IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

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PETITIONERS' SUPPLEMENTAL OPENING BRIEF

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I. Statement of the Case

A. Nature of the Proceeding and Relief Sought

This is an appeal of a revised order of the Land Conservation and Development Commission (LCDC or Commission), issued on November 17, 2008. The order is 08-WKTASK-001760, entitled "In the Matter of Periodic Review Task 1 and the Amendment of the Urban Growth Boundary for the City of McMinnville."[1] (Hereafter referred to as the revised order; see Excerpt of Record.)

The revised 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 LCDC.

C. Statutory Basis for Appellate Jurisdiction

The Court of Appeals has jurisdiction pursuant to ORS 197.650.

D. Nature of and Jurisdictional Basis for Agency Action

The Commission has jurisdiction over local government decisions concerning

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[1] The Commission issued its original order on November 8, 2006. The petitioners filed their opening brief on August 1, 2007. By order of Nov. 20, 2007, the Commission withdrew the original order for reconsideration. (Rev. Ord., p. 2) The Commission issued its order on reconsideration on Nov. 17, 2008, in which substantive changes to the original order were made. Thus, this Supplemental opening brief addresses the Revised Order on Reconsideration, pursuant to ORAP 4.35(6). Due to the many changes that are required to address the Revised Order, this opening brief is a complete substitute for the original opening brief.

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 UGB expansion, 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 several 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. (Rev. Ord. 5; Rec. 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. (Rev. Ord. 6-7; 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. (Rev. Ord. 6)

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)[2] 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.[3]

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)[4] This future park land is currently zoned for exclusive farm use. (Rec. 1460-69)[5]

The Commission approved the submittal, including the UGB expansion, by Order 06-WKTASK-001709 on November 8, 2006. It revised that order and issued a Revised Order Upon Reconsideration on November 17, 2008.

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*

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

[3] 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)

[4] 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.

[5] 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.

McMinnville, 41 Or LUBA 210 (2001) (Rec. 653), as well as participation in this stage of the decision-making. (Rec. 59-102, 139-312, 461-92, 629-706, 863-907; LCDC hearing transcript of September 12, 2006)

II. 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 referred to as the "priority statute."[6] Section (1) provides that:

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[6] "**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.

"*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 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 App. 5.)

Statewide Planning Goal 14, Urbanization, provides that the establishment and change of UGBs must be based on consideration of seven factors.[7] The first two factors are commonly referred to as the "need factors" and are evaluated together.[8]

Once a city has demonstrated a need to accommodate population growth, the

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(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."

[7] Goal 14 was amended, effective April 28, 2006. However, the "old" Goal applies to this decision and that is the version cited to in this brief.

[8] The "need" factors are:

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

jurisdiction must look inside the existing UGB to see whether lands there can accommodate that growth, pursuant to 197.732 (1)(c)(B), Goal 2, Part II(c)(2)[9], Goal 14, factor 4[10], OAR 660-004-0020(2)(b)(iii)[11]; *1000 Friends of Oregon v. City of North Plains*, 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 197.298, 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

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[9] Goal 2, Part II(c) provides, just as ORS 197.732(1)(c)(B):

"(c) The following standards are met:

* * * *

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

[10] 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."

[11] 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:

* * * *

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

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

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.[12]

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.[13] 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 included in the UGB *before* those with more valuable soils. *DLCD v. Douglas County*, 36 Or LUBA at 36-37 & n. 14.

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 factors, rather than reliance on any one factor. *Parklane*, 165 Or App

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

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).[14]

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.[15]

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. (App.6) The *Parklane* 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 * * * so that resort to [the exceptions of (3)] will not be necessary to *identify* any of the land that is *available* for

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[14] See footnotes 9, 10, and 11 for the text of these laws.

[15] The 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;
>
> (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."

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

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.[16] The petitioners agree that McMinnville's population will grow between now and 2023 in ways that necessitate expanding the UGB.

