

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

CA No. A134379

**RESPONDENT CITY OF McMinnville's JOINT
PETITION FOR RECONSIDERATION**

Date of Opinion: July 13, 2011
Author of Opinion: Sercombe, J.
Concurring Judges: Ortega, P.J., Landau, J. pro tempore

Judicial Review of a Land Conservation and
Development Commission Final Order

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Pursuant to ORAP 6.25, Respondent City of McMinnville (the "City") hereby petitions for reconsideration of the Court's final opinion dated July 13, 2011. Specifically, the City requests that the Court reconsider that portion of its decision construing the relationship between Statewide Land Use Planning Goal 14 and ORS 197.298, and then apply the reconsidered construction to the decision of the Land Conservation and Development Commission ("LCDC") under review in this case.

ARGUMENT

In its decision in this case, the Court articulated a new interpretation of the relationship between the locational factors of Goal 14 and the land priorities in ORS 197.298 as they apply to the location of a municipal urban growth boundary ("UGB") expansion. This interpretation was not argued, and consequently was not addressed, by any of the parties. The City requests reconsideration to enable it to address the Court's interpretation. The City argues that there is a superior construction of the relationship that supports the LCDC's and the City's—and, heretofore, this Court's—interpretation of that relationship.

A. The Court's New Interpretation.

The Court begins its analysis by describing its prior case law with regard to Goal 14, ORS 197.298, and the relationship between the two schemes. Goal 14 consists of seven factors that govern whether and where a UGB is expanded.¹ Factors 1 and 2

¹ 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;
- (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

apply to the determination of whether a city needs to expand its UGB to accommodate growth, housing needs, employment opportunities, and livability. Factors 3 through 7 apply to location of that expansion based on public facilities and services, efficiency of land uses, consequences of development, retention of land for farm use, and compatibility of development with nearby agricultural activities. See 1000 Friends of Oregon v. LCDC, ___ Or ___, ___ P3d ___ (2011) (CA A134379 7/13/2011) ("Decision") at 22. As the Court notes, it has construed the locational factors as factors to be considered and balanced, but not as stand-alone criteria or necessary thresholds that must be met. Decision, slip op at 22-23, citing to Citizens Against Irresponsible Growth v. Metro, 179 Or 12, 17, 38 P3d 956 (2002), and 1000 Friends of Oregon v. Metro, 174 Or 406, 409-10, 26 P3d 151 (2001).

In contrast, ORS 197.298(1) requires land to be included in a UGB according to certain priorities, beginning with urban reserve lands, followed by exception lands and resource lands completely surrounded by exception lands, followed by marginal land, and lastly by resource lands.² ORS 197.298(2) further prioritizes resource

retention and Class VI the lowest priority; and
(7) Compatibility of the proposed urban uses with nearby agricultural activities.”

² 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).

lands by soil or site classification, assigning higher priority to lands of lower capability. The only methods under the statute for including lands outside of these priorities is (1) by independently applying "any requirements established by rule addressing urbanization," (2) if higher priority lands are "inadequate to accommodate the amount of land needed," or (3) one of the exceptions to the priorities in ORS 197.298(3) applies.

Based on the preamble in ORS 197.298(1) that the statute applies in addition to "any requirements established by rule addressing urbanization," this Court's prior case law held that Goal 14 is an independent and separate requirement, and that the subsequently enacted ORS 197.298 does not supersede or otherwise trump the considerations in Goal 14. Decision at 22-23, citing Residents of Rosemont v. Metro, 173 Or 321, 332-33, 21 P3d 1108 (2001), and 1000 Friends of Oregon, 174 Or at 412-414.

As the Court notes, it first considered the integration of Goal 14 and ORS 197.298 in City of West Linn v. LCDC, 201 Or 419, 119 P3d 285 (2005). Decision at 24-25. In West Linn, the Court agreed with LCDC that the Goal 14 locational factors are relevant in determining whether land of a particular priority in ORS 197.298(1) is

(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."

"inadequate to accommodate the amount of land needed." Decision at 25. The Court quotes its following holding from West Linn:

"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 '[i]nadequate 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 at 439-440.

