



Oregon

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May 28, 2009



TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director
Steven Oulman, AICP, Mid-Willamette Valley Regional Representative

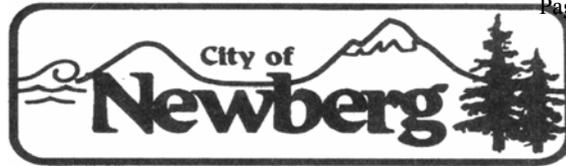
SUBJECT: **Agenda Item 15, June 4-5, 2009 LCDC Meeting**
Written exceptions to May 14 department report

By statute and rule, the commission's review of an urban reserve designation is undertaken in the manner of periodic review. OAR 660-025-0160(3) requires the department mail a copy of a report at least 21 days before the commission meeting to consider the appeal. OAR 660-025-0160(4) provides that parties to the local action and the director's decision may file written exceptions to the report within ten days of the report's mailing.

Attached are written exceptions submitted by the City of Newberg and Mike and Cathy Stuhr.

If you have questions about the materials please contact Steve Oulman, Regional Representative, at (503) 373-0050 ext. 259 or steve.oulman@state.or.us.

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May 26, 2009

*Via e-mail steve.oulman@state.or.us
And fax 503-378-5518*

Mr. Richard Whitman, Director
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301

Re: Exceptions to Director's Report on File No. 2008-005 (Order 001767)
City of Newberg and Yamhill County Urban Reserves

Dear Mr. Whitman:

We are writing on behalf of the City of Newberg to file exceptions to the Director's Report on Newberg's designation of urban reserves. These exceptions are being filed pursuant to OAR 660-025-0160.

General Exceptions

We request that the report be revised to recommend that the Commission sustain the objections we filed earlier, and reject the objections of 1000 Friends of Oregon and Friends of Yamhill County.

As we noted in our appeal, the Commission's role is to determine whether substantial evidence in the record supports Newberg's urban reserve designation. It is our hope that each member of the Commission will thoroughly review the over 3,000 page record that established the factual basis and substantial evidence in support of the urban reserve designation. While realistically this will not occur, we believe it is imperative that the report accurately and fairly summarize the evidence that is in the record. We take exception to many statements in the report that characterize years of study, expert analysis, coordination with many agencies, mountains of reports, minutes from dozens of hearings, maps, studies, and presented evidence as "little evidence" and "little explanation". In return, the Department proposes several actions, citing virtually no evidence themselves in support of those opinions, and ignoring statutes and rules that would make the suggested course of action impossible. We request that the recommendations that are based strictly on the Department's opinion be stricken from the report.

Exception 1: Overall Need

Newberg takes exception to the portion of the Director’s Report recommending that the Commission sustain the appeal of 1000 Friends of Oregon and Friends of Yamhill County (1000 Friends) on the ground that it is inherently inconsistent for the Commission to uphold Newberg’s determination of its overall needs for industrial, commercial and institutional land in its urban reserve area (URA), while rejecting Newberg’s determinations that portions of the needed industrial and institutional land must be provided on large, relatively flat parcels.

Background: DLCD Remand Order No. 001767, dated April 10, 2009 (Remand Order), upheld Newberg’s identification of an overall need for 1,665 acres of buildable land to be designated as urban reserve to meet its need from 2007 through 2040. The order set out the following table excerpted from Table 1 of Newberg’s UGB Justification Report:

Table 1 Total Land Need 2007-2040

Residential	947 acres
Commercial	85 acres
Industrial	226 acres
<u>Institutional</u>	<u>407 acres</u>
TOTAL	1,665 acres

and then concluded:

“The department finds that Newberg has correctly identified an overall need for buildable land for the planning period through 2040. That need is approximately 1,665 acres. * * *” (Remand Order, p. 4)

However, the Remand Order also rejected Newberg’s justification for concluding that portions of the needed industrial land (200 acres), commercial land (15 acres), and institutional land (327 acres) must be on large, relatively flat parcels. (Remand Order, pp. 5-7) In so doing, the Remand Order sustained objections made by 1000 Friends. (Remand Order, pp. 18-19)

1000 Friends appealed the Remand Order to the Commission, on the basis that the Department’s conclusion that Newberg had properly identified an overall need for 1,665 acres of urban reserve land was “inconsistent with the record and the Department’s specific findings regarding [the need for] industrial and institutional land.”¹ (1000 Friends Appeal, p. 1) 1000 Friends contended the Remand Order found Newberg failed

¹ To the extent 1000 Friends’ appeal also challenges Newberg’s justification for needing 226 acres of industrial land, 85 acres of commercial land and 407 acres of institutional land, please refer to Exceptions 2 through 4 below.

to justify the amount of industrial and institutional land needed in the URA, and cited one finding as demonstrating this alleged inconsistency:

“The city’s analysis of economic opportunities falls short of the requirements for an EOA contemplated by the Goal 9 rule and thus does not provide sufficient justification for the **amount** or type of employment lands the city asserts are needed and subsequently identified for inclusion in the URA.” (Ellipsis restored; emphasis by 1000 Friends.)

