Sent by Electronic Mail

February 3, 2014

To: Jim Rue and Angela Lazarean, DLCD
Land Conservation and Development Commission

From: Mia Nelson, Willamette Valley Advocate, 1000 Friends of Oregon
Sid Friedman, Friends of Yamhill County

Re: Exceptions to Director’s Report, Newberg UGB Amendment

1000 Friends of Oregon and Friends of Yamhill County filed joint Objections to the City of Newberg’s urban growth boundary amendment on September 16, 2013.

On January 23, 2014, DLCD distributed a Director’s Report responding to our joint objections. The Report recommends that the Commission sustain, in whole or in part, some of the objections we raised, but recommends denial of all or part of other objections.

These Exceptions pertain to some issues raised in our Objections; however, we preserve all our objections even though not all are addressed in this document.

Commission decisions must include an explanation of the reasoning that leads the agency from the facts that is has found to the conclusions that it draws from those facts. See, for example 1000 Friends of Oregon v. LCDC, 237 Or App 213, 224, 239 P3d 272 (2010).

SUMMARY OF EXCEPTIONS

Exception One: The city based its site characteristics on what is “typical” of industrial districts, rather than particular employment uses. The department correctly found that such an approach is impermissible, but then failed to apply that standard to its evaluation of the city’s actions. The Commission should direct the city, on remand, to demonstrate that its site characteristics are “typical” of its expected employment uses.

Exception Two: The department concluded that city had not established that two of its site characteristics are typical of its expected employment uses. This conclusion is not reflected in the recommendations. The Commission should direct the city, on remand, to either demonstrate that these site characteristics are “typical” of its expected employment uses, or delete them.

Exception Three: Our objections identified significant methodological problems with the analysis of industrial districts the city used to establish its site characteristics. The Report did not address these objections. The department should address these portions of our objections and revise its conclusions and recommendations accordingly.
Exception Four: The department found that the city did not explain why major collectors are insufficient to serve its expected industrial uses. The department nevertheless concluded that the city’s decision “seems reasonable.” The Commission decision cannot reach a conclusion without evidence to support that conclusion; therefore, the Commission should sustain our objection.

Exception Five: We objected to the city’s exclusion of potential sites in undeveloped areas based on the existing road network, without consideration of the potential road network when an area develops. The Report did not address this objection. The department should address this portion of our objections and revise its conclusions and recommendations accordingly.

Exception Six: The department rejected our objection to the unsupported site sizes the city used as the basis for its industrial land needs. The evidence the department points to in support of its conclusion does not pertain to those site sizes; it pertains to a different set of data. The department should reevaluate its response and the Commission should sustain our objection.

Exception Seven: The department rejected our objection to the city’s inventory of employment land, mistakenly pointing to a remanded inventory that the city did not rely upon. As a result, the department reached erroneous conclusions. The department also failed to address all issues raised in our objection. The department should reevaluate its response and the Commission should sustain our objection.

Exception Eight: The department misinterpreted the regulatory framework for evaluating whether land needs can reasonably be accommodated on land already in the UGB, erroneously stated that the city based rejection of an area on a site characteristic that the city did not cite, and incorrectly concluded that the city has a shortage of commercial land. The department should reevaluate its response and the Commission should sustain our objection.

Exception Nine: The department rejected our objection to the city’s inclusion of more large sites in the UGB than needed, because the number of acres approximates the estimate shown in the city’s tally of sites. However, the city determined its land need based on sites, not acres. The Commission should direct the city, on remand, to only include the number of needed sites in each size category, and to reduce the UGB expansion by any sites found to be surplus.

Exception Ten: The department rejected our objection to the inclusion of unbuildable land in the UGB for which no need has been demonstrated. This additional land doubles the size of the expansion. The Commission should direct the city, on remand, to remove the additional land.

EXPLANATION OF EXCEPTIONS

Exception One: Misapplication of standards for site characteristics (Friends Objection 1)

Brief Summary

The city based its site characteristics on what is “typical” of industrial districts, rather than particular employment uses. As a result, the city adopted site characteristics that improperly
exclude higher-priority land from the ORS 197.298 UGB alternatives analysis. The department correctly found that such an approach is impermissible, but then failed to apply that standard to its evaluation of the city’s actions. The Commission should direct the city, on remand, to demonstrate that its site characteristics are “typical” of its expected employment uses.

*Detailed Explanation*

According to OAR 660-009-0005(11), site characteristics are “the attributes of a site necessary for a particular industrial or other employment use to operate.” In its remand of the city’s 2010 EOA, LUBA devised a two-pronged test for site characteristics: (1) the attribute must be “typical” of the expected use and (2) the attribute must have some “meaningful connection” with the operation of the use.¹ The Court of Appeals upheld LUBA’s test, noting that “necessary” site characteristics are those attributes that are reasonably necessary to the successful operation of particular industrial or employment uses, in the sense that they bear some important relationship to that operation.²

In our Objection 1, we argued that the city erred by focusing its inquiry on the “typical” attributes of industrial districts, rather than researching the “typical” attributes of particular employment uses.³ We said that while all businesses need appropriate access, topography, and public facilities, an EOA must determine what attributes are “necessary” for each “particular use.” We agree with the department that compatible uses that have similar site needs can be grouped together into “broad site categories,” as provided by OAR 660-009-0015(2) and -0025(1).

This tailored inquiry is important, because what is critical for one use may be irrelevant to another use, or may even be detrimental. Failure to study the actual needs of particular employment uses may result in site characteristics that do not meet the needs of targeted industries and that improperly exclude higher-priority land from the ORS 197.298 UGB alternatives analysis.

In its Report, the department agreed that focusing solely on the attributes of industrial districts or parks would be unacceptable:

“The department finds that the term ‘particular’ should be interpreted in a way that allows a city a reasonable and practical path to compliance with the rules while addressing its economic development needs. At the same time, it cannot be construed so broadly that it renders the term ‘particular’ moot.