In the First Assignment of Error, the petitioners argue that the Commission's decision - regarding both specific pieces of land and overall categories of land - resulted in the unlawful *inclusion* into the UGB of certain low priority agricultural lands and the *exclusion* of certain exception areas and poorer quality agricultural lands from the UGB.

The city examined various areas around the UGB for possible inclusion. McMinnville proposed, and LCDC approved, a UGB expansion that includes 794 acres of lowest priority (i.e., most valuable soils) agricultural lands zoned for exclusive farm use (EFU). The city and Commission failed to include, instead, hundreds of acres of higher priority lands in the UGB. The petitioners argue below

[16] Most of the analysis and conclusions that went into those determinations are not the subject of this appeal.

that the following lowest priority lands, all zoned EFU 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 Second and Third Assignments of Error, the petitioners challenge LCDC's approval of two aspects of McMinnville's decision that directly impact the amount and type of lands added to the UGB: the type of lands included for parks, and 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.

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. (Rev. Order 12-33; Rec. 597-98, 789-96)

B. Standard of Review

This court reviews an LCDC order to determine if the agency erroneously interpreted a provision of law, acted outside the range of its discretion or inconsistently with official agency position or practice, violated statute or the constitution, or adopted an order 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. Neither compared 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.[17] Rather, the Commission improperly "skipped" down to lowest priority agricultural lands by incorrectly interpreting ORS 197.298(1), incorrectly using the exceptions in ORS 197.298(3), and incorrectly applying certain portions of Goal 14 and the alternatives analysis.

There is no disagreement among the parties that the four high value, EFU areas listed above 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

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

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

Three Mile Lane

The Three Mile Lane area is 165 acres and zoned for exclusive farm use. (Rec. 336) It consists primarily of Class I and II soils, the best capability soils. (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 areas. (Rec. 1384)

Southwest Area

The Southwest Area is 134 acres and zoned EFU. (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 nearby is small and separated from the Southwest Area by a floodplain.

Grandhaven

The Grandhaven area is 151 acres and zoned EFU. (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 and zoned EFU. (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

Excluded Exception Araea

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, three of which petitioners believe should be included. 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 exception lands. Rather, the Commission and city evaluated each area independently and made a decision to include or exclude each based on discrete application of some aspects of the law. This resulted in an inconsistent and illegal application of the factors. Following are the errors LCDC made in applying the locational factors and alternatives analysis to exception areas, without the required comparison among areas.

In applying Goal 14, factor 3 ("orderly and economic provision for public facilities and services"), 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 *in*cluded exception area, Redmond Hill Road, is estimated to be "high." In contrast, one *ex*cluded 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 merely 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 ("maximum efficiency of land uses within and on

the fringe of the existing urban area") 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 UGB inclusion, 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.[18]

Neither the Commission nor the city evaluated *any* exception areas under Goal 14, factor 7[19] (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 analysis among exception areas based on this criterion. 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 urbanization impacts 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

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[18] 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.

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

alternative sites. *Ryland Homes*, 174 Or App at 416-17; *Friends of Linn County v. Linn County*, 41 Or LUBA 342, 355-56 (2002). Neither did this comparison.

Resource Lands

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 UGB *in*clusion. (Rec. 1073-1077) The petitioners objected to four areas (Norton Lane, Three Mile Lane, Southwest Area, and Grandhaven), which are the lowest priority for UGB inclusion 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 *in*cluded in the UGB ahead of these lower priority farm lands because, among other reasons, they are of poorer quality soils. (Rec. 347-60). However, in rejecting these areas, the city did not actually address factor 3, but rather stated that its analysis of these three alternative 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 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 farm lands rather than the highest priority ones, under Goal 14, factor 3.