As the Court notes, it reaffirmed this interpretation of the relationship between Goal 14 and the priority statute in Hildenbrand v. the City of West Linn, 217 Or at 623, 634, 177 P3d 40 (2008) (the locational criteria of Goal 14 apply to the determination of whether there is inadequate land to serve a need within the meaning of the priorities statute, not just upon the constraints in ORS 197.298(3)). Decision at 25.

Following West Linn and Hildenbrand, it appeared to be clear that a local government is required to prioritize lands considered for inclusion in the UGB pursuant to ORS 197.298(1) and (2), consider such lands in their priority order, and then apply the Goal 14 factors to include or reject higher-priority lands before consideration of lower-priority lands, concluding when it has identified sufficient lands to meet its needs. This is how the City applied Goal 14 and ORS 197.298 and how the City argued in its brief that it should be applied. Respondent City of McMinnville's Answering Brief at 11-13.

Given this precedent, the Court appropriately rejected Petitioners' argument that the Goal 14 analysis only applies to lands within a specific priority classification. Decision at 27. At this point, however, the Court struck out on its own.

The Court was troubled by the concededly unclear relationship between Goal 14 Factors 3, 4, and 6 and the similar but arguably more restrictive priority exceptions in ORS 197.298(3). Decision at 28. The Court reasoned that construing the scheme to allow elimination of higher-priority lands based on Factors 3, 4, and 6 would render ORS 197.298(3) exceptions without effect. Applying the maxim of statutory construction that the legislature did not intend any portion of its enactments to be "meaningless surplusage," the Court concluded that this could not have been the legislature's intent. Decision at 29, citing State v. Stampher, 197 Or 413, 417, 106 P3d 172, rev den, 339 Or 230 (2005).

In order to resolve this apparent conflict, the Court announced a new analytical procedure for integrating Goal 14 and ORS 197.298: according to the Court, only Goal 14 Factors 5 (ESEE consequences) and 7 (compatibility with adjacent agricultural lands) are applied to determine whether priority land "is inadequate to accommodate the amount of land needed" under ORS 197.298(1). Decision at 31. After a local government has prioritized lands under Goal 14 Factors 5 and 7 and ORS 197.298(3), a new "Step Three" is added, during which the remaining factors of Goal 14 are applied to land so prioritized to include or exclude lands from the UGB. Decision at 31-32. According to the Court, ORS 197.298 operates to "identify land that *could* be added to the UGB to accommodate a needed type of land use," while Goal 14 is applied thereafter "to qualify land that, identified already under ORS 197.298, should be added to the Boundary." Decision at 31. The Court concluded that the City and LCDC

did not comply with this method of analysis and so reversed and remanded the decision. Decision at 31, 35-60.

B. Why the Court Should Reconsider its Interpretation.

The City respectfully requests that the Court reconsider this interpretation for the following reasons.

1. The Court's New Step Three Creates a Distinction without a Difference.

At the threshold, the Court's new "Step Three" creates an additional procedural hoop that doesn't appear to create a meaningful difference in the final analysis. At Step Three, a local government can apply Goal 14 Factors 3, 4, and 6 to exclude higher-priority lands identified under Step Two. Applying the Court's primary justification for its new interpretation, doesn't this new step simply render ORS 197.298(3) meaningless at a later stage in the analysis? Applying its newly minted procedure, the Court concludes that many of the City's decisions to exclude higher-priority lands violated ORS 197.298(1) because they were based on findings regarding efficiency of land use or the higher costs of providing a particular public facility or service to a higher-priority area. Decision at 31. If the City can ultimately exclude these same lands based on this same analysis at Step Three by applying Goal 14 Factors 3 and/or 4, the only apparent effect of the extra step is to add more procedure to an already procedure-rich process.

The other potential problem with waiting until Step Three to apply Factors 3, 4, and 6 is that there may not be enough suitable land after Step Two to meet the City's identified land needs. That certainly would have been the situation in this case. ORS 197.296 requires that a city expand its UGB with sufficient lands to meet its needs. A city would have no choice at Step Three but to return to Step Two and add lower-

priority lands back into the consideration. Again, this raises the question: what is the point of the extra step?

The Court should either revisit its conclusion that the legal scheme requires an extra step, or further explain the qualitative difference in the analysis that justifies the extra step. The City submits that the Court should return to its analysis in West Linn and Hildenbrand that all of the Goal 14 locational factors apply to the determination about whether land in a particular priority class "is adequate to accommodate the amount of land needed" under ORS 197.298(1).