For example, requiring a city to determine, with substantial evidence, precise operational and siting needs for semiconductor manufacturing, medical device manufacturing, and nano & micro technology manufacturing separately is not practical or reasonable. On the other hand, “manufacturing” is so broad and encompasses so many different “particular uses” that implementing site characteristics at this level would likely not

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¹ Friends of Yamhill County v. City of Newberg, 62 Or LUBA 5 (2010).
² Friends of Yamhill County v. City of Newberg, 240 Or App 238 (2011), emphasis added.
³ See introduction to Objection 1 on pages 4-5.
establish an adequate basis for rule compliance, much less address the practical needs of the city. In this example, ‘high tech manufacturing’ could be the appropriate level of aggregation that is still specific enough to be a ‘particular use.’ A city could choose to be more specific if its needs dictated it. The site characteristics that define the operational needs of a use could be more detailed when a city defines its needs more specifically.

The result of this analysis would be that the site characteristics a city uses in its employment land need determination and UGB location analysis derive from and are tailored for each employment use, or group of similar uses, the city has determined it will need to accommodate. Conversely, this interpretation would not permit the analysis to focus solely on typical attributes of industrial districts or parks or on site characteristics not related to the operational needs of particular employment uses.” (Report, p. 17-18, emphasis added)

We agree with the department’s interpretation of the term “particular,” and with its determination that Goal 9 “would not permit the analysis to focus solely on typical attributes of industrial districts or parks.” But this is exactly what the city did; it not only lumped all manufacturing together, it lumped manufacturing together with aviation-related businesses, food processing, wineries, and business services like architectural firms.

The department should therefore have recommended that the city, on remand, demonstrate that its site characteristics are “typical” of its expected employment uses. Instead, the department reached erroneous conclusions that are not based on the standard it articulated. For example:

“Although the analysis starts with the attributes of the industrial areas rather than with particular employment uses, the city has made adequate demonstration that the target industries typically locate in proximity to other employment uses because the tie to those uses has been made.” (Report, p. 27, emphasis in the original)

The Report does not explain why the department believes the city’s analysis is sufficient to establish what is “typical” for its diverse targeted industries. There is no reference to the record or any other description of how “the tie to those uses has been made.”

The EOA separately evaluated the “meaningful connection” these site characteristics have to particular industries. (R.5882-88) While the EOA’s “meaningful connection” evaluation did consider particular employment uses, it did not consider what is “typical” for those particular uses; the separate Site Study did that analysis.  

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4 As explained by the Site Study’s purpose statement: “The purpose of this study is to determine the site characteristics that are typical of Newberg’s targeted industrial uses. The study looks at similar size communities near Newberg, and investigates the characteristics of industrial districts where Newberg targeted industrial uses have located within the last 40 years. These site characteristics may then be designating new industrial areas within Newberg. This study seeks to determine typical site characteristics, and does not go further to determine whether the characteristic is necessary for a particular industrial use to operate, as this will be done through the Newberg Economic Opportunities Analysis.” (Site Study p. 2, R.5967, emphasis added)
The “meaningful connection” evaluation is a separate legal test from the “typical attributes of industrial uses” test. As previously discussed, the Site Study evaluated only industrial districts, without any analysis of what is typical for particular uses – an approach the department has specifically determined is not adequate.

The department already concluded that the city failed to demonstrate a “meaningful connection” to its targeted industries for the site characteristics listed in the staff’s recommended motion. For the above reasons, the department should revise its recommendation to direct that on remand, the city must also demonstrate that these site characteristics are “typical” of its expected employment uses.

Exception Two: Conclusions in Report not reflected in recommendations (Friends Obj. 1C)

Brief Summary

The department concluded that city had not established that two of its site characteristics are typical of its expected employment uses. This conclusion is not reflected in the recommendations. The Commission should direct the city, on remand, to either demonstrate that these site characteristics are “typical” of its expected employment uses, or delete them.

Detailed Explanation

In our Objection 1C, we said that the city failed to establish that the following site characteristics regarding compatibility with residential uses are “typical” of the city’s expected industrial uses:

“Exclude sites that abut residential neighborhoods on more than 25% of the site perimeter unless effective topographical buffers are present, such as a stream corridor, arterial street, state highway, rail line, or park.” (Industrial sites, EOA Table 12-23, R.5869)

The department agreed:

“The department finds that the explanation in the city’s findings does not establish that abutting residential use on more than 25 percent of a site’s perimeter is typical of the expected industrial uses and that it is meaningfully connected to the operation of those uses. Wanting to be a good neighbor and not blending well with residential use do not address the operational needs of employment uses.” (Report, p. 24, emphasis added)

We also objected that the city failed to establish that the following site characteristics regarding compatibility with residential uses are “typical” of the city’s expected commercial uses:

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5 See Objections, pages 15-16. Beyond the previously discussed failure to study “particular” uses, we offered two other reasons that these site characteristics are not “typical.” Both were methodological problems with the Site Study: improper exclusion of 12 districts from the study group, and failure to count the residential adjacency of already-buffered sites. The department did not dispute either of our claims.
“For community [commercial] centers, abut residential neighborhood on more than 50% of the site perimeter unless effective topographical or road buffers present or planned.” (Commercial sites, EOA Table 12-28, R.5897)

The department agreed:

“This attribute and explanation suffer from the same problems identified above for industrial land compatibility characteristics.” (Report, p. 26)

However, despite the department’s conclusion that the city has not established that these characteristics are “typical”, the recommendation on page 61 of the Report does not include correction of this problem. The department should amend its recommendation to require the city, on remand, to demonstrate that these two site characteristics are either “typical” of the city’s expected employment uses or delete them.

**Exception Three: Site Study Methodological Problems (Friends Objection 1B, 1E and 1F)**

**Brief Summary**

Our objections identified significant methodological problems with the analysis of industrial districts the city used to establish its site characteristics. The Report did not address these objections. The department should address these portions of our objections and revise its conclusions and recommendations accordingly.