The Director’s Report recommends that the Commission sustain 1000 Friend’s appeal/objection. The Director’s Report interprets 1000 Friends’ objection as being that “it is inconsistent for the department on one hand to agree with the city’s determination of an overall need for land through 2040 but on the other hand disagree with findings about components of the overall need, namely industrial and institutional land need.” (Director’s Report, p. 7) However, the Report also states:

“* * * Fundamentally, the department believes that the city undertook an appropriate analysis of land need. The department did not conduct an independent evaluation of land needs and is not substituting its judgment for that of the city. To this degree, the department can agree that the city’s overall findings and conclusions are reasonable.

“* * * * *

“As a result of this objection, the department clarifies the point originally found in the director’s decision: the department agrees with the city’s approach to determining need through 2040. The department does *not* recommend that the commission accept the city’s conclusion that 1,665 acres of land is needed through 2040.” (Emphasis in original. Director’s Report, pp. 7-8)

Discussion: The Director’s Report errs in agreeing with 1000 Friends’ contention that it is inherently inconsistent to accept Newberg’s determination of its overall acreage needs for industrial, commercial and institutional land while rejecting Newberg’ justification for requiring that portions of the overall amount of land needed must have certain specific characteristics to be suitable for future urban use. Contrary to 1000 Friends’ arguments, the Remand Order did not remand Newberg’s decision because the **overall amount** of land the city found to be needed for industrial and institutional use was not adequately justified, but rather because there was inadequate justification for the **specific characteristics** the city found to be needed for portions of such land – namely that they be large, relatively flat parcels. The overall amounts of land needed for the urban use from 2007-2040 are incorporated into Newberg’s acknowledged comprehensive plan, which has been adopted and acknowledged through the post-acknowledgement plan amendment process. In addition, these needs were the basis for Newberg’s 2006 UGB amendment, which was adopted and acknowledged through the “in the manner provided for periodic review” process under ORS 197.626.

Requested Revisions: Newberg asks that the response to 1000 Friends' appeal regarding overall need, found in the Director's Report at pages 7-8, be amended to provide as follows:

- a. 1000 Friends of Oregon objects to the director's conclusion that the city has correctly identified an overall need for approximately 1,665 acres of buildable land for inclusion in the URA.

Response: The department recommends that the commission reject this objection.

The department understands the objection of 1000 Friends to be that it is inconsistent for the department on one hand to agree with the city's determination of an overall need for land through 2040 but on the other hand to disagree with findings about components of the overall need, namely industrial and institutional land need.

The director's decision reflected a nuanced approach to reviewing Newberg's analysis and conclusions about land need. Fundamentally, the department believes that the city undertook an appropriate analysis of land need. The department did not conduct an independent evaluation of land needs and is not substituting its judgment for that of the city. To this degree, the department can agree that the city's findings and conclusions on overall need are reasonable.

When the department reviewed the city's identification of specific characteristics required for portions of the overall amount of industrial, commercial and institutional land needed, it concluded that the requirement that portions of the overall amount of land needed be large, relatively flat parcels were not adequately justified. As a result, the department recommended that the city undertake additional work to clarify its analysis and findings regarding these required characteristics (see discussion below). This did not mean, however, that the department disagreed with the city's determination of the overall amount of land needed.

In conclusion, the department agrees with the city's approach to determining land need through 2040 and recommends that the commission accept the city's conclusion that 1,665 acres of land is needed through 2040.

Exceptions 2: Large site industrial land need.

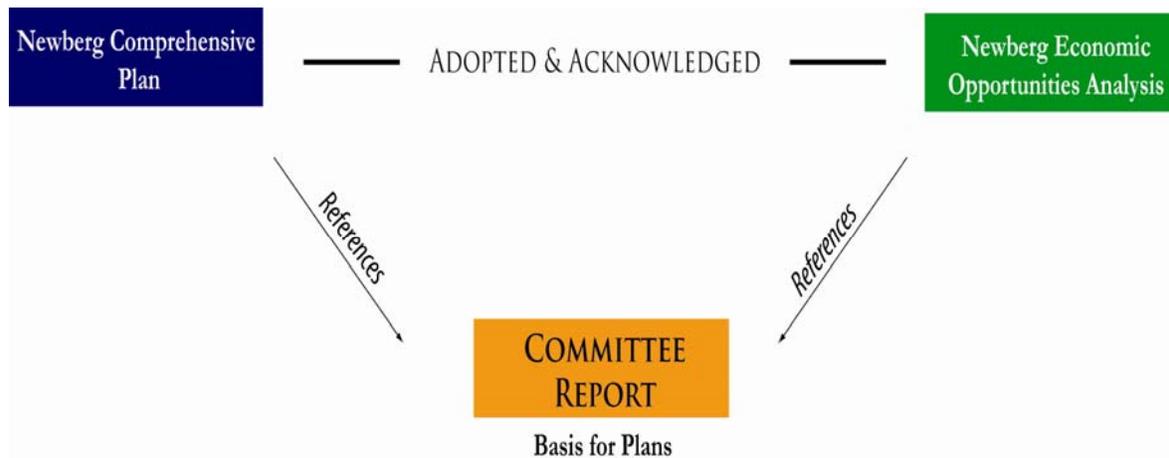
In this section, we ask that the commission sustain our objection regarding demonstrated need for large, flat industrial and commercial sites with direct access to a state highway. The record clearly shows that the City has provided substantial evidence in the record to support this conclusion in a manner consistent with Division 021 and Statewide Planning Goals 9 (Economy) and 14 (Urbanization).