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, no factual basis exists for rejecting these higher priority lands under factor 3 and the alternatives analysis requirement. The city did not make findings regarding factor 3 and the provision of public facilities and services for the Airport North resource area. (Rec. 347-50) Moreover, as explained in Sub-Assignment of Error Two below, the city addressed the wrong land. Similarly for the Fox Ridge Road North resource area, the city did not 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, the city does not explain how the West Hills compares to all other resource areas and there is no consistency concerning service costs as to which lands were included or excluded from the UGB. For example, the existing 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). Yet the Commission and city included Southwest and Grandhaven in the UGB, and excluded the West Hills area.

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

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 UGB inclusion, nor do they explain how they balanced any factor 4 conclusions with the other Goal 14 factors to determine which resource areas to include and exclude. (Rec. 1032-37, 1080-81) Rather, the city defers the resource lands findings under factor 4 to its findings under ORS 197.298. (Rec. 1081) However, 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 for 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. The

priority statute reinforces this, by mandating that valuable agricultural land is the last choice for UGB expansions, and by ORS 215.243,[20] 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 *in*cluded Norton Lane, Three Mile Lane, Grandhaven, and Southwest areas with the soil types in the *ex*cluded areas of the West Hills, Fox Ridge Road North, and Airport North demonstrates, but this is not the required analysis. It does not demonstrate an independent evaluation of factor 6, a balancing of factor 6 with the other Goal 14 locational factors, or a comparison across alternative expansion areas. This court stated that "the requirements of ORS 197.298 and factor 6 are not identical," and went

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[20] 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."

on to explain why. *Ryland Homes*, 174 Or App at 413-414.[21] The Commission made no findings on factor 6. Therefore, its application of Goal 14, factor 6 is flawed legally and is not supported by substantial evidence.

The Commission's findings regarding Goal 14, factor 7, and the alternative analysis requirements are flawed as well. The city's sole finding under factor 7 for all resource lands *in*cluded in the UGB 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 nearby each included resource area. 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, or how the proposed urbanization is compatible or could be rendered compatible with measures designed to reduce adverse impacts.[22]

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[21] 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 6, and it makes no comparison among alternative resource, or any, areas. (Rec. 1370-1434)

[22] 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 EFU-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. Thus, this conclusion violates Goal 14, Goal 2, Part II(c)(4), and OAR 660-004-0020(2)(d).

Finally, the descriptions are no longer accurate. In Ordinance No. 4841, the city amended the boundaries of each proposed area, in most cases by removing floodplain. 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 findings are based by 114 acres, thereby creating a new, 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 changes in their boundary configurations, and therefore there is no factual basis to balance factor 7 with the other Goal 14 locational factors for these areas.

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.

As previously explained, the city addressed the wrong area north of the airport.

For the West Hills, the Commission and city concluded (Rev. Ord. 25; 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 statement that could be said about almost any urbanized land adjacent to EFU land. It is not the required 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, LCDC did not address the entire area the petitioners contend should be included, nor did it address the portion 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. (Rev. Ord. 27) Thus, for these three areas, the Commission's decision violates Goal 14, factor 7, Goal 2, Part II(c)(4), and OAR 660-0040-0020.[23]

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

[23] There are three additional resource areas that neither the Commission nor the city addresses at all, for any 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. Because the Commission erroneously interpreted and applied the law, the decision should be remanded.

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).[24] Second, the Commission found that the city's projected housing need among low, medium, and high density is not a "planning and zoning directive[s]." Therefore, a statement of preference for a particular density cannot be used to disqualify land that can otherwise meet a general residential housing need, on the basis that the land cannot "reasonably accommodate" some specific density need.

Third, even using these density projections, the city found that 63% of all new

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

residential land need – 341 acres – is for low density, single family housing.[25] (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)[26] Clearly, some of the need for low density housing (as well as needs for parks and commercial uses) can be met on these *ex*cluded exception areas (and on higher priority, poorer soil farm lands, as argued below). The best farm land is not needed to meet the city's housing needs. Finally, as discussed below, there is no evidence these excluded exception areas cannot accommodate some medium or even high 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, of which 36.5 acres are buildable. (Rec. 1319, 1323). It is "virtually flat." (Rec. 1319) Adjacent areas within the UGB are already 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." The Commission's entire findings are (Rev. Ord. 23):

> "The Commission finds that the city established that this area cannot reasonably accommodate the identified need because transportation facilities cannot reasonably be provided to this area. * * * Old Sheridan Road, which

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[25] 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)

[26] 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.

