February 27, 2014

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

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

Re: Response to Newberg letter of February 20, Newberg UGB Amendment

During the course of the LCDC hearing on February 13, the City of Newberg requested an opportunity to submit additional written information. In addition, the Commission expressed interest in hearing more from the parties on various issues, and provided the city one week to submit additional arguments, with an additional week for objectors to provide their response.

We find Newberg’s arguments unpersuasive and look forward to a robust discussion of the issues on March 14. In particular, we hope to have a focused discussion regarding how the city actually applied its site characteristics to the specific alternative areas that it excluded. We believe that discussion will help clarify the real-world consequences of Newberg’s flawed approach.

In addition, it may be helpful to the Commission to hear from its own counsel regarding the Commission’s standard of review. At both the hearing on February 13, and in the City of Newberg letter dated February 20 (city’s response letter), the city suggests that the Commission’s standard of review is one of substantial evidence.1 In so doing, the city ignores the plain language of ORS 197.633(3)(c) and OAR 660-025-0160(2)(c). In addition to requiring that there be substantial evidence in the record as a whole to support the decision, the law explains:

“(3) The commission’s standard of review:
   (c) For issues concerning compliance with applicable laws, 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.”

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1 On February 13, the city said that this was an evidentiary issue and that the standard of review was one of substantial evidence. (Hearing Audio, Item 4 at approx: 45:40). They illustrated this with a slide labeled Standard of Review that only highlighted the substantial evidence standard in ORS 197.633(3)9a). In the city’s response letter, for almost every issue, the city frames the question as one of “substantial evidence” without reference to the additional standard for review in ORS 197.633(3)(c): compliance with the statutes, goals, rules, etc.
I. POTENTIAL COMPROMISE

The city’s response letter suggests a false choice to the Commission: either a UGB expansion onto a large block of cultivated farmland, or an industrial land supply comprised of isolated, scattered sites. The Commission should reject that narrow box; it is not an accurate description of the options before the city. Many of the alternative, higher-priority areas also include large blocks of vacant, suitable land.

During the course of the hearing, at least some Commissioners expressed interest in the potential compromise that had been discussed locally. Commissioner Eberwein asked what that map looked like and asked if compromise was “dead.” Chair Worrix also expressed an interest in seeing local compromise.

As we repeatedly said in our local testimony, both orally and in writing, the best, most timely resolution to the UGB issues will result from compromise. (R. 3870, 4436, 4464-66, 4611, 4885, 5315-19, 6801, Audio #11, Audio #15)

Our compromise discussions with city representatives were productive and appeared to result in a solution that would (a) provide the industrial sites the city says it needs; (b) revise the city’s industrial site suitability characteristics to be less prescriptive; and (c) preserve a large block of cultivated farmland for resource use. (R.5317).

As Councilor Howard said before voting “no” in 2012, “I think we could achieve our goals with a more modest, maybe phased, project.” (R. Audio #13). Councilor McKinney said, “I appreciated the meeting of the minds… I believe the points we discussed in that roundtable discussion will be the final way that this thing winds up working, except now it’s going to cost us tens of thousands of dollars through the courts… and probably arrive at the same conclusion except that it will be years off.” (R. Audio #13).

The compromise included a portion of the city’s proposed UGB expansion area, along with adjacent lands within an existing urban reserve and within the existing UGB. (R.5534-5537).

On the left, below, is a schematic of the tentatively agreed-to compromise area to meet the city’s need for industrial land. It is outlined in blue and diagonally cross-hatched. The areas in white are zoned EFU, the areas in green are urban reserve, and the area in yellow is urbanizable land within the current UGB, but outside the city limits. It includes all of the city’s proposed expansion area, except for the large block of prime farmland on the lower right-hand corner of the schematic.

The compromise would have replaced the large block of farmland with land north of Wilsonville Road that is mostly in the South Springbrook urban reserve, along with urbanizable land directly to the west along South Springbrook Road. The buildable portions of the replacement land are shown below, in the aerial on the right.
We have often stated our willingness to reach a compromise, which may or may not look like the compromise map above. Should the Commission direct their staff to lead a mediation effort, we would be a willing participant, but absent the department’s participation, we do not believe further efforts would be productive.

II. GAIBLER AGREEMENT & PRE-SELECTION OF AREA

At the February 13 hearing, some commissioners expressed a desire for more information on the private landowner agreement (“Gaibler agreement”) and the pre-selection of the expansion area prior to the development of site characteristics. The department suggested that this context is irrelevant. We disagree. Understanding context is always relevant.

Local governments often feel pressure from landowners and developers to bring land into the UGB. In this case, the city’s analysis doesn’t just seem reverse-engineered, it was reverse-engineered to a pre-selected area.

The “Gaibler agreement” between the City of Newberg and the private landowner was passed by ordinance in August of 2007 and it appears in the record at 6266-6286. It commits the city to “diligently pursue” the inclusion of the property in the UGB. (R.6270) This was more than two years before the city first proposed draft site characteristics in the November 2009 draft EOA (R.678-679, 6283-6338), and more than 2½ years before the city began the required analysis of alternative areas. (R.1315-1499)

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2 A legally justifiable compromise would likely be smaller and include less farmland than the compromise map depicted above.
As stated in the recitals to the Gaibler agreement, “the only suitable area for industrial expansion is the area along Highway 219 south of Wynooski Street.” (R. 6269) The city reached this conclusion years before the site characteristics, alternative analysis, public hearings, and Council deliberations.