Background: Newberg relied on three principal documents in the record to support its conclusion regarding the large site industrial and commercial need: The Newberg

Comprehensive Plan (the Plan); the Newberg Economic Opportunities Analysis (the EOA); and the Ad Hoc Committee’s Report to the City Council: Recommendations for Newberg’s Future (Committee Report). The City Council adopted Resolution 2005-2590 directing staff to implement the recommendations of the Committee Report in 2005. Amendments to the Plan and the new EOA were adopted and acknowledged as post-acknowledgement plan amendments in 2006 – based on the Committee Report. The Plan and the Committee Report served as the basis for institutional and residential amendments to the UGB in 2006 – amendments that were acknowledged in “the manner provided for periodic review.”

Both the Plan and the EOA identify – unambiguously – the Committee Report as the basis for adopted and acknowledged conclusions regarding large site industrial and commercial need. So do the City’s URA findings. The City’s April 2009 objection to the Director’s Decision provides specific citations to these documents. However, the Director’s Report regarding large site commercial and industrial need largely ignored the extensive and expert documentation of industrial and commercial site need found in the Committee Report and supporting technical memoranda.

The following graphic makes clear the relationships among the Plan, the EOA, the Committee Report:



Division 21, Goal 14 and Goal 9 Guidance: The Director’s response to the City’s objection recognizes that Division 21 provides little guidance on how to determine land need beyond the 20-year planning horizon, and that Goals 9 and 14 provide guidance on how such need may be determined. The following statements from Goal 14 and the Goal 9 and 14 administrative rules provide support for the City’s approach.

OAR 660-021-030(1) authorizes cities to work with their county to establish urban reserve areas outside of UGBs to meet 30-50 year land need but provides no guidance on how to determine such need. Section (2) establishes that the local governments must use

the Goal 14 locational factors to determine suitable lands and choose reasonable options that have the least impact on resource land. Section (3) establishes the hierarchy for determining which “suitable” lands may be included within the URA.

Goal 14 provides guidance on determining need and land suitability:

“In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need.”

The newly-amended Division 24 related to UGBs explains the meaning of “suitable” employment land in that context:

(8) “Suitable vacant and developed land” describes land for employment opportunities, and has the same meaning as provided in OAR 660-009-0005 section (1) for “developed land,” section (12) for “suitable,” and section (14) for “vacant land.”

OAR 660-009, which refines Goal 9, provides further clarification regarding employment land suitability in Section 005, Definitions:

(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.

Division 9, Section 015 requires cities to identify “required site types” and specifically allows “industrial and other employment uses to be grouped together into common site categories.”

(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. * * * Industrial or other employment uses with compatible site characteristics may be grouped together into common site categories.

Moreover, Division 9, Section 025 requires that cities identify the “approximate number, acreage and site characteristics of sites needed to accommodate industrial or other employment uses” and may group employment uses into “broad categories”:

(1) Identification of Needed Sites. The plan must identify the approximate number, acreage and site characteristics of sites needed to accommodate industrial and other employment uses to implement plan policies. Plans do not need to provide a different type of site for each industrial or other employment use. Compatible uses with similar site characteristics may be combined into broad site categories. Several broad site categories will provide for industrial and other

employment uses likely to occur in most planning areas. Cities and counties may also designate mixed-use zones to meet multiple needs in a given location.

Section 060 of Division 24 related to UGBs states that:

(5) 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.

ORS 197.298 priorities are similar to the hierarchy established in OAR 660-021-030(3).

How Newberg applied the Goal 9 rule to determine Industrial and Commercial Site Requirements: The Department apparently agrees with the City that the appropriate review standard for URA amendments is the Division 21 rule; and, the City agrees with the Department that Goals 9 and 14, and their implementing rules, provide guidance regarding how to determine industrial and commercial land suitability needs.

The following narrative explains how Newberg identified industrial and commercial site needs and shows why the Department's has mischaracterized Newberg's approach. We begin by the quoting the Department's findings and then provide an explanation as to why the Department got it wrong. Specific citations to the record are provided.