> 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)."

In its Revised Order, the Commission does not state the statutory basis for excluding the Old Sheridan Road area. Neither this court nor the petitioners should have to guess at the legal rationale employed by the Commission. It is not fair to petitioners to have to try to divine the Commission's legal thinking and the factual basis for it, nor is this an efficient use of the court's time; therefore, this assignment of error should be remanded.

The petitioners assume the Commission relied on ORS 197.298(3)(b), which provides one of the specific reasons for which a UGB can be expanded onto resource lands before an exception area:[27]

> "(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's Revised Order repeats the subsection (3)(b) language, by stating that the future urban service of "transportation facilities cannot *reasonably be*

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[27] Perhaps the Commission is relying on ORS 197.298(1)(d), which states that if land designated as an exception area is "inadequate to accommodate the amount of land needed," then a UGB expansion can include resource land, starting with the least valuable farm or forest lands. However, the Commission's and city's language do not refer to this section.

provided to this area." (Emphasis added.) And, the city's decision, on which the Commission relies, states that all excluded exception lands were done so based on one of the subsections of ORS 197.298(3). (Rec. 974) Therefore, the Commission must be relying on subsection (3)(b) to exclude the Old Sheridan Road area.

This is also the only logical conclusion as to the statutory grounds, based on the structure of ORS 197.298. If the Commission could exclude a higher priority area – exception lands – *more easily* under subsection (1)(d) because of the alleged difficulty of providing urban services than under subsection (3)(b), which specifically addressed urban services, then the entire purpose of subsection (3) would be negated. The statute would be turned on its head. It is also contrary to this court's explanation of the ORS 197.298 priorities, described in *Parklane*. The priorities "are to be applied sequentially," to ensure that "sufficient higher priority lands [will] be considered and classified * * * so that resort to [subsection (3)] will not be necessary to *identify* any of the land that is *available* for designation as urban [growth boundary]." *Parklane*, 165 Or App at 20, 21.

So, turning to subsection (3)(b), the Commission has incorrectly applied the law. 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 structure of that statute. There is no comparison required; rather, farm and forest lands are the last priority for a UGB expansion. The statute's structure recognizes and protects their resource value; 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 because they 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; 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.[28] The statute requires

[28] Goal 11, Public Facilities and Services, defines "Urban Facilities and Services" as follows:

consideration of all urban services.

This legal requirement makes practical sense. As the record shows, the city evaluated all the 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 LCDC approved are more difficult to serve in every category than Old Sheridan Road – for example, Redmond Hill Road. (Rec. 1063, Table 17) Allowing just 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 the only basis 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. (Rev. Order 23) This is not a topographical or physical barrier, especially when, as described below, it is not the only method to provide transportation service. Rather, it is a governmental barrier.

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.

"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.

Finally, there is no substantial evidence to support the Commission's findings; in fact, the only evidence is to the contrary. The evidence does not rise to the limited and high standard of "services could not reasonably be provided." For Old Sheridan Road area, the city 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. 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 LCDC approved for inclusion.[29] 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.

Because LCDC erroneously interpreted ORS 197.298 and made a decision not supported by substantial evidence, the court should remand the decision with

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[29] 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 served only with a "county rural road improved only with a gravel surface." (Rec. 1391)

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 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 (Rev. Ord. 23):

> "The Commission finds that the city established 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."

