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IN THE COURT OF APPEALS OF THE STATE OF OREGON

1000 FRIENDS OF OREGON; FRIENDS)	
OF YAMHILL COUNTY; and ILSA)	
PERSE,)	Court of Appeals No. A134379
)	
Petitioners,)	
)	
v.)	
)	
LAND CONSERVATION AND)	Review of Order No. 06-WKTASK-001709
DEVELOPMENT COMMISSION,)	of the Land Conservation and Development
)	Commission
Respondent,)	
)	
and,)	
)	
CITY OF MCMINNVILLE,)	
)	
Intervenor – Respondent.)	

PETITIONERS' OPENING BRIEF

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I. Statement of the Case

A. Nature of the Proceeding and Relief Sought

This is an appeal of an order of the Land Conservation and Development Commission (LCDC or Commission), issued on November 8, 2006. The order is 06-WKTASK-001709, entitled “In the Matter of Periodic Review Task 1 and the Amendment of the Urban Growth Boundary for the City of McMinnville.”

The order approves a periodic review work task, including an urban growth boundary amendment (UGB), submitted by the City of McMinnville pursuant to ORS 197.633 (periodic review) and ORS 197.626 (UGB expansion) and OAR chapter 660, division 025 (periodic review).

The petitioners seek remand or reversal of certain portions of the Commission’s decision.

B. Nature of the Judgment Sought to be Reviewed

The judgment is a final order of the Land Conservation and Development Commission.

C. Statutory Basis for Appellate Jurisdiction

The Court of Appeals has jurisdiction over this appeal pursuant to ORS 197.650.

D. Nature of and Jurisdictional Basis for Agency Action

The Commission has jurisdiction over local government decisions concerning periodic review of comprehensive land use plans and regulations, pursuant to ORS 197.628 - .644. LCDC has jurisdiction over local government decisions to expand a UGB by 50 or more acres, if the relevant city has a population over 2,500 persons, which McMinnville has, pursuant to ORS 197.626.

E. Questions Presented on Appeal

Did the Commission erroneously interpret provisions of law (ORS 197.298, Goal 14,

ORS 197.732(1)(c)(B), Goal 2, Part II(c), and OAR 660-004-0020), make a decision not supported by substantial evidence, and act inconsistently with official agency position, in approving the City of McMinnville's proposal to expand its UGB onto certain lands planned and zoned for exclusive farm use, rather than onto other, higher priority lands?

Did the Commission erroneously interpret provisions of law and make a decision not supported by substantial evidence when it approved the City's proposal regarding the amount and type of park land in the proposed UGB?

Did the Commission erroneously interpret provisions of law and make a decision not supported by substantial evidence when it inaccurately accounted for the city's high density housing need and approved the City's determination of the number of acres by which the UGB needs to be expanded?

F. Summary of Arguments

In approving McMinnville's proposed expansion of its UGB, the Commission erroneously interpreted provisions of law, made a decision not supported by substantial evidence, and acted inconsistently with official agency position. This resulted in the unnecessary and illegal inclusion of large areas of high value agricultural lands in the UGB, and the exclusion of exception areas and poorer quality agricultural lands.

G. Summary of Facts

The City of McMinnville has been conducting a periodic review of its comprehensive land use plan and zoning code for a number of years, designed to evaluate its current land supply and future land needs to the year 2023. The City prepared various analyses and concluded there was a shortfall of land inside the UGB for residential, commercial, and other uses of about 890 buildable acres. (Rec. 336) Consequently, in 2003 the City adopted by ordinances the McMinnville Growth Management and Urbanization Plan and appendices (MGMUP) and the Economic Opportunities Analysis, including a proposed UGB expansion.

It submitted these to LCDC. The Commission held hearings and, on December 3, 2004, issued a partial approval and remand order. (Rec. 11, 335)

In response to the remand, the City amended its MGMUP and Economic Opportunity Analysis by Ordinances Nos. 4840 and 4841, adopted January 11, 2006. (Rec. 11-12, 313-25, and 335-41) Yamhill County approved relevant portions of these ordinances. (Rec. 367-71) The City submitted these ordinances and related documentation, including a proposed UGB expansion, to LCDC. (Rec. 12)

In its periodic review submittal, McMinnville proposed to expand its UGB by 1188 gross acres, of which 890 acres are buildable – the approximate number of buildable acres the city determined it needed in an expansion area. (Rec. 336, 338) Of these buildable acres, 794 are currently zoned for exclusive farm use. (Rec. 336 (amended Table 13, column 2))

The City concluded it needed approximately 537 gross acres of new land for residential use, most of it for low density, single family housing in the R-1 and R-2 zones. (Rec. 1026, Table 5)¹ It also concluded it needed in the UGB expansion approximately 96 gross acres for schools, 48 gross acres for churches, 23 gross acres for public and semi-public uses, and 192.9 acres for commercial and office uses.²

In addition, the City concluded that all future need for community and neighborhood parks will require buildable residential land, thereby consuming 35% of all the buildable land in the expansion area. (Rec. 1221, Table 23)³ This future park land is currently zoned for exclusive farm use. (Rec. 1460-69)⁴

The Commission approved the submittal, including the UGB expansion, by Order 06-

¹ In the proposed expanded UGB, 341 acres are for low density, single family housing. Rec. 1026, Table 5.

² The city combined its office (85 acres) and commercial (88.6 acres) land needs under the one title “commercial,” and increased the total amount by 19 acres, so the city’s combined commercial and office need for new land is 192.9 acres. (Rec. 333, Table 6-4; 1027, Table 6; 1216, Table 19)

³ Table 23 shows a need for 314 new buildable acres for parks, which is 35% of the 890 buildable acres in the proposed UGB expansion.

⁴ The future community and neighborhood parks are planned only in Neighborhood Activity Centers (NACs); all the NACs in the expanded UGB are on farm land.

WKTASK-001709 on November 8, 2006. This decision is the subject of the present appeal.

II. Petitioners' Standing

The petitioners' statutory and constitutional standing is described in their affidavits filed with the Petition for Judicial Review. It is also demonstrated in their participation for approximately a decade in the periodic review of McMinnville's comprehensive plan, including its urban growth boundary. This includes prior litigation regarding earlier stages of this periodic review. *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001). (Rec. 653) It also includes extensive participation in this stage of the decision-making through analysis of thousands of pages of documents and preparation and delivery of testimony. (Rec. 59-102, 139-312, 461-92, 629-706, 863-907; LCDC hearing transcript of September 12, 2006)

III. Assignments of Error

INTRODUCTION

A. Legal requirements

Evaluation and expansion of an urban growth boundary requires application of several interrelated statutes, land use Goals, and administrative rules: ORS 197.298, Goal 14, ORS 197.732 (1)(c)(B), Goal 2, Part II(c), and OAR 660-004-0020. These laws overlap a bit, and mesh better in some respects than others. Nonetheless, statutory language, agency practice in previous urban growth boundary expansions, and case law provide a structure for an integrated application of these laws.

ORS 197.298 is often referred to as the "priority statute." Section (1) provides that: "*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***.*" (Emphasis added.) In previous UGB approval orders, LCDC has interpreted the italicized portion to mean that first, a jurisdiction must determine whether there is a need for a UGB expansion, using Goal 14, factors 1 and 2. (*See, e.g.*, LCDC Partial Approval and Remand

Order 05-WKTASK-001673 (Metro), July 22, 2005; relevant pages attached as Appendix 5.)

Statewide Planning Goal 14, Urbanization, provides that the establishment and change of UGBs must be based on consideration of seven factors.⁵ The first two factors are commonly referred to as the “need factors” and are evaluated together. They are:

- “(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
- (2) Need for housing, employment opportunities, and livability * * * *”

City of West Linn v. LCDC, 201 Or App 419, 429-30 (2005)

Once a city has demonstrated a need to accommodate population growth, the jurisdiction must next look inside the existing UGB to see whether lands there can accommodate that growth, pursuant to Goal 2, Part II(c)(2)⁶, Goal 14, factor 4⁷, ORS 197.732 (1)(c)(B)⁸, OAR 660-004-0020(2)(b)(iii)⁹; *1000 Friends of Oregon v. City of North Plains*,

⁵ Goal 14 was amended, effective on April 28, 2006. However, the “old” Goal applies to this decision and that is the version cited to in this brief.

⁶ Goal 2, Part II(c) provides:

“(c) The following standards are met:

- (1) Reasons justify why the state policy embodied in the applicable goals should not apply;
- (2) Areas which do not require a new exception cannot reasonably accommodate the use;
- (3) The long-term environmental, economic, social and energy consequences resulting from the use of the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
- (4) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.”

⁷ Goal 14, Factor 4, provides that in evaluating need for a UGB expansion, a jurisdiction must consider: “Maximum efficiency of land uses within and on the fringe of the existing urban area.”

⁸ Just as in Goal 2, ORS 197.732 (1)(c)(B) provides:

“(c) The following standards are met:

- (A) Reasons justify why the state policy embodied in the applicable goals should not apply;
- (B) Areas which do not require a new exception cannot reasonably accommodate the use;
- (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

27 Or LUBA 372, 390, *aff'd* 130 Or App 406, 882 P2d 1130 (1994). This includes consideration of whether lands can be redesignated from one zoning category to another to meet the need. *BenjFran Development v. Metro Service Dist.*, 17 Or LUBA 30, 49 (1988), *aff'd* 95 Or App 22, 767 P2d 467 (1989); *DLCD v. Douglas County*, 36 Or LUBA 26, 34-35 (1999).

If some or all of the identified need cannot be accommodated inside the UGB, the jurisdiction must then look to lands outside the UGB to determine which can reasonably accommodate the need. In so doing, the jurisdiction must follow the priority statute, ORS

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

⁹ OAR 660-004-0020(2) provides:

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

“(a) Reasons justify why the state policy embodied in the applicable goals should not apply: The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;

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

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

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

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

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

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

(iv) Can the proposed use be reasonably accommodated without the provision of a proposed public facility or service? If not, why not?”

197.298¹⁰, sequentially. *West Linn*, 201 Or App at 440; *D.S. Parklane Development, Inc. v Metro*, 165 Or App 1, 20-21 (2000); LCDC Metro Order, App. 5 at 43, 62; *DLCD v. Douglas County*, 36 Or LUBA at 35-37. The jurisdiction must look first to any lands designated as urban reserves, of which there are none around McMinnville. The city must then look to “second priority” lands - those designated as exception areas.¹¹

If the amount of land designated as exception areas is “inadequate to accommodate the amount of land needed,” McMinnville must next look to “fourth priority” lands – those designated for agriculture or forestry.¹² In selecting from among agricultural lands, higher priority must be given to those lands of lower productive capability as measured by soil classification. ORS 197.298(2). That is, agricultural lands with poorer quality soils must be

¹⁰ “**197.298 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.”

¹¹ In this case, “exception areas” are those lands for which an exception to the statewide planning goals for farm or forest lands, taken under ORS 197.732, has been acknowledged.

