiding Principle #5, Rec. 935-936. Accordingly, the MGMUP:

- mandates the rezoning of certain lands within the UGB to higher-density and/or residential designations. Rec. 955-966.

(c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection."

[5] ORS 197.296(7) states:

> "Using the analysis conducted under subsection (3)(b) of this section, the local government shall determine the overall average density and overall mix of housing types at which residential development of needed housing types must occur in order to meet housing needs over the next 20 years. If that density is greater than the actual density of development determined under subsection (5)(a)(A) of this section, or if that mix is different from the actual mix of housing types determined under subsection (5)(a)(A) of this section, the local government, as part of its periodic review, shall adopt measures that demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years."

- includes policies to allow for additional dwelling units in its single-family zones. Rec. 957.

- limits the application of the City's lowest-density zone (R-1) to slope-constrained lands, and directs the City to rezone other R-1-zoned lands to a higher-density R-2 designation. Rec. 960.

- adopts land-characteristic factors for designating low (R-1 and R-2) and medium-density (R-3 and R-4) residential lands. Rec. 1009 -1010.

- encourages housing in upper floors in its historic downtown. Rec. 961.

- creates a new R-5 zone (exclusive multi-family zone) applicable to neighborhood activity centers. Rec. 962-963.

- includes a transit corridor policy allowing increased residential densities along transit corridors. Rec. 963-966.

- provides for the creation and designation of Neighborhood Activity Centers ("NAC"). Rec. 957-959. (Map showing proposed Plan and Zone changes, including the location of the NACs, attached at ER-40.)

Of these efficiency/densification measures, the creation and designation of the NACs is the "cornerstone of the City's urbanization plan." Rec. 957. A NAC is designed as a mixed-use, neo-traditional neighborhood development.[6] It consists of a "focus area" containing neighborhood commercial and institutional uses and high-density housing, immediately surrounded by a "support area" of high-density housing, medium-density housing, and then lower-density housing. Rec. 958-957. The NACs

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[6] "Neo-traditional" development or "new urbanism" is a set of urban planning principles based on pre-automobile development designed to encourage walkable neighborhoods, reduce vehicle trips, encourage sustainability, and produce compact, higher-density urban development. See e.g., *New Urbanism and Beyond: Designing Cities for the Future*, Tigran Haas, Rizzoli (2008); *The Death and Life of Great American Cities*, Jane Jacobs, Random House (1961).

implement MGMUP Guiding Principle #6, which calls for a compact urban form and a return to traditional pedestrian-friendly neighborhoods consistent with concepts of "smart growth." Rec. 936-937; 987-988.

The NACs have certain locational and land requirements in order to make them work. Rec. 988-994. NACs need to be at least 1 to 1.5 miles from downtown, and must be separated from one another by 0.75 to 1 mile. Rec. 993. Non-residential uses in the "focus area" should radiate out from the center approximately 1/8 of a mile. Id. High-density housing must be located no more than 1/8 mile from the edge of a focus area, and medium-density housing must be located no more than 1/4 mile from the focus area. Id. Site area and development size and intensity are required to be within certain ranges. Rec. 994. Because compliance with these requirements requires a high degree of comprehensive master planning and a defined amount of land, the City concluded:

> "Neighborhood Activity Centers should not be located in areas that are heavily parcelized, or characterized by numerous individual ownerships. Priority should be given to locations that consist primarily of large vacant parcels in order to maximize the ability to realize such development in a cost effective, comprehensively planned manner." Rec. 993.

Petitioners did not object to any of these urbanization policies and efficiency measures. Indeed, they lauded these policies—and the creation of the NACs in particular—as "meaningful improvements over current practices" in their 2003 testimony to the commission. Rec. 863. These measures and policies therefore provide a legally valid basis for the City to make determinations regarding the suitability of land to meet these needs. Hildenbrand v. City of Adair Village, 217 Or App 623, 635-636, 177 P3d 40 (2008) ("Hildenbrand") (rejecting argument that plan policies about community form, growth management, and transportation needs are irrelevant to the location of an urban growth expansion under ORS 197.298).

Based on these location/site needs, the MGMUP designates four areas as NACs: Northwest, Southwest, Grandhaven, and Three Mile Lane. Rec. 994-1006. See Map attached at ER-40.[7] The MGMUP also adopts specific development and zoning designations for each area. Rec. 994-997 (Northwest area); Rec. 997-1000 (Grandhaven); Rec. 1001-1003 (Three Mile Lane); and Rec. 1004-1006 (Southwest). In addition, the MGMUP designates the Norton Lane area for medium- and high-density housing, although it is not located in a NAC, due to its analyzed carrying capacity for high-density development. Rec. 1432.

Implementation of these efficiency and density measures enabled the City to reduce its urban growth expansion by 225 acres. ER-18. If these measures do not accomplish their intended purpose because land added to the UGB cannot accommodate the need, then ORS 197.296(6) would require the City to enact a much larger UGB expansion in order to meet its 20-year land supply requirement.

IV. RESPONSE TO ASSIGNMENTS OF ERROR

RESPONSE TO FIRST ASSIGNMENT OF ERROR

LCDC correctly interpreted the applicable law (ORS 197.298, Goal 14, ORS 197.732(1)(C)(B), Goal 2 Part II(C), And OAR 660-004-0020), and correctly applied the substantial evidence test in acknowledging the City of McMinnville's UGB Expansion.

I. Preservation of Error.

Respondents agree that the issues in the first assignment of error were preserved below with the following exceptions: It is impossible to tell whether Petitioners raised many of their issues in the First Assignment of Error because they address only the City's findings and not the Commission's decisions with regard to their objections. In addition, Petitioners did not raise any objection with regard to the areas allegedly not analyzed by the City and the Commission in their testimony before

[7] The four NACs are labeled "B" and are within the gold circles.

the City Council. See City's Answering Brief, pp. 32-35.

II. Standard of Review.

The City agrees with Petitioners that this Court's standard of review is as set forth in ORS 183.482(8).[8]

ARGUMENT IN ANSWER TO FIRST ASSIGNMENT OF ERROR

INTRODUCTION

Petitioners' First Assignment of Error argues that the City's urban growth boundary expansion does not comply with the priority scheme set forth in ORS 197.298[9] and the locational factors of Goal 14,[10] and/or is not supported by

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[8] ORS 183.482(8) provides:

> "(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall:
>
> "(A) Set aside or modify the order; or
>
> "(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> "(b) The court shall remand the order to the agency if the court finds the agency's exercise of discretion to be:
>
> "(A) Outside the range of discretion delegated to the agency by law;
>
> "(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
>
> "(C) Otherwise in violation of a constitutional or statutory provision.
>
> "(c) The court shall set aside or remand the order if the court finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."

[9] ORS 197.298 provides:

> **"Priority of land to be included within urban growth boundary.**
> (1) In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities:

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

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

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

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

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

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

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

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

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

[10] As noted in LCDC's Revised Order, Statewide Land Use Planning Goal 14 was amended April 28, 2006. The City's submittal is governed by the Goal as it existed prior to these amendments. Prior to the 2006 amendments, Goal 14 required that a UGB amendment be based on the consideration of the following seven factors:

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

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

substantial evidence in the record. Petitioners' construction of the regulatory scheme ignores this Court's decisions in City of West Linn v. LCDC, 201 Or App 419, 119 P3d 285 (2005) ("West Linn") and Hildenbrand. Petitioners' evidentiary arguments ignore this Court's standard of review of LCDC's decision.

1. Petitioners' Interpretation of ORS 197.298 and its Relationship to Goal 14 is Inconsistent With West Linn and Hildenbrand.