Here again, the Commission does not cite the legal ground on which it relies to exclude Riverside North, making the petitioners' burden 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. Should the court decide to proceed, we assume the Commission excluded this area under ORS 197.298(3)(a) - that the Commission is contending that residential use is a "specific type[] of identified land need[]" - for two reasons. First, the Commission's decision uses a key phrase almost identical to one found only in ORS 197.298(3)(a): "cannot reasonably accommodate." Also, 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)

LCDC incorrectly applied the law, and there is no substantial evidence to support its findings. First, "residential" is not a specific type of identified land need, as used in subsection (3)(a). *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).[30]

The Commission incorrectly applies the exceptions subsection by using 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 characteristics. By its own language, [31] 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 excluded land without going fully through the priority scheme. In *Parklane*, this court affirmed the LUBA interpretation for how the urban reserve rule - here, UGB - priority scheme operates. This court favorably

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[30] In its 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.

[31] "(3) Land of lower priority under subsection (1) of this section may be *included* in an urban growth boundary...." (Emphasis added).

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 (emphasis added).

The city identified a need for non-residential uses, including retail, office, infrastructure, and institutional uses. (Rec. 333, 1027, 1216)[32] Neither the Commission nor 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

[32] 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 3)

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 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, which it included, 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 42 acres and relatively flat. (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 (Rev. Order 23):

"The Commission finds that the city established this area cannot reasonably accommodate the identified need. 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 land need for urban residential, commercial, office, and various public and semi-public uses. 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 are more difficult to urbanize than farm land because exception areas are already partially developed. 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

provide only for low density urban development, these are not reasons to exclude them. *City of West Linn v. LCDC*, 201 Or App at 434, 436, 446.

The Booth Bend Road decision should be remanded because it violates ORS 197.298. 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 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.[33]

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 a new elementary school site. (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 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

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[33] For example, the Three Mile Lane area proposed for expansion is 165 acres across Highway 18, and the Lawson Lane expansion area is 18 acres across Highway 18. (Rec. 364, 1293)

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. These higher priority areas should have been included instead of the lower priority, high value farm areas.[34] ORS 197.298 (2), (3).

As argued previously, 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

[34] The lower priority, high value farm lands included in the UGB by the city and Commission are described at pages 12-14.

area are 25% and greater." (Rec. 28)[35] 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 (Rev. Ord. 24-25, emphasis added):

> "The hills west of McMinnville are steeply sloped....
>
> * * * *
>
> "The city determined that the concentration of Class III soils within the West Hills area adjacent to the existing westerly urban growth boundary could not reasonably accommodate the land needs identified in the MGMUP.
>
> * * * *
>
> "The Commission finds that the city established *both* that the West Hills area could not reasonably accommodate the city's identified need and that under ORS 197.298(3)(b), the city could not reasonably provide water, a future urban service, due to the topographical constraint."

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

The Commission's decision appears based in part on an assumption that petitioners propose to bringing in the steep portion of the West Hills. This is inaccurate. Rather, the steep crescent is a logical geographic defining edge to an expanded UGB. (Rec. 92) However, between it and the existing UGB are 200 acres of gently sloping land that *should* be included in the UGB. (Rec. 353) The Commission has not addressed why this 200 acres cannot accommodate the city's need.

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[35] 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.

Assuming the Commission's decision can be construed to apply to the 200 acres to which the petitioners refer, the Commission's decision states there are two bases for its decision ("both"), but only provides the legal ground for one in its decision. For the first, the Commission states that "the West Hills area could not reasonably accommodate the city's identified need." (Rev. Ord. 25) The need that allegedly cannot be met by the West Hills is not identified. Given that the city has described needs for most urban uses (residential, commercial, office, and other public and semi-public uses)[36] , and those uses can have very different land needs, it is exceedingly challenging for the petitioners to evaluate whether the Commission's decision complies with the law. Because the Commission does not identify the statutory basis for this finding, nor does it explain how the law applies to the facts of this case (the "need" being met), we ask that the decision be remanded.