The Department's analysis merges the two primary issues by stating, over and over again, that "the city has not justified a specific need for commercial / industrial land that can only be satisfied by including large parcels in the URA." For clarity, the City's analysis is broken down into two parts:

- The City first considers whether the analysis is consistent with Goal 9 and 14 standards for identifying employment types and their siting requirements.
- Next, the City considers whether there is sufficient information in the record for the Commission to determine that agricultural land is needed to meet these requirements.

For industrial land, we believe that the City has gone through the steps necessary to justify inclusion of farm land within the UGB to meet identified industrial siting criteria.

For commercial land, we believe that the City has developed reasonable siting criteria, which should be sustained. While an exact parcel has not been selected, it is clear that the land must be in an area where public facilities and services can reasonably be provided.

Industrial Land Need: Department's Response to Newberg's Objection:

Objections – Large Site Industrial Need. The department recommends that the commission reject this objection. The city’s analysis and findings do not support a specific need for 200 acres composed of large, flat parcels * * * While the city assessed future economic development opportunities and potential employment land needs in an analysis of demand of industrial and office land, it failed to identify specific target industries and attendant land needs in the manner provided for in an Economic Opportunities Analysis (EOA) consistent with Goal 9.

Lacking a level of detailed analysis consistent with Goal 9, the city lacks an adequate factual base for its conclusions about the future need for land with specific characteristics. The director found that speculation about the future demand for a type of urban land was insufficient to justify a land need to be satisfied through designation of a URA.

The Newberg Comprehensive Plan identifies local and regional economic development opportunities. The plan identifies industry clusters emphasized in the Portland metropolitan region and concludes that Newberg *may* be able to capitalize on some businesses within the identified clusters, as well as existing manufacturing, medical services, higher education, and the wine/tourism industries found in the local area.

However, neither analysis in the comprehensive plan nor the city’s Findings Report identify specific target industries, the site needs for target industries, or why the city’s economic development strategy specifically requires up to 200 acres of large, flat land outside its existing UGB. Without this analysis, the city’s conclusion of a specific need for large, flat parcels that can only be accommodated by bringing farmland into the URA is not adequately supported.

* * *

In deciding this aspect the city’s conclusions regarding the specific need for large, flat sites for industrial uses, the director found that the city must “connect the dots” along the string of analyses starting with an analysis of economic opportunities, to identification of target industries, the specific site characteristics of those target industries, and how those site characteristics translate into specific acreage requirements.

While the department believes the employment land analysis is deficient to justify a specific land need, it does not believe that the error is difficult to resolve. **On remand, the city may clearly identify the specific target industries that it is planning for and follow through with identification of specific site characteristics and land needs.** Coordination of this analysis with the Oregon Economic and Community Development Department would provide a strong foundation to support the city’s conclusions.

(Emphasis added. Director's Report, p. 10)

Target Industries and Site Requirements: Supporting Evidence in Newberg Record:

While the City maintains that development of a full EOA is not required in order to create an urban reserve, the City agrees with the Department that the Goal 14 and Goal 9 rules do provide guidance to determine employment opportunities and their site characteristics. Page 4 of Newberg's April objection provides citations to the record that demonstrate that the City did in fact:

- identify specific target industries,
- describe the site needs for target industries, and
- explain why the City's economic development strategy specifically requires 200 acres of large, flat land outside its existing UGB.

The Director's Response to this specific objection improperly ignores the expert analysis found in the Committee Report regarding target industries, their specific site needs, and how these needs will be met. ECONorthwest and Winterbrook Planning memoranda address the Department's concerns, are found in the record. The Department's characterization of the City's Plan, EOA and Committee Report as "speculation" and "preference" disregards this expert testimony.

The conclusions (but not the entire analysis) found in the Committee Report were adopted in both the EOA and the Plan. The Department's response considers the EOA and the Plan – but not the Committee Report which supports these plans. The EOA (Table 12-13) identifies a need for 307 acres of industrial land to meet identified industrial site suitability requirements through the Year 2040. There is a specific need found for eleven large sites of 20 or more acres each. (Record, p. 231) The EOA references the Committee Report as the source for this identified need.

The industrial site need table in the EOA is also set forth in the Plan – which also recognizes the Committee Report as the source of its conclusions. (Record, pp. 202-203) The Committee Report summarizes a more detailed memorandum from Winterbrook Planning and ECONorthwest that identifies target industries and site classifications. These target industries and site classifications are consistent with targeted industrial clusters identified in the EOA. The Winterbrook memo describes the site characteristics required by targeted industries and site classifications as required by OAR 660-009-0025(2). (Record, pp. 113-115 and 165-167)

The Winterbrook / ECONorthwest memo provides the technical basis for the Committee Report, which in turn provides the analysis supporting conclusions regarding industrial land need in the acknowledged Newberg Comprehensive Plan. The plan identifies a need for 200 acres, with specific site characteristics, over the next 30 years. Large 20-acre sites are needed to (a) meet the size requirements of specific target industries, and (b) and for industrial parks, which allow such industries to cluster together. The Winterbrook Memo identifies objective requirements for site size, acreage, topography and proximity characteristics as required by Goal 9. (Supplemental Record, pp. 112-115 and 114-115)

Because the City has identified target industries and their siting requirements, the City's analysis is consistent with Goal 9 and 14. We request that the Commission sustain our objection.