Petitioners argue that ORS 197.298 establishes a rigid hierarchy for inclusion of lands in the UGB, and that the Goal 14 locational factors are only relevant to this hierarchy when choosing among lands within the same priority class. Pet. Brief at 8–9. Petitioners argue that the 197.298 priority scheme requires a demonstration that all higher-priority lands have been utilized before a local government may consider lower-priority lands. Id. Petitioners argue, or assume for the purposes of their specific arguments, that the only way the priorities in ORS 197.298(1) can be varied from is by application of the exceptions in ORS 197.298(3), which, Petitioners argue, are very limited in scope. Pet. Brief at 9.

This Court rejected a similar argument in West Linn:

> "In this case, petitioner argues that, before resorting to fourth-priority agriculture land such as Study Areas 85 and 87, Metro was required to conclude that none of the areas under consideration of a higher priority, wherever they may be located, provided adequate acreage. In other words, petitioner argues that Metro must exhaust the available supply of urban reserve, exception, and marginal land *anywhere adjacent to the*

> (3) Orderly and economic provision for public facilities and services;
>
> (4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
>
> (5) Environmental, energy, economic and social consequences;
>
> (6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and
>
> (7) Compatibility of the proposed urban uses with nearby agricultural activities."

> *UGB* before agricultural or forestry lands may be considered for inclusion within a UGB. Because Metro's alternative analysis shows that there are, in fact, other such areas available, petitioner argues, it is unlawful to include Study Areas 85 and 87. In support of that construction of the statute, petitioner invokes our opinion in D.S. Parklane Development, Inc. v. Metro, 165 Or App 1, 17-18, 994 P2d 1205 (2000). (Emphasis in original.)
>
> * * *
>
> "We agree with Metro that LCDC correctly construed ORS 197.298(1). The statute provides that progressively lower priority lands may be included within a UGB if higher priority land 'is inadequate to accommodate the amount of land needed.' The operative term is 'inadequate.' Whether there is adequate land to serve a need may depend on a variety of factors. In particular, the adequacy of land may be affected by locational considerations that must be taken into account under Goal 14. As LCDC correctly noted, ORS 197.298(1) expressly provides that the priorities that it describes apply '[i]n addition to any requirements established by rule addressing urbanization,' such as the locational factors described in Goal 14. As a result, the fact that other, higher priority land may exist *somewhere* adjacent to the UGB does not necessarily mean that that land will be '[]adequate to accommodate the amount of land needed,' if using it for an identified need would violate the locational considerations required by Goal 14. In other words, the statutory reference to 'inadequate' land addresses suitability, not just quantity, of higher priority land." West Linn, 201 Or App 439-440. (Emphasis added.)

The Court reaffirmed this interpretation of the relationship between Goal 14 and the priority statute in Hildenbrand, 217 Or App at 634-635. The locational analysis under Goal 14 is therefore relevant to—indeed, is necessarily part of—the determination of whether higher-priority lands are adequate to meet the land need under ORS 197.298(1). The correct legal analysis is therefore whether the higher-priority lands were appropriately excluded based on a correct application of the Goal 14 locational factors or any other "requirements established by rule addressing urbanization."

Petitioners' legal arguments throughout their First Assignment of Error are premised on their incorrect interpretation of the relationship between the ORS 197.298 priorities and the Goal 14 and other urbanization goals. Petitioners cite to West Linn in a handful of locations, but fail to address its reasoning.

2. Petitioners Fail to Apply the Correct Standard of Review.

LCDC's Review of a Local Periodic Review Decision: LCDC reviews a local periodic review submittal for compliance with the applicable Goals and Rules. OAR 660-025-0040. For periodic review submittals, "compliance with the goals" means that the submittal "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." ORS 197.747. Pursuant to Goal 2, LCDC must determine whether a local government's factual findings are supported by an "adequate factual base."[11] This requirement applies to legislative decisions, such as the City's UGB expansion at issue here, and has been interpreted to impose a "supported by substantial evidence" requirement similar to that of ORS 197.835(9)(a)(C). 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372, 377, aff'd 130 Or App 406 (1994). See LCDC's discussion in its Revised Order, ER-4-5.

In determining whether a local factual decision is supported by substantial evidence, LCDC must determine whether a reasonable person could have reached the same conclusion based on all of the evidence in the record. Younger v. City of Portland, 305 Or 346, 353-57, 752 P2d 262 (1988). If so, then LCDC must defer to the local determination, even if it might have reached a different conclusion

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[11] Goal 2 states, in pertinent part:

> "To establish a land use planning process and policy framework as a basis for all decision[s] and actions related to use of land and to assure an adequate factual base for such decisions and actions." (Emphasis added.)

had it been sitting as the initial decision maker. City of Portland v. Bureau of Labor and Industries, 298 Or 104, 119, 690 P2d 475 (1984).

Court of Appeals Review of LCDC's Decision: ORS 197.650(1) provides that this Court review an LCDC Order "in the manner provided in ORS 183.482," the statute governing review of contested cases under the Oregon Administrative Procedures Act.

ORS 183.482(7) confines the Court's review to the record and states that "the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion."

In West Linn, this Court concluded that the substantial evidence test applies to review of LCDC's Order pursuant to ORS 183.482(8)(c). The West Linn Court described substantial evidence as "evidence that, after reviewing the whole record, a reasonable person would find adequate to support a finding." 201 Or App at 431. The Court was clear, however, that it may not substitute its judgment as to LCDC's determination:

> "When we say that the substantial evidence test applies, however, we do not suggest that we review the record on our own to determine whether Metro's[12] decision, in fact, satisfied the standard. As we explained in Citizens Against Irresponsible Growth, '[o]ur role is to determine whether [the agency] applied the correct legal test in deciding whether Metro's decision is supported by substantial evidence.'" West Linn, 201 Or App at 428-429, citing Citizens Against Irresponsible Growth v. Metro, 179 Or App 12, 21, 38 P3d 956 (2002).

This Court reaffirmed this scope of substantial evidence review in Hildenbrand. According to the Hildenbrand Court, the question was whether the local government's record was so at odds with the agency's evaluation that the Court could

[12] Metro's approval of an expansion of the Metropolitan Area UGB was the subject of LCDC's periodic review order on appeal in the West Linn case.

infer that the agency had misunderstood or misapplied its scope of review. 217 Or App at 635, citing to Younger, 305 Or at 358.

The scope of evidentiary review therefore narrows as a decision climbs the appellate ladder: The local government makes the initial evidentiary determinations following public hearings; LCDC determines whether or not a local government's decision is supported by substantial evidence under Goal 2; and the Court of Appeals reviews whether LCDC's determination correctly applies the substantial evidence test.

Petitioners repeatedly argue that the City's decision was erroneous based on the evidence. Not once in their brief do Petitioners focus on the correct question: Did LCDC appropriately apply the substantial evidence test to the City's decision?

A. Response to Sub-Assignment of Error One

Petitioners' First Sub-Assignment of Error fails to apply the correct standard of review. Although Petitioners refer to "LCDC" or "the Commission" a number of times, their arguments in their First Sub-Assignment of Error are directed almost entirely toward the City's decision and cite only to the City's findings and background documents. With two minor exceptions discussed below, LCDC's decision is not quoted, cited to, or analyzed in Petitioners' First Sub-Assignment of Error. Because of this, it is impossible to tell whether Petitioners raised these specific arguments with regard to the City's decision in a valid objection to the director, as required by OAR 660-025-0140.[13] It is LCDC's decision, not the City's decision, that

[13] OAR 660-025-0140 provides:

> "(2) Persons who participated at the local level orally or in writing during the local process leading to the final decision may object to the local government's work task submittal. To be valid, objections must:

is before this Court on review. ORS 197.650. See Angel v. City of Portland, 113 Or App 169, 831 P2d 77 (1992) (arguments focused solely on the city's alleged errors ignore the Court of Appeals' scope of review of LUBA's decision and impede meaningful judicial review). As explained above, in reviewing LCDC's decision, this Court does not review the record on its own to determine whether the City's decision is supported by substantial evidence. Rather, this Court reviews whether LCDC applied the correct legal test. West Linn, 201 Or App 428-429.

