February 3, 2014

Oregon Department of Land Conservation and Development
Attn: Larry French, Periodic Review Specialist
Via e-mail: larry.french@state.or.us

Re: Newberg South Industrial Urban Growth Boundary Amendment
    Exceptions to DLCD Report dated 1/23/2014

Please accept the attached exceptions to the DLCD Report dated 1/23/2014 on the Newberg South Industrial UGB amendment. We request that the Department revise the report to reflect these exceptions and in so doing, recommend that the Commission approve the submittal.

If you have any questions; please contact me at 503-538-9421 or barton.brierley@newbergoregon.gov.

Sincerely,

Barton Brierley, AICP
Planning & Building Director

Enc
Cc: Tim Ramis, Truman Stone, Ken Friday, objectors via e-mail
City of Newberg Exceptions to DLCD Report Dated 1/23/2014

Newberg South Industrial UGB Amendment and Economic Opportunities Analysis

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Summary
We appreciate the Department's review of the submittal. In many areas we agree with the Department's analysis. In one particular area, the Department applied the wrong standard looking for evidence to support the submittal. Unfortunately, making this one error meant the Department overlooked substantial evidence in the record that showed the correct standard was met. Once the Department correct this one fundamental error, we believe they will find that the balance of the submittal meets the applicable standards and should be approved.

There are seven specific areas where the staff recommendation was in error.

1. Newberg correctly showed with substantial evidence in the whole record that each site suitability characteristic is both (1) typical of the industrial or employment use and (2) has some meaningful connection with the operation of the industrial or employment use. The Department used the wrong test when evaluating whether the adopted site suitability characteristics have "some meaningful connection with the operation of the industrial or employment use." The Department used the "indispensability test" that the Court of Appeals already rejected, rather than the "pragmatic approach" it endorsed. Because of this, the Department overlooked the evidence showing the site characteristics have a "meaningful connection with the operation of the industrial or employment use."

2. Newberg correctly assigned a portion of future industrial employment to fully built land.

3. Newberg correctly determined that the site uphill from the Allison Inn Resort (Site VI) cannot reasonably accommodate industrial needs because such a redesignation would work against the County's and City's economic goals, and the site does not meet the industrial site suitability characteristics.

4. Newberg correctly excluded Site 12, South Springbrook Road, because the site fails to meet the industrial site suitability characteristics.

5. Newberg correctly excluded Site 9, Dayton Avenue North, because the site does not have suitable truck access to a highway or arterial. Newberg correctly excluded Site 8, Fox Farm Road, because the site is not adjacent to the UGB and therefore is not a priority for inclusion in the UGB.

6. Newberg correctly considered the occupied storage yard at the Waste Management site as being an active and continuing industrial use rather than being a vacant or redevelopment site.

7. Newberg correctly considered and balance the Goal 14 location factors. In particular, there is substantial evidence in the record to show that it correctly considered Location Factor 4 in the analysis.

Because of these, we ask that the Commission reject the objections and approve the submittal.
Background
Newberg's adopted amendment includes an update to its Economic Opportunities Analysis, and amendment to its urban growth boundary to accommodate a portion of the unmet land needs described in the EOA. The UGB amendment is specifically to address needs for industrial park sites to accommodate a specific list of targeted industrial uses.

Commission Standard of Review
The Commission reviews the submittal for compliance with the applicable goals and administrative rules. OAR 660-025-0160(2)(c); OAR 660-025-0175(1)(b). Further, as described above, the Commission reviews these submittals in the manner provided for periodic review. ORS 197.626(1)(b). Additionally, review in the manner of periodic review is subject to ORS 197.633(3):

"The commission's standard of review:

(a) For evidentiary issues, is whether there is substantial evidence in the record as a whole to support the local government's decision.

(b) For procedural issues, is whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.

(c) For issues concerning compliance with applicable laws, is whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The commission shall defer to a local government's interpretation of the comprehensive plan or land use regulations in the manner provided in ORS 197.829. For purposes of this paragraph, 'complies' has the meaning given to the term 'compliance' in the phrase 'compliance with the goals' in ORS 197.747."1

On review, the Commission considers whether the submittal is consistent with the applicable goals and administrative rules and is supported by substantial evidence. OAR 660-025-0160(2)(a) and (c). The UGB submittal is a legislative decision. Home Builders Ass'n of Metropolitan Portland v. Metro, 184 Or App 633, 57 P3d 204 (2002). The Goal 2 requirement for an adequate factual base requires that a legislative land use decision be supported by substantial evidence. DLCD v. Douglas County, 37 Or LUBA 129, 132 (1999). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. Dodd v. Hood River County, 317 Or 172, 179, 855 P2d 608 (1993). Where the evidence in the record is conflicting, if a reasonable person could reach the decision the city and county made in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App 258, 890 P2d 455 (1995). Because the submittal embodies both basic findings of fact and inferences drawn from those facts, substantial evidence review involves two related
inquiries: "(1) whether the basic fact or facts are supported by substantial evidence, and (2) whether there is a basis in reason connecting the inference to the facts from which it is derived." City of Roseburg v. Roseburg City Firefighters, 292 Or 266, 271, 639 P2d 90 (1981). Where substantial evidence in the record supports the city and county's adopted findings concerning compliance with the Goals and the Commission's administrative rules, the Commission nevertheless must determine whether the findings lead to a correct conclusion under the Goals and rules. Oregonians in Action v. LCDC, 121 Or App 497, 504, 854 P2d 1010 (1993).

There is no statute, statewide planning goal or administrative rule that generally requires that legislative land use decisions be supported by findings. Port of St. Helens v. City of Scappoose, 58 Or LUBA 122, 132 (2008). However, there are instances where the applicable statutes, rules or ordinances require findings to show compliance with applicable criteria. In addition, where a statute, rule or ordinance requires a local government to consider certain things in making a decision, or to base its decision on an analysis, "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." Citizens Against Irresponsible Growth v. Metro, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). Such findings serve the additional purpose of assuring that the Commission does not substitute its judgment for that of the local government. Id.; Naumes Properties, LLC v. City of Central Point, 46 Or LUBA 304, 314 (2004).

In addition ORS 197.712 directs the Commission to apply and interpret existing goals and rules in such a way that comprehensive plans will provide an adequate supply of sites of suitable sizes, types, locations, and service levels for industrial uses consistent local plan policies.

ORS 197.712 Commission duties

(1) In addition to the findings and policies set forth in ORS 197.005, 197.010 and 215.243, the Legislative Assembly finds and declares that, in carrying out statewide comprehensive land use planning, the provision of adequate opportunities for a variety of economic activities throughout the state is vital to the health, welfare and prosperity of all the people of the state.

(2) By the adoption of new goals or rules, or the application, interpretation or amendment of existing goals or rules, the Land Conservation and Development Commission shall implement all of the following:

* * *

(c) Comprehensive plans and land use regulations shall provide for at least an adequate supply of sites of suitable sizes, types, locations and service levels for industrial and commercial uses consistent with plan policies.

(d) Comprehensive plans and land use regulations shall provide for compatible uses on or near sites zoned for specific industrial and commercial uses. (Emphasis added)
Exceptions to Department Report Section V: Department Analysis Regarding Site Characteristics

Explanation of Site Characteristics

Oregon's Statewide Planning Goal 9, Economic Development, is "[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." That goal directs local government to:

"3. Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies;

4. Limit uses on or near sites zoned for specific industrial and commercial uses to those which are compatible with proposed uses."

According to OAR 660 Division 9, local governments are to prepare economic opportunities analyses (EOAs) as part of their comprehensive land use plans. As part of that analysis, local governments are supposed to identify the type of sites and the characteristics of those sites that would be typical of expected uses. OAR 660-009-0015(2) states:

"(2) Identification of Required Site Types. The economic opportunities analysis must identify the number of sites by type reasonably expected to be needed to accommodate the expected employment growth based on the site characteristics typical of expected uses. Cities and counties are encouraged to examine existing firms in the planning area to identify the types of sites that may be needed for expansion. Industrial or other employment uses with compatible site characteristics may be grouped together into common site categories." (emphasis added)

OAR 660-009-0005(11) defines "site characteristics" as follows:

"'Site Characteristics' means the attributes of a site necessary for a particular industrial or other employment use to operate. Site characteristics include, but are not limited to, a minimum acreage or site configuration including shape and topography, visibility, specific types or levels of public facilities, services or energy infrastructure, or proximity to a particular transportation or freight facility such as rail, marine ports and airports, multimodal freight or transshipment facilities, and major transportation routes."

In addition, the Oregon Land Use Board of Appeals has ruled:

"If the words 'attributes of a site necessary for a particular industrial or other employment use to operate,' in the definition of 'site characteristics' are viewed in context with the language of 660-009-0015(2), we believe the site characteristics are properly viewed as attributes that are (1) typical of the industrial or employment use and
(2) have some meaningful connection with the operation of the industrial or employment use.” (Friends of Yamhill County v. City of Newberg, Or LUBA (August, 2010)).

The Court of Appeals held on appeal:

“In that statutory and regulatory context, we agree with LUBA that ‘site characteristics’ need not be ‘indispensable’ to a particular use in order to be ‘necessary for a particular industrial or other employment use to operate.’ The intent of Division 9 is to ensure that there is an ‘adequate supply of land for economic development and employment growth in Oregon,’ OAR 660-009-0000, which is vital to the health, welfare, and prosperity of the state. ... That overriding intent to allow and plan for anticipated economic growth – in part, through the identification of ‘site characteristics’ that make the land ‘suitable’ to meet the needs of anticipated growth – suggests something other than petitioners’ strict ‘indispensability’ test that would take into consideration only those ‘site characteristics’ without which particular industry and employment uses could not operate. Rather, the planning scheme (based on projections and economic trends) suggests, as LUBA adopted, a more pragmatic approach toward accommodating economic growth: 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.” (Friends of Yamhill County v. City of Newberg, Or App (February 16, 2011)).

They further held:

As noted above, LUBA articulated the relevant "site characteristic" test as involving two prongs: (1) that the attribute be "typical of the industrial or employment use" and (2) that it have "some meaningful connection with the operation of the industrial or employment use." (Friends of Yamhill County v. City of Newberg, Or App (February 16, 2011)).