¹² There is a third priority of lands – marginal lands – but none have been designated in Yamhill County. There are no lands designated for forestry at issue in this appeal.

included in the UGB before those with more valuable soils. *DLCD v. Douglas County*, 36 Or LUBA at 36-37 & n. 14. This analysis under (2) is similar to that of Goal 14, factor 6, which requires consideration of “retention of agricultural lands, with Class I soils being the highest priority for retention and Class VI the lowest priority.”

If there are more lands within a category than are needed to meet the need, then the jurisdiction must use factors 3-7 of Goal 14, the “locational” factors, to choose among those “like” lands. *West Linn*, 201 Or App at 440; Metro LCDC Order, App. 5 at 41, 43. Those factors are:

- “(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.”

A decision to include or exclude land from a UGB must be based on a balancing of all these factors, rather than reliance on any one factor. *Parklane*, 165 Or App at 25; *1000 Friends of Oregon v. Metro (Ryland Homes)*, 174 Or App 406, 409-10 (2001). The evaluation and comparison of alternative sites is also required by ORS 197.732 (1)(c), Goal 2, Part II(c)(3), (4), and OAR 660-004-0020(2)(a)-(d).¹³

It is possible to include in a UGB expansion lands of lower priority ahead of lands of higher priority under ORS 197.298, but only if one or more of the three narrow reasons described in ORS 197.298(3)(a)-(c) are found to exist. Those exceptions to the priorities are:

- “(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;

¹³ See footnotes 6, 8, and 9 for the text of these laws.

- (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.”

There is little case law on subsection (3). The UGB priority statute was adopted in 1995, and taken from the urban reserve rule, OAR 660-021-0000, et seq.¹⁴ The *Parklane*

¹⁴ The Urban Reserve Rule was adopted in 1992 and amended in 2000. The relevant portion of the 1992 version, on which the *Parklane* case is based, provided:

“(1) Urban reserve areas shall include an amount of land estimated to be at least a 10-year supply and no more than a 30-year supply of developable land beyond the time frame used to establish the urban growth boundary.

“(2) Inclusion of land within an urban reserve area shall be based upon factors 3 through 7 of Goal 14 and the criteria for exceptions in Goal 2 and ORS 197.732. Cities and counties cooperatively, and the Metropolitan Service District for the Portland Metropolitan Area Urban Growth Boundary, shall first study lands adjacent to the urban growth boundary for suitability for inclusion within urban reserve areas, as measured by Factors 3 through 7 of Goal 14 and by the requirements of OAR 660-004-0010. Local governments shall then designate for inclusion within urban reserve areas those suitable lands which satisfies the priorities in section (3) of this rule.

“(3) Land found suitable for an urban reserve may be included within an urban reserve area only according to the following priorities:

- (a) First priority goes to land adjacent to an urban growth boundary and identified in an acknowledged comprehensive plan as an exception area or nonresource land. First priority may include resource land that is completely surrounded by exception areas unless these are high value crop areas as defined in Goal 8 or prime or unique agricultural lands as defined by the United States Department of Agriculture;

- (b) If land of higher priority is inadequate to accommodate the amount of land estimated in section (1) of this rule, second priority goes to land designated as marginal land pursuant to ORS 197.247;

- (c) If land of higher priority is inadequate to accommodate the amount of land estimated in section (1) of this rule, third priority goes to land designated as secondary if such category is defined by Land Conservation and Development Commission rule or by the legislature;

- (d) If land of higher priority is inadequate to accommodate the amount of land estimated in section (1) of this rule, fourth priority goes to land designated in an acknowledged comprehensive plan for agriculture or forestry, or both. 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.

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

- (a) Specific types of identified land needs including the need to meet favorable ratios of jobs to housing for areas of at least 100,000 population served by one or more regional centers designated in the regional goals and objectives for the Portland Metropolitan Service district or in a comprehensive plan for areas outside the Portland area, cannot be reasonable accommodated on higher priority lands; or

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

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

“(5) Findings and conclusions concerning the results of the above consideration shall be adopted by the affected jurisdictions.”

case concerned the urban reserve rule, and this corresponding priority provision. There, this court explained that the priorities “are to be applied sequentially” and “are to be the governing consideration in designating urban reserves [in this case, a UGB expansion].” *Id.*, 165 Or App at 20. The exceptions in (3) are “limited circumstances.” *Id.* at 21. The rule is structured such that “sufficient suitable higher priority lands [will] be considered and classified pursuant to subsections [(1) and (2)] so that resort to [the exceptions of (3)] will not be necessary to *identify* any of the land that is *available* for designation as urban [growth boundary].” *Id.*

In *Residents of Rosemont v. Metro*, 173 Or App 321, 332 (2001), this court relied upon its *Parklane* interpretation of the urban reserve rule to interpret the UGB priority statute, ORS 197.298. Thus, the exceptions to the priorities contained in subsection (3) are *limited* – the standard for including valuable agricultural land ahead of exception areas and poorer quality farm lands is a high one.

B. Structure of the Decision and Assignments of Error

The city of McMinnville applied Goal 14, factors 1 and 2, to determine its projected population growth to the year 2023 and consequent need for land to meet the housing, employment, and other needs of that population. Most of the analysis and conclusions that went into those determinations are not the subject of this appeal. The petitioners agree that McMinnville’s population will grow between now and 2023 in ways that necessitate expanding the UGB. However, in the Second and Third Assignments of Error, the petitioners challenge the Commission’s approval of two aspects of McMinnville’s decision that directly impact the amount and type of lands the city added to the UGB. The Second Assignment of Error concerns land the city proposes, and the Commission approved, for inclusion as park land. The Third Assignment of Error concerns whether the city, and the Commission in its approval, neglected to include in its land need calculation the fact that

certain lands inside the UGB are intended to be zoned at higher densities.

The city examined various areas around the UGB for possible inclusion.

McMinnville proposed, and LCDC approved, an expansion of the UGB that includes 794 acres of lowest priority (i.e., most valuable soils) agricultural lands zoned for exclusive farm use. The city and Commission failed to include, instead, hundreds of acres of higher priority lands in the UGB. The petitioners argue below that the following lowest priority lands, all zoned for exclusive farm use and containing Class I or II soils, should be *excluded* from the UGB:

- Three Mile Lane
- Southwest Area
- Grandhaven Area
- Norton Lane

The petitioners argue that, provided there is a need, the following areas should *not* have been excluded from the UGB:

- Old Sheridan Road, exception area
- Riverside North, exception area
- Booth Bend Road, exception area
- West Hills, poorer quality agricultural lands
- Fox Ridge Road North, poorer quality agricultural lands
- Area North of Airport, poorer quality agricultural lands

In the First Assignment of Error, the petitioners argue that the Commission failed to employ the proper legal analysis and follow Commission precedent, and made decisions not based on substantial evidence, regarding both specific pieces of land and overall categories of land. This resulted in the unlawful inclusion of certain low priority agricultural lands and the exclusion of certain exception areas and poorer quality agricultural lands from the UGB.

FIRST ASSIGNMENT OF ERROR

The Commission erroneously interpreted provisions of law (ORS 197.298, Goal 14, ORS 197.732 (1)(c)(B), and Goal 2, Part II(c), and OAR 660-004-0020), made a decision not supported by substantial evidence, and acted inconsistently with official agency position, in approving the City of McMinnville's proposal to expand the UGB

onto certain lands planned and zoned for exclusive farm use, rather than onto other lands.

A. Preservation of Error

The petitioners raised this issue as objections and exceptions throughout the proceedings before the city and the Commission. (Rec. 83-102, 166-92, 257-65, 645-52, 895-901) The Commission recognized these objections and exceptions and responded to them. (Rec. 25-36, 597-98, 789-96)

B. Standard of Review

This court reviews an order of the Land Conservation and Development Commission to find if the agency erroneously interpreted a provision of law, acted outside the range of its discretion or inconsistently with official agency position or practice, acted in violation of statute or the constitution, or adopted an order that is not supported by substantial evidence. ORS 183.482(8).

ARGUMENT

Neither the Commission nor McMinnville conducted the sequential analysis required by ORS 197.298 in evaluating lands according to the priorities for inclusion in the UGB. Nor did either compare lands in “like” categories by balancing the Goal 14, factors 3-7. And, neither applied the alternatives analysis of Goal 2, Part II, ORS 197.732(1)(c)(B), and OAR 660-004-0020.¹⁵ Rather, the Commission and city improperly “skipped” down to lowest priority agricultural lands by improper use of the exceptions in ORS 197.298(3), and by improper, discrete applications of certain portions of Goal 14 and the alternatives analysis.

There is no disagreement among the parties that the listed four high value, exclusive farm use areas are the lowest priority under ORS 197.298; the disagreement is whether there is a legal justification to include them ahead of higher priority lands. Therefore, following is a brief description of each low priority, high value soils agricultural area that the

¹⁵ Goal 2, Part II, ORS 197.732 (1)(c)(B), and OAR 660-004-0020 will be referred to collectively as the “alternatives analysis.”

Commission approved for the UGB expansion. Attached is a map from the record depicting all the areas the Commission approved for inclusion in the UGB. (App. 1; Rec. Supp., map entitled *UGB Expansion Proposal – Fig. 6*)

Three Mile Lane

The Three Mile Lane area is 165 acres in size and zoned entirely for exclusive farm use. (Rec. 336) It consists primarily of Class I and II soils, the best capability soil classification. (Rec. 982, Table 13; 1384, 1391) These lands are in active farm use and adjoin other lands in farm use, which lie to the southwest. Structures on the land are sparse and rural, including barns and outbuildings. (Rec. 1384) Over a mile of the Three Mile Lane boundary is adjacent to actively farmed land zoned EFU. (Rec. 98, 336, 1384) Three Mile Lane is south of the current UGB, and separated from it by Highway 18, a 5-lane limited access highway that forms a physical barrier between the two. (Rec. 1384)

Southwest Area

The Southwest Area is 134 acres in size and zoned for exclusive farm use. (Rec. 336) It consists primarily of Class II soils, among the best soil classification. (Rec. 982, Table 13; 1402) These lands are in active farm use and adjoin other lands in farm use, including along its entire western border. (Rec. 1395) Structures are sparse and rural in nature, including barns and outbuildings. (Rec. 1395) The Southwest Area lies to the south and west of the current UGB, at the outer edge of the proposed UGB and in the midst of actively farmed land. The only residential development in the vicinity is small and separated from the Southwest area by a floodplain.

Grandhaven

The Grandhaven area is 151 acres in size and zoned for exclusive farm use. (Rec. 336, 1418) It consists primarily of Class II soils, among the best soil classification. (Rec. 1425) The land is in farm use, including an existing filbert orchard, and large parcel farm

operations are to the west, north, and east of it. (Rec. 1418) There are only 3 houses on the property. (Rec. 1418) The proposed UGB would create an unbuffered edge of approximately one mile with actively farmed land in an EFU zone. (Rec. 98, 336) The Grandhaven area lies to the north of the current UGB.