In several places, Petitioners take the Commission to task for not adopting sufficiently detailed findings addressing each and every one of the applicable goals, rules, and statutory criteria. In other places, Petitioners' arguments appear to assume that LCDC's acknowledgment Order adopts and incorporates the City's decision by reference. As explained above and noted in LCDC's brief, this isn't LCDC's job under periodic review. It is the City's job to enact comprehensive plan and zoning regulations, such as the UGB amendment at issue here, and to adopt findings that determine and demonstrate compliance with the applicable goals, administrative rules, and statutory requirements. It is LCDC's job to review that decision to determine whether it complies with the applicable statutes, goals, and rules. That review is not *de novo*; rather, it occurs pursuant to a notice-and-objection

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(a) Be in writing and filed with the department's Salem office no later than 21 days from the date the notice was mailed by the local government;
(b) Clearly 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;
(c) Suggest specific revisions that would resolve the objection; and
(d) Demonstrate that the objecting party participated at the local level orally or in writing during the local process."

OAR 660-025-0140(3) states that "[o]bjections that do not meet the requirements of section (2) of this rule will not be considered by the director or commission."

process where the Commission's scope of review is governed by and limited to valid objections raised by persons who participated at the local level and to issues raised by the director pursuant to department review. OAR 660-025-0140; OAR 660-025-0150. Nothing in the Periodic Review Statute or Rule requires or authorizes the Commission to replicate the City's findings, incorporate them by reference, or to re-make the City's decision. Petitioners could certainly file an objection with LCDC that the City's decision and findings were not sufficiently detailed or did not address all relevant criteria, and then challenge LCDC's determination of compliance or sufficiency, but that is not what they have done in their First Sub-Assignment of Error. Under ORS 183.482, this Court does not review agency decisions de novo and is confined to the issues raised before the agency. Acc. Prev. Div. v. Van Eyk, 31 Or App 1355, 1357, 572 P2d 671 (1977). Petitioners' arguments regarding their objections to the *City's* findings do not provide a basis for this Court to reverse or remand *LCDC's* decision.[14]

The two exceptions where Petitioners discuss LCDC's decision are located on page 23 of Petitioners' Opening Brief.

First, Petitioners quote the Commission's determination with regard to the incompatibility of urban development in the West Hills area with farm and forestry on adjacent resource lands, and argue that this determination is conclusory. Goal 14, Factor 7, requires consideration of the "compatibility of the proposed urban uses with nearby agricultural activities." LCDC concurred with the City's finding that because the West Hills area was surrounded on three sides by farm and forestry lands, significant conflicts with resource use would result if urban housing were to be developed in that area. Rec. 29. Petitioners do not explain how this analysis

[14] As the Court noted in Angel, arguments focused on the local government's decision leave respondents—and this Court—to extrapolate petitioner's arguments with regard to the agency's decision.

demonstrates that LCDC misapplied the applicable law or the substantial evidence test. This argument provides no basis for this Court to reverse or remand the finding.

In addition, LCDC's rejection of Petitioners' objection with regard to the West Hills area was based on more than just this single determination. ER-25-26. LCDC's other findings include the difficulty and expense of serving the area with water and road services, which goes to Goal 14, Factor 3 ("orderly and economic provisions for public facilities and services"). ER-26. They discuss the difficulties of developing the needed medium- and high-density housing given the topography and existing rural residential development, which goes to Goal 14, Factor 4 ("maximum efficiency of land uses within and on the fringe of the existing urban areas"). ER-26.

Goal 14 locational factors are not independent approval criteria; rather they are considerations that must be balanced in order to determine the appropriate location of a UGB. As this Court held in 1000 Friends of Oregon v. Metro, 174 Or App 406, 26 P3d 151 (2001):

> "* * * the locational factors are not independent approval criteria. It is not necessary that a designated level of satisfaction of the objectives of each of the factors must always be met before a local government can justify a change in a UGB. Rather, the local government must show that the factors were 'considered' and balanced by the local government in determining if a change in the UGB for a particular area is justified. It is within a local government's authority to evaluate the Goal 14 factors and exercise its judgment as to which areas should be made available for growth." 174 Or App at 420-421, citing Branscomb v. LCDC, 64 Or App 738, 743, 669 P2d 1192 (1983), aff'd 297 Or 142, 681 P2d 124 (1984).

LCDC rejected Petitioners' objection to the exclusion of the West Hills area for multiple reasons. Petitioners fail to explain how the cited finding, taken out of context, demonstrates that LCDC misapplied Goal 14 or the substantial evidence test when it approved the City's exclusion of the West Hills area from the UGB.

Second, Petitioners cite to LCDC's Order for the proposition that the City and the Commission did not address the entire Fox Ridge Road North area that Petitioners contend should be included, violating OAR 660-004-0020. Petitioners also argue that LCDC failed to address the portion of the area that is part of a Measure 37 claim. They further argue that LCDC made no findings that address Goal 14, Factor 7 (agricultural land use compatibility).

LCDC's findings do in fact explain why Tax Lot 700 was included, but Tax Lots 100 and 200 and the lands to the west were excluded. ER-28-29, particularly ER-29 (first two paragraphs).[15] It also contains an agricultural compatibility analysis for the included Tax Lot 700.[16] ER-27 (last two paragraphs). Petitioners fail to explain how their argument that additional lands should have been considered affects or undermines these findings.

Petitioners repeat their argument regarding the Measure 37 property in more detail in their specific arguments with regard to the Fox Ridge Road North area in Sub-Assignment of Error Two. Pet. Brief at 43-47. The City relies on its response to those arguments. See City's Answering Brief, pp 29-30.

B. Response to Sub-Assignment of Error Two.

The preamble to Petitioners' Sub-Assignment of Error Two suffers from the same errors as Petitioners' First Sub-Assignment of Error. Without citing to

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[15] Although LCDC did address the lands west of Tax Lots 100 and 200, the City notes that OAR 660-004-0020 does not apply to choices among resource lands. See City's Answering Brief at 31-33. Even if it did apply, the Rule only requires a site-specific analysis if a proponent submits factual evidence demonstrating that the proffered alternative lands can more reasonably accommodate the need. Id. Other than identifying the lands west of Tax Lots 100 and 200 and asserting that they are higher priority under ORS 197.298, Petitioners do not explain why such lands can more reasonably accommodate the need as compared to the lands the City selected. Neither the City nor LCDC was therefore legally required to address such lands.

[16] Goal 14, Factor 7, requires an analysis of the "compatibility of the proposed urban uses with nearby agricultural activities."

LCDC's decision, Petitioners ascribe a position to LCDC based on Petitioners' (incorrect) characterization of the City's decision, and then attack that straw man.[17] Pet. Brief, pp. 23-25. For the reasons discussed above, this argument does not provide a basis for this Court to reverse or remand LCDC's decision.

Response to Petitioners' Arguments Regarding Excluded Exception Areas.[18]

Old Sheridan Road

Petitioners object to LCDC's finding concurring with the City's conclusion that the Old Sheridan Road area cannot reasonably accommodate the indentified land need. Petitioners argue that Old Sheridan Road can reasonably accommodate the need because it is possible to extend urban service to the area, and because it can be accessed by other roads.