2. The Court's Interpretation is Not Consistent With the Text of the Statute.

The City submits that the Court's addition of Step Three is not consistent with the text of ORS 197.298. See, e.g., State v. Gaines, 346 Or 160, 206 P3d 1042 (2009). As noted above, the preamble in ORS 197.298(1) states that the statute applies "in addition to" Goal 14, not "prior to," "instead of," or "except where it subsumes the requirements of" the Goal. As noted above, this direction in the preamble of ORS 197.298 formed the basis of the Court's conclusion in Residents of Rosemont that ORS 197.298 and Goal 14 are applied independently, and that the statute was not intended to supersede the Goal. It also was the basis for the Court's conclusion in West Linn and Hildenbrand that the Goal had to be considered in conjunction with the statutory priorities analysis.

In the case at hand, the Court creates a new procedure for applying parts of Goal 14 after the statutory analysis has been completed. The Court concluded that ORS 197.298 operates to "identify land that *could* be added to the UGB to accommodate a needed type of land use," while Goal 14 is applied thereafter "to qualify land that, identified already under ORS 197.298, should be added to the Boundary." This conclusion conflicts with the text in the preamble to ORS 197.298(1) that "land may not

be included within an urban growth boundary except under the following priorities: . . . "

A construction that certain factors of Goal 14 can apply *after* the priority has been determined under ORS 197.298 to exclude lands determined to be higher priority under the statute cannot be reconciled with the text of the preamble. The only construction of ORS 197.298 that gives full effect to the direction that the statute applies "in addition to the requirements established" by Goal 14 *and* the mandate that "land may not be included within an urban growth boundary except under the following priorities" is the construction that Goal 14 also applies to determining whether lands can accommodate the need under ORS 197.298(1) and (2). This was the Court's holding in West Linn and Hildenbrand. Those holdings reflect a better reading of the text of the statute. The Court's new interpretation inserts a new procedure not found in the statute contrary to ORS 174.040 (in construing a statute, the courts may not insert what has been omitted).

3. The Court's Interpretation is Not Consistent With Its Precedent.

As the Court notes, any textual analysis by the Court must be assisted by its prior construction of the statutory terms. Decision at 18, citing Waite v. Dempsey, 203 Or 136, 141, 125 P3d 788 (2005). The City has previously discussed the Court's departure from its prior holdings in West Linn and Hildenbrand. The Court treats its interpretation in the case at hand as an extension of its holding in West Linn. See e.g., Decision at 30. In fact, it effectively reverses the Court's holding in West Linn, quoted above and restated in Hildenbrand, that all five locational factors apply during the priority determination notwithstanding ORS 197.298(3). The Court should reconsider its interpretation in this case or, at the very least, expressly overrule the prior cases to avoid confusion for practitioners.

The Court's decision is also contrary to its holdings in Citizens Against Irresponsible Growth v. Metro and 1000 Friends of Oregon v. Metro. As noted above,

the Court held in these cases that the Goal 14 locational factors had to be considered together and balanced against one another. The Court also concluded in those cases that the factors were not individual criteria or thresholds. By bifurcating the Goal 14 locational analysis and applying parts of it at different stages in the review process, the Court eliminates a city's ability to balance the factors against one another and essentially divides the factors into (at least) two independent criteria that are applied at separate times. Again, the Court should reconsider its interpretation in this case, or expressly overrule or distinguish these prior cases.

C. The City's Alternative Interpretation.

The City submits that there is a construction of the legal scheme that addresses the apparent conflict between Goal 14 Factors 3, 4, and 6 and ORS 197.298(3) in a manner more consistent with the text of the statute and the Court's prior case law. The City agrees with the Court that the legislature would not have enacted ORS 197.298(3) unless it intended it to have some practical effect independent of Goal 14. The City believes that the Court's error lies in its conclusion that ORS 197.298(3) affects the way Goal 14 is applied rather than the way the priorities are determined under the statute.