The city not only signed the Gaibler agreement, it also master planned the entire area it now proposes for inclusion in the UGB in October of 2009, before the first version of site characteristics was adopted and before the required analysis of alternatives. (R.698)

The signing of the Gaibler agreement and the investment in the master plan have clearly colored the city’s subsequent actions. As recorded in the minutes of the October 2012 hearing before the County Commissioners:

“Barton Brierly ... stated that the Gaibler agreement was public knowledge and the city intends to stick to its word on that.” (R.6802)

And as Councilor Bacon said in reference to the potential compromise discussions:

“I really, really wish we were able to come together on something, [but] I think we were put in a position by people who came before us.” (R. Audio #13, 29:21)

As noted above, understanding context is always relevant. This back-story matters.

**III. SITE CHARACTERISTICS (Friends Objection 1, Friends Exceptions 1-5)**

At the hearing on February 13, the Commission discussed site characteristics, including: both (a) the proper interpretation of the rule; and (b) their proper application considering the priorities in ORS 197.298, the locational factors of Goal 14, and the potential pre-emption of balancing Goal 9 with Goal 3.

**Rule Interpretation**

Under the rules adopted by LCDC:

“Site Characteristics” means the attributes of a site necessary for a particular industrial or other employment use to operate.” (OAR 660-009-0005(11))

And:

“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.” (OAR 660-009-0015(2))

As noted by Commissioner Lidz, this is the Commission’s rule, and it is therefore appropriate for the Commission to interpret its meaning. In its attempt to interpret the Commission’s intention, LUBA devised a two-prong test that essentially separates the determination of
“necessary for a particular industrial or other employment use to operate” from the determination of “site characteristics typical of expected uses.” If the Commission does not agree with this bifurcated approach, it can and should say so.

In its response letter, Newberg stated that “the opponents agree that the Court’s ruling should be applied.” This is incorrect. While our objections do respond to Newberg’s findings on LUBA’s two-prong test, the Commission should offer its own interpretation.

First, we believe that LUBA’s bifurcated test is artificial and redundant. If a site characteristic is indeed reasonably necessary for a particular employment use to operate, it will by definition be typical of the use, since it will only be the rare, atypical example which will operate on a site which lacks that attribute. A separate injury into what is “typical” is unnecessary and confusing.3

Regarding the second prong of LUBA’s bifurcated test, we believe the Commission intended “necessary” to mean something more than “meaningful connection.” The term “meaningful connection” is not in the rule, but is instead the court’s best guess as to what the Commission meant by the term “necessary.” The phrase “meaningful connection” is not only more subjective than the original “necessary,” it has no commonly understood meaning, and was not defined by the court.

3 In any event, the city did not apply the “typical” prong of the test as LUBA and the Court of Appeals intended. Newberg interpreted “typical” to mean anything that is common to all industry, rather than to particular expected uses. And the city did so without regard to the operational requirements of industry. However, LUBA’s definition of “typical” is based on operational requirements:

“While ‘typical’ attributes would presumably include those attributes that are absolutely necessary to construct and operate a business, ‘typical’ attributes would also likely include those attributes that while not ‘necessary,’ in the dictionary sense of the word, are nevertheless typically required for a business to operate successfully.” Friends of Yamhill County v. City of Newberg, 62 Or LUBA 5 (2010).

Instead of following the court’s determination that “typical” site characteristics are those that are “typically required for a business to operate successfully,” the city merely documented some common characteristics of industrial districts, then concluded that since those traits were common in industrial districts, those traits are also necessary for each individual industry.

For example, most residential districts in Newberg also are within ¼ mile of an arterial. (Compare Newberg Transportation System Plan and Newberg Zoning Map, R.6506-07) No one would argue that residential lands actually need that access – close arterial proximity is just happenstance, a byproduct of the city’s spatial layout. The city erred by failing to recognize that the same is true for industrial uses – “typicality” as a stand-alone concept does not establish need.

Another example is the city’s claim that unless they are larger than 50 acres, industrial districts must be adjacent to commercial areas. Again, the city wrongly assumed that because most industrial districts adjoin commercial land, that proximity must be intentional, and related to individual business needs. However, most industrial districts also adjoin residential land. No one would argue that this fact proves that industry actually needs to be next to residential, yet the city is advancing the same sort of argument when it claims that commercial-industrial proximity is deliberate, and is evidence of need.
As Chair Worrix observed, the interpretation of “necessary” should consider the consequences of such a determination. If a site characteristic is deemed “necessary,” all land that does not have that characteristic will be preemptively eliminated from consideration under the ORS 197.298 and Goal 14 analyses. Newberg’s proposal demonstrates that if the term “necessary” is interpreted incorrectly, site characteristics can be misused as a tool to evade the statutory priorities for the inclusion of land in a UGB.

We recommend that the Commission not waste time trying to determine what “meaningful connection” means; instead, the Commission should say what it meant by the word “necessary.” We think the Commission meant “reasonably necessary.”