Norton Lane

The Norton Lane area is 142 acres in size and zoned for exclusive farm use. (Rec. 336, Table 13; 1373) It consists primarily of Class II soils. (Rec. 1382). The western portion is a public park; the eastern portion is in farm use, including a dairy farm. Structures appear to be associated with the dairy farm. (Rec. 1382) Lands zoned for exclusive farm use and floodplains are located to the west, north, and east of the Norton Lane area. The area is southeast of the current UGB. The proposed UGB would create an unbuffered edge of approximately one mile with actively farm land zoned EFU. (Rec. 98, 336)

Sub-Assignment of Error One: Improper Interpretation of Goal 14 Locational Factors and Alternatives Analysis

The city examined nine exception areas around the current UGB. (Rec.1038, 1069-88) It included five of those exception areas and excluded four areas. However, neither the city nor the Commission compared all the exception areas with one another by balancing the locational factors of Goal 14 and applying the alternatives analysis to decide among the lands in this category. Rather, the Commission and city evaluated each area independently and made a decision to include or exclude each area based on discrete application of some aspects of these laws. Following are the errors the Commission made in applying the locational factors and alternatives analysis to exception areas.

In applying Goal 14, factor 3, and the alternatives analysis, the city estimated whether the cost of providing water, sewer, and transportation to each studied exception area was low, medium, or high. (Rec. 1084, Table 19) There is no pattern to the estimated costs and

whether an exception area was excluded from or included in the UGB. For example, the cost of every service for one *included* exception area, Redmond Hill Road, is estimated to be “high.” In contrast, one *excluded* area (Booth Bend Road) is estimated to have a “low” cost for water, and another (Riverside North) is estimated to have “medium” costs for both sewer and water. Neither the city nor the Commission explains how or whether they compared the relative costs of these services under factor 3. Nor do they explain how or whether factor 3 was balanced with the other Goal 14 locational factors in concluding which exception areas to include or exclude. Instead, the city merely made, and the Commission endorsed, this conclusory re-statement of the law: “The City can provide services to the exception areas proposed for inclusion in the UGB more efficiently than other exception areas.” (Rec. 1080)

In applying Goal 14, factor 4 and the alternatives analysis, the city adopted efficiency measures, including the Neighborhood Activity Center (NAC), to be applied to some lands inside the existing UGB and to some lands brought into the UGB. (Rec. 1032-37, 1080-81). However, neither the Commission nor city explains how they used factor 4 to compare exception areas for inclusion in the UGB, nor do they explain how they balanced any factor 4 conclusions with the other Goal 14 factors to determine which exception areas to include and which to exclude.¹⁶

Neither the Commission nor the city evaluated any exception areas under Goal 14, factor 7¹⁷ (compatibility of proposed urban uses with nearby agricultural activities), or the similar analysis required under the alternatives analysis, ORS 197.732 (1)(c)(D), OAR 660-004-0020(2)(d), and Goal 2, Part II(c)(4). Therefore, the Commission and city could not and did not balance factor 7 with the other Goal 14 locational factors, or conduct an alternatives

¹⁶ The city and Commission appear to use some aspects of the factor 4 efficiency measures to bolster their arguments under ORS 197.298(3) to exclude specific areas. These are addressed under each specific excluded area in Sub-Assignment of Error Two.

¹⁷ The city’s findings regarding Goal 14, factor 7, can be found at pp. 1086-87. These address only certain EFU areas. They do not address any exception areas.

analysis among exception areas based on this criteria. This court has clearly stated that the urban growth boundary “statutes and rules specifically require a local government to set forth findings of fact and statements of reasons when adopting or amending an urban growth boundary pursuant to Goal 14.” *Ryland Homes*, 174 Or App at 410. This includes specifically addressing factor 7. In doing so, it is not sufficient to address the impacts of urbanization solely on the proposed UGB expansion site, as that “would have little context or meaning.” Rather, the city and Commission must compare the proposed sites with alternative sites. *Ryland Homes*, 174 Or App at 416-17 (quoting LUBA); *Friends of Linn County v. Linn County*, 41 Or LUBA 342, 355-56 (2002). Neither did this comparison.

The Commission and city made similar errors of law in evaluating resource lands for possible inclusion in the UGB. In applying Goal 14, factor 3 to resource areas, the city made findings for each of the five resource areas it proposed for inclusion in the UGB. (Rec. 1073-1077) The petitioners objected to four of these areas (Norton Lane, Three Mile Lane, Southwest Area, and Grandhaven), which are of the lowest priority for inclusion in the UGB under ORS 197.298 and Goal 14. In Ordinance No. 4841, the city addressed three additional resource areas (West Hills, Fox Ridge Road North, Area North of Airport) that the petitioners argued should be *included* in the UGB ahead of these lower priority resource lands because, among other reasons, they are of poorer quality soils. (Rec. 347-60). However, in doing so, the city did not address factor 3, but rather stated that its analysis of these three additional areas was under ORS 197.298(2) and (3) (Rec. 360):

“The Council concludes that ORS 197.298(2) and (3) and Factor 6 are satisfied because * * * * [w]here higher priority lands are proposed for inclusion the City has provided sufficient reasons to satisfy ORS 197.298(3)(a)-(c).”

Therefore, the Commission and city did not explain how they compared these various resource lands under factor 3 and the similar provisions of the alternatives analysis, nor did either explain how they chose to include the lowest priority resource lands rather than the

highest priority ones.

This court has rejected the notion that it should construct a local government's arguments under Goal 14 from other material in the decision documents:

“If the local government has not specifically articulated its findings regarding a particular factor and explained how it balanced that factor in making a decision regarding a change in a UGB, it is not properly within our scope of review to make assumptions and draw inferences from other portions of the local government's findings in order to surmise what the local government's decision really was.”

Ryland Homes, 174 Or App at 411.

Even if the court wanted to delve into various city background documents, there is no factual basis for any conclusion under factor 3 and the alternatives analysis requirement. Concerning the resource area north of the airport, the city did not state anything regarding factor 3 and the provision of public facilities and services. (Rec. 347-50) Moreover, as explained in Sub-Assignment of Error Two below, the city addressed the wrong land in its decision. Similarly for the Fox Ridge Road North resource area, the city did not even address the provision of public facilities. (Rec. 351-53)

Regarding the West Hills resource area, the city does state some facts regarding provision of public facilities. However, there is no explanation of how this compares to all other resource areas, the language used is not comparable to that in the findings for the included resource lands, and there is no consistency concerning service costs as to which lands were included or excluded from the UGB. For example, the McMinnville Water & Light Water Master Plan already contemplates construction of water facilities necessary to serve the West Hills area, which the city excluded. Roads could be extended to this area, although some of these may be “expensive” because of slopes. (Rec. 354-55). In contrast, the cost of providing sewer to the lower priority, high value Southwest area would be “high,” and to the Grandhaven area would be “moderate to high.” (Rec. 1075, 1077) Almost all the included lowest priority resources lands are described as being “devoid” of transportation

improvements and requiring major road improvements. (Rec. 1073-77).

The Commission and city did not, and there is no basis for this court to, make any legal conclusion regarding factor 3 and the alternatives analysis for any of the resource land areas.

As explained above, in applying Goal 14, factor 4 and the alternatives analysis to the category of resource lands, the city adopted the NAC efficiency measures. (Rec. 1032-36). However, neither the Commission nor city explains how they used factor 4 to compare among resource areas for inclusion in the UGB, nor do they explain how they balanced any factor 4 conclusions with other Goal 14 factors to determine which resource areas to include and which to exclude. (Rec. 1032-37, 1080-81) Rather, the city defers findings under factor 4 concerning resource lands to its findings under ORS 197.298. (Rec. 1081) As described above, the city must explain how it addressed *each* Goal 14 factor, and the Commission must find that it did so. The Goal 14 factors are not identical to ORS 197.298. *Ryland Homes*, 174 Or App at 413.

Moreover, the city's reliance on its NAC to exclude higher priority lands from the UGB is misplaced. The NAC is a land efficiency concept the city properly uses to demonstrate it is meeting the requirements under Goal 14, factor 4 and OAR 660-004-0020(b)(B)(iii) to use land *inside* the existing UGB efficiently before expanding the UGB. However, as seen under specific areas in Sub-Assignment of Error Two, factor 4 cannot be used *outside* the UGB to unilaterally eliminate any particular expansion area, but rather must be balanced with the other locational factors, including agricultural land retention, and compared across alternative expansion areas. This is reinforced by the priority statute, which requires valuable agricultural land to be the last choice for UGB expansions, and by ORS

215.243,¹⁸ which establishes state policy to preserve agricultural lands.

The Commission and city did not make an independent evaluation of Goal 14, factor 6 (retention of agricultural lands, with Class I soils being highest priority for retention and Class VI lowest) for the resource lands it included and excluded. Rather, the city's factor 6 analysis is subsumed in its analysis under ORS 197.298. In its findings, the city concluded (Rec. 1068):

“The Council concludes that ORS 197.298(2) and (3) and Factor 6 are satisfied because areas with higher capability agricultural lands are being retained outside the UGB and other areas with lower capability agricultural [sic] are proposed for inclusion.”

Not only is this statement false, as a simple comparison of the soil types in the included Norton Lane, Three Mile Lane, Grandhaven, and Southwest areas with the soil types in the excluded areas of the West Hills, Fox Ridge Road North, and North of the Airport demonstrates, but this is not the required analysis. It does not demonstrate a balancing of factor 6 with the other Goal 14 locational factors, nor a comparison across alternative expansion areas. This court stated that “the requirements of ORS 197.298 and factor 6 are not identical,” and went on to explain why. *Ryland Homes*, 174 Or App at 413-414.¹⁹ The Commission's application of Goal 14, factor 6 is flawed legally and is not supported by substantial evidence.

The Commission's conclusion and the city's findings regarding Goal 14, factor 7, and

¹⁸ ORS 215.243 states:

“(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

“(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.”

¹⁹ As previously observed, this court will not draw inferences from other parts of the record to surmise whether a particular criterion was met. But even if it did so, the record material is not helpful. It does not specifically address factor 3, and it makes no comparison among alternative resource, or any, areas. (Rec. 1370-1432)

the alternative analysis requirements are flawed as well. The city's sole finding for all resource lands under factor 7 is (Rec. 1088):

“The Council concludes that the proposed expansion areas will not create compatibility conflicts between uses. Much of the existing UGB is adjacent to resource lands that are currently in agricultural uses. Expansion of the UGB would not create new ones that would create new types of compatibility issues.”

This conclusory statement is preceded by brief descriptions of the agricultural activity in the vicinity of each of the included resource areas, which are the lowest priority, highest value farm lands. These descriptions are both insufficient and inaccurate. (Rec. 1086-88) None of the descriptions includes an explanation – for the subject area or nearby - of the crops grown, the types of farm practices, the scale of farming, or the potential conflicting uses, much less how the proposed urbanization is compatible or could be rendered compatible with measures designed to reduce adverse impacts. Goal 2, Part II(c)(4), OAR 660-004-0020(2)(d).