**Detailed Explanation**

In our Objections 1B, 1E and 1F, we identified significant methodological problems with the Site Study, beyond the previously discussed failure to study “particular” employment uses. We said that due to these problems, the city erred by relying on the Site Study to determine that various site characteristics are “typical.” The list of objections quotes the “typical” site characteristics the city relied upon, followed by the errors that resulted in evaluating alternative sites for the use:

**Objection 1B:** “Adjoin an existing industrial or commercial area, or an area with sufficient buildable land [50 acres] to allow expansion of the industrial district.”6 (Industrial sites, EOA Table 12-23, R.5869)

- Improper exclusion of 12 smaller districts from the study group, skewed results
- Inaccurate acreage figures reported for some district, made them appear larger
- Grouped non-contiguous districts together, created appearance of one larger district7

**Objection 1E:** “Include parcels or contiguous group of parcels that have suitable truck access to a state highway or arterial street within ¼ mile.” (Industrial sites, EOA Table 12-23, R.5869)

- Studied distance from arterial to edge of district, instead of distance to individual sites8

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6 EOA p. 54, see p. 58 for clarification that “sufficient buildable land” means 50 acres (R. 5869, R. 5873)
7 See Objections, p.8, including footnotes
8 See Objections, p. 23
Objection 1F: “Exclude: Sites that are not predominantly less than 5% slope within buildable areas” (R.5869)
  • Studied only industrial areas where all land is naturally flat\(^9\)

The Report does not address these objections.\(^{10}\) The department should address these portions of our objections and revise its conclusions and recommendations accordingly.

**Exception Four: Major collectors vs. arterials (Friends Objection 1D and 1E)**

**Brief Summary**

The city claimed that access to an arterial was a necessary site characteristic and thus it excluded otherwise suitable sites that had access to a major collector. The department found that the city did not explain why major collectors are insufficient to serve its expected industrial uses. The department nevertheless concluded that the city’s decision “seems reasonable.” The Commission decision cannot reach a conclusion without evidence to support that conclusion; therefore, the Commission should sustain our objection.

**Detailed Explanation**

In Objections 1D and 1E, we said that the following site characteristics fail to consider that major collectors are functionally and physically similar to arterials, and so can also accommodate industrial traffic:\(^{11}\)

“Exclude sites that require truck traffic to travel through or adjacent to a residential neighborhood to reach an *arterial* street or state highway.” (R.5869, emphasis added)

“Include parcels or contiguous group of parcels that have suitable truck access to a state highway or *arterial* street within 1/4 mile.” (Industrial sites, *EOA* Table 12-23, R.5869, emphasis added)

We pointed to evidence that major collectors functionally equivalent to arterials, and that the city failed to explain why only state highways and arterial roadways should be considered acceptable truck routes. The department agreed that the city did not explain its decision, but nevertheless concluded that the decision “seems reasonable”:

“While the department is unable to find an explanation of why the city chose to limit its industrial transportation proximity site characteristic to arterials and state highways, it is reasonable that a city would locate employment areas, which tend to be traffic generators, along streets planned to function for the expected use. Newberg’s choice seems reasonable.” (Report, p. 31)

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\(^9\) See Objections, p. 25
\(^{10}\) “If valid objections are received or the department conducts its own review, the department must issue a report. The report shall address the issues raised in valid objections.” OAR 660-025-140(6).
\(^{11}\) See Objections, p. 20 and 23.
The department does not point to any facts or other explanation in the record to support its conclusion. The Commission cannot conclude that only state highways and arterials are “planned to function for the expected use” without evidence to support that conclusion.

The department’s recommendation should be revised to require that on remand, the city either revise these site characteristics to include major collectors, or demonstrate why only state highways and arterials can convey industrial traffic.

**Exception Five: Existing vs. potential road network (Friends Objections 1D and 1E)**

**Brief Summary**

We objected to the city’s exclusion of potential sites in undeveloped areas based on the existing road network, without consideration of the potential road network when an area develops. The Report did not address this objection. The department should address this portion of our objections and revise its conclusions and recommendations accordingly.

**Detailed Explanation**

In Objections 1D and 1E, we said the city erred by assessing access of potential sites based solely on the city’s current road network, instead of the access that could be provided once a new industrial area is developed. The city used the following characteristics to exclude sites:

- “Exclude sites that require truck traffic to travel through or adjacent to a residential neighborhood to reach an arterial street or state highway.” (R.5869)
- “Include parcels or contiguous group of parcels that have suitable truck access to a state highway or arterial street within 1/4 mile.” (Industrial sites, EOA Table 12-23, R.5869)
- “For neighborhood [commercial] centers – access to major collector or minor arterial street at a minimum” (Commercial sites, EOA Table 12-28, R.5897)
- “For community [commercial] centers – access to minor or major arterial” (Commercial sites, EOA Table 12-28, R.5897)

Our objection pointed out that higher capacity roadways do not presently serve surrounding rural properties or underdeveloped parts of the city or UGB, because there is little or no development to serve. The appropriate inquiry is not whether appropriate access already exists; rather, it is whether appropriate access could be provided once a new commercial or industrial area is developed.

The Report does not address this issue. The department should address these portions of our objections and revise its conclusions and recommendations accordingly.

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12 See Objections, p. 21-24.
Exception Six: Site Sizes (Friends Objection 2)

**Brief Summary**

The department rejected our objection to the unsupported site sizes the city used as the basis for its industrial land needs. The evidence the department points to in support of its conclusion does not pertain to those site sizes; it pertains to a different set of data. The department should reevaluate its response and the Commission should sustain our objection.

**Detailed Explanation**

In our objection, we said that the city based its industrial land needs on inflated site sizes that are unsupported by evidence in the record. This objection centers on the site sizes shown in Table 12-20 in the EOA. This table estimates the number of firms in each of three size-of-workforce categories, and then assigns a range of sites sizes, as well as an average site size, to each category. It is reproduced below.

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13 For Objection 1D, the Report did not mention this aspect of that objection at all. For Objection 1E, the Report contains only this sentence: “While the objection lists three site characteristics employed by the city to which Friends objects, the explanation addresses only one: ‘Include parcels or contiguous group of parcels [that] have suitable truck access to a state highway or arterial street within ¼ mile.’ Since the arguments regarding the other two site characteristics are undeveloped, the department does not consider that part of the sub-objection.” (Report, p. 30)

It appears the department misunderstood the scope of our objection to these two commercial site characteristics. We did object to the concept that all the city’s targeted industries must have access to an arterial within ¼ mile, and that is why our argument in Objection 1E focused on that site characteristic.