Thus, in order to achieve the legislature’s directives and the statewide planning goals to “Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies,” cities must identify site characteristics of these uses. Each site characteristic must meet the “pragmatic approach” two prong test (1) that the attribute be "typical of the industrial or employment use" and (2) that it have "some meaningful connection with the operation of the industrial or employment use."

Meaning of “Meaningful Connection”

Summary: The Department’s report demonstrated an understanding of the first prong of the “pragmatic approach”: what is “typical.” The Department clearly struggled with the second prong: what it means to “have some meaningful connection with the operation of the industrial or employment use.” The report doesn’t contain an explanation of what the Department thinks constitutes a “meaningful connection.” It does dismiss all evidence that attempts to show a “meaningful
connection.” The report rejects all evidence that shows how particular characteristics have meaningful benefits to industrial users with generalized statements that none of those meaningful benefits address operational needs of those users. It is apparent that the Department used the same “indispensability test” that the Court already rejected when evaluating site characteristics, rather than the “pragmatic approach” the court affirmed.

We ask that the Department revise its recommendation prior to the hearing and apply the correct test when considering each site characteristic. In any case, it is ultimately the Commission’s duty to verify that there is substantial evidence in the record to show that each site characteristic has a “meaningful connection” to the employment use using the Court’s approved approach. Newberg demonstrates that there is substantial evidence that it does.

Discussion: As noted earlier, the “meaningful connection” test was established by LUBA and affirmed by the Court of Appeals. The test was made to reconcile what otherwise would be a conflict between the Goal 9 objective of promoting economic growth and an overly restrictive interpretation of what is “necessary” that would seem to restrict that growth.

To gain a better understanding of what the Court of Appeals intended, one should look at the ruling itself.

The core issue is that case was understanding the definition of “site characteristics” in OAR 660-009-0005(11).

"Site Characteristics" means the attributes of a site necessary for a particular industrial or other employment use to operate. Site characteristics include, but are not limited to, a minimum acreage or site configuration including shape and topography, visibility, specific types or levels of public facilities, services or energy infrastructure, or proximity to a particular transportation or freight facility such as rail, marine ports and airports, multimodal freight or transshipment facilities, and major transportation routes. (Emphasis added).

LUBA and the Court of Appeals noted what seemed to be a contradiction in the definition above. On the one hand, site characteristics must be “necessary” for the operation of the employment use, suggesting some level of indispensability. On the other hand “shape” and “visibility” seem to be characteristics that are beneficial but not necessarily indispensable. LUBA found:

Applying [the ordinary methodology for interpreting administrative rules] here, the text of OAR 660-009-0005(11) itself suggests [the Land Conservation and Development Commission (LCDC)] did not intend that a site characteristic must be an attribute that cannot be done without or an attribute that must be had. OAR 660-009-0005(11) includes a non-exclusive list of examples. Given a properly motivated developer, it is hard to see how a specific site "shape" or "visibility" could ever be an attribute that could not be done without. Friends of Yamhill County v. City of Newberg, Or App (February 16,
2011) quoting Friends of Yamhill County v. City of Newberg, Or LUBA (August, 2010)). (Bracketed material in Court of Appeals)

The Court of Appeals gave a lengthy discussion about what the word “necessary” means.

Although "necessary" is commonly used to denote something "indispensable," the word has long proved more elastic in legal parlance. Nearly a century ago, in State v. Young, 74 Or 399, 406, 145 P 647 (1915), the Oregon Supreme Court observed:

"The word 'necessary' must be construed in the connection in which it is used. It is a word susceptible of various meanings. It may import absolute physical necessity, or that which is only convenient or useful or essential: 5 Words and Phrases, p. 4705. The courts have many times construed the word 'necessary,' and it has almost universally been held to mean needful or convenient; especially is this the case where the word is used in conjunction with other and stronger terms."

Little has changed since Young to make the term "necessary," so far as it appears in statutes or administrative rules, any less ambiguous when read in isolation. As Black's Law Dictionary 1029 (6th ed 1990) explains,

"This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper, and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object sought."

***

In other words, context is critical in determining whether the word "necessary" means "indispensable" (as petitioners contend) or something less stringent, such as "reasonably necessary" or "useful" or "convenient." Thus, we turn to the relevant context in which the definition of "site characteristics," including the word "necessary," appears.

This discussion led the court to look carefully at the context in which “necessary” appears. The Court took careful note that this rule is part of Goal 9: Economic Development. "The intent of Division 9 is to ensure that there is an ‘adequate supply of land for economic development and employment growth in Oregon’. . ." The court understood in context that the objective is to promote economic development, not to thwart or limit it. The Court continues:

That overriding intent to allow and plan for anticipated economic growth--in part, through the identification of "site characteristics" that make the land "suitable" to meet
the needs of anticipated growth—suggests something other than petitioners' strict "indispensability" test that would take into consideration only those "site characteristics" without which particular industry and employment uses could not operate. Rather, the planning scheme (based on projections and economic trends) suggests, as LUBA adopted, a more pragmatic approach toward accommodating economic growth: 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. In our view, LUBA's formulation of the relevant inquiry adequately captures the concept of reasonable necessity that is embodied in the rule.

***

As noted above, LUBA articulated the relevant "site characteristic" test as involving two prongs: (1) that the attribute be "typical of the industrial or employment use" and (2) that it have "some meaningful connection with the operation of the industrial or employment use."

That is the origin of the "meaningful connection" test. In short, when looking at a site characteristic, one must consider that the purpose of having site characteristics is to promote economic growth. Characteristics that have a "meaningful connection" are those that would promote this economic growth, not ones that "cannot be done without."

Given this discussion, consider what evidence a city might use to show that "visibility" is a site characteristic with a meaningful connection to an employment use, such as for a shopping center. One would expect a discussion about how such visibility would be a meaningful benefit to the shopping center because it would bring more customers to the site. One certainly would not expect a discussion about how visibility is essential or indispensible to the shopping center's operational needs. They would not have to attempt to prove that it would be impossible for a shopping center to operate without such visibility.

Newberg's findings do show how each site characteristic has a meaningful connection to the industrial use by describing the operations of the use and showing how the site characteristics are a substantial benefit to those operations. For example, Newberg's findings go to great length to talk about industrial and residential compatibility. Evidence shows that typical industrial uses operate machinery that makes noise. Being separated from residential uses has a meaningful connection to the industrial use because they can operate noisy machinery without being subjected to nuisance complaints and potential nuisance restrictions because of the neighbors. The findings list a number of other operational characteristics of industrial uses: use of hazardous materials, night shifts, outdoor storage of materials, use of machinery that causes vibrations, and so forth. All of these operations can be severely hampered if the site is not separated from residential areas and neighbors file nuisance complaints or the site is subjected to design conditions that prohibit these uses. Thus, findings show that residential separation has a meaningful connection to the industrial use.
Some “meaningful connections” are more obvious than others. For example, some industries use forklifts to move heavy materials around a site. Even modest slopes make forklift operation difficult, dangerous, or impossible. Therefore, having a level site has an obvious meaningful connection to the operation of that industry. On the other hand, many Newberg shops make specific parts for other local businesses. A day’s work might involve fashioning a prototype part, walking across the street to the client business to test the part for fit, going back to the shop to make some adjustments, and repeating the process a half dozen times until the appropriate fit is achieved. Having those two shops in close proximity therefore does have a “meaningful connection,” even though one could argue the proximity is not “indispensable.”

While the Department’s report doesn’t explain what it considers a “meaningful connection,” it does dismiss all evidence that attempts to show one. The best clue as to the Department’s thinking comes on DLCD Report 29: “The findings state that industrial district size is beneficial in several respects, but provide only general connections to operational needs, so the department cannot find that the city has demonstrated a meaningful connection between industrial district size and the operational needs of target uses.” [Italics in original, bold added] By emphasizing “needs,” in this context, it is apparent that the Department is thinking that “needs” means “essential” or “indispensable” in the same way the Court rejected.

Therefore, the Department applied the wrong test when evaluating the site characteristics. They did not look at the evidence to see if Newberg showed a “meaningful connection with the operation of the industrial or employment use;” they looked to see if the evidence proved the characteristic was “indispensable” to some operational “need.” Their recommendations that the Commission reject a number of site suitability characteristics are fundamentally flawed.

Unfortunately this one fundamental error led the Department to make a number of other errant recommendations in the report. It is our hope that the Department will correct their recommendation by the time of the hearing, and we believe that by so doing they will recommend approval of the submittal. Nevertheless, the task of determining whether there is substantial evidence in the whole record to show that each adopted site characteristic has a “meaningful connection with the operation of the industrial or employment use” falls on the Commission. The information that follows in the exception letter details the evidence in the record that supports Newberg’s conclusion that the selected site characteristics meet the “meaningful connection” test. Therefore, the Commission may approve the submittal and need not remand for any additional findings.

Applicability of site characteristics to groups of parcels vs. individual parcels

Summary: When creating and applying site characteristics, the “site” may be one parcel or a group of parcels containing uses with compatible site characteristics.

Discussion: OAR 660-009-0005 (11) says: “‘Site Characteristics’ means the attributes of a site necessary for a particular industrial or other employment use to operate. . . .” (emphasis added). The Department’s report discusses whether a “particular” use means a specific individual type of use, such as “medical device manufacturing,” or a broader category such as “manufacturing.” The department
settles on a “group of uses with similar operational needs” as the appropriate level to analyze, such as “high-tech manufacturing.” We generally agree that that is the appropriate level of aggregation. This is the level Newberg employed when establishing site characteristics. See Table 12-24 on Record 5882 to 5888. We do note that the analysis is not so much “groups of uses with similar operational needs,” but rather exactly what the rule says, “Industrial or other employment uses with compatible site characteristics...”¹ That is, we agree that the analysis should consider the operational characteristics of “high-tech manufacturing” and “warehousing” separately. However, if these two uses have compatible site suitability characteristics, they can be grouped together into one site category.