Application of Industrial Siting Criteria: Department's Response to Newberg's Objection:

The city's analysis and findings do not support a specific need for 200 acres composed of large, flat parcels that can only be accommodated by bringing farmland into the URA. (Director's Report p. 9)

Application of Industrial Siting Criteria: Supporting Evidence in the Record:

Page 4 of Newberg's objection letter also shows that the Winterbrook Memo evaluated industrial sites within the UGB and determined that (a) there is a deficit of suitable sites within the UGB, and (b) the SE Study Area along Highway 219 and adjacent to the City's existing Airport Industrial Area best meets identified site requirements.

The Committee Report examined buildable land within the UGB and determined that some industrial land need can be met within the UGB, but that additional land would need to be identified to meet Year 2040 land needs. After examining alternative sites outside the UGB against site suitability criteria, the Committee Report identified the "Southeast Study Area" along Highway 219 as the prime candidate for meeting large site industrial needs. (Record, pp. 115-117) The Plan identifies an unmet need for small and large site industrial land through the Year 2020. (Record, p. 203)

After examining exception areas and resource land outside the UGB against the site suitability criteria found in the Committee Report, the City determined that the unmet need for large-site industrial could only be met on what has now become "The South Industrial Reserve." As noted in the URA Justification Report, the South Industrial Reserve uniquely meets all of the City's industrial siting requirements. As noted in this report:

"The 186-acre SIR has direct access to Highway 219. The SIR has large, flat parcels that are well-suited for targeted industrial uses and master planned industrial parks. The area is relatively inexpensive to serve with transportation, sanitary sewer and water facilities, and is located near the existing Sportsman Airpark and Wyooski Road industrial areas." (URA Justification Report, Record, p. 3129)

In conclusion, the City identified target industries and their siting requirements, applied these siting requirements to land within the UGB and alternative study areas outside the UGB, and determined that the South Industrial Reserve uniquely meets these siting requirements. The City has connected the dots.

Requested Revision: We request that the report be revised to recommend the commission sustain Newberg's objection and reject the objections of 1000 Friends of

Oregon/Friends of Yamhill County. We request that the Commission accept the identified need for 200 acres of industrial land within the urban reserve area, and accept the site suitability characteristics contained within the findings report. We request that the report recommend that Newberg appropriately included the South Industrial Reserve in the Urban Reserve.

Exception 3: Large site commercial land need.

Commercial Land Need: Department's Response to Objection

Objections – Large Site Commercial Need The city objects that the director's decision did not adequately consider information in the record showing a need for an additional 15-acre site to meet commercial needs through the year 2040. The city notes that the Ad Hoc Committee and city consultants/staff thoroughly considered site characteristics appropriate for future growth needs. * * * The department recommends that the commission reject this objection.

The department does not disagree that the city needs additional commercial land in the future or that additional land may be required outside the existing UGB. [However] The city's analysis of commercial land needs suffers similar deficiencies as the needs analysis for industrial land.

In its analysis, the city identifies an overall 2040 commercial land need of 45 acres and concludes that 30 acres of future commercial land need can be accommodated within the existing UGB, leaving an unaddressed need of 15 acres proposed for inclusion in the URA.

The director did not dispute that development of commercial retail on large, flat parcels may be easier or less expensive, but such convenience does not demonstrate how an urban reserve designation that requires conversion of resource land complies with the statewide planning goals.

However, the nature of commercial retail development is significantly different from industrial land development – much more flexible in terms of site characteristics.

(**Emphasis** added. Director's Report, p. 11-12)

Commercial Land Need: Supporting Evidence in the Record: The City agrees with the Department regarding the City's identification of commercial employment and site characteristics as set forth in Goal 14 and the Goal 9 rule. Pages 5-6 of Newberg's objection letter provide citations to the record that demonstrate that the City in fact did identify specific commercial development types, their site needs, and why the City's economic development strategy specifically requires 15 acres of large, flat land outside its existing UGB.

The EOA (Table 12-10) identifies a need for 109 acres of commercial land to meet commercial site suitability requirements through the Year 2040. However, unlike industrial land needs, most of this need can be met within the existing UGB, largely because the City did what the Goal 14 rules anticipate: rezone land within the UGB to meet future commercial land needs. The City also chose not to provide a large shopping center which would have required an additional 25 acres of land.