Not only is “reasonably necessary” the most straightforward interpretation, it is also the most straightforward test to apply. If there are many examples of successful businesses operating on sites that lack a particular attribute, that characteristic cannot be reasonably necessary for that type of employment use.

For example, if many wineries operate successfully on hillsides, then a flat site cannot be a necessary site characteristic for wineries. Whether or not more than half or less than half of wineries in a given survey area have that characteristic is not an important inquiry, and we do not believe the Commission intended to establish such a test by its use of the word “typical” in the rule.

Newberg’s handling of the winery industry, which is one of its targeted industries, provides a good example of the city’s flawed analysis. The city relied on a document entitled Typical Characteristics of Industrial Sites for Newberg Targeted Industrial Uses (hereafter “Site Study”). (R.5965-95) The Site Study examines some characteristics of 25 industrial “districts” – areas of contiguous industrially-zoned land – in Newberg and other Willamette Valley cities. No industrial district contained all the targeted industries, and some contained retail and commercial businesses as well. Only one of the studied industrial districts contained a winery. (R.5981)

The city did not look at individual wineries; instead it looked at these 25 industrial districts, only one of which contains a winery. That district happens to be flat. However, this does not override the evidence in the record that many individual wineries around Newberg operate successfully on hillsides. (R.1537)

The errors that infect Newberg’s conclusions regarding wineries also infect its conclusions regarding the other employment uses. For example, biotech firms are one of Newberg’s targeted industries, yet none of the 25 districts studied by the city contained biotech firms. (R.5980-86) As Lee Does pointed out at the February 13 hearing, the city’s failure to study the actual needs of the biotech industry led to site characteristics that are not only unnecessary for biotech, but are actually incompatible with that industry, such as close proximity to arterial roadways.

The Commission should affirm that the language in its rule means what it says:

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4 Many Newberg-area wineries locate on sites with slopes greater than 10%, including Chehalem, A to Z, and August Cellars. R.1537
“‘Site Characteristics’ means the attributes of a site [reasonably] necessary for a particular industrial or other employment use to operate [successfully].”

For the above reasons, we respectfully suggest that the proposed remand order be amended to reflect the actual language in the rule, instead of the “meaningfully connected” language in the current draft, i.e:

The department recommends the commission instruct the city, on remand, to:

1. Demonstrate that the “site characteristics” identified by the city pursuant to OAR 660-009-0015(2) and OAR 660-024-0060(5) are “necessary for the particular industrial or other employment uses to operate,” or consider those factors during the analysis of alternative expansion areas under the Goal 14 location factors:

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**Application of Site Characteristics**

As previously discussed, site characteristics establish the attributes that are reasonably necessary for particular industrial or other employment uses to operate successfully, and are incorporated into an EOA pursuant to Goal 9’s implementing rules. Should the EOA result in a UGB amendment, a city cannot apply its site characteristics in a manner that is inconsistent with the requirements that govern UGB amendments.

Under Goal 14, a city must first look within its UGB to determine if an identified land need can be reasonably accommodated within the existing boundary. To the extent that it cannot, ORS 197.298 and OAR 660-024-0060 establish the priority of land to be added to a UGB. The locational factors of Goal 14 provide further considerations for boundary locations.

Consistent with the priorities laid out statute and rule, a city must first look within its UGB, then to its urban reserves, then to exception areas, and finally, to resource land. At each step, the relevant question is this: Can any of the targeted industries operate successfully on the higher-priority land? Alternatively, because this is a long-term 20-year land supply and there is no crystal ball, the city could ask: Which higher-priority land should definitely be eliminated because none of the targeted industries can operate successfully there? Lower-priority land can only be considered after as many needs as possible have been accommodated on higher-priority lands.

This is not what Newberg did. As Commissioner Morrow observed at the hearing, Newberg did not look at the attributes needed for “particular uses.” Instead, the city first aggregated all expected uses into the single category of “industrial district,” then aggregated all the districts it looked at, and only then developed site characteristics based on the aggregated characteristics of many districts that were themselves aggregations of many uses, including uses that are not among Newberg’s target industries. (R. 5980-5986)
As a result, the city never established the site needs of “particular industrial or other employment uses,” as is clearly required by the plain language of OAR 660-009-0015(2) and OAR 660-009-0005(11). Because Newberg never established the site needs of particular uses, it failed to evaluate whether some or all of these uses could operate successfully in higher-priority areas (UGB, urban reserves, or exception areas).

We agree with your staff that the Commission should therefore remand the city’s site characteristics.

But there is another problem with Newberg’s approach: in addition to violating Goal 9’s implementing rules, Newberg also misapplied the site characteristics to its UGB expansion in a manner that is inconsistent with ORS 197.298, and with Goal 14 and its implementing rules.

The wrongly-adopted site characteristics were then misapplied to improperly screen out alternative areas. Newberg did not ask if a portion of a study area could reasonably accommodate the use. Instead it asked if the entire study area was suitable.