For the Norton Lane area, the city states only: “To the east is ...actively farmed land within the 100-year floodplain of the Yamhill River.” (Rec. 1086) For Three Mile Lane, the city states: “South and west of the sub-area, across the Yamhill River and its associated floodplain, is land zoned EF-40 that is largely in active farm use.” For the Southwest area, the city states: “To the south and west of this subarea is additional resource land currently in agricultural farm use.” (Rec. 1087) For the Grandhaven area, the city states: “Surrounding land uses consist of large-parcel farm operations to the west, north, and east of creeks and rivers that border this sub-area. To the immediate south is found both large-acre farm operations and rural residential development.” (Rec. 1088)

These descriptions do not provide any information as to whether urbanization of these areas can be rendered compatible with nearby agricultural activities, nor do they allow comparison among alternative expansion areas. And neither the Commission nor the city

provides such a comparison. Finally, the descriptions are no longer accurate. In Ordinance No. 4841, the city amended the boundaries of each area, in most cases by removing floodplain from the proposed area. The following changes related to nearby agricultural activities resulted, increasing potential conflicts, but the city did not modify its factor 7 findings or conclusions. (Rec. 98, 336, 1429, Table 16)

- Norton Lane: The amended boundary reduced the acreage on which the Commission's and city's findings are based by 114 acres, thereby creating an unbuffered edge of approximately one mile with actively farmed EFU land.
- Three Mile Lane: The amended boundary creates a new unbuffered edge of over a mile with actively farmed EFU land.
- Southwest: Removal of 60 acres results in this area directly abutting EFU land for approximately 1600 feet.
- Grandhaven: The amended boundary creates an edge of approximately one mile with actively farmed EFU land.

The Commission and city did not make any findings under factor 7 for these four lowest priority, high value farm areas that address the significant change in their boundary configurations, and therefore also could not validly balance factor 7 with the other Goal 14 locational factors.

The Commission's decision, and the city's findings, under factor 7 for the three higher priority, lower soil capability areas that it excluded are similarly conclusory, insufficient, or inaccurate. These are areas the petitioners argue are required to be included rather than more valuable, lower priority agricultural lands. As previously explained, the city addressed the wrong area north of the airport. For the West Hills, the Commission and city concluded (Rec. 29, 355):

“The West Hills area borders on farm and forestry lands to the north, west, and south. If brought into the [UGB] and developed with needed medium- or high- density housing, the potential for conflicts between the residential development and surrounding farming or forestry operations would increase significantly: the expansion would increase the number of dwelling units and residents adjacent to these farm and forestry operations.”

This is a statement that could be said about any urbanized land adjacent to EFU land.

It is not a description of agricultural activities near the West Hills, it does not address how conflicting uses could be rendered compatible, and it does not compare across alternative sites. Finally, for Fox Ridge Road North, as described in Sub-Assignment of Error Two, the Commission and city do not address the entire area the petitioners contend should be included, nor do they address the portion of this area that is part of an approved Measure 37 claim for residential development. There are no findings that address factor 7 and reflect these two major issues that impact the compatibility of the area with nearby agricultural activities – size of area and nature of development in and around it. (Rec. 31)

There are three additional resource areas that neither the Commission nor the city addresses at all, for any of the Goal 14 locational factors or the alternatives analysis. These are lands in the Riverside area, south of the airport, and south of Three Mile Lane, and are described in more detail in Sub-Assignment of Error Two, below.

Finally, neither the Commission nor the city used the Goal 14 locational factors or the alternatives analysis to compare across alternative expansion sites that are *not* alike; that is, to compare exception areas with resource lands. While case law and Commission precedent provide that the Goal 14 locational factors are to be used to choose among “like” lands within the ORS 197.298 categories, to the extent there may be a requirement to also compare between categories of land, that has not been done.

Because the Commission erroneously interpreted and applied the law, the decision should be remanded.

Sub-Assignment of Error Two: Improper Interpretation and Application of ORS 197.298

Excluded Exception Areas

The Commission approved the city’s exclusion of three exception areas – Old Sheridan Road, Riverside North, and Booth Bend Road – which the petitioners argue should be included. These areas are the highest priority for UGB expansion under the priority

statute, ORS 197.298. In each case, the petitioners argue these areas were improperly excluded in favor of the lower priority, high value farm land described above.

Before addressing specific exception areas, the Commission endorses an argument that implicitly or explicitly is a basis for excluding each exception area: that the city's need for residential land is for medium and high density housing, which none of these areas can allegedly reasonably accommodate. This argument is legally and factually flawed. First, the city's stated need under its Goal 14, factors 1 and 2 findings is for "residential" land, not for any sub-type of residential land. (Rec. 1027, 1211) The city has projected that need among low, medium, and high density development patterns. This is not, and the Commission does not find, a "specific type of identified land need" under ORS 197.298(3)(a).²⁰ Second, the Commission found that the city's projection of housing need among low, medium, and high density is not a "planning and zoning directive[s]." Therefore, it cannot be used to disqualify land that otherwise can meet a residential housing need, on the basis that the land cannot "reasonably accommodate" the need.

Third, even using these projections, 63% of all new residential land need – 341 acres – is for low density, single family housing.²¹ (Rec. 1026, Table 5) This need *alone* exceeds *all* the buildable land in *all* the exception areas the city proposes for UGB expansion. (Rec. 985, Table 15 and 1026, Table 5)²² Clearly, some of the need for low density housing (as well as needs for parks and commercial uses) can be met on these excluded exception areas (and on higher priority, poorer soil farm lands, as argued below). Finally, as discussed below, there is no evidence these areas cannot accommodate some medium or even high

²⁰ The petitioners do not concede that this could even qualify under ORS 197.298(3)(a).

²¹ The city's low density zones are R-1 and R-2; the medium density zones are R-3 and R-4; the high density zone is R-5. Approximately 30% of the projected new land need is for medium density housing and 7% is for high density. (Rec. 1026, Table 5)

²² Table 15 shows that all the exception areas proposed for expansion can only provide 227 buildable acres, for 906 dwelling units. The new land needed for low density housing is 341 acres for 1379 dwelling units.

density housing. To the extent the Commission's decision rests on this argument, it should be remanded.

Old Sheridan Road

The Old Sheridan Road exception area is located on the southeast side of McMinnville, abutting the UGB. It is 80 acres in size, of which 36.5 acres are buildable. (Rec. 1319, 1323). It is "virtually flat." (Rec. 1319) Adjacent areas within the UGB are developed or planned to develop with residential uses. (Rec. 1319)

LCDC approved the City's decision to exclude this area from the UGB on the sole ground that "transportation facilities cannot reasonably be provided to this area under ORS 197.298(3)(b)." (Rec. 27) The Commission's entire findings are (Rec. 27-28):²³

"...Old Sheridan Road, which borders the sub-area along its western edge, is designated in both the Yamhill County 'Transportation System Plan' and the McMinnville 'Transportation Master Plan' as a minor arterial street. The Oregon Department of Transportation (ODOT) classifies Oregon Highway 18, which borders this sub-area along its entire eastern edge, as a Limited Access Highway. The significance of this designation is that direct access to the sub-area from Highway 18 will not be granted by ODOT (Attachment 1)."

Section (3)(b) of the priority statute provides:

"(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:

* * * *

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

The Commission has incorrectly applied the law. In addition, there is no substantial

²³ The city's findings are slightly broader. While the city developed a factual description of Old Sheridan Road, it relied on only 3 reasons to exclude it from the UGB (Rec.1183-1510).

- " - The cost of providing public services necessary to support the sub-area's urbanization is high.
- Access to this sub-area is limited to Old Sheridan Road, a County road subject to occasional flooding.
- The development of this sub-area for commercial uses would be contrary to current McMinnville plan policies that discourage strip development (See Plan Policy 24.00)." (Rec. 1061)

evidence to support the Commission's findings; in fact, the only evidence is to the contrary.

First, as described above, unlike Goal 14, ORS 197.298 is not a balancing statute, but a hierarchy. The exceptions of subsection (3) are to be applied in "limited" circumstances.

There is no case law illuminating the meaning of "reasonably" in 197.298(3)(b). However, guidance can be found in case law addressing similar language from an administrative rule governing UGB expansions. OAR 660-004-0010(1)(c)(B)(ii) provides that, among other things, when a local government proposes to expand a UGB, it must first demonstrate that "[a]reas which do not require a new exception cannot reasonably accommodate the use." In *Residents of Rosemont*, 173 Or App, at 335, n. 6, this court stated:

"[T]he 'reasonably accommodate' inquiry in criterion ii is whether the areas that do not require a new exception *can* accommodate the use at all, not whether they can do so as efficiently or as beneficially as the proposed exception area might."

This interpretation - which sets a high bar - is in a rule using the "reasonably accommodate" language to compare among lands. In contrast, use of "reasonably" in ORS 197.298 sets an even higher standard due to the very structure of that statute. There is no comparison: farm and forest lands are the last priority for a UGB expansion. Their resource value is recognized and protected by the statute's structure; they are not to be balanced with other criteria but rather are the last resort. Ahead of farm lands are all exception lands. Exception lands - by their definition - are more difficult to urbanize than farm land because exception areas are already partially developed. ORS 197.732(1), OAR ch. 660, div. 04. So, it cannot be that farm land could come in to the UGB ahead of exception land simply because it is cheaper or easier to develop, since due to the nature of farm land that will almost always be the case.

The Commission's decision does not meet these legal requirements for several reasons. First, it does not meet the language of ORS 197.298(3)(b) on its face. This subsection is met only if "future urban services" - plural - cannot be reasonably provided.

The Commission's findings relate to only one urban service – transportation. Urban services include, among other things, sewer and stormwater services, water, and electrical services, in addition to roads.²⁴ The statute requires consideration of all urban services.

This legal requirement makes practical sense. As the record shows, the city evaluated all its alternative sites for a variety of urban services, and found that every site is a mixed bag: in any given area, it may be relatively easy to provide one type of service, moderately difficult to provide another, and difficult to provide yet another. (Rec. 1063, Table 17) The Old Sheridan Road area is an example – here, the city found that the cost of providing water services would be moderate and electrical services low. (Rec. 1328) In fact, several areas that the city included and LCDC approved are more difficult to serve in every category than Old Sheridan Road – for example, Redmond Hill Road. (Rec. 1063, Table 17) Allowing one type of urban service to knock out an area from consideration would effectively undermine the ORS 197.298 hierarchy completely.

Second, subsection (3) (b) provides only one reason by which a finding can be made that urban services can not be reasonably provided – if there are topographical or other physical constraints. That is not the case here. The Commission's transportation reason is because ODOT will not allow access from Highway 18 to the Old Sheridan Road area. (Rec. 27-28) This is not a topographical or physical barrier, especially when, as described below, it is not the only method to provide transportation service.

Because the Commission's findings do not meet the exception allowed under ORS 197.298(3)(b), this court should remand the decision on this site.