The EOA cites Urban Land Institute (ULI) studies to support the need for a site of 10-15 acres for a community center that meets site requirements identified in the Committee Report. (Record, p. 238) The commercial site need table in the EOA is also repeated in the Plan. The Plan references the Committee Report as the source of its information. (Record, p. 200)

The Committee Report provides a more detailed analysis of commercial site requirements, based on a technical memorandum from Winterbrook Planning that describes the site characteristics required by targeted types of commercial development, as required by OAR 660-009-0025 (2). This memo references research by the ULI related to commercial shopping centers. (Record, pp.109-110) The Committee Report identifies objective site size, topographical and proximity characteristics for small, medium and large shopping centers consistent with Goal 9. (Record, pp. 160-164)

The Department's response reduces the City's analysis regarding commercial siting requirements to an issue of "convenience" and relative "expense." Nowhere in the record does the City use these terms. Rather, the City on evidence from the ULI on typical siting requirements for community shopping centers. Measurable standards such as site size, slope (less than 10%), improvement to land value ratios, natural hazards, natural features, street access, shape, and residential compatibility were identified.

The City strongly objects to the Department's unsupported conclusion regarding the "nature of commercial development." Again, the City provided expert evidence from Winterbrook Planning and the Urban Land Institute regarding the site requirements of community commercial centers. The Department's unsupported comment that commercial development is categorically "more flexible in terms of site characteristics" undermines the purpose of Goal 9, which is to provide suitable sites to attract targeted employment opportunities.

The City requests that the Commission sustain the City's objection with respect to the adequacy of its commercial siting criteria.

Application of Community Shopping Center Siting Criteria: The Department's Response to Objection:

The city has posited, however, that commercial land to be included in the URA must be composed of large, flat parcels to accommodate a preference for a shopping center.

While the Newberg Comprehensive Plan articulates a general preference for neighborhood (3–5 acre) and community (10–15 acre) shopping centers and against regional (20–30 acre) shopping centers, the plan lacks specific policies for retail development and the URA analysis makes no finding demonstrating why a 15-acre shopping center site potentially developed between year 2026 and 2040 can only be accommodated on a large, flat site in the proposed URA. (Director’s Report, p. 11)

Application of Community Shopping Center Siting Criteria: Evidence in the

Record: The record includes the expert identification of targeted commercial development types and their site requirements, and applies these criteria to determine the adequacy of the City’s commercial land supply within the UGB. Based on this analysis, the City determined that most 2040 commercial needs could be met within the existing UGB – except for a 15-acre community shopping center. (URA Justification Report, Record, p. 3116). This was not a chance finding: Newberg actually rezoned three areas within the UGB from the time of the original Ad Hoc Committee report to accommodate commercial land needs. That Newberg was able to reduce the need to *only* 15-acres should be lauded, not criticized.

The City determined that this shopping center should be located in the proposed Southeast Newberg URA to serve this planned residential area. In this case, the primary reasons for locating the shopping center on farmland is to create a complete community, reduce vehicle miles traveled, and achieve other policy objectives.

Requested Revision: We request that the report be revised to recommend the commission sustain Newberg’s objection and reject the objections of 1000 Friends of Oregon/Friends of Yamhill County. We request that the Commission accept the identified need for 15 acres of commercial land within the urban reserve area, and accept the site suitability characteristics contained within the findings report.

Exception 4: Institutional land needs.

Newberg’s institutional land needs are contained in its adopted and acknowledged comprehensive plan. These were developed using substantial expert study and testimony from the Chehalem Parks and Recreation District, the Newberg School District, interviews with private schools, churches, and expert opinion from Winterbrook Planning, as documented in the record. With respect to school needs, evidence in the record states:

“Our discussions with and testimony from the Newberg School District have shown several trends in education that affect land needs. For example, the school district is serving students with disabilities, older students with life skills instruction needs, and students with multiple language backgrounds. Newberg High School has implemented an innovative “small schools” program where it has divided the high school into several smaller schools on one campus. Title IX athletics requirements also affect land need. In short, the school site of tomorrow can be expected to be far more than just a traditional high school campus.”

(Record p. 2522)

Newberg's local government districts enjoy substantial, award winning cooperation. This actually serves to *reduce* the total institutional land need, consistent with the urban reserve requirements.

“Continued cooperation and co-location was taken into account in calculating the acreage required, with smaller site requirements assumed for parks adjoining schools.” (Record p. 2522)

The Director's Report on page 13 states, “The department has extensive experience around the state with school siting issues in which it consistently sees school districts and local governments expressing land needs based on high estimates of desired acreage and locational criteria that emphasize flat, undeveloped tracts.” It appears that the Department wishes to substitute its opinion that Newberg's estimates are “high” for the coordinated, adopted, and acknowledged estimates based on expert study and detailed consideration of future land needs. The Court of Appeals in *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 214-16, 124 P3d 1249 (2005) states:

“The comprehensive plan is the fundamental document that governs land use planning. Citizens must be able to rely on the fact that the acknowledged comprehensive plan and information integrated in that plan will serve as the basis for land use decisions, rather than running the risk of being "sandbagged" by government's reliance on new data that is inconsistent with the information on which the comprehensive plan was based.”

What the Department proposes is clearly to sandbag Newberg by interjecting new opinions in contradiction of well founded and established comprehensive plan data.