The better reading of the statute is that the exceptions in ORS 197.298(3) are intended to apply to determine land priority at the inception of the ORS 197.298 analysis prior to conducting the suitability analysis set forth in ORS 197.298(1)(a)-(d) and (2). The exceptions in subsection (3) are intended to be used to move lands up or down the priority ladder based on specific characteristics that indicate that such lands either must be considered first, can be excluded without further consideration, or are considered only when other lands are exhausted.

ORS 197.298(3)(a) allows consideration of lower-priority land if "specific types of identified land needs cannot be reasonably accommodated on higher priority lands." Certain industrial needs, for example, require vacant land of a particular size located in proximity to existing or planned transportation facilities. Under the City's interpretation, a city could use exception (3)(a) to exclude from consideration those lands that don't meet the identified land needs, prioritize the subset of lands that do meet the land need pursuant to ORS 197.298(1), review them in priority order under ORS 197.298(1), and apply the Goal 14 locational factors to include or exclude such lands consistent with West Linn.

ORS 197.298(3)(b) allows exclusion of lower-priority lands if "future urban services could not reasonably be provided to the higher priority lands due to topographical or physical constraints." There is no point in conducting a detailed analysis of otherwise available lands if they can't be reasonably served with urban services at the threshold. Under the City's interpretation, a city could exclude such lands from consideration under subsection (3)(b), prioritize the subset of remaining lands that are not so constrained, review them in priority order, and apply the Goal 14 locational factors to include or exclude such lands from the UGB consistent with West Linn.

ORS 197.298(3)(c) allows the inclusion of lower-priority lands if the "maximum efficiency of land uses within a proposed UGB requires inclusion of lower priority lands in order to include or to provide services to higher priority lands." There may be situations where urbanizable high-priority lands are separated from an existing UGB by lower-priority lands, and the only way to efficiently urbanize the higher-priority lands is to include the lower-priority lands as well. Under the City's interpretation, a city could use subsection (3)(c) to consider such lands in conjunction with the higher-priority

lands at the priority of the latter under ORS 197.298(1), and apply the Goal 14 locational factors to include or exclude such lands from the UGB consistent with West Linn.

The City's interpretation also makes sense when you consider that ORS 197.298 not only applies to large-scale legislative UGB amendments such as the City's amendment at issue, but also to small quasi-judicial amendments to meet a specific need. If a city needs a new high school to serve the northwest part of town that cannot be accommodated within the existing UGB, it makes no sense to require the City to analyze all potential urbanizable lands surrounding its existing UGB when it can utilize ORS 197.298(3)(a) to limit its analysis to the subset of lands that can meet the need.

The City's interpretation gives independent effect to the exceptions in ORS 197.298(3), and has the added benefit of allowing a city to eliminate unnecessary steps in the analysis, rather than adding an additional step. If a city demonstrates that one of the priority exceptions in subsection (3) applies, the city can cut to the chase.

Under the City's interpretation—and relevant to the City's decision in the instant case—a decision *not* to apply the exceptions in ORS 197.298(3), but instead consider *all* available lands in priority order in ORS 197.298(1) and (2) and include or exclude lands based on Goal 14 factors, does not violate the statute or Goal 14. It may mean that a city analyzes more lands, or certain lands in more detail, than it would have otherwise been required to do had it fenced such lands in or out under ORS 197.298(3), but it doesn't mean that its final analysis to exclude or include such lands based on a consideration of the Goal 14 locational factors is in error.

D. Application of the Interpretations to the Lands at Issue in the City's UGB Amendment.

1. The Neighborhood Activity Centers.

As the Court notes, the City incorporated a new planning concept called a "neighborhood activity center" ("NAC") in order to increase density in the expansion area. Decision at 8. A NAC is a mixed-use, comprehensively developed community that depends for its success on certain locational and site characteristics. Id. Based on the development of the NACs, the City was able to reduce its buildable lands need by 225 acres, and was thereby able to reduce its UGB expansion by more than 20 percent. Id. The City incorporated this concept, including the locational and site needs, into its Comprehensive Plan as required by ORS 197.296(6)(b) (if a city is going to rely on increased density to meet housing needs, it must amend its Comprehensive Plan 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"). The Petitioners did not contest the NAC concept or the adopted NAC locational requirements before the Court or LCDC.