Third, the Commission's decision is not supported by substantial evidence in the record. The evidence does not rise to the limited and high standard of "services could not

²⁴ Goal 11, Public Facilities and Services, defines "Urban Facilities and Services" as follows: "Refers to key facilities and to appropriate types and levels of at least the following: police protection; sanitary facilities; storm drainage facilities; planning, zoning and subdivision control; health services; recreation facilities and services; energy and communication services; and community governmental services."

reasonably be provided.” For Old Sheridan Road area, the city actually found that “urban services necessary to support such development [urban densities] *can* be extended to it.” (Rec. 1329; emphasis added) Highway 18 is not the only way to provide access to the area. As the record demonstrates, there is a local street from the subdivision inside the adjacent UGB that is stubbed out directly to the Old Sheridan Road area. (Rec. 170 and Supp. Rec. photos of street stubbed from UGB to Old Sheridan Road) Old Sheridan Road and Durham Lane can, and already do, provide access. (Rec. 1329) They will require improvement to urban standards, but that is true of virtually every area the city considered for inclusion in the UGB – including the agriculture areas that McMinnville proposed and LCDC approved for inclusion.²⁵ The Commission cannot exclude the higher priority area of Old Sheridan Road under ORS 197.298 based on a legal finding that a service cannot be reasonably provided to it - because a local road would have to be improved to urban standards - and then find that it is *not* unreasonable to do the same – improve a local road to urban standards - for agricultural land of lower priority.

Finally, the city states that Old Sheridan Road is subject to “occasional flooding.” (Rec. 978) Although the Commission’s decision does not rely on this finding, we will nevertheless address it. There is no evidence in the record to support this, only a conclusory statement that “portions” of the road flood during 100-year flood events. (Rec. 1330) There is no evidence of how this is “occasional,” nor is it shown how that results in it being unreasonable to provide transportation to the area, given that this – like every other road outside the UGB – will have to be improved to urban standards inside the UGB.²⁶

²⁵ The Southwest area, zoned EFU, would be served by roads that: “...are not improved to urban standards. Urbanization of this area would require improvements to these roads in order to adequately serve adjacent urban development.” (Rec. 1402) The Grandhaven area, zoned EFU, is “virtually devoid of transportation improvements” of any kind. (Rec. 1425) It will be served by extensions of streets into it, the same as the Old Sheridan Road area. The Three Mile Lane area is currently only served with a “county rural road improved only with a gravel surface.” (Rec. 1391)

²⁶ The city’s decision cites one other factor for excluding Old Sheridan Road – that commercial development would be contrary to city policies discouraging strip commercial development. The Commission’s decision

Because the Commission has erroneously interpreted ORS 197.298 and made a decision not supported by substantial evidence, the court should remand the decision with instructions to add the Old Sheridan Road area to the UGB and remove lower priority farm land.

Riverside North

The Riverside North exception area is located adjacent to the current UGB on the east side of the city. It contains 101 acres; over 36 acres are buildable. (Rec. 1263-67). The terrain is flat to rolling. It lies within the UGB-side of a bend in the Yamhill River, which “visually mark[s] McMinnville’s existing urban edge.” (Rec. 1263, 1241) Record photos show the entire area is virtually vacant. (Rec. 177 photos are difficult to discern; see Supp. Rec.) The Commission’s finding for excluding the Riverside North exception area, in its entirety, is (Rec. 27):

“The Commission agrees with the city that this area cannot reasonably accommodate the residential use because of the noise and odor associated with the adjacent sewage treatment plant, industrial use, and railroad. This location is not suitable for residential use. The area could accommodate industrial use when the city has a need.”

Unlike its findings for excluding other exception areas from the UGB, the Commission does not cite the legal ground on which it relies to exclude Riverside North, making the petitioners’ argument unnecessarily challenging. Because the Commission does not cite the legal basis for its decision, we ask that the Court remand this portion of the decision. Ordinance No. 4841, is not illuminating. (Rec. 335) The city’s MGMUP indicates that the sole legal basis for excluding Riverside North – and every other exception area that the city excludes - is ORS 197.298, without reference to which subpart of this statute the city is relying upon. (Rec. 974) The subparts are distinct legal grounds, and neither the

does not mention commercial development at all – it did not cite this as a basis for its decision nor relate it to any legal criteria. This court should not search the record for evidence on which the Commission did not rely, but here there is no evidence that the any commercial development would be part of the development.

petitioners nor this court should have to sort through this to make the Commission's argument. Should the court decide to proceed, we assume the Commission excluded this area under ORS 197.298(3)(a) on the ground that the Commission is contending that residential use is a "specific type[s] of identified land need[s]", because the Commission's decision uses a key phrase almost identical to one found only in ORS 197.298(3)(a): "cannot reasonably accommodate." In addition, the Commission relies on the city's decision, and the MGMUP cites ORS 197.298(3) as its reason for excluding Riverside North. (Rec. 974)

The Commission has incorrectly applied the law. In addition, there is no substantial evidence to support the Commission's findings.

First, "residential" is not a specific type of identified land need, as used in subsection (3)(a). As discussed, the exceptions to the priority scheme are "limited." *Parklane*, 165 Or App at 21. Rather, "residential" is a general land use category that "is a common if not paradigmatic justification for expanding an urban growth boundary that is more easily understood as need identified under Goal 14, factors 1 and 2. Using Goal 14, factor 1 and 2 as a 'specific type of identified land need' under ORS 197.298(3)(a) is anomalous, because there is nothing about that need* * * that is a 'specific type'." *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565, 608-09 (2000); *rev'd on other grounds*, 174 Or App 406 (2001).²⁷

It is an incorrect application of the exceptions subsection for the Commission to use it to *reject* a particular high priority site for a *general* type of land use (residential) that can be met on many higher priority lands, and instead include the lowest priority sites in the UGB.

Rather, subsection (3)(a) is properly used for a limited, narrow subset of a general land use, or a unique category of land use, that requires certain previously defined site

²⁷ In its own footnote, LUBA stated: "In our view, the phrase 'specific types of identified land needs' is more readily understood to refer to specific categories of needed development that require land with particular site or locational characteristics." *1000 Friends of Oregon v. Metro*, 38 Or LUBA at 609, n. 32.

characteristics. By its own language,²⁸ it is to be used to *qualify* otherwise low priority land for inclusion in limited circumstances – not to reject lands that otherwise can accommodate a general urban use.

Second, the Commission is essentially excluding land without going fully through the priority scheme. In *Parklane*, this court affirmed the interpretation of LUBA for how the urban reserve rule - here, UGB - priority scheme operates. First, this court favorably quoted LUBA in the underlying case:

“Accordingly, we conclude that correct application of Subsection 4 [of the urban reserve rule, which is subsection (3) in the UGB priority statute] requires the local government to categorize the inventory of suitable lands according to their Subsection 3 [subsections (1) and (2)] priorities and subpriorities, and then, in considering a specific site under one of the Subsection 4 [(3)] exceptions, determine that no higher priority land is adequate to meet the particular subsection 4 need.”

Id., 165 Or App at 13.

This court went on to explain:

“LUBA’s interpretation requires that sufficient suitable higher priority lands be considered and classified pursuant to subsection (2) and (3) [subsections (1) and (2) of current UGB priority statute] so that resort to subsection (4) [subsection (3) of current priority statute] will not be necessary to *identify* any of the land that is *available* for designation as urban reserves. LUBA’s interpretation does not prevent the use of subsection (4) to *designate* lower priority lands as urban reserves under the limited circumstance contemplated by paragraphs (4)(a) through (c) [subsection (3)(a) – (c)]. * * * [S]ubsection (4) contains *exceptions* to the priority requirements for urban reserve designation contained elsewhere in the rule. LUBA’s interpretation simply ensures that the exceptions will operate only under the circumstances that justify them and will not serve instead as a default mechanism for filling voids in the pool of available lands left by an incomplete application of the identification and prioritization process under subsection (2) and (3).”

Id., 165 Or App at 21.

The city identified a need for non-residential uses, including retail, office, infrastructure, and institutional uses. (Rec. 333, 1027, 1216)²⁹ Neither the Commission nor

²⁸ “(3) Land of lower priority under subsection (1) of this section may be *included* in an urban growth boundary....” (Emphasis added).

²⁹ The city identified a need for 173.6 acres for commercial and office uses, but proposed a UGB with 192.9 acres of commercial and office land. (See footnote 2)

the city addressed whether these uses could be met on the Riverside North site. Nor has the Commission or the city considered whether vacant industrial land already in the UGB could be re-zoned to residential to meet the residential land need, and the Riverside North site swapped for that as an industrial site, given the city's apparent endorsement of it as an excellent future industrial site. (Rec. 977) Consideration of lands inside the UGB is required by Goal 14, Goal 2, and ORS 197.732(1)(c). This includes consideration of whether lands can be re-designated from one zoning category to another. *BenjFran*, 17 Or LUBA at 49, *aff'd* 95 Or App 22, 767 P2d 467. The Commission, and city, have conducted "an incomplete application of the identification and prioritization process." Rather, they have used the subsection (3) exceptions process as the default mechanism to fill a self-created "void" – that of residential land, which is not even a "specific" type of identified land need.

Finally, there is no substantial evidence on which to exclude Riverside North for residential use, given that the city has proposed, and the Commission has approved, inclusion of Riverside South for residential use. Riverside South is an exception area properly included in the UGB expansion proposal. The Commission did not make specific findings regarding inclusion of Riverside South. However, these sites are described in almost identical terms by the city on the precise issue on which the city and Commission excluded Riverside North - that the adjacent uses render the site unsuitable for residential use.

For example, regarding Riverside North, the city stated (Rec. 1046):

"The development of this sub-area for urban residential use would be difficult to achieve * * * due in no small part to the adjacent industrial uses previously described [Cascade Steel Mill, railroad right-of-way, other heavy industrial uses inside UGB] which generally do not make visually or environmentally pleasing or otherwise compatible neighbors to residential uses. These industrial uses, which generate considerable noise, dust, and light, will have a marked negative effect upon the quality of life for future residents of the sub-area."

* * * *

"Given this adjacent development pattern, the presence of the rail line ...this area would appear to be best suited for future industrial development."

Regarding Riverside South, the city stated (Rec. 1048-49):

“[C]lustering of housing types and costs in a pedestrian friendly environment * * * will be difficult to achieve within this sub-area. As with the Riverside North sub-area, this is due in no small part to the adjacent and nearby industrial uses previously described [Cascade Steel Mill, railroad right-of-way, other heavy industrial uses inside UGB] which generally do not make visually pleasing or otherwise compatible or preferred neighbors to residential uses. These will have a negative effect upon the quality of life for future residents of the sub-area.

* * * *

“With this sub-area being border on all sides by land zoned for either industrial or resource use, it is possible to consider that land within this sub-area, if urbanized, may be better suited for non-residential development.”

The evidence cannot operate to include one area and exclude an adjacent area for the same use – residential - which are found to have the same qualities. In doing so, the Commission has acted “inconsistently with official agency position or practice,” in addition to without substantial evidence.

For the reasons above, we ask the Court to remand the decision for inclusion of the Riverside North exception area, and consequent removal of lower priority areas.

Booth Bend Road

The Booth Bend Road exception area is relatively flat and consists of 42 acres. (Rec. 1310) Seventeen of the 19 parcels in the area are already developed, leaving 13.2 buildable acres. It is located south of McMinnville, across State Highway 18 (Rec. 1306). It is linked to the city by a bridge – Booth Bend Road - across Highway 18.