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[17] For example, Petitioners argue that LCDC "endorses" the City's determination that it needs more lands for medium- and high-density housing and argue that this determination by the City is factually incorrect. Petitioners argue that 63% of all new residential land need is for low-density R-1 and R-2-zoned lands, and that such need exceeds the lands provided in the exception areas included in the UGB. Pet. Brief at 23-24. Petitioners therefore argue that no need for medium- and high-density housing has been demonstrated, and the additional low-density housing need can be met on exception areas and lower-priority resource lands that have been excluded. Petitioners misread the City's housing needs analysis. First, although low-density housing lands do make up approximately 63% of the buildable lands needed, medium- and high-density housing make up approximately 55% of the determined housing need. Table 68, Rec. 1152. As noted in the Introduction, the City has historically met its need for low-density housing, but has been deficient in meeting its need for medium- and high-density housing. ORS 197.296(6) therefore requires that the City focus on measures that will "demonstrably" meet its need for medium- and high-density housing. While the City determined that certain of the exception areas could be added to meet the need for lower-density residential development, none of the areas studied could meet the need for medium- to high-density housing or accommodate the development of the NACs for various reasons, including costs, parcelization, and proximity. Rec. 1359-1365; particularly the conclusion on page 1365. LCDC affirmed the City's analysis. ER-25-33. Review of the land need percentages alone does not tell the whole—and thus the accurate—story of the City's land need.

[18] Map showing the included and excluded exception areas attached at ER-41.

At the threshold, Petitioners argue that higher-priority lands such as Old Sheridan Road must be included over lower-priority lands unless it is impossible to provide services to the area due to natural topographical or physical constraints pursuant to ORS 197.298(3). As noted above and in LCDC's Answering Brief, ORS 197.298(3) is not relevant to the determination.[19] Petitioners' argument regarding ORS 197.298(3) does not provide a basis for this Court to reverse or remand LCDC's decision.

LCDC affirmed the City's findings that the Old Sheridan Road area should be excluded because transportation facilities cannot reasonably be provided to that area. ER-24. LCDC's decision is based in part on a letter from the Oregon Department of Transportation ("ODOT") to the City indicating that it will not provide additional access to the area from Highway 18. ER-24; ODOT letter at Rec. 1435. The reason, however, is not that there isn't other non-highway access, as Petitioners argue, it is because lack of additional access to Highway 18 loads all access onto Old Sheridan Road, requiring prohibitively expensive road improvements and impairing public safety at the existing intersections with Highway 18. Rec. 1329. This is illustrated by the map of the area at Rec. 1325.

ODOT noted these problems in its testimony to the City, which concludes:

> "ODOT does not support inclusion of [the Old Sheridan Road area] in the UGB due to potential adverse impacts of development-generated traffic to traffic operations and safety at the intersection of OR 18 and Durham Road. Further, inclusion of the properties east of OR 18 may encourage redevelopment to higher intensity land uses which may not be compatible with function and designation of the highway."
> Rec. 1435.

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[19] The City notes, however, that Hildenbrand rejected a similar contention that only natural topographical or physical constraints are relevant considerations under ORS 197.298(3)(b), concluding that artificial barriers, such as a state highway, are "physical constraints" within the meaning of the statute. Hildenbrand, 217 Or at 635.

Goal 2 requires local governments to coordinate plan amendments with affected governmental agencies. Pursuant to ORS 197.015(6), "[a] plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible." ODOT's analysis provides both a legal and factual basis for LCDC's acknowledgment of the City's decision.

For these reasons, Petitioners do not demonstrate that LCDC misapplied applicable law or misapplied the substantial evidence test.

Riverside North

Petitioners object to LCDC's decision acknowledging the City's determination that Riverside North cannot reasonably accommodate residential use because of its location surrounded by the City's sewage treatment plant, steel mill and other heavy industrial uses, and the railroad. ER-24.

Petitioners first argue that the decision should be remanded because LCDC does not cite the legal basis for its finding. Petitioners focus on LCDC's use of the phrase "reasonably accommodate," conclude that the basis for LCDC's decision is ORS 197.298(3)(a), and argue that the decision violates the priority scheme as this Court interpreted it in Parklane.

As noted above, this Court specifically rejected Petitioners' reliance on Parklane for the same proposition as West Linn. 201 Or App at 440-441. The Court in West Linn concluded that suitability of land to accommodate the land need under Goal 14 and other urbanization goals and rules could be considered in determining whether higher-priority lands can reasonably accommodate the need under ORS 197.298. West Linn, Id. Goal 14, Factor 5, requires the consideration of "environmental, energy, economic and social consequences" when determining the appropriate location of a UGB expansion. The proposed UGB expansion is driven by the need for additional residential land. The existence of conflicting industrial uses is

clearly a relevant environmental, economic, and social consideration in determining whether an area can accommodate residential use. LCDC concurred with the City's conclusion that it was more appropriate to reserve Riverside North for future industrial expansion when such need arises. ER-24.

Petitioners nonetheless argue that it is error for the City or the Commission not to consider rezoning industrial-designated land located within the UGB for residential use, and then rezoning Riverside North for industrial use. Other than Petitioners' suggestion, there is nothing in their argument or the record to indicate that such an analysis is required, that such a swap is feasible, or that the "swapped" areas could be served or would be compatible with surrounding uses. In point of fact, because the City determined that it had a 56-acre surplus of industrial lands within the UGB, the City conducted an exhaustive review of each parcel planned and zoned for industrial use to determine if it could be rezoned for residential use. Rec. 961. The City identified 11.2 acres as suitable for rezoning to residential use, and reduced its land needs accordingly. Rec. 961-962. Given the record, Petitioners' argument does not demonstrate that the Commission's finding as to the suitability of the site for residential use indicates that it misapplied the applicable law or the substantial evidence test.

Finally, Petitioners argue that the Commission's finding is not supported by substantial evidence because the Commission included the Riverside South area, which has, according to Petitioners, similar conditions as described in the City's findings. The Commission approved inclusion of Riverside South in the UGB in its 2004 Order, which wasn't challenged. Rec. 395. Petitioners did not raise this issue in their written objections with regard to Riverside North. Rec. 176-177. It is not error for the Commission to fail to address an objection that was not validly raised. OAR 660-025-0140(2), (3). Regardless, the City's full findings explain in detail why the City recommended exclusion of Riverside North and inclusion of

Riverside South. Rec. 1045-1049.[20] For these reasons, Petitioners do not explain how findings with regard to inclusion of Riverside South demonstrate that the Commission misapplied the substantial evidence test with regard to Riverside North.

For these reasons, Petitioners do not demonstrate that LCDC misapplied applicable law or misapplied the substantial evidence test.

Booth Bend Road

Petitioners object to LCDC's decision acknowledging the City's conclusion that the Booth Bend Road area could not reasonably accommodate the needed housing because it would be an isolated extension of the UGB south of Highway 18 and would be inconsistent with the City's overall Comprehensive Plan Policy calling for urban development to be compact and pedestrian friendly. ER-24. The City further noted in its findings that extending the boundary some 4,800 feet into an area zoned EF-40 would create conflicts with adjacent agricultural lands, would be expensive to serve, and would only result in 13.66 acres of additional developable land. Rec. 1050-1051.

Petitioners first argue that the City's compact urban form goal arises from Goal 14 and therefore must be balanced with other Goal 14 factors, such as retention of agricultural lands. First, as noted above, the City's findings do address impacts on agricultural use. In addition, the City's goals of creating a compact urban form and containing expansions within the City's natural and physical boundaries are incorporated into the City's Comprehensive Plan as two of its "Guiding Principles" for development and expansion of the UGB in the MGMUP. Rec. 936-939. Principle #7, relating to natural boundaries, specifically adopts a policy that urban

[20] The City's findings do note that Riverside South faces many of the same impediments to urbanization as Riverside North. Rec. 1047-1049. The chief difference that tipped the balance against Riverside North was the incompatible adjacent land uses and the desire to retain Riverside North for future industrial land needs. Rec. 1046-1047.

development should not cross Highway 18 west of the Yamhill River. Rec. 938. Petitioners fail to explain why adopted Comprehensive Plan policies may not be considered as part of the locational analysis, and this Court has expressly concluded that such policies are relevant to that determination. Hildenbrand, 217 Or App at 636. Indeed, Petitioners acknowledge that policies governing urban form are a legitimate consideration under Goal 14, Factor 4.