Requested revision: We request that the report be revised to recommend that the Commission sustain Newberg's objection and reject 1000 Friends/Friends of Yamhill County objection and acknowledge Newberg's identified institutional land needs, including large site needs, as contained in the findings. We also ask that the Commission acknowledge use of the institutional size and site characteristics used in the findings, and acknowledge they were based on an adequate factual basis and substantial evidence in the record.

Exception 5: Overall conclusion – large site needs.

The Department's Conclusion

The urban reserve rule does not specify how land need must be calculated. The determination must however be consistent with the goals, including Goal 14 – Urbanization. **That goal provides, “In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need.”**

Looking solely at the relative short-term development costs, meeting a future land use via large undeveloped tracts is preferable to accommodating comparable land uses in a more constrained environment utilizing smaller parcels and/or redevelopment tools. However, preference alone does not equate to “need” and Newberg has not justified particular circumstances in its comprehensive plan policies or particular development needs unique to the city that establish a separate, specific need for industrial, commercial, or institutional uses that can only be satisfied by including large, flat undeveloped tracts in the URA. Some future land uses understandably will utilize flat farmland, particularly given Newberg’s setting.

However, the department recommends that the commission conclude that identifying a specific land need for large, flat parcels skews subsequent steps of selecting land for inclusion in the URA in violation of Goal 14, notably avoiding higher priority exception land simply because it is parcelized or more difficult to develop.

The department recommends that the commission reject objections by the city that it provided sufficient rationale to identify specific land need for industrial, commercial, and institutional land that can only be met by the inclusion of large flat parcels in this designation of urban reserves. (Emphasis added, Director’s Report, p. 13)

Discussion: In its conclusion, the Department includes commentary and conclusions that were not included in the Director’s Decision and have no relationship to anything in the Record. However, this sort of *dicta* has a way of becoming “Commission Policy” down the road. Hence the City’s concern.

The City agrees with the first paragraph of the Departments conclusion regarding large site need. However, we have serious concerns about the policy implications in the second paragraph.

- Nowhere in the record does the City indicate that its reasons for including large tracts within the URA are based on “short-term development costs.”
- Nor has the City relied on “preference alone” to determine site requirements for identified industrial and commercial employment opportunities. It has, as the record shows, relied on expert testimony and guidance from the Goal 9 rule.

OAR 660-009-005 defines “suitable land” as “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 proposed uses – specific targeted industrial firms and industry clusters, as well as a community shopping center – are identified in the EOA and the Committee Report.

Division 9, Section 015 requires cities to identify “required site types” and specifically allows “industrial and other employment uses to be grouped together into common site categories.”

That’s exactly what Newberg has done: it has identified site types to accommodate targeted employment: large sites for specific targeted industries, industrial parks and a community shopping center.

The Goal 9 rule does not require that site need somehow be “unique to the City” as suggested in the opposing paragraph. If this were the case, then regional EOAs couldn’t rely on regionally identified target industry and site requirements.

The City is particularly concerned with the emphasized paragraph in the Department’s conclusion. This statement implies that *any* local government effort to identify and apply site requirements – as explicitly authorized by Goal 14 and as required by Goal 9 – somehow “skews subsequent steps for selecting land for inclusion within a UGB.”

On Page 6 of the report, the Department states, “Designation of a URA is a two-step exercise. First, a local government identifies a long-term land need for the community. Second, a local government undertakes a locational analysis to identify lands appropriate for inclusion in the URA.” We agree with this statement. Later, however, the Department reverses this statement, “However, the department recommends that the commission conclude that identifying a specific land need for large, flat parcels skews subsequent steps of selecting land for inclusion in the URA in violation of Goal 14, notably avoiding higher priority exception land simply because it is parcelized or more difficult to develop.” In short, the Department seems to be saying “a need is a need, unless the need can’t be accommodated in the UGB or on rural exception land, then it is a preference.”

As stated, Newberg relied on estimates of land needs from it adopted and acknowledged comprehensive plan and Economic Opportunities Analysis, which are based on substantial research, evidence, and expert consultation. Newberg did not conduct these studies, adopt them into it comprehensive plan, and get them acknowledged by the state just for kicks; it did them to ensure that it had an adequate factual basis upon which to do several future planning efforts, including the 2006 UGB amendment, several rezonings of land within the UGB to accommodate land needs with UGB, as required by rule, and the 2007 URA.

The Department and 1000 Friends/Friends of Yamhill County counter that they ought to get another bite at the apple long after the needs have been approved and acknowledged, and replace these established needs with vague, unsubstantiated opinions that the needs ought somehow be less. This sandbagging should be rejected outright.