Conversely, we did not object to the idea that neighborhood commercial centers should have access to a major collector or minor arterial, or that community commercial centers should have access to minor or major arterial. Our only concern was that these site characteristics consider only the current road network, not the network that could be provided in the future. Since we had already developed that argument in Objection 1D, we did not make any further arguments about those two site characteristics in Objection 1E.

Instead, our proposed remedy to Objection 1E requested the needed change: “Also, the commercial site characteristics, ‘For neighborhood centers – access to major collector or minor arterial street at a minimum’ and ‘For community centers – access to minor or major arterial’ should be modified to reflect that the feasibility of providing adequate future transportation facilities must be directly assessed – the existing road network is not determinative.”

(Objections, p. 24)

We said that the city failed to explain why these particular site sizes were chosen, instead of other sizes. The record contains no evidence or explanation as to why, for example, firms in the 10-74 employee category require sites ranging from 2-10 acres, instead of 1-5 acres.

The department rejected our concerns:

“The table that displays the results of the calculations (Table 12-20, Rec. at 5863) includes a column with the heading: ‘Ave. Site Size (Acres).’ This column displays the approximate mid-point of each of the size ranges. While the findings do not specifically explain why they used an average site size, use of an average is a common practice for representing a range. The city effectively explained, by virtue of the column identifier, that it used an average (median) to represent the size ranges of sites expected to be needed. The department finds that the city is not required to explain in detail every customarily used step in its analysis. Had the city used something other than average, then an explanation may be warranted. The city relied on expert advice regarding the appropriate size ranges to employ. Rec. at 5863. Based on the foregoing, the department finds that the city’s distribution of the employment forecast to site-size ranges and projecting the median site size to estimate the acreage need is based on substantial evidence and is adequately explained in the findings.” (Report, p. 35, emphasis in the original)

However, the evidence the department points to in support of its conclusion regarding the site sizes in Table 12-20 does not pertain to those site sizes; instead it pertains to a different set of data in Table 12-21. The department stated, “The city relied on expert advice regarding the appropriate size ranges to employ. Rec. at 5863.” However, a review of that citation reveals only this information:

- A claim that “OBDD reviewed the site size ranges by targeted industry cluster in Table 12-21 and supports the estimated site sizes and ranges as viable and marketable for Newberg’s targeted industries.”
• A general explanation of how the city collected data from experts on possible site sizes for various industries, which was then compiled in the EOA’s Table 12-21. (R.5864)

As noted in our objections, OBDD made a general determination that the size ranges by targeted industry cluster in Table 12-21 would be “viable and marketable.” OBDD did not review the ranges in Table 12-20, nor did OBDD make a determination that any particular site sizes were necessary for the types and sizes of firms the city expects.

Table 12-21 contain site size ranges by targeted industry cluster and sector. Table 12-20 includes site size ranges by number of employees. Neither the city nor the department ever connected the dots between the size ranges in Table 12-21 and Table 12-20. There is no information anywhere in the record that explains how – or even if – the data in Table 12-21 were used to inform the site size ranges that were ultimately displayed in Table 12-20’s “Size Range (Acres)” column. One cannot determine why, for example, Table 12-20 concluded that firms in the 10-74 employee category require a range of 2-10 acres, instead of some other range, like 1-5 acres.15

The Report also points to R.5868-5871 as support for Table 12-20’s site need determinations:

“The findings regarding industrial site size as a ‘site characteristic’ for determining suitability (the subject of the LUBA decision), was supplemented in the 2013 version. Rec. at 5869-5871. The new findings cite information provided by the Oregon Business Development Department to verify site size needs. Rec. at 5863, 5868.”

However, a review of this material reveals general information and assertions about industrial sites and businesses, but nothing that would explain Table 12-20’s conclusions.

Commission decisions must include an explanation of the reasoning that leads the agency from the facts that is has found to the conclusions that it draws from those facts. The department should revise its recommendation to find that Table 12-20’s site size needs are not supported by substantial evidence, and to require the city, on remand, to evaluate both the supporting and conflicting evidence, and explain how the site sizes in Table 12-20 were derived, in light of that evidence.

15 In our objections, we also said that there is no practical way to use the Table 12-21 data to inform the city’s actual site needs, due to extreme variation in the ranges. An overall range of 1 to 243 acres is provided for the listed industries, with absolutely no guidance on how to select particular site sizes for Newberg from within the given range. For larger firms, the only pertinent evidence in the record actually undermines the city’s conclusions. The city is expecting four firms with 75 employees or more, with a total of 820 employees between them – an average of 205 employees per firm. In our objections, we pointed to evidence in the record that the city’s existing targeted industries in the same employee size range typically locate on 2-12 acre sites. However, Table 12-20 lists an average site size of 10-50 acres for these four firms, without any explanation of why such large sizes are needed.
Exception Seven: Buildable Lands Inventory (Friends Objection 4)

Brief Summary

The department rejected our objection to the city’s inventory of employment land, mistakenly pointing to a remanded inventory that the city did not rely upon. As a result, the department reached erroneous conclusions. The department also failed to address all issues raised in our objection. The department should reevaluate its response and the Commission should sustain our objection.