As the Court notes, the City reviewed and rejected all higher-priority lands that did not meet the required criteria for a successful NAC. Decision at 37-38. This resulted in the location of the four³ NACs on lower-priority resource lands. According to the Court, the City should have determined the *quantity* of land needed for a NAC, and therefore, by relying on a qualitative analysis, the City "proved the wrong point." Id.

This is inconsistent with the Court's holdings in West Linn and Hildenbrand. In West Linn, the Court expressly held that the statutory reference to

³ The Petitioners only contested the location of three of the four NACs.

"inadequate" land in ORS 197.298(1) "addresses suitability, not just quantity, of higher priority land." West Linn, 201 Or at 440. (Emphasis added.) This Court went further in Hildenbrand, expressly rejecting the argument that plan policies about community form and growth management are irrelevant to the location of an urban growth expansion under ORS 197.298(1). Hildenbrand v. City of Adair Village, 217 Or 623, 635-636, 177 P3d 40 (2008). According to this Court in Hildenbrand, these kinds of policies are relevant under Goal 14 Factors 3 (efficient provision of public facilities and services) and 5 (ESEE consequences) *notwithstanding* ORS 197.298(3). Id., 217 Or at 636. Even under the Court's new interpretation, Factor 5 continues to apply at "Step Two." Either the Court needs to reverse or modify these holdings, or explain in more detail why it thinks the City "proved the wrong point."

In addition, the adopted locational requirements for NACs *include* a breakdown of the amount of land needed for a viable NAC. McMinnville Urban Growth Management Plan, App. 1 – 5; Site Area Chart at App -5. This was not pointed out to the Court because the Petitioners did not raise this as an issue in their appeal. LCDC's finding regarding "the amount of land needed" is therefore supported by the record.

Under the City's interpretation proffered above, the City could have potentially utilized the NAC locational criteria to determine that it had a "special land need" for lands with certain characteristics, and thereby eliminated consideration of the higher-priority lands at the threshold under ORS 197.298(3)(a). The City did not do so. But that does not mean the analysis the City conducted misapplied the law. The City considered *all* higher-priority lands under ORS 197.298(1) and (2) and eliminated those that were not suitable for NAC development based on the adopted locational and site characteristics (among other considerations). According to the Court in Hildenbrand,

such adopted locational requirements are valid considerations under Goal 14 Factors 3 and 5 (and, the City would argue, Factor 4 (efficient accommodation of land needs)).

Finally, under the Court's interpretation, Factors 3 and 4 become valid considerations at Step Three and could then be used to eliminate lands identified for inclusion at Step Two. No discernable planning purpose is accomplished by requiring a Step Three.

The Court should affirm the City's inclusion of the designated NAC areas in the UGB.

2. Old Sheridan Road Exception Area.

As the Court notes, the City decided not to include the Old Sheridan Road Exception Area in part because lack of access to Highway 18 required prohibitively expensive road improvements and created congestion and safety hazards at other access points to the highway.⁴ The Court concluded that this was not a valid consideration at Step Two because roads are not an "urban service" under ORS 197.298(3)(b), and so sustained Petitioners' assignment of error. Decision at 42 to 45.

Roads, however, are clearly a "public facility" within the meaning of Goal 14 Factor 3 ("orderly and economic provision for public facilities and services"). If the City can ultimately exclude Old Sheridan Road at Step Three under Goal 14 Factor 3 based on the same findings and conclusions as contained in its current decision before the Court, the City must again ask: what planning purpose is served by sending the City back to conduct an extra step only to reach the same result?

Under the City's interpretation, Goal 14 Factor 3 is relevant during the ORS 197.298(1) and (2) analysis of all available suitable lands. The fact that the City did not

⁴ The Oregon Department of Transportation recommended against inclusion of Old Sheridan Road for this reason. See City's Response Brief at 22-22

exclude Old Sheridan Road at the inception of the process under ORS 197.298(3)(b) or (c) does not require reversal or remand of the City's Factors 3 and 4 analysis. The Court should affirm the City's exclusion of the Old Sheridan Road Exception Area from the UGB.

3. Booth Bend Exception and West Hills Resource Land Areas.

The Court sustained Petitioners' objection to the City's Booth Bend Road and West Hills Resource Land Areas because it concluded that the City's findings regarding the cost-effectiveness of providing public facilities and services to these areas, relied on by LCDC, were not appropriate considerations at Step Two under ORS 197.298(1).