Petitioners' next claim that LCDC erred by affirming the City's conclusion that the Booth Bend Road area was "isolated," and that LCDC did not act consistently with its North Plains decision because other parts of the City are located south of Highway 18. The Booth Bend Road area is located west of the Yamhill River, is surrounded by larger parcels in agricultural use, and would be the only area of the City located west of the river and south of Highway 18 if it were included in the UGB. Compare map of Booth Bend Road area at Rec. 1308 with the map of all of the exceptions proposed for inclusion/exclusion at ER-41. Although Lawson Lane and Three Mile Lane, included in the UGB, are also south of Highway 18, they are located east and north of the Yamhill River adjacent to one another, and directly adjacent to land currently within the City limits. ER-39.[21] A reasonable person could conclude that the Booth Bend Road area is isolated both factually and within the meaning of the City's urbanization policy limiting expansion south of Highway 18 and west of the Yamhill River.

For these reasons, Petitioners do not demonstrate that LCDC's decision misapplied applicable law or the substantial evidence test.

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[21] The City also notes that the Three Mile Lane, Norton Lane, and Grandhaven areas are bounded by the City limits and the Yamhill River, and are therefore physically isolated from other resource lands, unlike the Booth Bend Road Area, and are contained within natural boundaries consistent with MGMUP Principle #7, cited above. ER-39.

Response to Petitioners' Arguments with Regard to EFU Areas with Poorer Soils.

West Hills Area

Petitioners' arguments with regard to the West Hills area take the Commission's findings out of context, cite to portions of the record that don't support their proposition, and misstate the applicable law.

First, Petitioners imply that the City and the Commission failed to address the "200 acres of gently sloping land" between the UGB and a crescent of land with slopes greater than 25%. Pet. Brief at 35-36. In point of fact, the City's findings address both areas. The City notes that the West Hills area consists of Class III and IV agricultural lands characterized by moderate to steeply sloping lands with slopes ranging from 7% to more than 25%. Rec. 353. The Class IV soils are confined to the steepest areas with slopes over 25%. Id. The 200 acres of Class III soils adjacent to the UGB range from 7% to 25% slopes. Id. The City's findings conclude that this entire area fails to satisfy the identified land need for a number of reasons:

- Testimony from engineers indicated that additional costs and site development work for developing on the Class III lands due to the slopes are prohibitive for multi-family and affordable housing. Rec. 354 (discussion under "Slopes"). This is a relevant locational consideration under Goal 14, Factor 5 (environmental, energy, economic, and social ("EEES") consequences).

- The City's existing water system can only provide service to lands situated between 100 and 250 feet in elevation, while the entire West Hills area is above 300 feet in elevation. Rec. 354 (discussion under "Water"). Although the McMinnville Water & Light Master Plan contemplates construction of an additional pressure system to 415 feet, that would only service half of the Class III lands. Id. The City concludes that based on slopes and the market, even if the area were fully

serviced, the services would only support low-density housing. Id. This is a relevant locational consideration under Goal 14, Factor 3 (orderly and efficient provision of public services), Factor 4 (maximum efficiency of land uses within and on the fringe), and Factor 5 (EEES consequences).

- The City concludes that providing road and public transportation to the Class III and IV soils, coupled with the distance from the City Center, would make provision of such services difficult and expensive. Rec. 354-355 (discussion under "Transportation"). This is a relevant locational consideration under Goal 14, Factor 3 (orderly and efficient provision of public services).

- The City concludes that attempting to site medium- or high-density housing in the West Hills area would be inconsistent with surrounding development, incompatible with surrounding agricultural uses, and, due to distance, would not support adjacent services as called for by the City planning policies. Rec. 355-356 (discussion under "Land Use Compatibility" and "Agricultural Lands Compatibility"). This is a relevant consideration under Goal 14, Factor 5 (EEES consequences) and Factor 7 (compatibility of proposed urban uses with nearby agricultural uses).

- The City concludes that the Class III soils area adjacent to the existing urban growth boundary is outside of the boundaries of the nearest NAC, and thus development of medium- and high-density housing would create a satellite extending into resource land area inconsistent with the NAC concept. Rec. 356 (discussion under "Complete Neighborhoods"). This is a relevant consideration under Goal 14, Factor 5 (EEES consequences).

The City's conclusion that the West Hills area could not reasonably accommodate the need was therefore based on the balancing of all of these factors, as required by Goal 14. Based on the authorities cited previously, these are all valid

locational considerations for concluding that this area cannot accommodate the land need under ORS 197.298.

LCDC's decision cites most of the City's findings noted above in support of its acknowledgment of the City's decision to exclude this area. ER-25-26. Petitioners argue why the City or LCDC should have reached different conclusions based on their review of the evidence in the record, but Petitioners do not explain why LCDC's analysis demonstrates that LCDC did not correctly apply the applicable law or the substantial evidence test.

Petitioners finally argue that there is no evidence that a NAC cannot be sited in the West Hills area. This argument ignores the locational requirements and land characteristics needed for the NACs in the MGMUP, cited above, and the City's and LCDC's findings that medium- and high-density housing cannot be accommodated in the West Hills area. It also ignores the fact that the City has already designated a NAC in the Northwest area on lower-capability class resource lands. Rec. at 994-997; ER-40. (Petitioners do not object to the City's inclusion of the Northwest area in the UGB.) As noted above, NACs must be cited at least .75 to one mile apart, which would preclude a second NAC in the West Hills area. Petitioners may disagree with the City's analyses and conclusions, but that is not this Court's scope of review.

For these reasons, Petitioners do not demonstrate that LCDC misapplied applicable law or misapplied the substantial evidence test.

<u>Area North of Fox Ridge Road</u>

The City included one of three parcels, and excluded other lands. Rec. 351-353. LCDC approved this decision. Rec. 30-32. Petitioners argue that the Commission should not have acknowledged the City's exclusion of Tax Lot 100 and the northern portion of Tax Lot 200. Petitioners also argue that the City and LCDC

failed to consider and address an additional 165 acres of land outside of these tax lots located west of Tax Lot 100.

LCDC concurred with the City's decision to include one 34-acre parcel of land in the Fox Ridge Road area ("TL 700"), and to exclude all or part of two other parcels consisting of an additional 116 acres ("TL 100" and "TL 200"). ER-26-27. Contrary to Petitioners' assertion, LCDC expressly addressed their objection to the exclusion of the lands west of TL 100, in addition to their objection to the exclusion of TL 100 and the northern portion of TL 200.[22] ER-29 (first two paragraphs).[23]

LCDC's decision is based on a number of City findings, including steep topography, location in relation to existing urban and urbanizable development, connectivity, location in relation to a future school site, and impacts on abutting and affected agricultural operations. ER-26–29. Under West Linn and Hildenbrand, these are all valid locational considerations under Goal 14, Factors 3, 4, 5, and 7 for concluding that lower-priority land cannot accommodate the land need under ORS 197.298. As with the West Hills area, Petitioners object to the City's findings with regard to road service and connectivity, but fail to address these findings in the context of the City's entire decision, and fail to explain how the Commission's

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[22] Although LCDC did address the lands west of TLs 100 and 200, the City notes that OAR 660-004-0020 does not apply to choices among resource lands. See City's response to Petitioners' argument that the City and Commission should have analyzed other lands, City's Answering Brief at 31-33. Even if it did apply, the Rule only requires a site-specific analysis if a proponent submits factual evidence demonstrating that the proffered alternative lands can more reasonably accommodate the need. Id. Other than identifying the lands west of TLs 100 and 200 and asserting that they are higher priority under ORS 197.298, Petitioners do not explain why such lands can more reasonably accommodate the need as compared to the lands the City selected. Neither the City nor LCDC was therefore mandated to respond.