It appears the Commission excludes this area not because of its ability to accommodate an urban need, but because "development of medium-to-high density housing...would create a 'satellite' area extending out into resource lands." (Rev. Ord. 25) However, this is not the standard under ORS 197.298. The statutory standard is whether the parcel of land *itself* is adequate to accommodate the need, not its impact on surrounding lands. The practical implications of the Commission's decision illustrate its absurdity. The Commission proposes excluding from the UGB land of poorer soils – the West Hills – because of alleged conflicts with surrounding farm uses, and instead substituting into the UGB the best quality farm lands – Three Mile Lane, Southwest, Grandhaven, and Norton Lane.

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[36] Rec. 333, Table 6-4; 336; 339, Table 14.

In the alternative, if the Commission is relying on a "need" to exclude the West Hills, it cannot, under ORS 197.298, so narrowly define "need" that it can be met only on the lowest priority lands, unless it wants to use the limited option of the subsection (3) categories for when high value farm land can be included in a UGB ahead of low value farm land and exception areas, which it did not do. The city implies that its need for medium and higher density housing oriented toward a NAC precludes inclusion of the West Hills. [37] However, the city has already concluded that its urban land need encompasses all housing. (Rec. 333, Table 6-4; 336; 339, Table 14; 1210, Table 11 and 1215, Table 17) LCDC acknowledges the West Hills area *can* accommodate housing, including medium and high density housing, and that the area would likely develop in a fashion similar to the area adjacent to it that is inside the UGB. (Rec. 354; Rev. Ord. 25)

Even if the West Hills were suitable for only low density housing, the city has demonstrated a substantial need for low density housing, which 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.[38] This need *alone* exceeds all the buildable land in all the exception areas the city proposes for the UGB expansion, so clearly some of the single family land need could be met in the West Hills, rather than on higher value farm land. And, LCDC did not address whether the city's other urban

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[37] There is an implication that the city considered this site for medium and high density housing, when it stated that "Development of medium- to high- density housing in this area would create a 'satellite' area extending out into the resource land areas." (Rev. Order 25)

[38] 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)

land needs could be met in the West Hills. [39]

The 200 acres in the West Hills can accommodate any residential need identified by the city, and therefore should be included in the UGB before inclusion of higher value agricultural lands.

Further, the Commission cannot exclude the West Hills area, and include lower priority, higher value agricultural areas, under ORS 197.298(3)(b), based on an alleged topographical constraint of water supply. As the city describes, the 200 acres in the West Hills has slopes of 7-20%, considered developable. (Rec. 353) The city acknowledges the West Hills *can* accommodate medium density housing, but it will be somewhat more expensive. (Rec. 354).[40] 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 mid-point of the Class III soils in the West Hills area." (Rev. Ord. 24). Therefore, the planned future water facility can provide water service to at least half of the West Hills area (the midpoint).

Finally, although it is not clear from the Commission's order if this was a basis for exclusion, the West Hills cannot be excluded under ORS 197.298 because it is not near a NAC. That reasoning is circular. LCDC states the area cannot be included because it is "outside the boundaries of the nearest ... NAC." (Rev. Order 25; Rec. 356) Neighborhood Activity Centers are defined as areas that (Rec. 957):

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[39] For example, the city 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.

[40] There is no evidence in the record demonstrating that slopes of 7% 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))

> "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 cannot exclude this area because of actions it took (or here, did not take) to render the site ineligible for the city's alleged land need.[41] Nor is there evidence that a NAC could not be provided in the West Hills area if it were brought into the UGB.

For the above described reasons, the Court should remand LCDC's decision to exclude the West Hills area from the UGB.

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 petitioners consistently proposed inclusion of the entire Fox Ridge Road North area in the UGB (Rec. 185-86, 218-19, 901), as did the Oreogn Department of Agriculture. (Rec. 288) The Commission approved inclusion of only one tax lot in this area.[42]

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[41] 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.