For example, Newberg screened out all study areas that were predominantly over 5% in slope. (See Friends sub-objection 1F at pp. 24-25) These include, among others, an area within the UGB (Site I) and two areas outside the UGB, (Site 20 and Site I). These three study areas have extensive buildable areas that are predominantly less than 5% in slope and these flatter areas are either within or adjacent to the UGB. (R.3868, 3890-91, 5804). In each case, Newberg combined the flatter, suitable portions with more distant, steeper areas (R.3868, 5804) and then excluded the entire study area because it was predominantly over 5% in slope (R.5729, 5740-41, 5747, 5752).

For example, as shown by the below map, part of Site I is hilly (brown shaded areas), but the part adjacent to the UGB is flat. This flat part contains at least 100 acres of usable land, yet was deemed too steep because it was lumped in with hundreds of acres of hilly land.
In addition, as explained in our Objection 1A, many of the site characteristics Newberg adopted are actually Goal 14 locational factors, e.g. residential proximity, truck traffic, commercial adjacency, etc. As we said at the February 13 hearing, we agree with your staff that it is possible for a locational factor to also be a site characteristic, but only if it is reasonably necessary for a particular industrial or other employment use to operate successfully. Again, we agree with your staff – Newberg has not made that demonstration.

In conclusion, Newberg adopted site characteristics that are inconsistent with Goal 9, and then misapplied them in a manner that is inconsistent with Goal 14 and its implementing rules, and ORS 197.298. As a result, the city incorrectly passed over higher priority land and instead included lower priority land in the boundary.

The Commission should therefore instruct the city, on remand, to:

1. Demonstrate that the “site characteristics” identified by the city pursuant to OAR 660-009-0015(2) and OAR 660-024-0060(5) are “necessary for the particular industrial or other employment uses to operate,” or consider those factors during the analysis of alternative expansion areas under the Goal 14 location factors; and

2. Apply the site characteristics to determine whether higher priority land can accommodate identified land needs within portions of study areas.

Remand of the site characteristics is necessary to correct these systemic problems. It will also eliminate the need for the Commission to address each specific site characteristic at this time.

Methodological Errors (Friends Exception 3)

At the hearing, Commissioner Lidz asked for more information on the methodological errors in the city’s Site Study that are identified in our Objection 1 and Exception 3.

- District Size and Adjacency to Commercial (Friends Objection 1B)

We start by noting that, as described above, the city made a fundamental error by evaluating the site characteristics of industrial districts in the first place, rather than individual industries. But even if it were proper to analyze industrial districts, the city’s analysis is still flawed due to methodological problems.  

First, we pointed out that the acreage figures reported for some districts are apparently inflated. For example, the Site Study classified the “Woodburn-Commerce” district in the 50-100 acre size category. (R.5985) However, the area scales to 3300’ long and an average of 500’ wide. (R.5995) That is only 38 acres, which puts the district in the 20-50 acre size category.

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5 See Objections, p.8, including footnotes
6 Calculation: 3300’ x 500’ = 1,650,000 sq. ft. = 38 acres (one acre = 43,560 sq. ft.)
Second, we said that the city excluded 12 smaller districts from its study group; when those are included, most districts are smaller than 50 acres. (R.5666-67) In response, the city claimed that most of these districts were excluded because they “were not created or substantially developed within the last 40 years, so they do not represent expected future uses.” (R.3231)

The city’s supposition, unsubstantiated with evidence, is that if a district was originally developed more than 40 years ago, then the district is incompatible with modern industries. If the city were correct that these older districts are truly unsuitable, they would all be vacant or converted to non-industrial purposes. But the opposite is true: the districts are occupied by modern industries that successfully compete in today’s marketplace.

Once modernized, these older districts are indistinguishable from newer ones. For example, below are four districts the city claims are “too old” to provide adequate sites for industry, and are therefore irrelevant for its study purposes:

It is evident that these four districts are not significantly different from any other industrial area. They are home to thoroughly modern businesses like Georgia-Pacific, Woodfold Manufacturing, Smith Cookie, and Industrial Machining and Fabrication. (R.6475). These are all examples of Newberg’s targeted industries, and they are all operating successfully in

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7 See R.6478, 6484, 6488, 6505.
districts smaller than 50 acres. The city has provided no evidence that warrants ignoring these examples when considering the site needs of its targeted industries.

- **25% Maximum Perimeter With Residential Land (Friends Objection 1C)**

Because the city erred by studying only districts, it thereby failed to determine the buffering needs of “particular uses.” There are abundant examples in the record of businesses that have more than 25% perimeter with residential. Some of these businesses have buffers — vegetation, earth berms, railways or major roads that separate them from adjacent residential land.\(^8\) Others are unbuffered, with direct, unshielded adjacency to residential.

Moreover, the city’s *Site Study* looked only at the amount of *unbuffered* residential adjacency, not the amount of already-buffered perimeter. If an industrial district was *already* buffered from adjacent residential areas, the city did not count that part as having any residential adjacency. Therefore, the city did not determine how much buffering businesses typically have, how much they actually need, nor how much is feasible.

In contrast, the city excluded all candidate alternative areas with over 25% residential adjacency, without regard to the feasibility of adding buffers where needed. Instead, the city simply asserted, without evidence, that additional buffers would be unfeasible. (R.5879)

Finally, the areas surveyed by the city’s *Site Study* are not representative of all the industrial districts in the study area. As previously discussed, 12 districts were improperly excluded from the *Site Study* — and all but three of those have more than 25% adjacency to residential land.\(^9\) For example, the excluded Forest Grove and Woodburn sites pictured above are surrounded by residential.

