



Oregon

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February 10, 2014

TO: Land Conservation and Development Commission

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SUBJECT: Agenda Item 4, February 13-14, 2014, LCDC Meeting

CITY OF NEWBERG – URBAN GROWTH BOUNDARY AMENDMENT SUPPLEMENTAL REPORT

This report follows but does not replace the department's January 23, 2014 report to the Land Conservation and Development Commission (commission) regarding the Newberg urban growth boundary (UGB) submittal review. The department has received two letters of exception to the January 23 report, and these are addressed in section II of this report.

The department received exceptions to its January 23, 2014 report from the City of Newberg (city) and 1000 Friends of Oregon and Friends of Yamhill County (Friends). Some of the exceptions raise complex issues that require analysis by the department. Several of the exceptions contend the department misconstrued either what the city adopted or what the objector meant. In these cases, the department needs to confer with the city and perhaps other parties to ensure the best recommendation is provided to the commission.

The department received the exceptions 10 days prior to the scheduled hearing on the referral, so the opportunity to evaluate the merits of 22 exceptions in detail has not been available. Consequently, this report addresses the city's primary argument in its exceptions in Section II, but proposed findings and recommendations on the others will be provided for the commission to consider at its March 13-14 meeting.

The summary in Section I provides an overview of the fundamental issues before the commission in this proceeding.

I. SUMMARY

The legal and evidentiary issues before the commission are discussed in the Staff Report. The city has amended its plan to address its economic development needs. Among these amendments

is an expansion of the UGB to accommodate expected demand for new industrial sites until 2032. This action raises several questions for the commission to decide.

The state's land use policy includes a variety of considerations that come into play during a UGB amendment: economic development, needed housing, farmland protection, efficient use of land and infrastructure, and natural resource protection are among the many objectives the state's policy is designed to achieve. The policy framework does not give priority to one of these objectives over the others because they are all important for maintaining healthy, prosperous communities. Instead, the policy framework is expressed through various statutes, goals, and rules, designed to maximize the benefits of each objective.

The city's submittal raises issues related to how much land is needed for industrial uses¹ and where the need is accommodated. Much of the review relates to whether the city demonstrated that its decision complies with specific requirements, but the most basic question is whether the city included too much land in the UGB. There is little argument that the city has demonstrated it needs at least some additional industrial land, but the threshold question the commission must decide is whether more land was added to the UGB than needed.

The department recommended sustaining two objections related to the city's submittal regarding the need for industrial land. *See* Staff Report at 31-32 regarding capacity on fully developed land and Staff Report at 49-50 regarding the Waste Management site. The amount of land or number of sites affected by this recommendation is unknown, but likely not a large portion of the city's calculated need. The more significant questions concern whether the need for employment land can be accommodated on land that is either already inside the UGB or on higher-priority lands outside the UGB than what the city actually included in the adopted amendment.

Many of the objections concern the city's use of "site characteristics" to exclude land for consideration as a potential UGB expansion. The commission's rules sensibly relieve a city from analyzing a site as a potential UGB expansion area if the city has specified characteristics that are necessary for a site to be suitable for an intended use, and the land in question does not contain those characteristics. OAR 660-024-0060(5).² Put differently, this provision allows a city to limit its focus and analysis to lands containing the identified characteristics, the consequence of which is that these lands are exempted from the compliance with the priority requirements in ORS 197.298 and the boundary location alternatives analysis in Goal 14.

In this case, the city identified a number of site characteristics and determined that the only areas suitable to satisfy the needs of industrial users are on high-value farmland. Thus, the commission

¹ While the city's economic opportunities analysis (EOA) identified a need for additional commercial uses, the present UGB submittal is limited to accommodating the needs for industrial uses.

² OAR 660-024-0060(5) provides:

If a local government has specified characteristics such as parcel size, topography, or proximity that are necessary for land to be suitable for an identified need, the local government may limit its consideration to land that has the specified characteristics when it conducts the boundary location alternatives analysis and applies ORS 197.298.

is asked to determine whether the city properly disregarded other areas that perhaps could have accommodated industrial uses without converting high-value farmland.