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

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.[43] The Fox Ridge Road North area is zoned EFU and consists primarily of Class III and IV soils. (Rev. Ord. 25; App. 2) It 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 westward 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 (see previous section). Fox Ridge Road North consists of four contiguous tax lots 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, 244[44]; App. 3)

The Commission excluded the Fox Ridge Road North area based on ORS 197.298. As the Commission states (Rev. Ord. 27-28):

> "For the reasons cited above, the city concluded that the 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, did not included [sic] these lands in its expanded UGB, purportedly under ORS 197.298 (3)(a). The Commission concludes the city erred in excluding the lands under ORS 197.289(3)(a) [sic]. However,

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[43] 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.

[44] Record page 244 is titled "Composite Constraints and Soil Map." The copy in the record is illegible, so a clearer copy is 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 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.

> pursuant to Goal 2, the city did not need to consider lands under ORS 197.298 that could not reasonably accommodate its identified land need.
>
> * * * *
>
> "The Commission concludes that the city has established 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 findings are factually and legally in error. The Commission's findings discuss only a portion of this area – two tax lots totaling 110 acres[45] - concluding they should not be included in the UGB. (Rev. Ord. 25-27; Rec. 351-53) The Commission and city 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)

Pursuant to OAR 660-004-0020(2)(b)(C)[46], if a party to the local proceeding describes why there are "specific sites that can more reasonably accommodate the proposed use," the city must address that alternative site with a specific review. The city did not do this and thus the Commission can not rely on the city's findings to exclude the entire Fox Ridge Road North area. And, given that neither the city nor Commission evaluated the larger Fox Ridge Road North area, the Commission cannot conclude that under ORS 197.298, the area cannot reasonably accommodate the

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[45] 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.

[46] OAR 660-0040-0020(b)(C) states: "Site specific comparisons are not required of a local government taking an exception, unless another party to the local proceeding can describe why there are specific sites that can more reasonably accommodate the proposed use. A detailed evaluation of specific alternative sites is thus not required unless such sites are specifically described with facts to support the assertion that the sites are more reasonable by another party during the local exceptions proceeding."

identified need.

There is also no factual basis for the conclusion that the Fox Ridge Road North area – both the parcels the Commission did address and those it did not – cannot meet the city's need for land for generic urban uses - residential, commercial, office, public, park, and other needs. The Commission acknowledges that the three excluded parcels for which they did make findings (the one parcel included and the two parcels excluded) contain flat, buildable land. (Rev. Ord. 26; Rec. 351)[47] 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., Oct. 14, 2005 City memo p. 11) 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." (Rev. Ord. 27)

The additional land for which the Commission and city did not make findings is also buildable. It is approximately 165 acres and contains a broad band of flat, buildable land from 700-2000 feet wide. (Rec. 94, 185, 300, 244; App. 3) The only

[47] 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)

evidence in the record supports including this area.

The other reasons given by the Commission and city for excluding the two tax lots in this area – road connectivity and cutting off farm parcels – are factually unsubstantiated, because the city, and thus the Commission, limited its evaluation to just the two tax lots. The Commission found these two lots would have "limited" connectivity to Hill Road and would create an "island" of agricultural activity. (Rev. Order 27) However, that is not the case, if the remainder of the Fox Ridge Road North area is included. 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]." (Rev. Order 27)[48] 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. Moreover, this is not a basis in ORS 197.298 for excluding from the UGB a higher priority area and instead including better farm land.

Because LCDC erred in applying ORS 197.298 and made a decision without substantial evidence for Fox Ridge Road North, we ask the Court to remand it.

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[48] 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.