- **¼ mile proximity to an arterial or state highway**

The *EOA* and the city’s exceptions wrongly conflate industrial sites with industrial districts and imply that every industrial site the city studied was within ¼ mile of an arterial or state highway. In fact, the *Site Study* did not consider individual sites; it looked only at the road’s distance from an outer border of the much larger industrial *districts*. (R.5877, 5974) Since some districts are well more than ¼ mile wide, the actual distance from an industrial *site* at the edge of a district might be ½ mile or more. Thus, the city erred in its conclusion that the industrial sites it studied are typically within ¼ mile of an arterial or state highway.

**Existing vs. potential road network (Friends Objection 1D and 1E, Exception 5)**

We objected to the city’s exclusion of potential sites in undeveloped areas based on the *existing* road network, without consideration of the *potential* road network when an area develops.

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\(^8\) At the commission’s February meeting, we showed the SP Newsprint paper factory, which has a large buffered border with residential. The Steeltek site in Sherwood has vegetative buffers on three sides. See our Objections, p. 16.

\(^9\) See our Objections, p. 15, including footnotes.
Newberg’s response letter claims – for the first time – that the city did consider potential as well as existing access when performing its alternative analysis:

“In applying this characteristic, Newberg looked both at the existing transportation network and potential future transportation network. In at least one case (Wilsonville Road), Newberg concluded that an arterial reasonably could be provided in the area to provide access, and thus found that area suitable for industrial uses. See Record 5761. In other cases, such as Zimri Drive, Newberg concluded that an arterial could not reasonably be provided to serve the area. See Record 5730.” (City response letter, p. 12)

The evidence the city points to does not support its assertions. Wilsonville Road was already designated an arterial. Hence, this is not a genuine consideration of potential functional upgrades, as the city claimed.

In the case of Zimri Drive, rather than examine an upgrade to the southernmost ¼ mile of Zimri Drive, which is just north of the existing Mountainview arterial, the city inexplicably examined a much longer and steeper route in the opposite direction:

“Zimri and Springbrook both go north through hilly terrain with grades in excess of 10%, and end at Bell Road, which is narrow, hilly, and windy. So neither reasonably could be redesignated an arterial.” R. 5730

Contrary to the city’s new claims, it did not consider upgrades to roadways when it eliminated sites from consideration. For example, these are the city’s findings regarding North Valley Site 1:

“Site 1 is adjacent to a residential neighborhood on its south side. The truck access would be to North Valley Road. The nearest arterial or state highway is College Street (Highway 219). Truck travel on North Valley Road would travel adjacent to residential areas to reach College Street. Thus, Site 1 does not meet the truck travel compatibility criterion.” (Findings, R.5744)

The findings do not contain any evaluation or explanation as to why North Valley Road or Chehalem Drive could or could not be upgraded to an arterial. There are numerous similar examples.

**Arterial vs. Major Collector (Friends Objection 1E, Exception 4)**

We objected to a site characteristic that would eliminate all industrial sites from consideration if they did not already have access to a state highway or arterial street within ¼ mile.

In its response letter, Newberg waved away the possibility of upgrading any roads to arterials because that would take “several decades of planning.” If the barrier is going to be set that

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10 See Newberg Transportation System Plan (R.6506)
high, then extra care must be taken to ensure that sites are not wrongly eliminated – are arterials really needed within ¼ mile of all industrial sites?

The city asserts that all industrial sites need to be within ¼ mile of an arterial based on an observation that most industrial districts the city chose to study have that kind of access. However, an observation that this trait is common does not establish need. For example, most residential districts in Newberg also are within ¼ mile of an arterial.11 No one would argue that residential lands actually need that access – close arterial proximity is just happenstance, a byproduct of the city’s spatial layout.

In addition, as previously mentioned, the city chose to study the distance from arterial roads to the edges of districts, instead of individual sites. As a result, the city failed to consider that many industries operate successfully without close arterial access.

For example, SP Newsprint, a paper factory in Newberg that generates heavy truck traffic, is located in a district that is within ¼ mile of an arterial. However, SP Newsprint itself is over ½ mile from an arterial or state highway. Instead, the factory has access to a major collector, Wypooski Road:

R.6406, annotated with road information from Newberg Transportation System Plan (R.6506)

SP Newsprint illustrates that close arterial access is not needed, even for the heaviest kinds of industry. If this paper factory does not need close arterial access, why would less intensive industries, such as biotech or wineries, need it? Why aren’t major collectors adequate? The city has never provided evidence to answer these questions.

In its February 20 response letter (p. 10), the city asserts that collectors are inadequate because they do not provide the proper road functions. The city explained that collectors are roads that “provide access to property and that collect and distribute traffic between access roads and arterials,” whereas arterials are “state highways and other public roads that principally provide service to through traffic between cities and towns, state highways and major destinations.”

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11 Compare Newberg Transportation System Plan and Newberg Zoning Map, R.6506-07.
The definitions provided by the city only serve to undermine its position: if the purpose of an arterial is serve “through traffic between cities and towns,” why would arterials be necessary to provide local road access to the city’s resident industries?