Key to answering that question is the determination of site suitability. The commission's rules state that such a determination is to be based on whether the characteristics of the site have a "meaningful connection" to a "particular use." For example, is an "industrial district" – typically a collection of different uses – a "particular use"? Or, is the term "particular use" directed at specific type of use, such as high tech manufacturing, healthcare facilities, and warehouse and distribution? Second, do the city's identified site characteristics have "meaningful connections" to the operational requirements of the particular use? The outcome of this inquiry has practical effects; misapplication of site characteristics could result in exclusion of sites that are in fact suitable for targeted uses from the UGB analysis. Some of these sites may also have a higher priority for inclusion under ORS 197.298.

As explained in the Staff Report, the department concludes that the city's use of industrial districts is too broad to constitute a "particular use." *See* Staff Report at 17-18.

The department also found that the city's identified site characteristics' connections to operational needs are not sufficiently explained or supported. *See* Staff Report at 15-17 for the analysis of site characteristics, and 19-49 for the application of this analysis (in the context of responding to objections).

It is difficult to disregard the fact that all of the areas the city found suitable for industrial use are high-value farmland when most of the study areas are not. Specifically, the city identified 21 study areas outside the existing UGB (in addition to 14 areas inside the existing UGB). *See* Staff Report at page 8 for a map of the study areas. Applying the site characteristics, the city excluded all but two study areas – 11 and 14 – both of which are high-value farmland, and thus the last priority for inclusion in a UGB. Consequently, when the city applied the ORS 197.298 priorities to alternative areas to include in a UGB, all of the alternatives were of the same (low) priority. Had other, higher-priority, areas been found to be suitable for industrial use, it is possible that the UGB amendment would have included less or no high-value farmland, although that outcome is not certain. Many of the qualities that make land suitable for industrial use – not too steep, large acreage, not too wet – also make it valuable farmland.

The tension in this case is whether the city can provide a sufficient amount of land suitable for the particular industrial uses the city believes it can attract while avoiding high-value farmland. The department's and commission's role in resolving this tension is to determine whether the city adequately explained and supported its findings and conclusions within the framework of the commission's statutes and rules.

II. RESPONSE TO EXCEPTIONS

On February 3, 2014, the city submitted 12 exceptions to the Staff Report, which include responses to some of Friends' objections ([Newberg exception](#)). On the same date, Friends

submitted 10 [exceptions](#). The exceptions were submitted within the time required by OAR 660-025-0160(5).

For reasons stated in the introduction of this report, the department is not addressing Friends' exceptions at this time. As for the city's exceptions, the department is responding to the city's overarching exception that the department is improperly interpreting and applying the administrative rules related to site characteristics. *See* Newberg exception at 4-13 for the city's explanation and exception. The department will respond to the city's individual exceptions and all of Friends' exceptions in a subsequent report for consideration at the commission's March 13-14 meeting.

1. The Department's Interpretation of "Site Characteristics"

The city contends that the department has misinterpreted the term "site characteristics," as that term has been interpreted by LUBA and the Court of Appeals. The city further contends that this misinterpretation has led the department to incorrectly recommend that the commission remand city's submittal because the record does not contain substantial evidence that certain of the city's site characteristics meet the site characteristic requirements.

LUBA interpreted "site characteristics" as follows:

[W]e believe that 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. If the record demonstrates that an attribute is both typical and has some meaningful connection with the operational requirements of the industrial or employment use, we believe OAR 660-009-0005(11) and 660-009-0015(2) would permit the city to list it as a site characteristic. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5, 19 (2010).

The Court of Appeals affirmed LUBA's opinion, holding 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*, 240 Or App 738, 747 (2011).

Thus, the focus of the "site characteristics" analysis is on the operational connection between the attribute and the particular industrial use: what is necessary for a particular use to successfully operate on a given site; not whether the site represents a perfectly ideal set of conditions, or is more attractive than other sites on which successful operation would also be possible.

As LUBA notes, this interpretation is subjective, giving the city some latitude in determining what site characteristics are "necessary" for successful operations. It is not a "strict" necessity test; it does not require that the city demonstrate that the selected site characteristic is one that a particular use must have or cannot do without. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA at 18. However, it is also not a test that asks whether a characteristic might be nice to

have, or might result in a more attractive site, or one that gives the city a marketing advantage. *Id.* (rejecting the city's suggestion that a site characteristic can be one that would give the city advantage in competing with other areas).³ In its most simplistic form, it is a test that asks what is needed, not what is wanted.