A related question is whether those site characteristics should be applied to each individual parcel in a site, or where a site consists of multiple parcels with separate uses, such as in an industrial park or specific industrial district, to the site as whole. The context of the Goal 9 Rule suggests that it may be one, the other, or both. In considering this question, it is instructive to look at the definition of “industrial use” given in 660-009-0005(3):

(3) “Industrial Use” means employment activities generating income from the production, handling or distribution of goods. Industrial uses include, but are not limited to: manufacturing; assembly; fabrication; processing; storage; logistics; warehousing; importation; distribution and transshipment; and research and development. Industrial uses may have unique land, infrastructure, energy, and transportation requirements. Industrial uses may have external impacts on surrounding uses and may cluster in traditional or new industrial areas where they are segregated from other non-industrial activities. (Emphasis added).

That the very definition of “industrial use” envisions a “cluster” of uses is a very strong suggestion of a legislative intent to consider industrial uses alone or in groups (clusters).

In addition, the definition of “site characteristics” quote earlier says, “... Site characteristics include, but are not limited to, a minimum acreage or site configuration including shape and topography, ...” (Emphasis added). “Site configuration” is not simply the shape of one parcel, but also the arrangement parcels in relation to one another. The dictionary definition of “configuration” is the “relative arrangement of parts or elements: as (1) : shape (2) : contour of land (3) : functional arrangement.” Merriam-Webster Online Dictionary www.merriam-webster.com accessed 1/27/2014. It is informative that the definition of “site configuration” specifically states the first two of these elements: “shape” (shape), and “topography” (contour of land). The third, “arrangement of parcels” (functional arrangement), follows naturally. Thus one would expect that a site characteristic might be “a minimum acreage” of individual parcels, or the minimum total acreage of a group of parcels.

¹ OAR 660-009-0015 (2) reads: Identification of Required Site Types. The economic opportunities analysis must identify the number of sites by type reasonably expected to be needed to accommodate the expected employment growth based on the site characteristics typical of expected uses. Cities and counties are encouraged to examine existing firms in the planning area to identify the types of sites that may be needed for expansion. Industrial or other employment uses with compatible site characteristics may be grouped together into common site categories. (Emphasis added).
This is very much analogous to identifying site characteristics for a shopping center. A local plan may identify a need for a shopping center, and one would expect it to identify site characteristics based on typical characteristics of the comparable shopping centers, such as a minimum site size of 10, 20, or 30 acres and access to a major road. One would not expect to look solely at the characteristics of each business individually within that shopping center. A shopping center may have a combination of large and small businesses that individually occupy from over 10-acres to as little as a ¼ acre each. In theory a city could parse those individual stores out to separate scattered lots all over the city, dispense with the need to find a single 10, 20, or 30 acre site, and still meet its total commercial acreage need. But there are reasons ("meaningful connections") that many some stores locate in shopping centers as opposed scattered individual sites, such as attracting regional customers. The whole is greater than the sum of the parts. Plans that rely solely on scattered sites would not meet the Goal 9 requirement to provide "at least an adequate supply of sites of suitable sizes, *types, locations*, and service levels for a variety of industrial and commercial uses consistent with plan policies." (Emphasis added)

The same is true of industrial park sites. There are operational reasons why industrial uses "cluster in traditional or new industrial areas" that cannot be satisfied on scattered individual sites. Therefore, a city is obligated by Goal 9 to look the characteristics of the whole site (the group of parcels or the industrial park), and not simply each parcel individually.

In this case, the plan identifies a particular need for "*industrial park sites,*" not simply scattered individual sites. Record 5892. It also identified a list of targeted industrial uses, all with compatible site characteristics, that it is seeking to bring to those parks. Record 5734. Therefore, it is only proper that the analysis look at site characteristics for industrial parks rather than separately for each individual business that might locate within that park.

**Distinction of Site Characteristics and Goal 14 Location Factors**

Site characteristics and the Goal 14 Location factors are distinct and separate standards relating to UGB amendments. Site characteristics are used to determine need. The Goal 14 Location Factors are used to determine which land of a particular priority class can best meet that need by weighing certain factors.

An objector raised concerns that some site characteristics cover the same topics as Goal 14 Location Factors. The Department’s analysis of this objection is: "The department concludes that a valid site characteristic may be used by a city to exclude land from application of the priorities in *ORS 197.298* and consideration of the Goal 14 location factors even if that site characteristic is similar to a location factor."

We agree with the Department. For instance, Newberg's adopted site suitability characteristics exclude sites that abut residential neighborhoods on more than 25 percent of the site perimeter. This characteristic is not about the impact the industrial use has on nearby residences, it is about the impact nearby residences have on the industrial use! If an industry cannot have a night shift, store materials outdoors, operate noisy equipment, or use hazardous materials because of nuisance complaints from neighbors, their operations will be severely hampered. That is not to say that abutting on 25 percent of the perimeter is a good thing; ideally there would be a zero percent perimeter. During the later Goal 14
Factor 3 analysis, one would likely rank a site with zero percent residential boundary higher than one with 25 percent boundary as having fewer social impacts. Therefore, touching on the same topic in both analyses is permissible, and discussing one topic at one stage does not usurp the analysis taken at the later stage.

Exceptions to Report VI.A: Department response to objections from 1000 Friends of Oregon/Friends of Yamhill County

1000 Friends of Oregon and Friends of Yamhill County (hereinafter “Friends”) submitted a lengthy objection to the submittal. The Department’s report recommended that the Commission reject many of their objections, and we agree with the Department on these points. There are other parts of the objection where we believe the department either misconstrued the law or overlooked substantial evidence in the record that supports the submittal. We ask that the Commission also reject the remainder of Friends objections.

Exception to Report VI.A.1 and 2, Site characteristics and relation to Goal 14 Location Factors

Previous in this exception letter we discuss both the proper application of site characteristics, and the relation between the site characteristics and the Goal 14 Location Factors. We do not repeat these explanations here. In addition, some of the objections relate to specific characteristics, such as the residential compatibility characteristic and the district size characteristic. We will discuss those individual characteristics in the following sections.

Exception to Report VI.A.3: Response to Friends objection 1B: Industrial District Size

As noted earlier, the Department’s recommendation on this characteristic is erroneously based on the “strict indispensability” test the Court rejected.

“The findings state that industrial district size is beneficial in several respects, but provide only general connections to operational needs, so the department cannot find that the city has demonstrated a meaningful connection between industrial district size and the operational needs of target uses.” DLCD Report 29: [Italics in original, bold added] By emphasizing “needs,” in this context, it is apparent that the Department is thinking that “needs” means “essential” or “indispensable” in the same way the Court rejected.

There is substantial evidence in the whole record that the industrial district size characteristic is both “typical” and “meaningful.” We show the applicable findings in the following section. We ask the department correct the report and show that the industrial district size characteristic meets the “meaningful connection” test.
Exception to Report VI.A.3: Response to Friends objection 1B: Industrial/Commercial Proximity

Summary: There is substantial evidence in the record as a whole to demonstrate the industrial/commercial proximity criterion is both (1) typical and (2) has a meaningful relationship with operation of industrial uses. The Commission should reject the objection and approve the submittal as containing the characteristic and everywhere it is applied.

Discussion: The Department’s report states, “The record includes an explanation for the [industrial/commercial] proximity site characteristics that is too lengthy to quote here.” DLCD Report 26. The Department follow this up with an analysis that, “the findings do not demonstrate there is a meaningful connection between proximity to other employment uses and the operation of the target industries.” In fact, that “lengthy” explanation contains a targeted list showing why the characteristic has a meaningful relationship with the industrial use. We do quote that summary below:

A common form of industrial development is to cluster industrial uses in industrial districts or industrial parks. There are many reasons for this, including:

- The district can have adequately sized power and other utilities to serve industrial uses.
- The district can have adequately sized roads for heavy truck traffic.
- There are fewer issues of compatibility when industrial uses are located adjacent to each other rather than next to residential type uses.
- There are economies of scale when many industrial uses can be served by the same suppliers or delivery systems.
- Industrial uses can create synergy with each other. For example, one industry’s byproducts can be used by another industry as resources.
- Businesses can share employee amenities such as parks, fitness centers, lunch areas, and day care facilities.
- Larger districts provide opportunities for business expansion onto adjoining or nearby sites.

Having clustered uses is a common theme throughout industrial development in most cities. The very definition of “industrial use” in OAR 660-009-005(3) says, “Industrial uses . . . may cluster in traditional or new industrial areas where they are segregated from other non-industrial activities.” The Cottage Grove EOA states that “firms with similar business activities can realize operational savings when they congregate in a single location or region. Clustering can reduce costs by creating economies of scale for suppliers. Firms tend to locate in areas where there is already a presence of other firms.
engaged in similar or related activities.” In addition, the report Methods for Evaluating Commercial and Industrial Land Sufficiency: A Recommendation for Oregon Communities (Otak, Inc & ECONorthwest, 2002) states that “Economists have shown that firms locate in a city because of the presence of factors other than direct factors of production. These indirect factors include agglomerative economies, also known industry clusters, location amenities, and innovative capacity.” Clustering, or industrial districts, are meaningful to the operation of industry because of the shared economies of scale and synergy it can create. (Footnotes omitted). Record 5871.

The Department correctly concludes that industrial/commercial proximity is “typical” of the targeted industrial uses. There is substantial evidence in the record that industrial/commercial proximity has a “meaningful relationship” to that operation. Therefore, the Commission should reject the objection and approve the submittal.

Exception to Report VI.A.4 (and VI.A.2): Response to Friends objection 1C (and 1A): residential proximity

As we explained on page 13, the residential compatibility characteristic is a site suitability characteristics and not Goal 14 location inquiry. These characteristics are not about the social impacts of industrial development on surrounding residential development; they are about the impact residential development has on nearby industrial development! If an industrial development cannot expect to load trucks early in the morning, have a night shift, operate machinery outside, use some hazardous materials, or emit some level of odor because they are limited by complaints and restrictions related to residential neighbors next door, their operations will be severely hampered. In fact, most site selectors will simply choose a different site for their industry. That is why industrial uses are typically located away from residential areas, and why residential separation has a meaningful relationship to the operation of in the industry.