Neither the Commission nor the city explicitly provides the legal basis on which they excluded the Booth Bend Road exception area from the UGB expansion. However, we surmise the basis is ORS 197.298(3), because the city’s decision is in its 197.298(3)(a) analysis (Rec. 974), and the Commission uses the “cannot reasonably accommodate” the need language of ORS 197.298 (3)(a). The Commission’s findings state (Rec. 27):

“The Commission agrees with the city’s decision to exclude this area from the UGB. Service can be provided to this area since the extension of Booth Bend Road across Highway 18 already exists and would not need to be upgraded to a large extent to

support a relatively minor amount of infill development (or at least the findings do not state otherwise). However, this area is problematic since it would be an isolated extension of the UGB across the highway, making walking to nearby destinations difficult. This is consistent with the decision the Commission made regarding the City of North Plains. This exception area cannot reasonably accommodate the need for a compact, pedestrian-friendly urban area.”

The city has stated its land need is for urban residential, commercial, office, and various public and semi-public uses. (Rec. Ordinance No. 4840, p. 314, Table 14; 333; Ordinance No. 4841, p. 339, Table 14) The city has goal of a compact, pedestrian-friendly urban area, but that is not a “specific type of identified land need” for purposes of excluding exception areas and instead including lower priority farm land in a UGB expansion. If that were the case, the priority statute would be meaningless because cities could craft the “need” such that only flat farm land would be able to fulfill it. Rather, the goal of a compact urban form arises out of Goal 14, factor 4, as the city itself describes. (Rec. 1032-37) It must be balanced with the other Goal 14 factors, including factor 6 – retention of agricultural lands.

Exception lands – by their definition – are more difficult to urbanize than farm land because exception areas are already partially developed. ORS 197.732(1), OAR ch. 660, div. 04. And yet, exception lands are given higher priority for UGB expansions than farm and forest lands because of the state’s policy to protect farm and forest lands and recognition that expansion of urban development into rural areas is a matter of “state concern.” ORS 215.243 This court has observed on other occasions that simply because exception areas are more difficult to serve than other areas, are more “geographically challenged,” or can only provide for low density urban development are not reasons alone to exclude them. *City of West Linn v. LCDC*, 201 Or App at 434, 436, 446.

The decision on Booth Bend Road should be remanded on this ground alone – that the decision violates ORS 197.298. However, in addition, it is not consistent with the Commission’s decision in North Plains, or even internally with its own decision in this

matter. In North Plains, the Commission approved expansion of a UGB onto farm land adjacent to the city, rather than onto exception land that was located south of the city, across State Highway 26. There, Highway 26 was found to be a barrier to a compact, well-connected city because no part of North Plains extends across Highway 26. In contrast, McMinnville's pre-expansion UGB already extends across Highway 18, and this very decision approves the addition of hundreds more acres of prime farmland across the Highway. (For example, the Three Mile Lane area proposed for expansion would be 165 acres across Highway 18, and the Lawson Lane expansion area will be 18 acres across Highway 18. Rec. 364, 1293)

Booth Bend is not an isolated or unusual piece of land across Highway 18. The UGB already stretches to other lands across the Highway, the Booth Bend area is already connected to the urban area by a bridge (a walk of 250 feet), and it is less than 1000 feet to the site of a new elementary school. (Rec. 291) The current absence of sidewalks is true for every area evaluated for inclusion in the UGB – because these are all currently rural areas without urban amenities.

Because the Commission's decision, derived from the city's underlying one, violates ORS 197.298 and is inconsistent with official agency position or practice, this court should remand the decision with instructions to add the Booth Bend Road area and remove lower priority farm land.

EFU Areas with Poorer Soils

The Commission approved the city's decision to exclude from the UGB expansion the following areas that are zoned for exclusive farm use, but have poorer soils than the EFU areas the city did include – West Hills, Fox Ridge Road North, and Area North of McMinnville Airport. The lower priority, high value farm areas the Commission and city did

include are described above.³⁰ Under ORS 197.298 (2) and (3), the following areas of poorer soils should have instead been included.

As argued under the section on excluded exception areas, none of these areas should have been excluded because they cannot accommodate medium and high density housing. This is not a specific type of identified land need. And, medium and high density housing represent a small fraction of the uses for which McMinnville needs a UGB expansion. There is no showing that the other uses cannot be met on these higher priority lands, rather than on the low priority lands the city and Commission included. Finally, for some areas there is no evidence they cannot accommodate some medium and high density housing.

West Hills

The West Hills area is located adjacent to and west of the current UGB and west of two other areas proposed for UGB inclusion, to which the petitioners do not object – the Redmond Hills Road and Fox Ridge Road areas. (See maps at App. 1 and 2). This West Hills area contains Class III and IV soils, and has almost no physical development. (Rec. 28) At its westernmost edge, there is a “wide band of steeply sloping land that forms a crescent touching on Fox Ridge Road at its northern tip and the Redmond Hill Road area to the south. Slopes within this crescent shaped area are 25% and greater.” (Rec. 28)³¹ It slopes downward and eastward to the “lower West Hills area ,” which is adjacent to the existing UGB. The lower West Hills area contains approximately 200 acres with a gentle slope of about 7%-25%. (Rec. 353)

The Commission, agreeing with the city, found that based on various characteristics of this area (Rec. 29-30):

³⁰ The lower priority, high value farm lands included in the UGB by the city and Commission are described at pages 13-14.

³¹ The overall size of the West Hills area, including the slopes over 25%, is not in the record, though the size of some parcels is, and is indicated as appropriate.

“In accordance with ORS 197.298 (3)(a),(b), and (c), ... the West Hills area adjacent to the existing westerly urban growth boundary [is] inadequate to accommodate the specific types of land needs identified in the MGMUP.

* * * *

“[T]he city has identified a specific land need, namely, medium – and high – density housing and that this location is outside of the planned NAC, creating a satellite with no pedestrian access to shopping or other commercial services.”

The Commission has misunderstood our objection, has mis-applied ORS 197.298(3), and its decision is not supported by substantial evidence.

First, the petitioners agree that the steep lands within the “crescent” should not be included in the UGB and have never advocated their inclusion. However, the crescent is a logical geographic defining edge to an expanded UGB (Rec. 92) Between it and the existing UGB are 200 acres of gently sloping land that should be included in the UGB. (Rec. 353)

Second, the Commission’s decision again undermines the purpose of ORS 197.298(3) by allowing the city to so narrowly define a “need” that it can, allegedly, be met only on the lowest priority lands. The city claims its need for medium and higher density housing oriented toward a NAC precludes inclusion of the West Hills. However, this argument fails on legal and factual grounds. The city established its need for land for residential, commercial, office, and other public and semi-public uses. (Rec. 333, Table 6-4; 336; 339, Table 14) Both the Commission and city acknowledge the West Hills area can accommodate housing. The city finds the area would likely do so in a similar fashion to the area adjacent to it that is inside the UGB. (Rec. 354) The Commission’s decision acknowledges that the West Hills *can* accommodate medium and high density housing. (Rec. 29)

Even if the housing is low density, the city has demonstrated a substantial need for low density housing that can be met on this site. As already described, two-thirds of the additional residential land the city projects it needs is for low density housing.³² This need

³² The city identified a need for 341 buildable residential acres for low density housing in the R-1 and R-2 zones. (Rec. 1210, Table 11 and 1215, Table 17)

alone exceeds all the buildable land in all the exception areas the city proposes for the UGB expansion, so clearly some of the need for single family land could be met in the West Hills, rather than on higher value farm land. And, the city and Commission have not addressed whether the city's other land needs could be met in the West Hills.³³

The city and Commission cannot comply with ORS 197.298(3)(a) by cherry-picking from a broad category of land needs to argue that it has a specific type of identified land need than can only be met on narrowly defined lands, and use that to exclude lands that could meet the broader category of needs. Thus, the West Hills can accommodate the residential need identified by the city, including medium and high density housing, and therefore should be included in the UGB before inclusion of higher value agricultural lands.

Nor can the Commission exclude the West Hills area, and include lower priority, higher value agricultural areas, under ORS 197.298(3)(b). The Commission and city did *not* conclude that "future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints," which is the legal standard under (3)(b) to bring in lower priority lands. Rather, the city acknowledges the West Hills *can* accommodate medium density housing, but it will be somewhat more expensive. (Rec. 354).³⁴ This is likely because the Commission states in its findings that the "McMinnville Water & Light Water Master Plan indicates future construction of an additional pressure zone system that could provide water service up to a high elevation of 415 feet; this elevation occurs at roughly the midpoint of the Class III soils in the West Hills area." (Rec. 28).

Similarly, inclusion of the area would necessitate extensions of and improvements to streets, some of which may be expensive, depending on the street system chosen. (Rec. 29)

³³ The city also claims it needs 314 acres of *buildable* land for future parks; this could also be met in the West Hills, rather than on higher value farm land.

³⁴ There is no evidence in the record demonstrating that slopes of 6% to 20% cannot accommodate the city's medium and high density housing. In fact, the only evidence in the record is to the contrary. (Rec. 93, 235-40 (letter from Astoria Community Development Director))

But neither the Commission nor city concludes that a street system “could not reasonably be provided,” nor do their findings here differ from the findings made for every other area considered for inclusion, whether farm land or exception area. These are all areas that are not already developed to urban standards of infrastructure, because they are currently outside the UGB and zoned for rural uses. Exclusion of the poorer soil West Hills and inclusion of lower priority, higher value agricultural lands violates ORS 197.298(3)(b).

Finally, the West Hills cannot be excluded under ORS 197.298(3)(a) or (c)³⁵ on the basis that it is not near a NAC. The Commission’s and city’s reasoning is circular. They conclude that the area cannot be included because it is “outside the boundaries of the nearest ... NAC.” (Rec. 356) Neighborhood Activity Centers are defined as areas that (Rec. 957):

“would provide a range of land uses within walking distance of neighborhoods ...including neighborhood-scaled retail, office, recreation, civic, day care, places of assembly, public parks and open spaces and medical offices.

* * * *

“These activity centers would be selected due to their location, distribution, proximity to vacant buildable lands, ability to accommodate higher intensity and density development***.”

The city did not plan for NACs outside the areas that it chose to include in its UGB expansion, so, naturally, there is no NAC near the West Hills. The Commission and city cannot exclude this area under (3)(a) because of actions it took (or here, did not take) to render the site ineligible for the city’s alleged specific type of land need.³⁶ Nor is there evidence that a NAC, or other supportive non-residential development, could not be provided in the West Hills area if it were brought into the UGB.

³⁵ Both the Commission (Rec. 29) and the city (Rec. 356) cite ORS 197.298(3)(c) as a basis to exclude the West Hills, in addition to subsections (a) and (b). The subsection (c) argument is not developed by either, and the petitioners cannot divine it from the language of their findings. We ask the court to reverse to the extent any legal conclusion is based on ORS 197.298(3)(c) concerning the West Hills.

³⁶ This is analogous to the situation in *Residents of Rosemont*, where the Court found it improper that Metro had “preselected” the area for a UGB expansion, and then found that the affordable housing “need” could only be met in close proximity to that site. Rather, the court directed Metro to evaluate the entire region to find land to meet the housing need. 173 Or App at 330-31.