This is the problem the department identified in the Staff Report: "The findings state that industrial district size is *beneficial* in several respects, but provide only general or incomplete 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." Staff Report at 29. The same problem is present with the other site characteristics identified by the city, such as proximity to transportation and site topography.

It is in light of this interpretation of "site characteristics" that the department is recommending that the city be asked to provide more evidence and explanation concerning the necessity of (or meaningful connection between) certain site characteristics to the successful operation of particular uses. Importantly, the department is not recommending that the commission determine, as a matter of law, that the identified site characteristics have no meaningful connection to any of the particular uses. It is possible that the city may be able to provide sufficient evidence to demonstrate that there is a meaningful connection between one or more of the affected site characteristics and the successful operation of a particular use. The department's conclusion is that the city has not yet done so.

In several of its exceptions, the city contends that the department was not looking for "some meaningful connection with the operation of the industrial or employment use," but instead was looking for evidence of what industries "cannot do without," an interpretation in opposition to the Court's guidance. Newberg exception at 9, 12, 14, 16, 22. The department disagrees. As explained above, the department adopted LUBA and the Court of Appeals' interpretation of "site characteristics" and found that the city had not demonstrated that the identified site characteristics were meaningfully connected to the particular use's operational needs. To the extent the city appears to argue otherwise, the department notes that an inquiry into the *operational* needs of a particular use is required: OAR 660-009-0005(11) defines "site characteristics" as "the attributes of a site necessary for a particular industrial or other employment use to *operate*." (Emphasis added.)

In addition, city's findings relate to the needs of a *district* rather than a particular industrial use. Specifically, the city made findings regarding the needs of industry *generally* (e.g., good transportation access, separation from residential use) and derived very specific site characteristics, based on a survey of business districts – not particular industrial uses. The city then related these site characteristics to the target industrial uses (Table 12-24, Rec. at 5882-

³ LUBA also noted that the "city's exclusive focus on marketing concerns also runs the risk that the city might run afoul of other statewide planning goal and statutory obligations for establishing urban growth boundaries in a way that balances the need to provide adequate land for industrial development and statutory and goal standards for protecting agricultural, forest, and other sensitive lands." *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA at 20.

5888), but the department did not find that the city had adequately established a meaningful connection between those characteristics and the operational needs. For example, the city stated that its target industries needed to have close and suitable truck access, and one of the site characteristics it chose was: “parcels or contiguous group of parcels [that] have suitable truck access to a state highway or arterial street within ¼ mile.” The one-quarter mile standard and the reference to state highways and arterials are derived from the city’s analysis of sample industrial parks, not from analysis of particular industrial uses.

2. Grouping of “Particular Uses”

The department explained how it interprets the requirement to tie the required site characteristics to a particular use in the Staff Report:

[T]he department interprets the applicable administrative rules to require a city to demonstrate that the site characteristics describe the operations needs of a particular employment uses or groups of uses with similar operational needs. The department finds that the term “particular” should be interpreted in a way that allows a city a reasonable and practical path to compliance with the rules while addressing its economic development needs. At the same time, it cannot be construed so broadly that it renders the term “particular” moot. Staff Report at 17.

In its exceptions, the city suggests a different view, arguing that if multiple “particular uses” have compatible site characteristics, they can be grouped together into one “site category.” *See* Newberg exception at 11-13. The issue here is the city’s definition of compatibility. If the city is attempting to exclude a site based on site characteristics, the city may combine two or more “particular uses.” The department believes such combining might be permissible, but only to the extent that it would not result in the exclusion of a site that would be included if the site characteristics of any individual particular use were applied. Otherwise, the grouping of particular uses would undermine the “particular use” requirement. For example, consider a particular use with site characteristics A and B, and a particular use with site characteristics B and C. The two particular uses might be “compatible” in the sense that they could both operate on a site with characteristics A, B, and C. But this interpretation would lead to the improper exclusion of sites that only have characteristics A and B, or only have characteristics B and C.

3. Conclusion

The department does not propose to amend its recommendation at this time based on the city’s exceptions.