Detailed Explanation

Our objection contends that the EOA, comprehensive plan amendments, and UGB amendment fail to comply with OAR 660-009-0015(3), Goal 14, OAR 660-024-0050(1) and (4), and Goal 2, because: 1) they lack the required inventory of suitable vacant and developed land, 2) they instead rely on incomplete and erroneous summary tables and maps that lack an adequate factual base, 3) they are internally inconsistent, and 4) they fail to consider the capacity of all buildable commercial land.16

The department misconstrued the evidence in the record and failed to address all issues raised in our objection.17

Failure to prepare a legally compliant employment land inventory

We said that the summary tables and maps labeled “Buildable Industrial Land, Newberg UGB, 2012” (R.5890-91) and “Buildable Commercial Land, Newberg UGB, 2010” (R.5900, 5902) are not an adequate substitute for an accurate, verifiable, legally compliant inventory of employment lands.18

The department concedes that these summary tables and maps may not, by themselves, be sufficient to comply with Goal 9, but recommends rejecting our objection based on what it apparently believes to be a valid Buildable Lands Inventory (BLI):

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16 See Objections p. 34-38.
17 The department also misunderstood the scope of our objection. We objected to the city’s failure to correctly inventory existing employment land. The following response in the Report references the process the city used to identify sites within the UGB that could be re-designated as employment land:
   “The city applied established site characteristics to identify eligible sites within the existing UGB. Record at 5729-5732, 5801. The city conducted the inventory as required by OAR 660-009-0015(3)(a)(A). This analysis yielded only one acre of land inside the current UGB that is suitable for re-designation to industrial. The submittal includes adoption of an industrial plan designation for this property. The department finds that Newberg’s employment land inventory was completed in conformity with the requirements of OAR 660-009-0015(3)(a).” (Report, p. 38)
18 At a minimum, an adequate inventory would identify buildable parcels and the amount of vacant and/or redevelopable land each one contains, and identification of any development constraints or infrastructure needs that affect the buildable area of sites.
“In this case, the city includes summary tables within the EOA which may not, by themselves, be sufficient to comply with the rule. Rec. at 5889-5892. However, the record also contains a detailed Buildable Land Inventory (BLI). Record at 6551.” (Report, p. 38)

The BLI at R.6551 is the sole reason the Report cites for not sustaining our objection, but the department is mistaken about its legal status. This BLI is not a legally valid document – it was remanded by LUBA in 2010, and was never acknowledged. In fact, the only reason the remanded 2009 BLI is in the record is because we placed it there, as an attachment to a letter we submitted to the city in 2011. (R.6535) This remanded 2009 BLI is not part of the EOA, and was not re-adopted by the city as part of these proceedings.

The department’s conclusion that the employment inventory “was completed in conformity with the requirements of OAR 660-009-0015(3)(a)” is based on the remanded BLI and is therefore in error. Therefore, the department should revise its conclusions and recommendations to require, on remand, that the city conduct a legally compliant inventory of employment lands.

**Failure to account for all land shown in summary table and map of industrial land**

Our objection identified a site that was included in the EOA’s map of buildable industrial land (Figure 12-11; R.5891) and is included in the total acreage in the summary table of such land (Table 12-1; R.5890), but is not counted as a site in the EOA’s comparison of supply and demand (Table 12-25; R.5892).

The Report acknowledges this issue but does not address it. The department should address this portion of our objection, and revise its conclusions and recommendations accordingly.

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19 See *Friends Of Yamhill County V. City Of Newberg*, 62 Or LUBA 211 (2010) at R.6339-6357. LUBA explicitly ruled that the BLI the Report now points to was legally inadequate, concluding: “there is not an adequate factual base in the record to support the city’s exclusion of land from the inventory….” (R.6345)


21 In response to our local testimony on the issue, the city pointed to what it considers its inventory of employment land: “Newberg has adopted an inventory of buildable commercial and industrial land, following and including all the elements required in OAR 660 Division 9. This was adopted into the Newberg Comprehensive Plan through Ordinance 2013-2761. The inventory is found in Appendix A.” (R.6004) “Appendix A” is the city’s EOA, which contains the inadequate summary tables and maps.

22 For commercial land, the city does not even assert that it has updated its inventory since the remand.

23 “If valid objections are received or the department conducts its own review, the department must issue a report. The report shall address the issues raised in valid objections.” OAR 660-025-140(6).
Our objection identified extensive additional vacant commercial land that was not included in the EOA’s summary map and table of buildable commercial land, which is the basis for the city’s conclusions regarding its commercial land supply. The missing land is illustrated below:

**Newberg Has a Commercial Surplus**

**EOA COMMERCIAL INVENTORY – pg. 77**

**Newberg Zoning Map**

**from Springbrook Master Plan**

**Development Standards**

**Village**

**Allocated Uses**

- Retail
- Restaurants
- Attached Dwelling Units
- Manufactured Home
- Multi Family Units
- Home Occupations
- Church
- Artist Studios
- Passive or Active Use
- Parks
- Agriculture
- Civic Uses
- Town Green
- Office
- Commercial
- Dwellings
- Commercial
- Mixed Use
- Business Use
- Professional
- Industrial
- Warehousing
- Storage
- Other Uses

**Prohibited Uses**

- Drive through, outside storage; temporary storage allowed

**Newberg Zone District**

**Modulated After**

**C-3**

**Building and Site Standards**
The department appears to agree that this property must be included in the city’s commercial land inventory. Nonetheless, the Report recommends that this sub-objection be rejected because the department’s “review of the inventory (Rec. at 6555) indicates that these properties were included.” However, R.6555 is the remanded 2009 BLI, not the inventory the city is actually using.

The department missed the point of our objection: The vacant commercial lands were included in the remanded inventory, and they are included in the city’s zoning map, but these lands were not included in the EOA, and so were not considered when the city evaluated its commercial land supply.

The fact that these lands were included in the remanded 2009 BLI does not cure their subsequent omission from the EOA. The city must account for this capacity. The department should revise its conclusions and recommendations to require the city, on remand, to do so.

**Other employment zones**

The city’s inventory of employment land “must include an inventory of vacant and developed lands within the planning area designated for industrial or other employment use.” (OAR 660-009-0015(3), emphasis added)

In our objection, we said that the inventories in the EOA consider industrial land and commercial land, but completely ignore other employment land (institutional zone, residential-professional zone), even though the EOA anticipates significant employment in these zones. (R.5845-46)

The Report does not address this issue. The department should address this aspect of our objection and revise its conclusions and recommendations accordingly.