A 25 percent maximum border was established because that is what is “typical.” That is not to say that a 25 percent border is “good.” In fact it would be desirable for there to be a zero percent border. Thus, in the later Goal 14 Location Factor inquiry, one would expect that a site with a zero percent residential border would get some weight over a site with a 25 percent border.

The Department uses the wrong standard when considering this characteristic. Their analysis states, “Wanting to be a good neighbor and not blending well with residential use do not address the operational needs of employment uses.” DLCD Report 24 (emphasis in original). By emphasizing “operational needs” it is clear that they are looking for some indispensable requirement of the industrial use. That is, they were applying the “strict indispensability” test that he court rejected instead of the “pragmatic approach” and “meaningful connection” the court endorsed. They did not find evidence of a “meaningful connection” between residential separation and industrial operations because they were not looking for it. They were looking for reasons industrial uses “cannot do without” residential separation.
In addition, their focus on the phrase that “most industrial businesses want to be good neighbors” ignores all the evidence that shows genuine operational constraints imposed by the adjacency to residential uses. A mountain of evidence exists in the record to show that residential separation has “some meaningful connection with the operation of the industrial or employment use.”

Therefore, the Commission has the duty to determine whether there is substantial evidence shows that residential separation has a meaningful relation to the operation of the industrial uses. We have shown the main findings below. As stated earlier, substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. We believe a reasonable person would conclude that separation of industrial use from residential use does have a meaningful connection with operation of the industrial use.

Cities have to take into account location and compatibility when planning for economic development. At the heart of municipal zoning is an identified need to separate residential and industrial uses. The landmark case of Euclid v. Ambler declared that government has a valid interest in maintaining neighborhood character and regulating where certain land uses should occur. The Oregon Administrative Rule that governs economic development includes a provision that guides cities to manage compatibility of uses:

OAR 660-0090-0025 (6) Compatibility. Cities and counties are strongly encouraged to manage encroachment and intrusion of uses incompatible with industrial and other employment uses. Strategies for managing encroachment and intrusion of incompatible uses include, but are not limited to, transition areas around uses having negative impacts on surrounding areas, design criteria, district designation, and limiting non-essential uses within districts.

Most industrial businesses want to be good neighbors and to be able to fully operate their businesses without constraints imposed by being forced into direct contact with residential neighbors. Other cities have determined that industrial uses need to have other compatible uses nearby as well. An explanation for land use buffers is found in several Economic Opportunities Analysis reports done by ECONorthwest for various cities:

“According to the public officials and developers/brokers ECO interviewed, industrial areas have operational characteristics that do not blend as well with residential land uses as they do with office and mixed-use areas. Generally, as the function of industrial use intensifies (e.g., heavy manufacturing) so too does the importance of buffering to mitigate impacts of noise, odors, traffic, and 24-hour 7-day week operations. Adequate buffers may consist of vegetation, landscaped swales, roadways, and public use parks/recreation areas. Depending upon the industrial use and site topography, site buffers range from approximately 50 to 100 feet. Selected commercial office, retail, lodging and mixed-use (e.g. apartments or office over retail) activities are becoming
acceptable adjacent uses to light industrial areas.” Newberg’s existing industrial users report that it is not prudent to locate industrial development next to residential neighborhoods. One prominent industrial business is currently adjacent to residential development on one side, and says that they have issues with large truck traffic getting mixed in with neighborhood pedestrian, bicycle and vehicle traffic, causing visibility and safety problems. In addition, site noise is undesirable to residential neighbors, whether from the banging and grinding that accompanies manufacturing uses or from onsite loudspeakers used for communication throughout the site. Many industrial uses also have long hours, sometimes even 24 hours a day, compounding noise issues. Other things that can be considered nuisances to residential neighbors are outdoor storage of materials, dust, and vibration; all commonplace things in industrial developments.

Record 5878.

The most common compatibility issues are with residential development adjacent to employment uses. Residences next to employment areas often complain about the noise, smell, vibration, traffic, large trucks, and appearance of adjacent industrial and employment uses. Many industries use hazardous materials. While all industries try to avoid spills, emissions, fires, or other accidents, some inevitably occur. The best way to mitigate the issues is to separate employment and residential uses into separate non-adjacent districts with separate accesses. Where employment and residential uses must be adjacent, the length of the boundary should be minimized. The compatibility characteristics help achieve this.

Where residential and employment districts, particularly industrial districts, must be adjacent, additional steps are needed to achieve compatibility. Where industrial uses have been separated from residential uses by substantial buffers, such as stream corridors, a wooded open space, rail lines, an arterial street or a highway, the uses have generated few complaints or compatibility issues. Experience has shown that compatibility needs more than a simple row of landscaping, trees, and a berm. One industrial user rejected a potential industrial site partly because of complaints from residential neighbors across the street of truck traffic on that collector street, and the potential noise, vibration, and appearance of the industrial facility. This was despite the fact that the industry promised a berm and landscaping at the edge of the site. At another location, a manufacturer received complaints from residents in an adjoining manufactured home park about noise and vibration caused by dumping materials into a dumpster near their homes. In that case, the manufacturer was able to address the concern by relocating the dumpster to the other side of the property. This solution would not have been possible had the manufacturer been adjacent to residential uses on more than one side. In a third instance, a manufacturer going through design review to construct a new facility adjacent to a manufactured dwelling park was asked to remove building openings from the side of the building opposite the residences to reduce exterior building noise. The manufacturer indicated that openings on that side were vital to their
operation, so instead they moved the entire building so that it was well over 100 feet from the residential area. Again, this solution would not have been possible had there also been residences on another side, and had the site not been sufficiently large to accommodate the reconfiguration. These all show why it is very important to limit boundaries between industrial uses and residential areas beyond simple landscape buffers.

Record 5921.

The Department’s Report further criticizes: “Many reported incompatibilities involve the effects of manufacturing while several of the target industries do not include manufacturing.” DLCD Report 25. This ignores the extensive table 5882-5888 that carefully analyzes each of the 15 targeted industries expected to use industrial space, and explains in detail precisely why residential compatibility has a meaningful relationship to that industry’s operation.

There is sufficient evidence in the whole record to show that residential proximity criterion is both (1) typical and (2) meaningful. The Commission should reject the objection and approve the submittal as to residential proximity criterion and its application throughout the findings.

Compatibility with semi-urban residential lots

Summary: Newberg’s residential compatibility characteristic does not apply to adjacency with rural residential zoned lots with over 2.5 acre minimum lot size or development. It does apply to what might be called “semi-urban” lots: those lots with 1 to 2.5 acre minimum lot size or development. This is because Newberg found that the same residential compatibility issues with those semi-urban residential areas as with fully urban residential areas.

Friends object to this based solely on the location of buildings. Their premise is that as long as the building is separated from the industrial use by a specific distance that compatibility issues will disappear. That entirely ignores outdoor uses of residential lots. A family barbeque in the back yard is actually more likely to generate nuisance complaints about a noisy, smelly industrial use next door than cooking in the kitchen.

Discussion: Newberg adopted a lengthy response to this objection. This is quoted below:

Experience has shown that these same issues of compatibility exist with rural residential neighborhoods as well as urban residential neighborhoods. The fact that a house is located outside an urban growth boundary on a couple acre lot does not mean that the residents there aren’t affected by the noise, smell, vibration, traffic, a potential hazards from industrial uses. For example, about seven years ago a commercial area on the east side of Newberg was annexed to the city. Neighbors in an adjacent rural residential neighborhood initially opposed the annexation. A solution acceptable to most was found when the developer agreed to move the commercial area several hundred feet from the rural residential area. An industrial development proposing to locate next to a rural residential area is likely to face the even more compatibility issues, substantially
affecting the operation of the facility. Another example involved an area in Newberg where the transportation plan would have allowed truck traffic from an industrial area to go through a rural residential neighborhood. Through intensive negotiations with the neighborhood, the city actually downgraded the classification of the road and built traffic circles and other features in the road so that truck traffic could not use the road.

Yamhill County has several rural residential districts near Newberg, including an AF-10 district, and VLDR-5, VLDR 2.5, and VLDR-1 districts. The number designation in those districts designates the minimum lot size in acres. While there would be conflicts between industrial uses and residential development in any of these zones, it is likely these conflicts will be modest with the lower density districts (AF-10 and VLDR-5), and substantial in the higher density districts (VLDR-1 and VLDR-2.5). This is because an industrial park or site adjacent to one of the lower density districts may only abut only a handful of such rural residential lots, and the homes on those lots could have the flexibility to locate a large distance from the industrial area. In contrast, development next to the higher density VLDR-2.5 and VLDR-1 districts suffers the double whammy of both having 2-4 times as many neighbors to deal with, and having those neighboring houses 2-4 times as close. Thus, it is important to avoid and limit borders with VLDR-1 and VLDR-2.5 zoned land and land developed to those densities, and to avoid truck traffic through those neighborhoods.

As a point of comparison, much litigation has dealt with the question of what constitutes an “urban” use versus a “rural” use when it comes to residential development outside UGBs. This has led to rules (See OAR 660-660-0040) that essentially deem residential development in exception areas with less than two acre minimum lot sizes to be urban uses, that with minimum lot sizes of 10 acres or more as a rural uses, and those in between (2-10 acres) as needing to undergo further scrutiny to determine whether they are urban or rural. The purpose of this comparison is not to further debate on what is urban vs. rural, it is simply to compare that those areas with smaller minimum lot sizes (VLDR-2.5 and VLDR-1) are more urban in character and therefore likely to have conflict with adjacent industrial uses, while those in more sparsely populated VLDR-5 and AF-10 areas are less likely to have such conflicts.

To be clear, the Newberg industrial site suitability characteristics do not preclude consideration of locating industrial districts next to rural residential uses. However, areas surrounded by or with substantial borders with the rural residential uses are likely to preclude effective industrial operations. Record 5922-5923.

The Department concludes, “an assessment of the land use pattern, rather than the current zoning designation, is appropriate.” DLCD Report 29. There are three main issues with this approach. First, as noted the conflict in not simply with the residential building, it is with the residential use, which includes the outdoor use of the yards. Second, the zoning does determine what the future land use pattern is. Just because an area zoned for 1-acre lots is not so subdivided today does not mean it won’t be in the
future. Third, the current land use pattern can change. Just because someone doesn't have a pool in the back yard now doesn't mean they won't put one in later. Thus, Newberg appropriately used the existing zoning.