[23] The City also notes that if TLs 100 and 200 are appropriately excluded, the lands to the west of those tax lots would not be eligible for urbanization because they would not be contiguous to the City limits. See ORS 222.111.

approval of the City's decision indicates how it misapplied the applicable law or the substantial evidence test.

Petitioners argue that TL 100 should have been included because it was subject to an approved Measure 37 claim. The record demonstrates that the City considered including this tax lot in its amended UGB, but chose not to do so because Measure 37 was invalidated by the Marion County Circuit Court during the City's consideration of the amendment. Rec. 107-108. That decision was subsequently appealed to the Oregon Supreme Court, which reversed the trial court, but the Supreme Court's decision was still pending on January 31, 2006, when the City submitted its amendments that are the subject of this appeal to LCDC. See MacPherson v. DAS, 340 Or 117, 130 P3d 308 (2006) (decided February 21, 2006). (And Measure 37 was ultimately replaced by Measure 49. See Corey v. DLCD, 344 Or 457, 184 P3d 1109 (2008).)

More to the point, Petitioners cite to no legal requirement in Goal 14 or ORS 197.298 obligating or allowing a city to consider agricultural land as higher-priority land simply because it is subject to a Measure 37 claim. None exists. The possibility that a property zoned for agricultural use might be developed pursuant to a Measure 37 claim does not change its priority status under ORS 197.298 unless and until an exception is taken pursuant to Goal 2. See ORS 197.298(1)(b) (" . . . second priority is land adjacent to an urban growth boundary that is identified in an acknowledged comprehensive plan as an exception area or nonresource land"). The existence of a Measure 37 claim on a portion of the excluded property does not undermine the legal or factual basis for the Commission's decision to exclude that property or indicate that the Commission misapplied applicable law.

For these reasons, Petitioners do not demonstrate that LCDC's decision misapplied applicable law or the substantial evidence test.

Area North of McMinnville Airport

Petitioners claim that the Commission and the City failed to make findings regarding a 35-acre parcel located across Highway 18 from the McMinnville Airport to the north, and directly south of the Evergreen Aviation Museum ("Airport North").

Petitioners argue at the threshold that this area is the highest-priority resource land for inclusion under ORS 197.298(1)(b) because it is completely surrounded by the UGB. The map attached as App. 4 to Petitioners' brief proves that this is not the case. The parcel is *mostly* surrounded by land within the UGB, but a panhandle connects it with lands to the north outside of the UGB, so it is not *completely* surrounded, as required for second-priority lands within the meaning of ORS 197.298(1)(b).

Even if this area were completely surrounded by the UGB, such resource lands must also not contain any high-value farmland in order to qualify as "second priority" under ORS 197.298(1)(b). The soils map attached as App. 4 to Petitioners' brief indicates that approximately 30% to 40% of the area consists of Class II farm soils. Class II soils are defined to be "high value farmland." ORS 215.710(1).

Petitioners argue that the City made no findings with regard to the Airport North area, citing to a site description as "the City's entire findings." Pet. Brief at 48, n. 49. A review of the City's findings, however, indicates that the City addressed Airport North as part of a group of three areas of lands north and east of the McMinnville Airport. Rec. 347-348. After describing the site conditions of all three areas, the findings state:

> "For the following reasons, the City finds that the above-described lands are inappropriate for use in satisfying the identified residential and commercial land needs." (Emphasis added.) Rec. 348.

Although several of the City's findings that follow this statement clearly do not apply to all three of the sites, several of the findings do apply to all three sites. The City found that development of lands adjacent to the airport at urban residential densities would be incompatible with the long-range plans for the airport, noting that the McMinnville Municipal Airport Master Plan indicates that air traffic will nearly double over the planning period. Rec. 348 and 349. The City also cited to the Oregon Department of Aviation's "Airport Land Use Compatibility Guide Book" for its findings regarding safety and noise conflicts.

The Commission's decision cites to the City's findings. ER-29-30. Petitioners make their standard argument that high-density housing is not a "specific land need" under ORS 197.298(3)(a), and so the conflicts created by the siting of housing next to an airport cannot justify including lower-priority resource lands over Airport North, citing to Parklane. Under West Linn and Hildenbrand, however, avoiding conflicts between an existing airport and future housing (high density or otherwise) are valid locational considerations under Goal 14, Factors 3 (orderly and economic provision of services), 4 (maximum efficiency of land uses), and 5 (EEES consequences) for concluding that Airport North cannot accommodate the land need under ORS 197.298(1).

For these reasons, Petitioners do not demonstrate that LCDC's decision misapplied applicable law or the substantial evidence test.

Response to Petitioners' Argument About Areas Allegedly Not Analyzed by the Commission and the City.

Petitioners argue that the City and the Commission failed to consider certain lands identified in Petitioners' objections: The Riverside Resource Area, lands south of the Airport, and land south of Three Mile Lane and west of Booth Bend Road. According to Petitioners, this objection necessitates that the City conduct a site-specific evaluation under OAR 660-004-0020(2)(b)(C).

At the threshold, OAR 660-004-0020(2)(b) does not appear to apply to choices among resource-zoned lands. OAR 660-004-0020(2)(b) is part of the Goal 2 Administrative Rule and requires a demonstration that "areas that do not require a new exception cannot reasonably accommodate the use." All of the lands identified by Petitioners in this Sub-Assignment of Error are resource-zoned lands that would require a new exception under Goal 2 to urbanize.

Even if this Rule did apply, however, OAR 660-004-0020(2)(b)(C) does not require a local government to conduct a site-specific analysis of a proffered alternative site unless a participant at the local level specifically describes such site and submits factual evidence into the record as to why such site can more reasonably accommodate the proposed use:

> "This alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. Initially, a local government adopting an exception need assess only whether those similar types of areas in the vicinity could not reasonably accommodate the proposed use. Site specific comparisons are not required of a local government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding." (Emphasis added.)

Petitioners did not make any arguments with regard to these lands—let alone arguments of sufficient specificity under the Rule—in their testimony before the City Council. See January 11, 2006, City Council testimony, Rec. 213 to 250; December 6, 2005, City Council testimony, Rec. 251 to 302; May 24, 2005, City Council testimony, Rec. 303 to 312. The City therefore did not violate this Rule by failing to conduct an analysis of these areas.

Petitioners did file an objection with LCDC with regard to these lands, but the objection doesn't remotely rise to the level of specificity required by the Rule. Rec. 187-188. Petitioners describe the location of the Riverside Resource Area, but other than noting that it is adjacent to the UGB and contains no Class I soils, Petitioners do not explain why this area would more reasonably accommodate the land need than the included resource lands of lower priority.[24] Petitioners' sole description of the other areas in its February 17, 2006, objections is "[t]his [the City's failure to analyze territory] is true of several other areas adjacent to the UGB, including land south of the airport and land south of Three Mile Lane that is west of Booth Bend Road." Rec. 187-188. Petitioners' objection in its June 22, 2006, appeal of the Director's decision to LCDC is no more specific. Rec. 97.