**Exception Eight: Accommodation of land needs (Friends Objection 5)**

**Brief Summary**

The department misinterpreted the regulatory framework for evaluating whether land needs can reasonably be accommodated on land already in the UGB, erroneously stated that the city based rejection of an area on a site characteristic that the city did not cite, and incorrectly concluded that the city has a shortage of commercial land. The department should reevaluate its response and the Commission should sustain our objection.

**Detailed Explanation**

Our objection contends that the UGB and comprehensive plan amendments violate Goal 14, ORS 197.298, OAR 660-024-0050(4), OAR 660-024-0060(1), and Goal 2, because they lack an
adequate factual base and findings to support a conclusion that a UGB expansion onto prime farmland was necessary; the city failed to demonstrate that land within the UGB and/or higher priority sites outside the UGB could not meet the identified land needs.

**Zimri Drive (Site VI)**

In our objection, we objected to the city’s conclusion that Zimri Drive – a 30-acre site in the UGB – cannot accommodate some of its identified industrial needs. The Report erroneously states that one of the city’s reasons involved a site characteristic that the city did not cite and that we did not challenge:

“This explanation of why this area is unsuitable for industrial use points to the following site characteristics implemented by the city (Rec. at 5728):

1. Site contains a parcel or group of parcels in close proximity with buildable land that contains at least 20 buildable or industrially developed acres (or smaller if adjacent to existing industrial district).

***

“The department has not recommended remand of the first characteristic listed immediately above, site size and adjacency. It is excluded on the adjacency portion, not the acreage portion, of the site characteristic.” (Report, p. 40)

The Report does not reflect that the city actually used a different site characteristic to exclude Zimri Drive:

“Adjoin an existing industrial or commercial area, or an area with sufficient buildable land [50 acres] to allow expansion of the industrial district.”  
(Industrial sites, *EOA* Table 12-23, R.5869)

The Department has already determined that this site characteristic is invalid. Therefore, it does not matter if the Zimri Drive site is adjacent to commercial land – an invalid site characteristic cannot be a basis for excluding this site. The Report should be corrected to reflect the site characteristic the city actually used, as well as that characteristic’s invalidity.

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24 See Objections, p. 39-43.
23 The Department appears to believe that this site characteristic requires both a 20-acre size and adjacency to an existing district. But that is not what it says; the requirement is “at least 20 buildable or industrially developed acres (or smaller if adjacent to existing industrial district).” Since Zimri Drive has 30 buildable acres, this site characteristic is satisfied; adjacency is not required.
26 *EOA* p. 54, see p. 58 for clarification that “sufficient buildable land” means 50 acres (R. 5869, R. 5873)
Surplus Commercial Lands

Our objection identified several areas of existing vacant commercial land that can accommodate industrial use and thus minimize urban expansion, make efficient use of existing infrastructure, and preserve farmland, as required by Goal 14 and ORS 197.298.27

The Report does not address whether or not these lands can, in fact, accommodate industrial uses. Instead, it states:

“However, at its core, the city does not want to re-designate these lands for industrial purposes because they are commercially designated in the existing, acknowledged comprehensive plan, and the city asserts that it does not have a surplus of such commercially designated land within its UGB. Pursuant to the discussion of the Friends’ objection 4, discussed above, the objectors have not provided sufficient evidence that the city’s conclusions regarding a shortage of commercial land in Newberg are erroneous. Therefore, the objection as it relates to Sites VII and XI is rejected.” (Report, p. 45-46)

The Department’s conclusion relies on its earlier determination that the city does not have a commercial land shortage. However, as demonstrated in our above Exception Seven, that determination was erroneous, because it was based on an incorrect understanding of the facts. That erroneous prior determination should be corrected, and this part of the Report should be amended to reflect that the city does have a commercial land surplus, which could partially meet the need for industrial land.

Even if the City did not have a surplus of commercial land, the city would still have to at least consider whether existing vacant commercial land could accommodate industrial uses, and be replaced on lower-priority land. Commercial uses have different site suitability requirements than industrial uses and can be more easily accommodated on lower-priority land.28 Under Goal 14 and ORS 197.298 resource land cannot be included in a UGB if the need can reasonably be accommodated on land already inside the boundary, or on higher-priority land.

North Valley/Chelahem Road Area (Modified Site I (in UGB) and Sites 1 & 3; Site XII

Our objection contends that Site 3 and the large, flatter portion of Site 1 should have been combined with the flatter portion of an adjacent site within the UGB (Site I) into one study area.29 Had this been done, the modified area would have then qualified for inclusion and redesignation as industrial land under all the city’s site requirements, with the installation of a center turn lane on Chehalem Drive.

Instead, the city analyzed Site I and Site 1 as separate sites, even though they are adjacent to each other. In each case, the City combined the suitable portion of the site with other, much steeper

28 Compare Required Industrial Site Suitability Characteristics at R. 5869 to Required Commercial Site Suitability Characteristics at R. 5897
29 See Objections, p. 54-55.
land – then concluded that the areas could not reasonably accommodate employment needs. The suitable portions of Site I and Site 1 are also adjacent to Site 3.

The Department recommended rejection of our objection:

“The city is required to assess the ability of lands within its existing UGB to meet the land need pursuant to OAR 660-024-0050(1). OAR 660-024-0050(4) provides the only substantive standard for such an assessment, stating that, prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB. Land inside the UGB is part of an acknowledged comprehensive plan, and is already designated for certain land uses commensurate with that plan that have been found to meet the city’s long-term needs for land and development upon that land. In terms of the UGB expansion process set forth in Goal 14 and OAR 660-024, land inside the UGB is analyzed for its ability to meet identified land needs first under a “reasonably accommodated” test, and if not enough such land exists, then land outside of the UGB is considered for addition to meet identified land needs based upon the locational criteria set forth in ORS 197.298, Goal 14, and OAR 660-024-0060.” (Report, p. 49, emphasis in the original)

The Department reached a similar conclusion in rejecting our objection regarding study of Site XII in conjunction with Site 12.