There is clearly some judgment as to what level of residential density would merit application of the residential separation criterion. It is not the Commission's role to make that judgment — it is the local government's. Newberg has shown with substantial evidence in the whole record and with sound judgment based on state law that the residential compatibility standard should be applied to adjacency to semi-urban residential uses. The Commission should reject the objection and approve the submittal on this criterion and how it is applied.

**Exception to Report VI.A.5: Response to Friends objections 1D: Truck traffic through residential areas**

**Summary:** Newberg has shown with substantial evidence in the whole record that avoiding truck traffic through residential areas is (1) typical of expected uses, and (2) has a meaningful connection with operation of industrial uses. The evidence is cited in the previous section.

The Department's analysis again uses the wrong test to analyze this criterion. We ask that the Commission reject the objection and approve the submittal.

**Exception to Report VI.A.6: (Response to Friends Objection 1E) Distance to major road**

**Summary:** The proper inquiry is whether there is substantial evidence in the record to support the conclusion that parcels or contiguous groups of parcels (1) typically have suitable truck access to an arterial or state highway within ¼ mile and that (2) having such suitable access has a meaningful relation to the operation of the industrial use. There is substantial evidence in the record to support both conclusions. The Commission should reject the objection and approve the submittal.

**Discussion:** This is a site characteristic that is directly authorized under OAR 660-009-0005 (11)

(11) "Site Characteristics" means the attributes of a site necessary for a particular industrial or other employment use to operate. Site characteristics include, but are not limited to, a minimum acreage or site configuration including shape and topography, visibility, specific types or levels of public facilities, services or energy infrastructure, or proximity to a particular transportation or freight facility such as rail, marine ports and airports, multimodal freight or transshipment facilities, and major transportation routes. [emphasis added]

Detailed findings in relation to this are found at Record 5876-5877 and Record 5974.

All of the industrial location site literature references how important having good highway access is for industry. Shipping is an integral part of most industrial businesses. Most shipping is done by the highway system, although some is still done by rail and
port. As stated in the Business and Industrial Park Development Handbook, “One of the most important location considerations for a business park or a large, single industrial site is the array of transportation services available at the site. Proximity to airports increasingly is sought by businesses, and although rail is no longer considered essential, some manufacturing and distribution tenants still require it. The major difference between earlier planned industrial districts and parks, and modern business parks has been the new freedom in choice of locations made possible by the “clean” uses now found in parks and by improved roads, especially the freeway network and the large trucking industry.”

According to the City of Hillsboro Economic Opportunities Analysis Industrial Development Pattern Type Matrix, for medium industrial users (25k-100k sq ft built space; and/or 4 to 25 acres of outdoor inventory/production areas):

“Transportation system that provides convenient connections to state highways is very important... Rail access is important to many uses and can be essential for some uses... Convenient access to well trained and qualified workforce is essential and industry clustering for access to skilled labor force is common...”

It is typical for industries to need to be as close as possible to a major road for easy access; every site in the nearby communities studied was within ¼ mile. Adequate access has a meaningful connection to industry because most businesses rely on being able to receive supplies and ship goods readily and easily. It is harmful to the business, to surrounding uses, and to the safety of pedestrian, bicycle, and neighborhood traffic to have large trucks regularly traveling through neighborhoods that are not built to handle large truck traffic. Therefore, Newberg has established the following industrial site suitability characteristic:

Sites that have suitable truck access to a state highway or arterial street within 1/4 mile.

The importance of this characteristic to each targeted industrial use is shown in Table 12-24 on page 67.

Table 12-24 then reviews each of the 18 targeted industries and describes the operational needs of that industry and how close access relates to those needs. (Record 5882 to 5888)

The Department’s analysis is that this was done “without any apparent analysis of the operational needs of those industries.” DLCD Report 31 (Emphasis added) Again, the department was not looking for “some meaningful connection with the operation of the industrial or employment use,” they were looking for evidence that industries “cannot do without” close access.

Arterials and state highways were chosen rather than collectors because that is what is “typical.” The fact that the studies did not show any sites which had close access to a collector street but not an arterial or state highway emphasizes the importance of being close arterials or highways.
There is substantial evidence in the whole record that close access has a meaningful relation to the targeted industries. The Commission should reject the objection and approve the submittal.

Exception to Report VI.A.7: Response Friends Objection 1F: Predominant Slopes

Another of Newberg's site suitability characteristics is to exclude sites with slopes of 10 percent or greater, and sites that are not predominantly less than 5 percent slope within buildable areas. Newberg has shown with substantial evidence in the whole record that this characteristic is both typical of targeted industrial uses, and has a meaningful connection to the operation of those uses.

The record is clear that having predominantly less than 5 percent slope is typical. 100 percent of industrial study areas in the nearby cities are predominantly less than 5 percent slope. See Record 5978. The objectors don't offer evidence to support any different conclusion.

The site characteristic recognizes that a site can have areas of varying slopes. As the evidence shows, even a three percent slope is too steep for many industrial production buildings and yards. An industrial developer considering an area with varying slopes might consider putting the parking lots or an office on a portion of the site with 5-10 percent slopes, and put the production and warehouse facilities on the portion of the site that is flat. This is not possible if the entire site is 5-10 percent slope. They might do some site grading to create a flat spot on the site, but this becomes very problematic or impossible where the entire site is 5-10 percent slope. The same can be said of industrial park sites: some parts of a park might be used for uses that can tolerate over 5 percent slopes, such as for parking lots, while others still demand more level sites. It is relevant that no industrial park in the multi-city study area had a predominant slope of over 5 percent.

In their critique, Friends confuse "buildable" and "suitable." Rules are clear that "buildable" and "suitable" are separate considerations. The definition of "suitable" under OAR 660-009-0005 (12) is:

(12) "Suitable" means serviceable land designated for industrial or other employment use that provides, or can be expected to provide the appropriate site characteristics for the proposed use.

The fact that a site may be "buildable" does not make that site "suitable." The fact that part of a site might be buildable with a 5-10 percent slope doesn't automatically mean that the whole site is "suitable" even if it lacks areas with under 5 percent slope. This is the "strict indispensability" test in another form that the Courts already have rejected.

Unfortunately the Department's report makes the same mistake. They confuse "buildable" and "suitable" in such a way to try to show that "predominantly less than 5 percent slope" is not a feature that "cannot be done without." This is another example that they applied the "strict indispensability" test rather than the "meaningful connection" test when considering site characteristics.
Given that, this also is an opportunity for the Commission to examine the evidence and see if it shows substantial evidence that the adopted slope characteristic is both “typical” and “has a meaningful relationship.” The information is reproduced below:

**Topography**

Topography is a critical factor in industry site location. Industrial uses require level sites for a number of reasons, including:

Many industries move supplies, equipment, and product from one part of the site to another. This movement becomes very difficult if the grade changes requiring steps or ramps within the site.

Trucks, forklifts, and other equipment are limited as to the grade at which they can safely operate.

Most buildings and structures require level floors. If a site is sloped, the site usually needs graded to be level. Grading sites can weaken the structural stability of the soil, or require retaining walls. Many industrial uses include heavy equipment which demands stable footings. Grading and retaining walls can weaken this stability.

According to Bill Grunkmeyer, author of the Ohio State University Extension fact sheet on the characteristics of an industrial site:

“Topography of the site is also an important factor. Companies usually seek fairly level sites with adequate drainage to avoid standing water. Depending on a firm's desire for aesthetic considerations, a gently sloping site may be attractive. Once again, in considering topography a firm is trying to decrease the cost of site work. If a community is located in a hilly region it is still possible to find an acceptable site by laying out a plan that locates the firm on a plateau or terraced section of a hill. This could be very attractive, particularly if the community takes into consideration easy access and high visibility potentials.”

In the book Planning the Built Environment, author Larz T. Anderson discusses the effect of slope on the feasibility of industrial land uses. The following is a summary of his findings:

1 to 3% slope: May accommodate moderate and small plans without extensive linear production; trucking terminals; and warehouses.

3 to 5% slope: Intensive, small-scale industry with minimum trucking needs (truck access is difficult and perhaps impossible with icing).

5 to 10% slope: Intensive, small-scale industry on slopes up to 7% (truck access becomes difficult and expensive when the slope exceeds 7%).
10 to 15% slope: This slope range is economically impractical for industrial development.

The Department of Land Conservation Goal 9 Guidebook includes a definition of constrained land that says that over 10% slope for industrial use is a physical constraint.

One Newberg business stated that they would need a level site with stable soil to facilitate a level concrete floor around 30,000 square feet in size. Two other Newberg examples illustrate the necessity of level sites: Action Equipment's new building, and A-dec's expansion on their existing site. Action Equipment recently located a new facility on level industrial land on Hayes Street. In their site search, they specified a need for a level site. The company manufactures large, long conveyor equipment. The building design had to focus on being large and level in order to accommodate set up, processing, and moving of the equipment, which in some cases is over a hundred feet long. In the second example, even though you would think the A-dec site is level just from looking at it, the topography caused problems when they needed to expand. A-dec had two buildings close together, and had to build a complex ramp to run forklifts from one building to another in order to make the operation work.

All of the 25 local and regional industrial districts studied were predominantly less than 5% slope, and all had our targeted industries represented in them. Therefore, a slope of less than 5% is typical for industrial uses, and slopes over 10% are not considered buildable industrial land.

Friends also object to the application of this characteristic. It is important to note that the findings don't give a strict "meet" or "not meet" for each characteristic, they also include a "could meet" consideration:

⊙ means site meets the criteria in the column.

⊙ means site could meet the criteria under some conditions or mitigation.

⊙ means the site does not meet the criteria in the column.

Record 5746.