Collectors, on the other hand, provide local access to property and route the collected traffic to the larger roadways, the exact functions that industry requires. In the SP Newsprint example, collector Wynooski Road provides just that type of access.

The Commission should reject this site characteristic. Nothing in the record indicates that close arterial access is needed to serve all industrial uses.

IV. SITE SIZES (Friends Objection 2, Friends Exception 6)

We objected to the city’s use of site sizes that are inflated, unexplained, and unsupported by any evidence in the record. Newberg estimated the number of firms in each of three size-of-workforce categories, and then assigned a range of site sizes, as well as an average site size, to each category – essentially an employees per acre approach.

The city provides no explanation as to why these particular site sizes were chosen, instead of other sizes. They are significantly larger than the city’s existing site sizes for similar numbers of employees.

In its response letter, the city offers a brand new theory: it was not required to explain its site sizes.

“The city’s choice of site sizes was based on the expert opinion of Winterbrook Planning and the professionals of the Newberg Planning Division. See Record 5863. Friends assert that all the assumptions underlying this selection be in the record and explained. However, case law is clear that this is not required. See ODOT v. Clackamas County, 27 Or LUBA 141 (1994). (There is no requirement that an expert witness explain the basis for all assumptions underlying the expert's evidence, or that evidence supporting the expert's assumptions be included in the record).” (City response letter, p.12)

The city misunderstands both what we said and what the court said. In this case, the city’s conclusions regarding its site sizes are unsupported by either evidence or explanation. We don’t maintain that an expert witness must explain all assumptions. We do maintain that a city’s assumptions and the conclusions it reaches must be based on something more than “the planning department says so.”

The LUBA case cited in the city’s response letter supports our position. While LUBA did decide that there is no absolute requirement that all expert assumptions be explained and supported with evidence, the opinion also said:

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13 If Newberg were to accommodate its future industrial employment merely as efficiently as it has in the past, the city would need 22% less industrial land overall. (R.6586-6590)
"Of course, we recognize that if sufficient evidence undermining an expert's assumptions is submitted during the local proceedings, it may be unreasonable for the local decision maker to rely on that expert's conclusions."

In this case, the evidence in the record shows that Newberg’s existing industrial employers, across all size ranges, use land at much higher employment densities than Newberg projects in the future. The city never provided any evidence or explanation showing why its site size determinations were reasonable, in light of these countervailing facts.

It is not enough to merely announce the site sizes, without any explanation or evidence. The word “expert” is not a magic talisman that can ward off claims of substantial evidence deficiencies, regardless of the facts. The unsubstantiated claims of an “expert” are not substantial evidence; even experts must explain how the facts led them to draw their conclusions. See Devin Oil Co., Inc. v. Morrow County, 62 Or LUBA 247 (2010), applicant’s engineer’s unsupported opinion is not substantial evidence.

The Court of Appeals has determined that remand is required when “one of [an] expert's basic assumptions is without evidentiary support.” Liberty Northwest Ins. Corp. v. Verner, 139 Or. App. 165, 168-60, 911 P.2d 948 (1996).

Contradictory evidence must also be explained; if the record contains some supporting evidence, that evidence may not be substantial when viewed with the countervailing evidence in the whole record. Canfield v. Yamhill County, 142 Or App 12, 17-18, 920 P2d 558 (1996).

The Commission should require the city, on remand, to reevaluate its industrial site size determinations in light of the evidence in the whole record.

V. EMPLOYMENT LANDS INVENTORY (Friends Objection 4, Exception 7)

An accurate assessment of employment capacity within the existing UGB is essential to a properly sized boundary, and, in turn, to ensuring both an adequate supply of urban employment land and an adequate land base to support our farm and forest industries. This assessment begins with an accurate employment land inventory.

Our objection contends that Newberg lacks an accurate, legally compliant inventory, failed to consider extensive areas of vacant commercial employment land, and failed to inventory other employment land in the institutional and residential-professional zones, even though the EOA anticipates significant employment in these zones.

The city’s response letter mischaracterizes our objection and fails to address its principle points. In addition, it makes unsupported factual assertions, misidentifies portions of the record, and offers a new explanation for the city’s failure to consider extensive areas of vacant employment land. Tellingly, what the city’s response letter does not do is point to a legally compliant employment lands inventory in the record.

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14 R. 6586-6590
15 A prior inventory was remanded by LUBA in 2010.
OAR 660-009-0015(3) requires (emphasis added):

Inventory of Industrial and Other Employment Lands. Comprehensive plans for all areas within urban growth boundaries must include an inventory of vacant and developed\(^{16}\) lands within the planning area designated for industrial or other employment use.

(a) For sites inventoried under this section, plans must provide the following information:

(A) The description, including site characteristics, of vacant or developed sites within each plan or zoning district;

(B) A description of any development constraints or infrastructure needs that affect the buildable area of sites in the inventory; and

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(b) When comparing current land supply to the projected demand, cities and counties may inventory contiguous lots or parcels together that are within a discrete plan or zoning district.

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Under OAR 660-009-0005(6):

"Other Employment Use" means all non-industrial employment activities including the widest range of retail, wholesale, service, non-profit, business headquarters, administrative and governmental employment activities that are accommodated in retail, office and flexible building types. Other employment uses also include employment activities of an entity or organization that serves the medical, educational, social service, recreation and security needs of the community typically in large buildings or multi-building campuses.