We take exception to the Department’s apparent position that a city is never required to study lands within the UGB in combination with lands outside the UGB. In determining whether land within the UGB can reasonably accommodate an identified land need, a city cannot categorically choose to study it in isolation, when study with adjacent land would make it viable. The determination must be made on a case-by-case basis. If the land within the UGB can reasonably accommodate some or all of the need in combination with higher-priority land outside the boundary, the city must consider them together and consider potential redesignation of the land within the UGB.

We also take exception to the Department’s apparent position that because “land inside the UGB *** is already designated for certain land uses *** that have been found to meet the city’s long-term needs,” it is a foregone conclusion that those land could not “reasonably accommodate” other uses. Such an interpretation would render Goal 14’s “reasonable accommodation” test meaningless, since all land inside a UGB is presumably there to “meet the city’s long-term needs,” and so could be pre-emptively shielded from consideration. Again, these determinations must be made on a case-by-case basis.

While we disagree with the city and Department’s findings regarding Site XII, at least the city and Department articulated a reason why it would be unreasonable to redesignate the site for industrial use: the land in Site XII is needed for multi-family-housing, the city has a shortage of multi-family housing, and the shortage would be difficult to replace elsewhere. This is the kind of case-by-case determination we believe Goal 14 requires.
In contrast to Site XII, the city determined that Site I could not reasonably accommodate industrial needs solely for reasons that disappear with the modified study area we proposed.\textsuperscript{30} It made no findings whatsoever regarding its current plan designations, nor did it address whether or not any resulting shortfall could be replaced on higher priority lands than the land the city chose.

Under Goal 14 and ORS 197.298, the city has an obligation to at least consider whether the flatter portion of Site I can accommodate the industrial need in conjunction with the flatter portion of Site 1 and/or Site 3.

**Exception Nine: Additional large sites (Friends Objection 6A)**

**Brief Summary**

The department rejected our objection to the city’s inclusion of more large sites in the UGB than needed, because the number of acres approximates the estimate shown in the city’s tally of sites. However, the city determined its land need based on sites, not acres. The Commission should direct the city, on remand, to only include the number of needed sites in each size category, and to reduce the UGB expansion by any sites found to be surplus.

**Detailed Explanation**

Our objection contends that the city included more large sites than it says it needs within its proposed UGB expansion; an extra site in the 30-50 acre category and an extra site in the 10-30 acre category.\textsuperscript{31} The department does not dispute this. Instead, the Report recommends rejection of this portion of our objection because, “The city’s tables show that the needed land is 131 net acres, and the expansion supplies 129 net acres.” (Report, p. 50, emphasis in the original)

However, the city determined its land need based on a specific number of sites in specific size ranges, not on an overall number of acres. The overall number of acres is merely the aggregate of these specific numbers of sites, based on the median site size in each range. It is not determinative of the city’s needs. The city’s findings state:

“The EOA determined land needs by first determining future industrial employment projections. Second, the EOA projected the proportion of future industrial firms in various small, medium, and large employment and site size categories. Third, the EOA allocates the future employment to the various firm and site size categories, \textit{and thus} determines the total amount of buildable industrial land needed for the planning period.” (Emphasis added) (R.5722)

“Newberg has an unmet need for one 30- to 50-acre site, one 10- to 30-acre site, 51 acres of 2- to 10-acre sites, and 20 acres of sites under 2 acres in size.” (R.5733)

\textsuperscript{30} The city’s findings are at R. 5729. The city cites slope, adjacency to residential and transportation access- issues that are all resolved with the modified study area we proposed.

\textsuperscript{31} See Objections, p. 56-59.
Table 7 further defines the smaller site deficit as 18 sites under 2 acres, and 7 sites that are 2-10 acres.\textsuperscript{32}

The city’s findings do not match the included number of sites by size range to the sites the City says it needs, and the Report does not dispute this. If the city \textit{were} to match its site needs with its proposed UGB expansion, it would become immediately apparent why this matters.\textsuperscript{33}

If city can meet its site needs on a smaller total acreage than would result from merely totaling the median sites sizes, Goal 14 and OAR 660-024-0040(1) require that it do so.

The department’s recommendation should be revised to require the city to explain how the included number of sites in each size category matches the number of sites the city says it needs, and to reduce the UGB expansion by any sites found to be surplus.

\textbf{Exception Ten: Extra acreage (Friends Objection 6B)}

\textit{Brief Summary}

The department rejected our objection to the inclusion of unbuildable land in the UGB for which no need has been demonstrated. This additional land doubles the size of the expansion. The Commission should direct the city, on remand, to remove the additional land.

\textit{Detailed Explanation}

Our objection contends that the city has not demonstrated a need for 128 acres of additional unbuildable land on the fringe of the UGB expansion area,\textsuperscript{34} in violation of Goal 14 and OAR 660-0040(1).\textsuperscript{35} This additional land nearly doubles the size of the proposed UGB expansion.

\textsuperscript{32} R.5733. The city’s findings also assert the smaller site deficit as a need for industrial park sites totaling approximately 70 acres. However, nothing in the record establishes that these smaller sites must be in an industrial park, nor do they need to be contiguous.

\textsuperscript{33} The tabulation below lists all of the UGB expansion sites by tax lot listed at \textit{Findings’} Table 14, \textit{except the two extra sites}. (R.5767-68)

<table>
<thead>
<tr>
<th>&lt;2 ac. Sites</th>
<th>2-10 ac. Sites</th>
<th>10-30 ac. Sites</th>
<th>30-50 ac. Sites</th>
</tr>
</thead>
<tbody>
<tr>
<td>3221-5300</td>
<td>3288-801</td>
<td>3228-1100</td>
<td>3228-1000</td>
</tr>
<tr>
<td>3228-800</td>
<td>3228-802</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3228BB-1100</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The city’s remaining need would be 15 sites under 2 acres, and 5 sites that are 2-10 acres. Using the city’s median site sizes and additional R-O-W (Table 4, R. 5723), this would require about 46 gross acres of buildable land. However, the UGB expansion also includes tax lots 3228-1900 (13.06 buildable acres) and tax lot 3228-900 (50.6 buildable acres). At a minimum, one if the 10-30 acre sites is clearly surplus.