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 other 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, [49] there are no findings related to it and the map the Commission refers to (App. 4) clearly shows the site petitioners raise 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) This does not

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[49] 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."

describe the site petitioners raise - which 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 pattern if the land was to develop, relying upon the McMinnville Municipal Airport Master Plan. (Rev. Ord. 29) This Master Plan is not in the record, but the Commission in its Revised Order takes official notice of it. However, the Commission does not cite to or quote from the Airport Mater Plan, probably because the Master Plan cannot support the Commission's decision - 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.[50] (Supp. Rec.C-147)

Finally, the Commission also finds that the "specific types of land needs as identified in the MGMUP cannot reasonably be accommodated on lands north and east of the McMinnville Municipal Airport, notwithstanding the predominantly Class III and IV soils." (Rev. Order 29) As described above, the safety issue is not associated with this parcel.

The Commission uses the term "specific type of land needs," but does not cite ORS 197.298(3)(a) for excluding this area, referring to "higher density housing" as not being appropriate for this site. (Rev. Ord. 29) If this is a roundabout way of excluding an area under the 197.298(3)(a) criterion, this does not qualify. High

[50] 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.

density housing is not a specific type of identified land need.

If, on the other hand, the Commission is attempting to exclude this area under ORS 197.298 (1), it is again turning the statute on its head. If the Commission could exclude a higher priority area – exception lands – *more easily* under subsection (1)(d) because of the challenges of providing urban services, than it can under subsection (3)(a), then the entire purpose of subsection (3) would be negated. As explained earlier, it is also contrary to this court's explanation of the ORS 197.298 priorities, described in *Parklane*. The priorities "are to be applied sequentially," to ensure that "sufficient higher priority lands [will] be considered and classified pursuant to subsections [(1) and (2)] so that resort to [subsection (3)] will not be necessary to *identify* any of the land that is *available* for designation as urban [growth boundary]." *Parklane*, 165 Or App at 20, 21.

Nor is high density the only type of residential land need that McMinnville has. As described above, most of the new residential land for which McMinnville has a need is low density, single family. There are no findings regarding single family use of this land, or its use for the other land needs McMinnville has – commercial, office, parks, public uses. Again, McMinnville is artificially narrowing its land need to eliminate consideration of a single higher priority site.

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

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 area[51], 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 Commission failed to evaluate these areas. Instead, the Commission approved the inclusion in the UGB of high value, lower priority agriculture land, in violation of ORS 197.298, Goals 2 and 14, OAR 660-004-0020, and ORS 197.732.

LCDC erroneously interpreted provisions of law, made a decision not supported by substantial evidence, and acted inconsistently with official agency

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[51] 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. (Rev. Ord. 29). 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.

position in approving the city of McMinnville's proposal to expand the UGB onto certain exclusive farm use lands, rather than onto other higher priority 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. (Rev. Order 19-20)

B. Standard of Review

This court reviews an LCDC order 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, violated statute or the constitution, or adopted an order not supported by substantial evidence. ORS 183.482(8).

ARGUMENT

The city proposed, and the Commission approved, a UGB expansion including 314 acres for future parks. (Rev. Ord., 19-20; Rec. 1221) This land is to meet the need for three park types: 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) 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) 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 the Commission's decision for the expansion area, will consume the lowest priority, highest value farm land.

The Commission's decision violates Goal 2 in two ways. 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 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, in violation of Goal 2's consistency requirement.

Goal 2 also requires that land use plans and implementing measures have an "adequate factual base." The Commission found (Rev. Ord. 19):

> "[T]he city determined that the park need projection is viable, and that it 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 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 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, and thus no discussion of how they would be able to fund park acquisition. 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) LCDC recognized these objections and exceptions and responded to them. (Rev. Ord. 12-15)

B. Standard of Review

This court reviews a LCDC order 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, violated 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)[52] 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.[53]

The Commission found (Rev. Ord. 13):

"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 city's submittal amends Plan Policy 187.000 to defer planning and implementation of NACs 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) LCDC 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

[52] McMinnville's high density, multi-family zone is R-5.

[53] 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.

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 13th day of October, 2009.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 13th 2009, I filed the original of this **Supplemental 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:

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I also certify that on October 13th 2009, I served two (2) true copies of this **Supplemental 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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