Thus, a legally compliant EOA must (a) inventory vacant and developed land designated for industrial or other employment uses, “including the widest range of retail, wholesale, service, non-profit, business headquarters, administrative and governmental employment activities that are accommodated in retail, office and flexible building types;” and (b) describe the site characteristics of the sites, and describe any development constraints or infrastructure needs that affect their buildable area.

As noted above, the city’s response letter does not, and cannot, state where in the record such an inventory exists, because there is no such inventory. Instead, the response letter misdirects. Our objection identified extensive additional vacant commercial land that was not included in the EOA’s summary map and table of buildable commercial land, which is the basis for the city’s conclusions regarding its commercial land supply. The missing land is

\(^{16}\) “Vacant” and “developed” are further defined in OAR 660-009-0005.
zoned Springbrook District/ Village (SD/V) zone. As shown below, the SD/V zone is modeled after, and is very similar to, the city’s C-3 commercial zone. R. 6753.

The uninventoried portion of SD/V land is outlined in red on the maps below. The zone map shows that it is zoned for commercial uses. The aerial shows that it is vacant, and the EOA map shows that it was not inventoried.

This issue was raised in local testimony (R.5663, 6753-54,) but the city’s response letter
offers it’s first attempt to explain its failure to consider the capacity of this land. The city states:

“The Springbrook District/Village area also is a mixed-use area planned part for residential uses and part for commercial uses. Record 5732, 5733. Newberg accordingly inventoried the part designated for commercial uses as commercial.” (City’s response letter, p.13)

There are several reasons the department and Commission should reject this post-hoc argument.

First, the city’s assertions are unsupported by the record. The record citations provided by the city at R.5732 and R.5733 do not even mention the Springbrook District/Village (SD/V) area, mixed-use zoning, or how the city inventoried the area.

Second, the record clearly shows that the SD/V zone is modeled after the city’s C-3 commercial zone and allows similar uses. (R.6753) All of the limited residential uses allowed in the SD/V zone are also allowed in the city’s C-3 zone. The retail, offices, restaurants, wineries, financial institutions, medical clinics, etc. that are allowed in the zone fall squarely within the definition of “other employment uses” found in OAR 660-009-0005(6). Yet, as illustrated in the EOA map above, the city’s analysis considered the western portion to be employment land and ignored the large, vacant eastern portion outlined in the maps above.

The city’s response letter concedes (p. 13) that it only considers a portion of the SD/V area to be employment land. The city implies that the reason it did this is that only a portion of the SD/V district is designated for commercial uses. However, the city’s zoning map clearly shows the entire SD/V district carries the same quasi-commercial zone without any sub-districts. (R.6507, 6753) The record contains no information as to how, why, or even if, Newberg concluded that no employment uses would occur on the omitted vacant land.

The following portion of city’s response letter (a) illustrates the shortcomings in the city’s approach; and (b) contains new unsupported factual assertions:

“Determining whether mixed-use zoned land constitutes ‘employment land’ is admittedly a bit of challenge. In some cases it may and in others it might not. Newberg did methodically consider such mixed-use zones, and, where the evidence in the record supported designating such land as ‘employment land’ it did so, and where the evidence did not support such a designation it did not. For example, the Providence Drive Medical Office area was included in the employment land inventory, and that area contains land that is both zoned Institutional and Residential-Professional. This was included because both areas were specifically planned for medical office uses.” (City’s response letter, p.13)

First, the city concedes that it only inventoried land in its institutional and residential-professional zones as employment land, if they “were specifically planned” for employment uses, even though the EOA anticipates significant employment in these zones. (R.5845-46)
This approach is not consistent with the requirements the rule.

Second, the city’s assertion that it methodically considered these mixed-use employment zones is both brand new, and unsupported by evidence in the record or by any findings.

The city’s zoning map is reproduced below. According to the remanded inventory at R.6555, the highlighted parcels contain buildable land. There is nothing in the record to support the city’s contention that it included these lands in its buildable lands inventory, nor is there anything in the record to support a conclusion that none of the employment uses allowed on these parcels will occur over the planning period.

![Newberg Zoning Map, R.6507 (highlighting added)](image)

Pursuant to OAR 660-009-0015(3)(a)(B), if there are development constraints or infrastructure needs that affect the buildable area of the sites picture above and/or the omitted land in the Springbrook Village District, this is precisely the sort of information that a legally-compliant buildable lands inventory would contain.

Finally, even if Newberg could demonstrate that employment uses will not occur on these lands under the current zoning, under Goal 14, it would still need to consider whether these lands could be redesignated for industrial or commercial use, instead of expanding the boundary. As Newberg’s own findings state:

“One other option that must be considered is whether sites that already are in the UGB reasonably could be redesignated industrial to meet the employment needs. If a site is well suited for industrial use, then it may be appropriate to redesignate that site industrial. If that would require expanding the UGB to
add additional land in the other category, this may be appropriate if the site characteristics needed for land in the current plan classification are more flexible than industrial…” (R.5726)

“It is far more difficult to find land that meets the industrial site suitability characteristics than that meets criteria for residential development.” (R.5732)

The Commission should require, on remand, that the city conduct a legally compliant inventory of employment lands.