For all the above described reasons, the Court should remand the Commission's decision regarding exclusion of the West Hills area from the UGB, with direction to remove lower priority areas.

Area North of Fox Ridge Road

The Fox Ridge Road North area is located adjacent to the western portion of the city's UGB, north of the Fox Ridge Road area that is proposed for inclusion. (App. 2) The Fox Ridge Road North area is zoned EFU and consists primarily of Class III and IV soils. (Rec. 30, App. 2) The petitioners consistently proposed inclusion of the entire Fox Ridge Road North area in the UGB. The Commission approved inclusion of only one tax lot in this area.³⁷

However, there is an additional area of several hundred buildable acres that the Commission has not included in the UGB, although it is of higher priority than the included EFU lands.³⁸ Fox Ridge Road North is adjacent to the UGB and stretches west of the included tax lot. It is bounded by Baker Creek and its floodplain to the north and extends to the west to include an exception area framed by steep slopes. (Rec. 246-49; App. 2) To the south is the West Hills Area, which the petitioners also believe should be included. Fox Ridge Road North consists of four contiguous tax lots zoned EFU and totaling 275 acres, plus an exception area that is already partially developed. The buildable corridor varies in width from 700 to 2000 feet, most of which is below the 275 foot elevation level for municipal water service. (Rec. 94, 185, 300, 244³⁹, App. 3)

³⁷ The Commission included tax lot 4418-700, which is about 44 acres. (Rec. 32, 246) On p. 246 of the Record, this tax lot is located in the lower left-hand portion of the map, just above the land zoned "VLDR-2.5."

³⁸ The tax lots in the Fox Ridge Road North area that petitioners argue should be included are shown on the zoning maps at pp. 246-49 in the record. They are tax lot 200 in the lower left of the map on p. 246, tax lots 100, 400, and 300 south of the Baker Creek floodplain on p. 247, and the exception areas zoned VLDR-2.5 on p. 248. These maps actually fit together like a puzzle.

³⁹ Record page 244 is titled "Composite Constraints and Soil Map." The copy in the record is illegible, so a clearer copy if attached as Appendix 3. It shows a swath of flat, buildable land ranging in width from 700 to 2000 feet, between the Baker Creek floodplain and some steeper slopes to the south and west, of approximately

The Commission excluded the Fox Ridge Road North area based on ORS

197.298(3)(a). As the Commission states (Rec. 32):

“For the reasons cited above, the city concludes that specific types of identified land needs as identified in the MGMUP cannot reasonably be accommodated by the areas of Class III and IV soils within tax lot R4513-00100 or the northern portion of tax lot R4418-00200. The city, therefore, has not included these lands in its expanded UGB, as permitted by ORS 197.298 (3)(a).

* * * *

“The Commission agrees with the city, in that the excluded lots will have limited future connectivity, are constrained by slope that leaves a limited building corridor, and would create an island of agricultural activity and cut off tax lots 1100 and 1000 from existing farm operations.”

The Commission’s and city’s findings discuss only a portion of this area – two tax lots totaling 110 acres⁴⁰ - concluding they should not be included in the UGB. (Rec. 30-32; 351-53) The Commission failed to make findings, nor is there any evidence in the record addressing, the remaining 165 acres of poorer quality soils and the exception area that the petitioners raised before the city and Commission as an alternative, higher priority site for UGB expansion. (Rec. 92-93, 185-86, 218-19)

There is no legal basis under ORS 197.298(3), or substantial evidence, to exclude either the two tax lots or the larger Fox Ridge Road North area.

As described above, ORS 197.298(3)(a) is designed to support the *inclusion* in the UGB of an area that is otherwise of low priority, because of a pre-defined specific type of identified land need that can only be met on the lower priority land. It is a narrow exception to the hierarchy scheme of ORS 197.298. *Residents of Rosemont*, 173 Or App at 332. But the city is not applying ORS 197.298(3)(a) in this manner. Rather, it is twisting the criteria to *exclude* higher priority land by claiming it has a specific type of identified land need that can *not* be met on higher priority land. That is an incorrect interpretation of the law, and it is

200-300 acres. The petitioners enlarged this Composite Map and presented it to the Commission at its hearing on this matter. This enlargement can be provided to the court.

⁴⁰ The tax lots for which there are findings are tax lots 200, Rec. 246, and the portion of tax lot 100 south of the floodplain, Rec. 247.

not supported by substantial evidence.

The city's need is for land to accommodate a variety of residential, commercial, office, public, park, and other needs. These are not specific types of identified land need, but rather general ones. The Commission and city acknowledge that the three parcels for which they did make findings (the one parcel included and the two parcels excluded) contain flat, buildable land. (Rec. 30, 351)⁴¹ One excluded parcel (tax lot 100, Abrams) is 95 acres and is the subject of a Measure 37 claim -- a claim that proposes residential development. (Rec. 104) The city originally recommended inclusion of this parcel, finding it was "necessary in order to satisfy future residential and commercial land needs." (Supp. Rec., p. 11 of City memorandum of October 14, 2005) The city later rescinded the site due to the uncertainty of Measure 37, not due to its suitability for residential and commercial development. (Rec. 107-08) The evidence does not show the land cannot accommodate any of the city's needs.

Even if being part of or close to a neighborhood activity center was a legitimate criterion in the UGB expansion analysis, the Fox Ridge Road North site cannot be eliminated on this ground. The Commission found that tax lots 100 and 200 "lie within the Northwestern NAC boundaries." (Rec. 31) However, the Commission dropped these lots from the NAC due to alleged limited road connectivity. The connectivity issue is addressed below, but again, the Commission continues to construct an artificial specific type of identified land need to eliminate higher priority lands.

The additional land for which the Commission and city did not make findings is also buildable. It is approximately 165 acres in size and contains a broad band of flat, buildable land from 700-2000 feet wide. The only evidence in the record supports including this area.

The other reasons given by the Commission and city for excluding the two tax lots in

⁴¹ The Commission and city findings are identical: "Topographically, this area immediately adjacent to Hill Road is generally flat * * * The Class III and IV soils comprise the flat portions of the Smith parcel [tax lot 700] * * * The flatter portions of these parcels [tax lots 100, 200, 700] have historically been farmed..." (Rec. 30)

this area -- road connectivity and cutting off land from farm operations - do not rise to the level of, nor meet the criteria for, a specific type of identified land need under ORS 197.297(3)(a). If valid, these might be grounds on which to decide among lands within the same category in the hierarchy under Goal 14, but this is not a legal justification for jumping from one category to another in the hierarchy. Road connectivity, and roads in general, is an issue in any expansion of the McMinnville UGB because, as indicated in the city's background documents for every alternative site considered, the lands outside the UGB are rural and without urban levels of infrastructure. The impact on farm land of alternative UGB expansion sites is also always an issue, and a required factor to consider and balance under Goal 14. These are not grounds on which to skip over the hierarchy to high value farm land.

The Commission's and city's conclusion are also factually unsubstantiated, in large part because they limited their evaluation to just the two tax lots. The Commission and city found these two lots would have "limited" connectivity to Hill Road and would create an "island" of agricultural activity. (Rec. 31-32) However, that is not the case, especially with the addition of the remainder of the Fox Ridge Road North area. As the Commission and city found, the connectivity is limited only "absent the addition of other lands to the north and west" [the remainder of Fox Ridge Road North]. (Rec. 31)⁴² Hence, addition of the Fox Ridge Road North lands removes the connectivity problem.

As the record shows, the "agricultural island" cited by the Commission is part of a larger Measure 37 claim, for which the applicant has received a waiver for development. The claimant has applied for and received approval of a subdivision plat on this land for lots as small as ½ acre. (Rec. 95, 104, 107-08) This is not an agricultural island, but rather is rural residential land.

Because the Commission erred in applying ORS 197.298 and made a decision

⁴² The area also has options to connect to many other existing roads, not just Hill Road – Fox Ridge Road to the south and Baker Creek Road to the west.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 1, 2007, I filed the original of this **Opening Brief** along with twenty (20) copies with the State Court Administrator at the address given below, by Certified Mail deposited in the United States Post Office in Portland, Oregon, postage pre-paid to:

Kingsley W. Click
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I also certify that on August 1, 2007, I served two (2) true copies of this **Opening Brief** upon each of the following persons at the addresses given below, by Certified Mail deposited in the United States Post Office in Portland, Oregon, postage pre-paid to:

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without substantial evidence for Fox Ridge Road North, we ask the Court to remand it.

Area North of McMinnville Airport

The McMinnville Airport North site consists of 35 acres of Class III soils. It is north of the McMinnville Airport, south of the Evergreen Aviation Museum, and west of the Olde Stone Village manufactured home park. It is currently farmed, has no structural improvements, and is surrounded by the current UGB. (Rec. 361 map, reproduced as App. 4; 364, Figure 6, rectangle surrounded by UGB north of Hwy. 18 and southeast of Norton Lane; 365) This site falls into the first and highest category of farm land for UGB inclusion – non-high value farm land surrounded by the UGB. ORS 197.298(1)(b).

Neither the Commission nor the city makes findings regarding this particular parcel. Rather, they have combined 3 non-contiguous parcels located on three different sides of the McMinnville Airport for analysis, and the result is findings that bear no factual relationship to the site that petitioners have raised. It also results in an analysis that does not address the relevant law – ORS 197.298(1)(b).

The Commission states that the city did include this area in its alternative lands analysis, but other than describing the site,⁴³ there are no findings related to it and the map the Commission refers to (App. 4) clearly shows the site is surrounded by the present UGB.

The Commission finds: “This land, if brought into the UGB, would be bordered by actively farmed land on three of its four sites.” (Rec. 33) The city’s findings demonstrate this is not true --- the site is surrounded by an airport, a museum, and a manufactured home park; not actively farmed land. (See map at App. 4)

The Commission describes safety issues associated with the airport flight traffic

⁴³ The City’s entire findings for the Airport North site are (Rec. 348):

“There exists to the north of the airport, south of the Evergreen Aviation Museum property, and west of Olde Stone Village, some 35 acres of land that is comprised of predominantly Class III soils. The property is owned by Evergreen Agricultural Enterprises and is actively farmed. Cirrus Avenue terminates at the site’s southwest corner; no other improvements are found within the site.”

pattern if the land was to develop, relying upon the McMinnville Municipal Airport Master Plan. (Rec. 33) However, this Master Plan is not in the record and therefore cannot be relied upon. Consequently, there is no evidence in the record on which to base an assertion that development on any lands in the vicinity of the airport are limited by a Master Plan. In addition, the Commission's description of the flight traffic pattern seems associated with the two other areas that have been combined in this analysis – the lands north of Olde Stone Village and east of the airport, but not north of the airport.⁴⁴ (Supp. Rec.C-147)

Finally, the Commission also finds that the land “cannot reasonably accommodate an identified need, namely medium - and high - density residential development, due to safety issues related to the airport, and can therefore be excluded in accordance with ORS 197.298 (3)(a).” (Rec. 33-34) As described above, the safety issue is not associated with this parcel. But even if it was, medium and high density housing is not a specific type of identified land need. Nor is it the only type of residential land need that McMinnville has. As described above, most of the new residential land that McMinnville has found a need for is low density, single family. The city has illegally chosen to allocate much of this low density housing to lower priority, high value farm land. There are no findings regarding single family use of this land, or its use for the other land needs McMinnville claims it has – commercial, office, parks, public uses. Again, McMinnville is artificially narrowing its land need to eliminate consideration of a single higher priority site. Finally, this is not the correct use of ORS 197.298(3)(a).