A vague statement that there are other higher-priority lands out there is the land use equivalent of "I have in my hand a list of known communists." There is no more particularized description of the areas or why they are more suitable for inclusion than the areas studied by the City, and no demonstration, other than by assertion, that they actually are higher-priority lands than the resource lands that the

[24] It is also not clear from Petitioners' objection that the Riverside Resource Area is in fact higher priority than the four included resource land areas to which Petitioners object. Pet. Brief, pp 13-14. Attached at ER-42 is the soils map from the Corrected Record, modified to show the locations of the Riverside Resource Area as described by Petitioners, and the four resource-zoned areas added to the UGB to which the Petitioners object. The map shows that although the Riverside Resource Area has no Class I soils, it consists almost entirely of Class II soils, which are also defined to be high-value farmland. ORS 215.710(1). This map shows that the Three Mile Lane, Norton Lane, Grandhaven, and Southwest areas also consist of predominately Class II soils. Norton Lane and Three Mile Lane contain some Class I soils, but they also contain at least an equivalent amount of lesser Class III, IV, and VI soils. On balance, it appears from the record that the Riverside Resource Area is in the same priority category as these other areas pursuant to soil classification under ORS 197.298(2).

City included.[25] Petitioners' objections with regard to these lands do not rise to the level of specificity required for a valid objection under OAR 660-025-0140(2). Any failure by the Commission to specifically address these lands is therefore not reversible error.[26] OAR 660-025-0140(3).

When the City undertook its alternative lands analysis under Goal 14 and ORS 197.298, it looked first to exception lands contiguous to the existing UGB. Rec. 1226. It then looked at resource lands within one mile of the existing UGB. Rec. 1065. It excluded lands from this consideration based on factors consistent with the City's urbanization policies, particularly with respect to existing development and containing boundaries within existing natural and physical boundaries. Rec. 1065-1068. In 2004, LCDC determined that this initial review failed to adequately address whether resource lands with lower-quality soils could reasonably accommodate the land need, and so the City went back and looked at those lands pursuant to this

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[25] If one looks at the lands "south of the airport" or "south of Three Mile Lane and west of Booth Bend Road" on the Soil Class Map attached at ER-42, it appears that these lands are predominately Class II farm soils—and thus high-value farmland pursuant to ORS 215.710(1)—until you get very far south of and very far away from the City's municipal boundaries. The lands in these areas that are adjacent to the City's boundary appear to be at the same level of priority as the included resource land areas to which the Petitioners object.

[26] In footnote 51, Petitioners note that the Commission did in fact address the Riverside Resource Area, but state that there is no evidence in the record with regard to this area, and therefore "it is unknown how the Commission arrived at its conclusion and the petitioners cannot respond to it." Pet. Brief at 51. LCDC found that the Riverside Resource Area contains the City's current and future wastewater treatment plants and therefore could not accommodate the need. ER-30. The record does in fact demonstrate that these properties are owned by the City and consist of the City's current water reclamation facility and fire training tower and a site for future expansion of its facility. Rec. 1263, 1264 (aerial photo of Riverside North Area and abutting properties); Rec. 1278, 1279 (aerial photo of Riverside South Area and abutting properties). Although the City believes that this finding is surplussage because LCDC was not required by law or rule to address this vague objection, LCDC's decision is nonetheless supported by the record.

requirement. Rec. 344-345. LCDC concluded that this analysis complied with its 2004 direction. ER-24-25.

As this Court noted in West Linn, the existence of other higher-priority lands outside of the UGB does not by itself indicate a failure to comply with ORS 197.298 if other locational criteria indicate that they cannot reasonably accommodate the need. West Linn, 201 Or App 439-440. Petitioners do not identify why the locational considerations that the City utilized to circumscribe its analysis of available lands violates Goal 14 or ORS 197.298. Petitioners' objections are too vague and too late.

For these reasons, Petitioners do not demonstrate that LCDC's decision misapplied applicable law or the substantial evidence test.

RESPONSE TO SECOND ASSIGNMENT OF ERROR

LCDC correctly interpreted the applicable provisions of law and correctly applied the substantial evidence test when it approved the City's determination of the amount and type of land necessary for parks.

I. Preservation of Error.

Respondents agree that the issues in the Second Assignment of Error were preserved below.

II. Standard of Review.

The City agrees with Petitioners that this Court's standard of review is as set forth in ORS 183.482(8).

ARGUMENT IN ANSWER TO SECOND ASSIGNMENT OF ERROR

Petitioners argue that the City's comprehensive plan policy that the neighborhood and community parks should be built on land above the 100-year flood plain is inconsistent with plan policies that envision incorporation of wetland and stream corridors as features of such parks, in violation of Goal 2. Petitioners therefore argue that the UGB expansion included too much land and should be reversed.

At the threshold, the City notes that it determined its future land need for parks pursuant to its adopted Parks, Recreation, and Open Space Master Plan (1998). Rec. 1219. The Master Plan adopts standards for the amount of parkland needed for each of the three categories (neighborhood parks, community parks, and green spaces) based on the amount of acres in each category needed per 1,000 residents. Rec. 1221. The City then determined how much land was needed in each category based on the projected population at the end of the planning period, subtracted existing parkland acreages, subtracted 55 acres of parkland that will be located on unbuildable land, and determined its parkland need at 314 acres of buildable lands. Id. Petitioners do not challenge any of these assumptions or calculations. This uncontested analysis by itself supports LCDC's decision approving the City's determination of the *amount* of parkland that will be needed for the planning period. ER-20-21.

In addition, the City's Plan Policy does *not* limit *all* park needs to buildable lands, as Petitioners argue. New Plan Policy 163.05 states:

> "The City of McMinnville shall locate future community and neighborhood parks above the boundary of the 100-year floodplain. Linear parks, greenways, open space, trails, and special use parks are appropriate recreational users of floodplain land to connect community and other park types to each other, to neighborhoods, and services, provided that the design and location of such uses can occur with minimum impacts on such environmentally sensitive lands." Rec. at 316.

The policy therefore only limits community and neighborhood parks to lands outside the 100-year floodplain, and does not prohibit parks from containing wetlands, stream corridors, or slopes. This policy is based on the cost and constraints of constructing active-use parks in the floodplain. Rec. 321-322.

As noted above, the City's parkland buildable lands needs were reduced by 55 acres to account for the historic percentage of parkland located in the

floodplain. Rec. 1219-1221, particularly Table 23 at 1221. The City parkland needs determination thus accounts for the fact that some parklands will be located on or contain unbuildable lands.

Petitioners cite three Plan Policies as allegedly conflicting with the above-noted policy:

Plan Policy 188.13 states that "a community park [in the Northwest Expansion area] should be located adjacent to the proposed elementary school and, to the extent possible, incorporate identified wetland corridors . . . ." As noted above, the policy prohibits community parks from being located in the 100-year floodplain; it does not prohibit parks from containing wetlands. This policy does not facially conflict with Plan Policy 163.05.

Plan Policy 188.31 states that "a neighborhood park [for Three Mile Lane] should be located next to the Yamhill River." Petitioners do not explain how this policy requires that a park adjacent to the river be located in the floodplain. Both policies could be complied with by constructing the developed portions of the park along the river outside of the floodplain. This policy does not facially conflict with Plan Policy 163.05.

Plan Policy 188.35 calls for wetlands to be incorporated into the neighborhood park in the central portion of the Southwest Subarea. Petitioners do not explain how incorporating wetlands into a park conflicts with a policy prohibiting parks from being located in the floodplain. This policy does not facially conflict with Plan Policy 163.05.

Petitioners finally argue that the City's determination of the amount of parkland needed is not supported by an "adequate factual base" within the meaning of Goal 2 because the City has not adopted any planning regulations or funding mechanisms to protect this acreage in the future.

As noted previously, the question before this Court is not whether the City's decision is supported by substantial evidence, but whether LCDC's determination indicates that it misapplied the test. Petitioners identify no goal, rule, or statute that requires a demonstration that public infrastructure be funded before it can be planned for.[27] As LCDC's decision notes, the City identified a number of funding and other mechanisms—such as bond measures, systems development charges, and exactions—that would enable the City to acquire the needed parklands as development occurs. ER-19.[28] LCDC concluded that the City had the tools it needs to acquire and protect the needed acres. ER-20.