\textsuperscript{34} The proposed UGB amendment includes 132 buildable acres for industrial needs and a water treatment plant. However, the City has proposed a UGB expansion that is double this size: 260 total gross acres.

\textsuperscript{35} See Objections, p. 59-61.
Most of this unbuildable land is floodplain and stream corridors; some is resource land in agricultural use; some is forested.36

The city’s only justification for the inclusion of this land was to provide “buffers and amenities” for adjacent industrial land:

“The stream corridors serve very important functions as buffers and amenities for the adjacent industrial development. They are only needed to be included in the UGB if the adjoining upland portion also is included.” (Findings, p. 47, R.5754)

In our objections, we pointed out that stream corridors do not need to be urbanized to serve as buffers and amenities. The department agreed:

“Second, the objection points out that “the stream corridors will continue to function as buffers and amenities in their current uses under their county plan designations.” Rec. at 60. The department agrees. If buffering were the only reason to include the land in the UGB, the riparian area can serve that function equally well outside the UGB.” (Report, p. 51)

This finding should have been dispositive, but the department recommended rejection of our objection. However, despite several pages of discussion, the department did not state what demonstrated need it believes will be satisfied by the inclusion of this additional land.

The Report includes several irrelevant observations and propositions:

- The Report notes that the city’s proposed comprehensive plan map identifies two park sites on the unbuildable land.

The city has not asserted a need for parks and recreation as a justification for inclusion of these lands; the department cannot re-characterize the city’s decision. Regardless, if the city did have a demonstrated need for parkland that could not be satisfied within the existing UGB, it would have to quantify that need and perform an alternatives analysis pursuant to ORS 197.298 and the locational factors of Goal 14. That legally required analysis would likely show that the city’s parkland needs could be accommodated on other, higher-priority land.

- The Report notes that the city asserts it has adopted riparian corridor protection measures.

The presence or absence of riparian corridor protection measures is not relevant to the question of demonstrated need.

- The Report explains that the city chose to place the UGB boundary at the centerline of drainage courses, and that generally, following natural features is a practical way to reduce survey costs. The Report states, “The practice may result in some unbuildable or unneeded land being included in the boundary, but the impracticality of placing the UGB

36 See photographs from R.5697 and R.5807 reproduced in our Objection 7 (Locational Factors).
in an undescribed location, and the imprecision of any “need” calculation, make *de minimis* additions acceptable.”

In this case, the additions *double* the size of the expansion – and our request for better accuracy hardly rises to “an unreasonably high level of precision.” It is not clear whether the department believes a *doubling* in size to be *de minimis*. If so, the department should say so, and explain why its view is legally valid; if not, the Report’s explanations are not relevant.

- The Report notes that much of the unbuildable land included in the UGB would be designated “Public/Quasi-Public” (PQ), and is not intended to satisfy the city’s industrial land need.

The department’s response misses the point. Regardless of the proposed plan designation, the city must still demonstrate a valid *need* for the land. The city demonstrated a need for 3 gross acres of PQ land.37 The expansion area includes 37 acres in to be designated PQ, more than 12 times the stated need. This proposed PQ land is in Study Sites 11.1 and 11.2. 38 The city has not demonstrated a need of any kind for Site 11.1, which has no buildable acreage and is some distance from proposed employment areas, nor has the city demonstrated any need for the additional 20 acres in Site 11.2.

- The Report finds that “a city is not required to list unbuildable land as a site characteristic in order to include it in a UGB expansion.”

This is a partial response to our contention that because the city did not specify proximity to a stream corridor as a site characteristic necessary for land to be suitable for its targeted industries, there was no basis to now claim that these industrial areas require such an amenity. The record contains no evidence whatsoever that adjacent open space is needed for the proper operation of any of the city’s industrial areas. The department did not respond to our fundamental contention: industrial sites do not “need” these additional lands in order to function.

- The Report states that the city’s findings regarding buffers and amenities for employees “do not unequivocally state that the EOA’s conclusions regarding the industrial site size characteristic include land on-site to serve as buffering.”

The Report goes on to suggest that the city’s references to “buildable acres” in its determination of needed site sizes “seem to be a recognition that buffers and environmental protections will occur on site, but not necessarily within buildable acres.” This is pure conjecture. However, even if that is true, it is irrelevant, since the department has already determined a need to include the extra acreage for buffering has not been demonstrated.

- The Report dismisses comparison to the 2004 decision on the McMinnville UGB, wherein the Commission rejected the inclusion of large areas of unbuildable land within

37 Record pp. 5945-5948
38 Study Sites 11.1 and 11.2 are proposed for PQ designation. R. 5809 & 5811. They have a total of 37 acres of which 3 acres are buildable. None of the buildable land is in Site 11.1 R. 5766
the 100-year floodplain, because “the regulatory framework has changed since the Commission’s McMinnville decision.”

The department’s dismissal of the McMinnville decision is misplaced. In McMinnville, as in the current proposal, the city had included large amounts of unbuildable land on the fringe that doubled the size of several expansion areas. In the McMinnville decision, the Commission concluded that the city had not demonstrated a need for the unbuildable land, and that its inclusion was inconsistent with the efficient accommodation of land needs and with farmland protection. While Goal 14 has since been amended, the regulatory framework – Goal 14 and ORS 197.298 – still requires a demonstrated need for land to be included within as UGB, that land needs be accommodated efficiently, and a showing that the need cannot be accommodated on higher-priority land.

At its heart, our objection contends that the city “unnecessarily included large areas that cannot reasonably accommodate any identified needs.”

The department has an affirmative responsibility to identify the specific demonstrated need it believes will be satisfied by inclusion of these 128 acres of unbuildable land, including both the extra land proposed for industrial designation and the extra land proposed for Public/Quasi-Public designation.

Thank you for consideration of our comments.
Dear Larry,

Attached are joint exceptions from 1000 Friends of Oregon and Friends of Yamhill County, regarding the Director's Report on the Newberg UGB Amendment.

Please let me know right away if you are unable to open the attachment.

Mia

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