Because the Commission erred in applying ORS 197.298 and made a decision without substantial evidence, we ask the Court to remand it.

⁴⁴ The Commission states that the land north of Olde Stone Village is immediately *west* of the protection zone for the McMinnville Airport runway, a zone used to minimize incompatible development with aircraft landings and departures. (Rec. 32). McMinnville Airport North is not in the protection zone described and is already surrounded by development that would presumably be incompatible if it were in the protection zone.

Areas Not Analyzed by the Commission or City

The petitioners and the Oregon Department of Agriculture testified that the city must consider all lands adjacent to the existing UGB for possible expansion, under ORS 197.298, Goals 2 and 14, and ORS 197.732. (Rec. 97, 187-88, 264-65, 287-89) In *Parklane*, this court, considering the similar urban reserve rule, agreed with LUBA's conclusion that "sufficient suitable higher priority lands be considered and classified pursuant to [the priority scheme] so that resort to [the exceptions process of subsection (3)] will not be necessary..." *Parklane*, 165 Or App at 21. The exceptions are limited, and are not the "default mechanism for filling voids in the pool of available lands left by an incomplete application of the identification and prioritization process under [subsection (2)]." *Id.*

Goal 2, Part II, ORS 197.732(1), and OAR 660-004-0020 contain the almost identical requirement that in expanding a UGB, the jurisdiction must show that "areas which do not require a new exception cannot reasonably accommodate the use." The petitioners brought specific sites to the attention of the city and Commission - the Riverside area⁴⁵, land south of the airport, and land south of Three Mile Lane and west of Booth Bend Road - necessitating a site specific evaluation. OAR 660-004-00-0020(2)(b)(C).

The city, and Commission, failed to evaluate these areas. Instead, the Commission approved the inclusion in the UGB of high value agriculture land, in violation of ORS 197.298, Goals 2 and 14, OAR 660-004-0020, and ORS 197.732.

Because the Commission erroneously interpreted provisions of law, made a decision not supported by substantial evidence, and acted inconsistently with official agency position in approving the City of McMinnville's proposal to expand the UGB onto certain exclusive

⁴⁵ The Commission makes a conclusory statement about the Riverside area in its decision – that the area contains the city's current and future wastewater reclamation site. (Rec. 24). There is no evidence in the record addressing this area, so it is unknown how the Commission arrived at its conclusion and the petitioners cannot respond to it.

farm use lands, rather than onto other lands, the decision should be remanded.

SECOND ASSIGNMENT OF ERROR

The Commission erroneously interpreted provisions of law and made a decision not supported by substantial evidence when it approved the City's proposal regarding the amount and type of land necessary for parks in the expansion area.

A. Preservation of Error

The petitioners raised this issue as objections and exceptions throughout the proceedings before the City and the Commission. (Rec. 78-81, 157-61, 214, 226-28, 258-59, 307-08, 875-76) The Commission recognized these objections and exceptions and responded to them. (Rec. 23-24)

B. Standard of Review

This court reviews an order of the Land Conservation and Development Commission to find if the agency erroneously interpreted a provision of law, acted outside the range of its discretion or inconsistently with official agency position or practice, acted in violation of statute or the constitution, or adopted an order that is not supported by substantial evidence. ORS 183.482(8).

ARGUMENT

The city proposed, and the Commission approved, that the UGB expansion include 314 acres for future parks. (Rec. 23-24, 1221) This land is to meet the need for three types of parks: Neighborhood Parks, Community Parks, and Greenspace/Greenway Parks. (Rec. 1219) All this park need is projected to consume buildable land; that is, the city concludes that none of these park needs will be met on steep slopes, floodplains, or wetlands. (Rec. 1219-21)⁴⁶ The city adopted a new plan policy (Policy 163.05), requiring that future community and neighborhood parks be located above the 100-year floodplain. (Rec. 316)

⁴⁶ The city acknowledges that some Greenspace/Greenway needs may be met on floodplains, but the 314 buildable acres includes 66% of the Greenspace/Greenway need. (Rec. 1220)

Thus, 35% of all the buildable land in the UGB expansion is projected to be used for parks. All future park land is currently zoned for exclusive farm use, and thus, based on what the Commission approved for the expansion area, will consume the lowest priority farm land.

The Commission's decision violates Goal 2. Goal 2 requires consistency among the city's planning documents, implementation measures, and land use actions. *Parklane*, 165 Or App at 22. The city's decision is inconsistent with its MGMUP (the city's land use plan) and zoning ordinances.

The MGMUP contains at least three new Plan Policies, and corresponding zoning ordinances, that are in direct conflict with Plan Policy 163.05, and demonstrate that some of the new park land will, in fact, be provided on floodplains, not on buildable lands. MGMUP Plan Policy 188.15 states that "a community park [in the Northwest expansion area] should be located adjacent to the proposed elementary school site and, to the extent possible, incorporate identified wetland corridors..." (Rec. 1466-67; *see also* Rec. 997, 1483) MGMUP Plan Policy 188.31 states: "A neighborhood park [for Three Mile Lane] should be located next to the Yamhill River." (Rec. 1468; *see also* 1002, 1484) MGMUP Plan Policy 188.35 states: "[A] neighborhood park should be located within the central portion of the [Southwest] subarea...The wetlands area should be incorporated into the park, as practical." (Rec. 1469; *see also* 1006, 1485)

The Commission's approval of the city's decision to site all future Community, Neighborhood, and most of the Greenspace/Greenway parks on buildable lands resulted in the inclusion of lowest priority, high value agricultural lands. However, this assumption is based on a comprehensive land use plan and zoning ordinances that are internally inconsistent and inconsistent with the decision. This violates Goal 2, and this the Commission's decision regarding park land should be reversed.

Goal 2 also requires that land use plans and implementing measures have an

“adequate factual base.” The Commission found (Rec. 24):

“[T]here is an adequate factual base to conclude that the park need projection is viable, and that the city has a reasonable ability, through the bond measure, SDCs, and other sources identified in the City’s adopted Parks Master plan, to provide funding for parks.”

However, there is no factual basis, in the city’s park history or in its planned future actions, for the Commission and city to conclude that the city can acquire or otherwise protect 35% of the buildable land in the expansion area for parks. McMinnville’s history of park land acquisition indicates that community parks often include floodplains. 52% of the land in the three existing community parks is within the 100-year floodplain. (Rec. 321) The city adopted a Parks Master Plan in 1999, projecting a need for 180 acres of land to serve current and projected new residents, at a cost of \$52 million. (Rec. 78) However, it has adopted a bond measure for only \$9.5 million and has acquired only 20 acres of buildable land in almost 20 years. (Rec. 78)

McMinnville has not adopted any planning regulations or funding mechanisms to protect or acquire the additional 314 acres of buildable land in the future. The current bond measure is for the existing UGB; the city has not proposed to renew it. There is no evidence in the record regarding systems development charges, much less a discussion of how they would be able to fund park acquisition. And the Parks Master Plan does not describe any other funding mechanism that would fund this park land acquisition.

Because the Commission’s decision concerning park land in the expansion area violates Goal 2, and therefore results in the inclusion of the lowest priority agricultural lands, it should be reversed.

THIRD ASSIGNMENT OF ERROR

The Commission failed to follow the law and made a decision not supported by substantial evidence when it inaccurately accounted for the city’s high-density housing need and approved the city’s determination of the number of acres by which the UGB must be expanded.

A. Preservation of Error

The petitioners raised this issue as objections and exceptions throughout the proceedings before the City and the Commission. (Rec. 63-4, 142-43,) The Commission recognized these objections and exceptions and responded to them. (Rec. 18-20)

B. Standard of Review

This court reviews an order of the Land Conservation and Development Commission to find if the agency erroneously interpreted a provision of law, acted outside the range of its discretion or inconsistently with official agency position or practice, acted in violation of statute or the constitution, or adopted an order that is not supported by substantial evidence. ORS 183.482(8).

ARGUMENT

The city determined that 18% of its future housing need is for high density, multi-family housing, or 1083 housing units. (Rec.1205, Table 8) It allocated approximately half those units to the new UGB area. (Rec. 1210, Table 11)⁴⁷ The remaining half was allocated to the existing urban growth boundary, including in the downtown core and transit corridors. (Rec. 316) However, the city has not, in fact, rezoned any lands within the current UGB to the R-5 high density zone. And, when expanding the UGB, the city did not account for the fact that land inside the UGB would be upzoned to R-5 from a lower density, which, had they accounted for this more efficient use of land within the UGB, would have reduced the overall UGB expansion need by an unknown amount.⁴⁸

The Commission found (Rec. 18):

⁴⁷ McMinnville's high density, multi-family zone is R-5.

⁴⁸ The city estimates its total need for R-5 housing can be met on 72 acres, inside and outside the UGB. (Rec. 1205, Table 8) The city allocated half these units to 36 acres outside the UGB (Rec. 1210, Table 11), but did not allocate any inside the UGB.

“Plan Policy 71.12 states that the R-5 zone should be applied to lands within the [NAC] and to lands within existing or planned transit corridors. The planning and implementation has, by policy ...187.00...been deferred to a time in the future when funding is available to carry out such master planning. Also, the MGMUP plans for all of the R-5 zoned land (38 acres) to occur on land outside the current UGB (see pages B-14 and B-15, Tables 10 and 11, respectively.”

According to Plan Policy 187, implementation of this re-zoning will occur within the planning period of 2003-2023. (Rec. 337) The Commission is simply wrong on what the evidence it points to shows. Table 10 (Rec. 1209) shows there is no land inside the pre-expansion UGB that is zoned R-5. Table 8 (Rec. 1205) shows a future need for 1083 units in an R-5 zone on 72 acres. Table 11 (Rec. 1210) shows that approximately half of this will be met outside the UGB. That leaves half inside the UGB, but unaccounted for.

Regardless of when the R-5 re-zoning occurs, the city cannot assume a more efficient use of land inside the UGB, yet expand the UGB based on the existing, less efficient zoning. This violates Goal 14, factors 1, 2, and 4. Finally, the city’s need for R-5 housing is over the entire planning period. (Rec. 1205-07) Given that the city’s approved plan policy could result in the re-zoning to R-5 being done in the last year of this planning period, this policy, and the Commission’s decision, are not “adequate to carry out the plan” under Goal 2, Part I, and do not meet the city’s obligation to meet Goal 10, Housing.

The Commission’s failure to adequately account for the city’s high density housing need resulted in high priority agricultural lands being brought into the boundary, in violation of Goal 14 and ORS 197.298, and also violated Goals 2 and 10.

IV. CONCLUSION

The Commission’s decision should be reversed and remanded.

Respectfully submitted this 1st day of August, 2007

Attorney for Petitioners