As noted above with regard to Old Sheridan Road, these are legitimate considerations under Goal 14 Factors 3 and 4.⁵ No planning purpose is served by sending the City back to conduct a Step Three analysis only to reach the same result. More years of process will not make these areas any easier to serve.

Under the City's interpretation, Goal 14 Factors 3 and 4 are relevant during the ORS 197.298(1) and (2) analysis of all available suitable lands. The fact that the City did not exclude Booth Bend Road or the West Hills Resource Areas at the inception of the process under ORS 197.298(3)(b) or (c) does not require reversal or remand of the City's Factor 3 analysis. The Court should affirm the City's exclusion of Booth Bend Road and West Hills Resource Areas from the UGB.

⁵ The City also points out that comprehensive plan policies regarding urban form are valid considerations under Factor 5 (ESEE consequences) according to this Court's opinion in Hildenbrand as referenced above. The City rejected Booth Bend Road in part based on lack of compliance with its plan policies requiring the UGB to follow natural features and that the City should not expand its UGB south of Highway 18 west of the Yamhill River. Respondent's Brief at 24-25. The Court does not address why these policies are not valid considerations at Step Two under Factor 5.

CONCLUSION

To face a remand after a more than eight-year UGB amendment process based on a new interpretation by this Court that the City didn't jump through the procedural hoops in the correct order—even though the City's Goal 14 analysis is ultimately sound—is intensely frustrating. Given the appeal history of this UGB amendment, it is likely to take three to five additional years (not to mention thousands of taxpayer dollars) to jump back through these new hoops, resulting in final acknowledgement of the City's UGB amendment sometime in years 12 to 15 of its identified 20-year land supply.⁶ This leaves the City in the unenviable position on remand of deciding whether to invest its funds in further pursuit of a UGB amendment that may be of limited utility once it is finally acknowledged, or to abandon that effort, start over with a new analysis, and hope the courts or LCDC haven't changed the rules again by the time the City gets the rock rolled back up the hill.⁷

These kinds of impacts are the reason why the Court should think long and hard about so significantly changing its precedent regarding the relationship between ORS 197.298 and Goal 14. The Court's holding not only pulls the rug out from under the City of McMinnville, it potentially affects every municipality in Oregon that is currently in the process of amending its UGB. Although Goal 14 has been amended since the City's submittal, new Goal 14 Boundary Location Factors 1 and 2 are the equivalents of

⁶ The City's 20-year land supply analysis starts with the year 2003.

⁷ The City realizes that the Court's conclusions regarding the adequacy of some of LCDC's findings will likely result in a remand regardless of whether the Court reconsiders its interpretation and agrees with the City. The difference is that the defects the Court found in LCDC's findings with regard to the area north of Fox Ridge Road and the 35-acre property north of the Airport are easily reparable at LCDC based on the City's existing UGB amendment and record. The Court's interpretation that the City fundamentally misapplied the required statutory and Goal 14 analysis, however, will require a remand to the City, a reanalysis and rewrite of its Comprehensive Plan amendment, a new round of hearings before the City and County planning commissions and governing bodies, adoption of a new amendment, and resubmittal to LCDC for a third time (and, probably, appeal back to this Court).

old Goal 14 Factors 3 and 4⁸ and would, under the Court's interpretation, have to be applied at Step Three in the analysis.

This Court got it right in West Linn and Hildenbrand. The City's proffered alternative interpretation of the relationship between Goal 14 and ORS 197.298 gives independent effect to the priority exceptions in ORS 197.298(3), and does far less violence to this precedent. For these reasons, the City respectfully requests that the Court reconsider and modify its decision in this case.

DATED this 10th day of August, 2011.

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⁸ New Goal 14 divides the factors into "Land Need" factors and "Boundary Location" factors. Boundary Location Factor 1 is "efficient accommodation of identified land needs." Boundary Location Factor 2 is "orderly and economic provision of public facilities and services."

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 10, 2011, I served Respondent City of McMinnville's joint petition for reconsideration on:

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by mailing to the above attorneys a copy of this joint petition for reconsideration by first class mail.

I further certify that on August 10, 2011, I filed the original and four copies of this joint petition for reconsideration by mailing to:

Appellate Court Administrator
Appellate Courts Records Section
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