VI. WASTE MANAGEMENT SITE (Friends Objection 6)

The rural Waste Management site pictured below is within the city’s proposed expansion area and will be served by city infrastructure if included within the UGB. The city’s response letter (p. 15) asserts that it is not vacant because it contains “permanent improvements.” The city has previously claimed that the site is “paved” and “improved.” (R.6003) The city further claims the site it not likely to be redeveloped over the 20-year planning period.

The city’s response is not credible. Gravel and/or asphalt paving do not constitute “permanent improvements.” The department is correct. The Commission should direct the city, on remand, to consider the site vacant if it is included within the UGB.

VII. EXTRA ACREAGE (Friends Objection 6B, Friends Exception 10)

In addition to the land added for industrial use and the sewage treatment plant, the city’s proposed UGB expansion includes an additional 128 acres of unbuildable land on the fringe of the UGB expansion area that doubles the size of the proposed expansion. We contend there is no demonstrated need for this land.
The city’s response letter (p. 16) asserts that these additional lands “are needed to meet livability need.” At the hearing on February 13, the city further identified a potential trail system and a need for buffering and amenities for the proposed industrial area. However, the city also testified that they would not have included the additional land if the UGB expansion had been elsewhere.

In addition, the city does not assert that industrial uses require additional adjacent parkland in order to operate successfully, as evidenced by the lack of any relevant site characteristics.

The city’s response letter also points to findings that in turn reference the South Industrial Area Master Plan. As previously discussed, this master plan was adopted by the city prior to their alternatives analysis. These findings assert that because the city master planned this additional land as “buffers and amenities for the industrial uses, therefore there is an inherent need for those things that can only be met by inclusion of the [additional land].” (R.5792)\(^\text{17}\)

Elsewhere, the findings state that the additional land is needed, “to fulfill the provisions of the South Industrial Area Master Plan (SIAMP)” (R.5784)

The Commission should reject this circular logic. Master planning the land does not establish a demonstrated need, nor does it demonstrate that the need, if it exists, can only be met in this location. If the city had demonstrated a need for additional land for “livability” the regulatory framework requires a showing that the need cannot be accommodated on higher-priority land and application of the locational factors in Goal 14; the city has not done this.

The city concedes that the land is not needed to meet its identified industrial lands needs and is not needed for its expected employment uses to operate successfully. The Commission should require, the city, on remand, to delete the unbuildable acreage in the floodplain and stream corridors.

**VIII. ADDITIONAL LARGE SITES (Friends Objection 6, Friends Exception 9)**

Our objection contends that the city included more large sites than it says it needs within its proposed UGB expansion: an extra site in the 30-50 acre category and an extra site in the 10-30 acre category.

The city’s response letter (p. 15) speculates that the additional large parcels could be subdivided to meet a need for smaller parcels; and asserts that Newberg needs both a specific number of sites and a specific number of acres.

The city’s letter misses the point: the problem is that the city did not examine how its needed sites could be accommodated in its proposed UGB area. If the city were to match its site needs with its proposed UGB expansion, it would become immediately apparent that the city could meet its site needs on a smaller total acreage than would result from merely totaling the

\(^{17}\) The city’s response letter misidentifies the record citation.
median sites sizes. Goal 14 and OAR 660-024-0040(1) require that it do so.

Further, if the city does intend for the additional large sites (large blocks of prime farmland) to be “subdivided” into smaller sites, the city needs to explain why the need for those smaller sites cannot be met on higher-priority land.

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

IX. AREAS THAT STRADDLE THE UGB (Friends Objection 5, Exception 8)

We contend that a city cannot categorically choose to study land within the UGB in isolation, when study with adjacent land outside the UGB would make it viable. The determination must be made on a case-by-case basis. If the land within the UGB can reasonably accommodate some or all of the need in combination with land outside the boundary, the city must consider them together and consider potential re-designation of the land within the UGB. Our objections identify two specific areas.18

The city’s response letter (p. 14-15) concedes that it is appropriate to consider such lands on a case-by-case basis. However, the letter then states:

“In looking at this case-by-case, neither of two challenged areas, Site I nor Site XII, can reasonably accommodate industrial use, whether adjacent sites outside the UGB are included or not. Contrary to Friends assertion, the reasons for finding that Site I cannot reasonably accommodate industrial use do not go away if additional land outside the UGB is added. Therefore, Newberg correctly analyzed the sites.” (City’s response letter, p. 15)

The city’s response ignores the record, does not point to any evidence, and is not supported by evidence. The city never considered the adjacent sites together despite requests that they do so. (R.3868-3869, 4465, 4602, 5666-67) Contrary to the city’s assertions, the failure to consider the areas together resulted in reasons to exclude them that wouldn’t otherwise exist. (R.5729, 5731, 5747, 5750)

The Commission should direct the city on remand to consider whether land inside the UGB can, in combination with land outside the UGB, reasonably accommodate identified land needs.

18 Sites XII and 12 in the vicinity of S. Springbrook Rd; and Sites 1, 3, and I in the vicinity of North Valley Rd. and Chehalem Drive.