In other words, if the only thing lacking for a site to meet all the suitability characteristics was drawing different boundaries, then that is what would be done. In the two example cited, both sites are far from meeting the suitability characteristics, so defining different boundaries is not necessary.
Exception to Report VI.A.10: Response to Friends objection 3: built space capacity

Summary: Newberg forecasts a need for 1,822 new industrial employees through 2032. The forecast factors in that roughly 30 percent, or 544 of these employees\(^2\) will be accommodated through infill, redevelopment, and intensification (that is, filling of existing built space) of uses.

Newberg considered the infill and redevelopment potential of existing industrial sites to meet these needs. Infill, redevelopment, and intensification of uses can potentially accommodate needs for about 44 percent of expected firms. However, even with these considerations, Newberg will still need 134 gross buildable acres of industrial and industrial type public/quasi-public land to meet its needs through 2032. Record 5708.

The table also includes assumptions that most (55%) of Newberg’s future industrial employment will be located on sites 10 acres or less, and that one-third of those future new industrial firms 2-10 acres in size, and one-half of firms under 2 acres in size, will find a site through infill, redevelopment or intensification of existing employment land uses. The table also assumes that for sites over 10 acres, one currently unoccupied site (Suntron) will be reoccupied, and that some infill will occur within existing larger sites.”

Record 5723. (Emphasis added).

The findings are clear that the Newberg factored in rehiring of employees (“built space capacity”) when saying it considered “intensification of use.” The report does not specifically parse out “infill” “redevelopment” and “intensification” separately. Friends do not point to any requirement to do so. Friends assert the last must be zero. This is in error. As noted, the submittal does consider that about 30 percent of new employees will not need to be accommodated on buildable land, and thus will be accommodated through a combination of infill, redevelopment, and intensification.

The document does in general talk about “new firms,” in that the primary purpose of the information was to show the need for buildable land. When talking about existing sites that through infill or

\(^2\) Table 4 on Record 5723 forecasts that roughly half the new employment of small firms (9 or fewer employees) will need new land. One half of 273 is 137. It also forecasts that roughly two-thirds of the new employment of medium firms (10-74 employees) will need new land. Two-thirds of 729 is 486. It also forecast a need for two 10-30 acre sites, one 30-50 acre site (equivalent in area to two 10-30 acre sites), and reuse of one existing 10-30 acre site for large firms (75 or more employees). Thus, about four-fifths of the employment would be on buildable land. Four-fifths of 820 is 656. So 1,279 new employees (137 + 486 + 656 = 1,279) employees are expected to be accommodated on buildable industrial land, and 544 employees (1,822 – 1,279 = 544) are expected to be accommodated on existing vacant and built land. This represents about 30 percent (544/1822 = 30%) of the total expected new industrial employment.
intensification of use can meet employment needs, the “new firm” in this context includes an existing firm with new employees.

There are two other points that are relevant. The trends analysis shows that automation and similar advances mean that more industrial space is being used by machinery and less by people. For example, a space in a machine shop that used to have several machinists working on lathes now has one large CNC machine turning out the same parts. The trends analysis states, “Manufacturing and other industries are seeing a corresponding increase in the ratio of floor area per employee, as more floor space is used by machine and less by workers.” Record 5822-5823. Thus, even if these firms return to the same level of productivity as they had prior to the recession, they won’t necessarily return the same number of workers to that same space.

Another point is how future vacancy is factored into the equation. Even in the best of times, some industrial space will be vacant as sites transition from one use to another. DLCD’s Goal 9 Guidebook recommends that a 5 to 15 percent future vacancy rate be applied. Record 4514. Newberg did not specifically assign a future vacancy rate. But it is clear that while some future firms will occupy currently vacant space, other currently occupied space will become vacant.

**Report VI.A.11: Inventory of Employment Land**

We concur with the Department’s analysis of this objection. There are two additional points to consider.

First, Newberg does not rely on the residential BLI in the record. The list of commercial and industrial lots in that BLI is the same that is used in the newly adopted inventory. The issue on remand of the residential BLI was that LUBA found that Newberg incorrectly excluded “* * * [] lots or portions of lots that, because of odd shape, topography, irregular placement of buildings, or limited accessibility could not be readily developed if urban services were available” from the residential BLI. That case also showed that the largest lot so excluded was less than one-half acre. This is significant, because in the employment land inventory, only lots over one-half acre are considered “vacant.” Thus, it is not surprising that the new commercial/industrial land inventory has the same results as the old.

Second, note that the EOA does list site characteristics of the inventoried lots. Size, size category and locations are site characteristics. See Record 5890 and Record 5900. Stream corridors and slopes are site characteristics and constraints. Those are shown in the maps within the record as well. See Record 5804.

**Exception to Report VI.A.12: Response to Friends objection 5: Alternative sites**

The Department responds to objection about whether several sites both inside and outside the UGB were not appropriately designated industrial. The following addresses these specific sites.
Site next to Allison Inn (Zimri Road Site VI – Inside UGB)

OAR 660-024-0050(4) requires the local government to demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB before expanding the UGB to provide such land. Newberg adopted findings based on substantial evidence in the whole record showing that Site VI, the residential zoned UGB land on the hillside just uphill from the Allison Inn, cannot reasonably accommodate industrial uses. Therefore the Commission should reject the objection and adopt findings for approval accordingly.

There are several ways a local government might show that a site inside the UGB cannot reasonably accommodate identified needs. One way is to show that site does not meet identified site suitability characteristics and therefore is *not suitable* the proposed use. However, even if a site does meet the site suitability characteristics, there may be other reasons why the site cannot reasonably accommodate the proposed use. For example, the redesignation might conflict with other overarching goals of the comprehensive plan.

In this case, Newberg adopted findings that show the site cannot reasonably accommodate industrial use because doing so actually would be in conflict with its economic development goals. It *also* adopted findings to show that the site did not meet the site suitability characteristics.

The record contains several references to the Allison Inn and the role it plays in Newberg’s Economic Development Strategy:

*Yamhill County – with its solid agricultural base, wine destination status, proximity to the metro area, and stunning beauty – also appears to be on the verge of something great. With the opening of the Allison resort in Newberg, along with other new attractions, there’s an opportunity just now to pick priorities and adopt strategies that move the community forward. Record 5830*

*Newberg is home to Oregon wine country’s premiere facility: The Allison Inn and Spa. Record 5853*

*In 2009, the Allison, a large luxury inn and spa targeting wine tourists, was opened. This development was a significant investment in this local industry and a very demonstrative statement in its future. Record 5848*

* * * * the Springbrook Master Plan has a commercial node that is expected to include businesses that will cater to the needs of wine tourists. Moreover, this commercial node will be located next to the newly constructed Allison Inn and Spa, a high-end resort that targets wine tourists. Record 5821.*

In contemplating the possibility of redesignating the residential land next to the Allison Inn as industrial, Newberg found:
It is adjacent to a resort hotel. There would be many conflicts between the dust, noise, smell, and truck traffic of an industrial area and the quiet peace resort users are seeking. Record 5730.

In addition, the Record contains the following explanation:

... designating the area next to the Allison for industrial would work against both the County’s and City’s economic development goals. The Yamhill County Agri-Business Plan (as quoted in Appendix A) describes the millions of visitors who come to the area to enjoy the “stunning beauty” and “wine destination,” and says Yamhill County is “on the verge of something great.” “With the opening of the Allison Resort in Newberg, along with other new attractions, there’s an opportunity now to pick priorities and adopt strategies that move the community forward.” Putting a factory next to this world class destination resort, creating many conflicts between the dust, noise, smell, and truck traffic of an industrial area and the quiet peace resort users are seeking, would be detract from both the County’s and City’s goals. Instead, Newberg is proposing locating industrial next to a waste transfer station, a wastewater treatment plant and other industrial uses. Record 6002

Because of this, Newberg concluded, “Site VI * * * could not reasonably accommodate land needs.” Record 5730.

In addition, Newberg also adopted findings that show that Site VI does not meet the site suitability characteristics:

(1) The site lacks proximity to an arterial or state highway.

(2) The site would require truck travel through a residential neighborhood.

(3) The site is small and not adjacent to an industrial or commercial area.

Friends objection suggests that if a Site VI includes a parcel containing a historic house (the site along Zimri Drive just north of the Allison Inn), Site VI would meet the transportation proximity criterion. However, if the historic house is included, it introduces other reasons that make redesignated the site “unreasonable,” namely conflict with a historic resource. In short, it the historic house is not included, Site IV fails to meet the transportation proximity criterion. If it is included, Site VI fails to “reasonably accommodate the need” because of the conflict with the historic house. It also would go through a residential neighborhood. Either way Site VI cannot reasonably accommodate industrial use. This is exactly what Newberg found:

The closest access would be on Zimri Drive, which still would be over ¼ mile distant from the nearest arterial (unless access was through a site with a historic home, which would not be reasonable).
Friends also contend that the Allison Inn site should be considered a “commercial area” for purposes of the site suitability characteristics analysis.

The Allison Inn Site is designated SD/H (Springbrook District Hospitality). What is considered “commercial” in one context may not be considered “commercial” in another. Newberg adopted findings that the Allison Inn site is not a “commercial area” for purposes of applying the commercial adjacent site suitability characteristic.

"While this area does include about 30 buildable acres, it is not adjacent to industrial or commercial areas. It is adjacent to a resort hotel." Record 5730.

This is consistent with their other findings, “Moreover, this commercial node will be located next to [on the south side of] the newly constructed Allison Inn and Spa, a high-end resort that targets wine tourists.” Record 5821. That the Newberg City Council, who both adopted the zoning for the Allison Inn and who adopted the site suitability characteristics, did not classify the site as “commercial” for purpose the site suitability characteristic analysis should be given deference.

Again, the discussion is moot. Even if Site VI were to be considered adjacent to commercial, Site VI fails to “reasonably accommodate” industrial use because doing so would go contrary to the overall economic development strategy.

Site XII Multi-Family Residential Site (Inside UGB)
We agree with the Department’s assessment that this site must by analyzed separately from land that is outside the UGB. We also agree with the Department’s assessment that this site cannot reasonably accommodate industrial uses, and that the objection should be rejected.

The statement that the site abuts a manufactured dwelling park across the street is correct. This is not a factor in determining whether the site meets the residential site suitability characteristic, the site fails to meet the site suitability characteristic without consideration of the park across the street.