For these reasons, Petitioners do not demonstrate that LCDC's decision misapplied applicable law or the substantial evidence test.

RESPONSE TO THIRD ASSIGNMENT OF ERROR

LCDC correctly interpreted the applicable provisions of law and correctly applied the substantial evidence test when it approved the City's Plan Policy regarding the implementation of the R-5 zone.

I. Preservation of Error.

Respondents agree that the issues in Petitioners' Third Assignment of Error were preserved below.

II. Standard of Review.

The City agrees with Petitioners that this Court's standard of review is as set forth in ORS 183.482(8).

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[27] Comprehensive planning in the State of Oregon would grind to a halt if this were the requirement.

[28] See also the discussion of the NAC master plan requirements in the City's Response to Third Assignment of Error.

ARGUMENT IN ANSWER TO THIRD ASSIGNMENT OF ERROR

Petitioners argue that LCDC erred by approving the City's proposed UGB expansion because the City has not yet rezoned any lands to R-5, its exclusive multi-family residential zone.

The MGMUP Land Efficiency Policy with regard to the R-5 zoning designation provides that all 72 acres of the required R-5 designated lands will be located in the NACs:

> "The City proposes to designate/zone an additional 72 acres of residential lands for multifamily housing in the R-5 zone to meet the identified need. All R-5 lands will be located in the neighborhood activity centers." Rec. 962.

Almost all of the territory designated in the NACs is located outside of the current City limits (ER-39, 43), which means the City has no current jurisdiction to adopt zoning regulations or approve development in those areas.[29] See ORS 215.130(2)(a) (county comprehensive plan and land use regulations apply until territory is annexed to a city and the city adopts the necessary legislative amendments implementing its plan and land use regulations). The City has, however, enacted a regulatory regime that will ensure that these areas are appropriately zoned as they are brought into the City, including the R-5 zoning designation (Rec. 914, 1487-1492) and the Neighborhood Activity Center Overlay Ordinance ("NAC Overlay") (Rec. 1475 to 1486).

The NAC Overlay prohibits development in the designated NACs prior to adoption of a NAC concept plan. Rec. 1477. The NAC Overlay provides that an Activity Center Concept Plan must be submitted as a condition of annexation. Section 5(A), Rec. 1486. Following annexation, Section 5(C) of the NAC Overlay

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[29] The City has designated the specific areas on its Comprehensive Plan Map as Neighborhood Activity Centers, and has adopted specific Comprehensive Plan Policies applicable to those Centers. Rec. 996-1014; Plan Policies 188.00 to 188.39, Rec. 1463-1469.

requires that development must be reviewed and approved pursuant to the City's Planned Development Overlay provisions. Id. The City therefore has a regulatory scheme in place to ensure that designated NACs are annexed, zoned (including the applicable R-5 zoning), and developed pursuant to the Plan Policies and zoning regulations applicable to NACs.

Finally, Plan Policy 187.00 directs the City to adopt more specific master plans for the four NAC areas over the course of the planning period as funding permits. Rec. 337. The adopted regulatory scheme, however, is sufficient to ensure implementation of the NAC concept if a developer should desire to annex and develop NAC-designated territory prior to completion of the City's master planning process. Petitioners' argument that this policy could result in failure to implement the NACs until the final years of the planning period is thus incorrect.

Notwithstanding the clear Plan Policy cited above, Petitioners state that LCDC incorrectly determined that all of the R-5-zoned lands will be located outside of the current UGB. Petitioners point to Table 11 (Rec. 1210) as demonstrating that only half of the land need for R-5 zoning will be met outside of the current UGB. Petitioners misread this table. A more complete description of this table is contained in the City's revised housing needs analysis in the Goal 10 element of the MGMUP. Rec. 1108-1170. In Table 68, the City determines how much buildable land it will need by housing type and zoning designation, both within and without the UGB, over the planning period. Rec. 1152. Table 71 determines how much additional land is needed by zoning designation and is the same table as Table 11. Rec. 1156. As the introduction to Table 71 explains, however, the table is a pro-rata distribution of housing need by zoning based on the percentage of total housing need by unit, divided by the units that can be accommodated within the existing UGB. Rec. 1156. The City determined that there is a total housing need for 6,014 new dwelling units of all types and concluded that a little less than half of that need (2,949 dwelling units) can

be met in the existing UGB, meaning that the City needs lands to provide for a total of 3,056 dwelling units. Id. The City applied this 51% ratio to the housing needs by zoning designation to determine how much additional land was needed for each zoning designation. Id.; compare with Table 68.

Table 11 was therefore never intended to direct the zoning for particular properties inside or outside of the UGB. Rather, it was part of the analysis to determine how much total additional land was needed for residential uses, based on an assumption that all of the needs would be accommodated pro-rata on buildable land in or added to the UGB. See also Rec. 1210-1211. Table 11 therefore does not undermine LCDC's finding or indicate that it misapplied the substantial evidence test.

Even if Table 11 stood for the proposition for which it is cited by Petitioners—that 38 acres of R-5-zoned lands must be located within the existing UGB—it does not demonstrate that LCDC misapplied the law or the substantial evidence test. A substantial amount of land within the current UGB is designated as part of the NACs in the Northwest and Grandhaven areas. See Map of proposed NACs at ER-43. Most of these lands are currently outside of the City limits (Id), and all of these lands are subject to the NAC master planning requirements noted above prior to annexation or development. It is therefore highly likely that some lands within the existing UGB will be rezoned to R-5, depending on the NAC master plan that is submitted. The point remains that the City cannot rezone any of these lands to R-5 until it obtains jurisdiction to do so following annexation. The master planning requirements noted above will ensure that such rezoning occurs.

Petitioners accuse the City of expanding the UGB based on the existing, less efficient zoning. As the above discussion of the City's housing needs analysis indicates, that is not what the City did. The size of the City's UGB expansion assumes that the City will successfully implement all 72 acres of its R-5 zone—and all of its other efficiency measures—and grow at the needed mix and density over the

20-year planning period. If the City's efficiency measures do not "demonstrably increase the likelihood" that it will achieve its goal of growing at an 18% higher density rate, ORS 197.296 (6) would require a larger—not a smaller—UGB expansion.[30]

For these reasons, Petitioners do not demonstrate that LCDC's decision misapplied applicable law or the substantial evidence test.

V. CONCLUSION

LCDC's decision should be affirmed.

DATED this _____ day of January, 2010.

MILLER NASH LLP

Jeffrey G. Condit
Oregon State Bar No. 822238

Attorneys for Respondent
City of McMinnville

[30] As noted previously, the adoption of the NACs and other efficiency measures reduced the City's buildable land need—and thus the UGB expansion—by 225 acres.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 26, 2010, I served Respondent City of McMinnville's Answering Brief on:

John Kroger, OSB #077207
Attorney General
Denise G. Fjordbeck, OSB #822578
Attorney in Charge
Civil/Administrative Appeals Unit
Department of Justice, Appellate Division
1162 Court Street NE
Salem, Oregon 97301

Attorneys for Respondent Land Conservation and Development Commission

Mary Kyle McCurdy, OSB #883530
1000 Friends of Oregon
534 SW Third Avenue, Suite 300
Portland, OR 97204

Attorneys for Petitioners

by mailing to the above attorneys two (2) true copies thereof, by first class mail. I further certify that the copies were contained in a sealed envelope addressed as above stated, the last-known address of the attorneys, and deposited with the United States Postal Service at Portland, Oregon.

I further certify that on January 26, 2010, I filed the original of Respondent City of McMinnville's Answering Brief, along with thirteen (13) copies, by mailing to:

Appellate Court Administrator
Appellate Courts Records Section
1163 State Street
Salem, Oregon 97301-2563

By first class mail.

MILLER NASH LLP

_____

Jeffrey G. Condit

Attorney for Respondent
City of McMinnville