Site 12 South Springbrook URA (Outside UGB)
The South Springbrook Road URA is outside the UGB. Newberg did not include this site in the UGB because it does not meet the residential compatibility site characteristics in that (1) it abuts residential neighborhoods on more than 25 percent of the site perimeter, and (2) it requires truck traffic to travel through or adjacent to a residential neighborhood.

The Department’s report incorrectly dismisses these two valid site characteristics for reasons stated earlier. The Commission should approve the site characteristics as valid, reject the objection, and approve the submittal as excluding the South Springbrook URA.

Site 9 Dayton Avenue North (Outside UGB)
Newberg studied, but did not include Site 9 (Dayton Avenue North) into the UGB for industrial because the site does not have suitable truck access to the Highway 99W and therefore is not suitable for industrial use.
The findings state, “While it is adjacent to Highway 99W, actual access is restricted due to an intervening rail line. The only other access is Dayton Avenue, which is not an arterial, and has access issues on both ends.” Record 5742.

This intervening rail line can be seen on Map 6 at Record 5805. A portion of this map is reproduced below with the rail line labeled.
The Commission should therefore reject the objection and approve the submittal as excluding Site 9.

The Department’s report describes this site as “already within the UGB.” DLCD Report 46. It is not. It is outside the UGB. The red line shown on the map above is the west side of the UGB.

As noted earlier, the Department failed to analyze the site suitability characteristics using the correct test.

**Site 8 Fox Farm Road**

**Summary:** Newberg did not include Site 8 (Fox Farm Road) into the UGB for industrial because the site is not adjacent to the UGB and therefore is not a priority for adding to the UGB.

*Site 8 is ⅓ to ¼ miles from the UGB, and thus is not adjacent to the UGB.* Record 5742.

*Not adjacent to UGB, nor part of an area that could immediately be added to UGB* Record 5749

Because the site is not adjacent to the UGB and is a rural exception area, the site is not a priority for inclusion in the UGB under the ORS 197.298, and Newberg properly excluded it. The Department’s
report errors by stating the site is "already within the UGB," and by misquoting the actual adopted findings. The Commission should reject the objection and approve the submittal as excluding Site 8.

Discussion: The Department’s report has two significant errors in discussing this site. First, the report describes this site as "already within the UGB." Staff Report 46. It is not. It is 1/3 to ¾ miles outside the UGB. See Record 5742. Second, the report misquotes the findings on Record 5742. The actual findings state that the reason for excluding the site is that it is not adjacent to the UGB. It was not for failure to meet the transportation proximity criterion. The actual adopted text states:

*Site 8 is 1/3 to 3/4 miles from the UGB, and thus is not adjacent to the UGB. The area is separated from the UGB by the Chehalem Creek Canyon, which would make extension of facilities to the site very problematic. For example, previous studies showed that two miles of wastewater lines and a new wastewater pump station, or a new wastewater treatment plant would be needed to serve this area. Thus, it could not reasonably be added to the UGB in conjunction with adjoining properties. There are three small non-contiguous parcels in the area with county industrial zoning. It does have close access to Highway 99W, though access restrictions along that stretch of highway may prevent access directly to the highway. The future connection to the bypass between Newberg and Dundee might provide access. Thus, Site 8 does not meet the UGB proximity criterion.* Record 5742. (Emphasis in original)

Adjacency to the UGB is a threshold standard for considering whether exception areas may be included in the UGB. ORS 197.298(1)(b), the UGB priority statute states:

*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: * * 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. (Emphasis added).*

OAR 660-024-0060(4) further states:

*(4) In determining alternative land for evaluation under ORS 197.298, "land adjacent to the UGB" is not limited to those lots or parcels that abut the UGB, but also includes land in the vicinity of the UGB that has a reasonable potential to satisfy the identified need deficiency.*

The site does not abut the UGB and does not have a reasonable potential to satisfy the identified need for industrial land, therefore the site does not meet the ORS 197.298 priorities for inclusion in the UGB. The findings include substantial evidence for showing why the site does not have a reasonable potential to satisfy the need:

*“two miles of wastewater lines and a new wastewater pump station, or a new wastewater treatment plant would be needed to serve this area.” Record 5742.*
Access restrictions along that stretch of highway may prevent access directly to the highway. Record 5742.

We agree that the potential for access restrictions is not sufficient to establish that the site does not have suitable truck access. On the other hand, it is appropriate to weigh that uncertainty when considering whether the site has a “reasonable potential to satisfy the need.”

There is substantial evidence in the whole record to conclude that the site does not have a reasonable potential to satisfy the identified need deficiency. Thus, under ORS 197.298(1)(b), Site 8 does not have higher priority for inclusion in the UGB. In fact, it has no priority for inclusion.

In addition, for reasons noted earlier, the Department incorrectly analyzed the residential site suitability characteristic and therefore incorrectly recommended reanalysis of this site.

Exception to Report VI.A.13: Response to Friends objection 6 regarding lands included in the UGB

Large sites
We agree with the Department’s analysis that Newberg “has not included more land than it has shown is needed.” The plan anticipates that some of the currently large parcels could be subdivided to meet identified needs for smaller parcels. It certainly would not be reasonable to require that the parcels be subdivided before they were included in the UGB.

Waste Management Site (Site 11.3)
The adopted UGB amendment includes Site 11.3, comprised of Tax Lot 3228-01200 and 3228-01700, into the urban growth boundary. That site is used by Waste Management. They operate a refuse collection and recycling operation on these two lots that includes several buildings and a storage yard. That portion of Map 8 at Record 5807 is reproduced below:
The submittal includes the site into the UGB\(^3\) to accommodate continued and expanded use of this facility, including facilitating the extension of utilities to the site such as for washing vehicles. Record 6003. Newberg classified 3.32 acres of the site as vacant ("buildable") and the remainder as either "built" or unbuildable (the areas within the stream corridor). Record 5767. Friends objection is essentially that existing storage yard should be considered vacant or at least "likely to be redeveloped."

As can be seen on the aerial, the storage yard is part of an active industrial use. Evidence in the record supports the conclusion that the site will remain an improved storage yard through 2032, though it is likely to support more equipment than its current use as population and industry grows in the area. The submittal at Record 5790 states,

*This UGB amendment includes land that is currently used for the Newberg Garbage & Recycling Transfer [now Waste Management] site. Bringing this land into the UGB with its existing use may also provide for greater collaboration with future surrounding industrial uses for the collection, reuse and recycling of metallic and nonmetallic waste.*

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\(^3\) As a minor objection, the Department's report states the site is "within the existing UGB." Staff Report 50. The site in question is actually in the portion of land that is being included in the UGB.
Expecting that one industrial use be displaced so that another industrial use can go there does not achieve the Goal 9 objective of economic growth. It also begs the question: if the storage yard is removed and replaced with some other use, where will the storage yard go? Perhaps it could move to another site in the UGB, but there it also would take up land. Plus, solid waste related uses are not the kind of uses that are particularly easy to site because of significant external impacts. It only makes sense, given the overall economic objectives of the plan, to plan that the storage yard will remain a storage yard through the planning period.

The Department's analysis of this site misconstrues applicable law. We ask that the Commission reject the objection and the staff analysis and adopt findings that follow the applicable law and show that the Newberg correctly showed the site as have 3.32 acres vacant ("buildable") and the remainder "built."

The Department's analysis is confusing; this is likely because the rules themselves are confusing. Therefore it would be useful to examine the rules more closely.

OAR 660-009-0005(14) provides this definition:

"Vacant Land" means a lot or parcel:

(a) Equal to or larger than one half-acre not currently containing permanent buildings or improvements; or

(b) Equal to or larger than five acres where less than one half-acre is occupied by permanent buildings or improvements.

In brief "vacant" means "not occupied by permanent buildings or improvements." This site is larger than five acres, so the second definition applies.

The term "permanent improvements" is not defined in rule. The dictionary definition of "permanent" is "continuing or enduring without fundamental or marked change." The definition of "improvement" is "an addition or change that makes something better or more valuable." Merriam-Webster Online Dictionary www.merriam-webster.com accessed 1/25/2014. In the context of the Goal 9, a permanent improvement is some sort of purposeful change to the land for a use that one would expect to continue to be in place unless some redevelopment occurs. It is not the value, type, or extent of the improvement, nor the ease of converting it to other uses, that makes it "permanent;" it is fact that the improvement is in some active use that would be expected to continue indefinitely unless some different development occurs on the site. For example, a baseball diamond or a golf course would be "permanent improvements," in that they are purposeful changes to the land, and one would expect the diamond or course to remain in place long term unless some other use would be put to the site. This is despite the fact that neither involve much in the way of fencing, paving or buildings, and both might be relatively easy physically to convert to other uses.

OAR 660-009-0005(1) provides this definition:
"Developed Land’ means non-vacant land that is likely to be redeveloped during the planning period."

In brief “developed” means “likely to be redeveloped.” This is where most of the confusion lies because the definition uses an ordinary term in an unordinary way.

In analyzing how to classify a parcel, the first determination is whether it is “vacant” (that is not occupied by permanent buildings of improvements). If it is occupied with permanent improvements (“non-vacant”), the second determination is whether the parcel is “likely to be redeveloped during the planning period.” If there is not substantial evidence to determine the parcel is likely to be redeveloped, then the site is “occupied by permanent improvements and not likely to be redeveloped” land. For simplicity we use the term “built” to describe such land and to distinguish it from the confusing term “developed” (likely to be redeveloped).

Given this explanation, the Commission should answer two questions:

(1) Is there substantial evidence in the whole record to conclude that the Waste Management Site is occupied by permanent improvements? and

(2) Is there substantial evidence in the whole record to conclude that the Waste Management Site is likely to be redeveloped by 2032?

If the answer to the first question is “yes” and the second is “no,” then Newberg correctly analyzed the site, and the Commission should approve the submittal.

Now we can turn to the facts of the submittal.

(1) Is there substantial evidence in the whole record to conclude that the Waste Management Site Is occupied by permanent improvements?

The evidence in the record includes aerial photos of the site at Record 5807 and in several other places and photos of the site at Record 5956. The photos show fencing and landscaping at the perimeter of the site, and surfacing. They also show the site being used to accommodate dumpsters. Regardless of the type of surfacing, it is clear that the site contains “improvements.” Those improvements are “continuing or enduring without fundamental or marked change,” in that you could not convert the area to some other use, such as a manufacturing operation, without a fundamental change to the improvements. The answer to the first part of the inquiry is therefore “yes.” We move to the second part of the inquiry.

(2) Is there substantial evidence in the whole record to conclude that the Waste Management Site Is likely to be redeveloped by 2032?

Evidence in the record supports the conclusion that the site will remain an improved storage yard through 2032, though it is likely to support more equipment than its current use. The submittal at Record 5790 states,
This UGB amendment includes land that is currently used for the Newberg Garbage & Recycling Transfer [now Waste Management] site. Bringing this land into the UGB with its existing use may also provide for greater collaboration with future surrounding industrial uses for the collection, reuse and recycling of metallic and nonmetallic waste.

Also, in Record 6003

"** the area most likely to remain an improved storage area. Bringing the land into the UGB would allow connection to sewer and water for uses such as washing trucks."

The only evidence in the record Friends point to is a report that analyzes whether the site might accommodate development by 2040. This is not sufficient evidence to establish that the site is “likely” to be redeveloped by 2032.

The answer to the second part of the inquiry is therefore “no.”

The Commission therefore should reject the objection and adopt findings consistent with the law showing that Newberg correctly classified this site as an occupied site with a continuing industrial use.

Inclusion of Stream Corridors

In general, we concur with the Department’s conclusion that Newberg correctly included the adjacent stream corridors in the UGB.

The substantive difference between this case and the McMinnville case is that McMinnville had not demonstrated a need for the land. There was no suggestion that they couldn’t establish a need, simply that they hadn’t. “To address this issue the city needs to either delete the unbuildable floodplain portions of these sites from the UGB or justify a need for these lands for urban use under Goal 14, [the former] Factors 1 and 2.” DLCD Staff Report to LCDC March 30, 2004. (Emphasis added) Newberg has established a need, as noted in the Department Report, and therefore correctly included the land.

We do have an exception to the analysis on DLCD Report 51. One part, it states, “Newberg also asserts that it has riparian corridor measures in place to protect riparian resources. Rec. at 5783.” We agree with this. However, the Department goes on to say:

... 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.

In fact, Newberg riparian corridor protection measures take effect only if the land is brought into the UGB. That is, bringing that land into the UGB will afford the stream corridor protection measures that do not exist outside the UGB! That is another reason why the areas need to be included in the UGB.
Exception to Report VI.A.14: Response to Friends objection 7: Goal 14 Location Factors.

Showing that the Goal 14 Factors have been “Considered” and “Balanced”

Newberg considered the four Goal 14 location factors. Newberg adopted extensive findings showing how the factors all have been “considered” and “balanced.” Nine pages of findings show how each factor was “considered.” A summary table and accompanying explanation show how the factors were “balanced.” See Record 5755-5764. Table 12 on Record 5764 is reproduced below:

<table>
<thead>
<tr>
<th>Location Factor Description</th>
<th>Alternative A</th>
<th>Alternative B</th>
<th>Alternative C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factor 1: Efficient Accommodation of Land Needs</td>
<td>3rd</td>
<td>Best</td>
<td>2nd Best</td>
</tr>
<tr>
<td>Factor 2: Efficient Public Facilities</td>
<td>3rd</td>
<td>Best</td>
<td>2nd Best</td>
</tr>
<tr>
<td>Factor 3: ESEE Consequences</td>
<td>3rd</td>
<td>Best</td>
<td>2nd Best</td>
</tr>
<tr>
<td>Factor 4: Compatibility with Farm/Forest Uses</td>
<td>Best</td>
<td>2nd Best</td>
<td>3rd</td>
</tr>
<tr>
<td>Overall</td>
<td>3rd</td>
<td>Best</td>
<td>2nd Best</td>
</tr>
</tbody>
</table>

The reason to show this information in table form was to show that the factors were given equal weight and were balanced. While a more mixed result may have required greater explanation, in this case the conclusion is clear. The alternative that ranks best in three of four categories will necessarily be the best option overall when all four factors are given equal weight. The Commission should reject the objection.

Location Factor 4

Summary: Newberg’s Location Factor 4 analysis and the record as whole (1) describe the farm uses in the area, (2) describe potential conflicts and benefits of the alternatives, and (3) determine which alternative best meets Location Factor 4. Based on substantial evidence in the whole record, Newberg correctly concluded that Alternative A best meets Location Factor 4. Alternative B was ultimately selected for inclusion in the UGB because it best met the other three location factors. The Commission should reject the objection and approve the submittal as correctly identifying Alternate A as best meeting Location Factor 4.

Discussion: UGB Location Factor 4 is, “Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB.”

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4 The Department’s report incorrectly identifies this factor as Location Factor 3 on DLCD Report 54, but correctly identifies it as Location Factor 4 elsewhere in the discussion.
the Goal 4 Location Factor analysis is to determine which farmland to include of the three possible alternatives. It is important to understand that Factor 4 is put into play only after extensive analysis has been done to show that including farmland in the UGB is the only legal option. It also is important to consider that Location Factor 4 is relative analysis not an absolute analysis. That is, the purpose is to determine which alternative is "better" in meeting the factor rather than determining whether a particular factor meets or does not meet some absolute threshold. The findings do not need to show that there will be no compatibility issues, nor do they need to show that every compatibility issue is mitigated. The analysis does not require that every conceivable benefit or conflict be listed. The analysis only requires that compatibility be "considered," and that there be substantial evidence in the record to reach the conclusion on which alternative "better" meets Location Factor 4.

In considering the amount of evidence required to show which alternative is "better," the Commission should consider it germane that Newberg's findings actually show that Alternative A, the alternative that was not selected, was found to best meet Location Factor 4. That is, if Newberg were to go back and adopt lengthier findings that really, really show that Alternative A (and/or Alternative C) better met Location Factor 4, it still would be obligated to select Alternative B because it best meets the Location Factors as a whole when giving each equal weight.

Given that discussion we can now consider the evidence.

The record contains evidence in several areas that describe the farm activities in the area. Most notably, there is a map and aerial photo of the area (Record 5807-5808). This map and aerial photo depict orchards, farmed fields, agricultural buildings, and other buildings in the area. The minutes of the various hearings show that staff explained the various uses that were shown on this aerial. For example, the minutes of one hearing say,

Staff pointed out the areas currently used for grass seed production and a filbert orchard. He also pointed out an area being used as a riding stable and another as a jam packing plant; both are agriculture uses and benefit the community, but are not producing crops. Record 3074

Next, the record contains evidence that they type of compatibility issues benefits and conflicts that may occur between industrial uses and agricultural uses was considered.

For example, siting residential uses near agricultural lands can create conflicts as farmers plow fields, spray chemicals, and operate farm machinery near houses. Conducting these same farming practices near industrial land does not necessarily generate conflicts. Having nearby industrial land can in fact enhance the farm activities, as farmers can have a nearby location to store and process agricultural products, and to store equipment. Conflicts can arise, but they generally are not as severe as for other urban uses. Record 5764.

For example, on Record 6004, Newberg staff describe "... potential conflicts, such as spraying, keeping animals, or conflicting industrial use." Record 6004.
It also is germane to consider that Friends themselves downplay compatibility issues between agricultural use and industrial use.

\[ \text{... many of the targeted industries are by definition, compatible with land in agricultural zones, including wineries, nurseries, agricultural products, and food processing.} \]

\[ \text{Nothing in agricultural operations inherently renders adjacent sites unsuitable or unviable for industrial uses. In fact, of the various urban uses, industrial use is considered to be more compatible with agricultural uses and other urban uses, such as residential, are less compatible with agricultural uses.} \]


So the question before Newberg was whether there was some major difference why it would be better to site industrial uses next to a filbert orchard versus a grass seed field or other use in the area. Based on the information in the record, Newberg concluded “There is little significant difference between the three alternatives.” Record 5764.

Still, Newberg needed to determine which of the three alternatives best met Factor 4, even if impacts were substantially the same for each. As explained in the record: “Border with agricultural land is used as a measuring stick to compare alternatives, as the potential conflicts, such as spraying, keeping animals, or conflicting industrial use, are directly related to and best measured by how much land these lands are adjacent.” Record 6004. Since Alternative A had the smallest border with agricultural land, it was selected as the one that best met Location Factor 4.

As to Friends objections about potential compatibility issues with land in Marion County. We agree with the Department’s response that this objection should be rejected. Location Factor 4 requires consideration of compatibility with “nearby agricultural and forest activities occurring on farm and forest land outside the UGB.” (Emphasis added). While there is no specific definition of what constitutes “nearby,” we feel it is safe to consider land across the Willamette in a different county as not “nearby.”

Exceptions to Department Report Sections VI.B-F, other objectors
The objections raised by Shirley Cooper, Lee M. Does, Grace Shaad, and Ranee Salmonsson are essentially the same as those raised by Friends. The Commission should reject these objections for the reasons stated earlier.

Conclusion
The Department’s report correctly recommends that the Commission reject a number of the objections. The report incorrectly applies the “indispensability test” when evaluating site characteristics instead of the “meaningful connection” test. We ask that the Department issue a corrected report reflecting an
accurate assessment of the site characteristics. We also have addressed the remaining questions above, and therefore ask that the report be revised to include a recommendation that the Commission approve the submittal.
French, Larry

From: Barton Brierley <barton.brierley@newbergoregon.gov>
Sent: Monday, February 03, 2014 4:52 PM
To: French, Larry
Cc: Rue, Jim; Lazarean, Angela; Ken Friday; Sid Friedman; Mary Kyle McCurdy; Mia Nelson; Tim.Ramis@jordanramis.com; Truman Stone
Subject: Newberg Exceptions to Directors Report on Newberg South Industrial UGB

Larry: Attached is Newberg's exceptions to the DLCD Report on the South Industrial UGB amendment. Please confirm receipt, and let me know if you have any difficulty opening the document.

Barton Brierley, AICP
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