Requested revision: We request that report be revised to recommend that the Commission sustain Newberg’s objection and reject 1000 Friends/Friends of Yamhill County objection and acknowledge Newberg’s identified large site needs, as contained in

the findings and the City's adopted and acknowledged comprehensive plan. We ask specifically that the Commission find that:

1. The City has identified target industries and their siting characteristics as required by Goal 9, and that these are appropriate for use in determining land suitable for inclusion in the urban reserve.
2. The City has applied large-site industrial criteria to land within the UGB and to study areas outside the UGB and is justified in its conclusion that the Southeast Industrial Reserve area uniquely meets these criteria.
3. The City has identified appropriate siting criteria for community commercial shopping centers and may apply these criteria to determine an appropriate location for such a center consistent with Division 21 locational standards.
4. The City has appropriately determined institutional land needs and site characteristics for institutional lands.

If the Commission feels even more study is necessary, we will provide it. However, we don't feel this is necessary.

The City also respectfully requests that unsupported comments in the Department's response be deleted from any findings made by the Commission in this matter. The Department's statement is quoted below, followed by the City's comments.

Department Comment: "However, the department recommends that the commission conclude that identifying a specific land need for large, flat parcels skews subsequent steps of selecting land for inclusion in the URA in violation of Goal 14, notably avoiding higher priority exception land simply because it is parcelized or more difficult to develop." (Director's Report, p. 13)

City Concern: This statement violates Goal 9 requirements that cities identify site requirements of targeted employment. It would also render meaningless the authorization in Goal 14 to identify and apply site requirements when determining long-term land need. The Commission has acknowledged many plans with industrial siting requirements that result in the inclusion of flat resource land near major transportation corridors to meet industrial and commercial land needs.

Department Comment: "The director did not dispute that development of commercial retail on large, flat parcels may be easier or less expensive, but such convenience does not demonstrate how an urban reserve designation that requires conversion of resource land complies with the statewide planning goals." (Director's Report, p. 12)

City Concern: The City did not make such a convenience finding, but relied on evidence regarding commercial siting requirements from the Urban Land Institute. This comment

is not found in the Director's decision either. A search through the Director's Decision did not uncover the terms "convenient," "expensive" or "easier."

Department Comment: "However, the nature of commercial retail development is significantly different from industrial land development – much more flexible in terms of site characteristics." (Director's Report, p. 12)

City Concern: This conclusion is unsupported by evidence in the record and effectively substitutes the Department's judgment for that of the City and its expert analysis in adopted plans and referenced studies. This is inappropriate.

Department Comment: "The department has extensive experience around the state with school siting issues in which it consistently sees school districts and local governments expressing land needs based on high estimates of desired acreage and locational criteria that emphasize flat, undeveloped tracts. The department consistently maintains that site preferences do not translate into site needs." (Director's Report, p. 13)

City Concern: This conclusion is unsupported by evidence in the record and effectively substitutes the Department's judgment for that of the City and its expert analysis in adopted plans and referenced studies. This is inappropriate.

Exception 6: Complete neighborhoods and livability need

One purpose of Goal 14 is ". . . to provide for livable communities."² The Goal 14 Land Need Factor 2 is "Demonstrated need for housing, employment opportunities, **livability** or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2)." (Emphasis added) It further states, "In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need."³ Thus, it is clear that the choice of which lands to include in an urban area must be based on a consideration of if and how livable communities can be created within the areas

² The full goal text of Goal 14 is "To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."

³ The full ext of the land need section states:

"**Land Need** Establishment and change of urban growth boundaries shall be based on the following:
(1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments; and
(2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2).

In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need. Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary."

included. The goal sets a clear expectation that some areas might be included and others not based on the community's livability objectives.

In compliance with Goal 14, Newberg carefully has crafted policies and defined livability needs and characteristics necessary to meet these needs. Newberg then assessed whether including lands in the urban reserve would meet these needs, and concluded that including certain areas in the urban reserve was necessary.

The department rejected this analysis on two grounds. First, the department objected to including additional acreage in the urban reserve to meet livability needs. On Page 15 of the report, the Department states, "Commission precedent has been that no specific 'livability' need exists in terms of identifying **acreage** necessary to inclusion [sic] in a URA or UGB." (**emphasis added**) As stated in our appeal, Newberg added **0** additional acres to the urban reserve solely to meet livability needs. All land was added to meet identified acreage needs for housing, employment, public facilities, or institutions. Therefore, the objection should have been sustained. In that this may not have been clear in the findings, we would agree to a remand that directed Newberg to revise the findings to make this fact more clear.

Second, the department rejects the notion that the decision on which lands to include in an urban reserve should consider livability at all. On Page 15 of the report, the Department states: "The department recommends that the commission find that Newberg should be able to achieve community livability objections on any land designated urban reserve and ultimately included in the urban growth boundary." This is presumptive, ludicrous, and clearly contrary to Goal 14. The idea that "any ol' urban reserve will do" is not only insulting to the hundreds of community participants that crafted a vision for Newberg's future, it is not based on any evidence in the record and also flies in the face of the express language of Goal 14 that states communities are supposed to identify "livability needs" and achieve "livable communities."

Requested revision: We request that the report be modified to sustain Newberg's objection and accept Newberg's livability needs as contained in the findings report. In the alternative, we would agree to a remand that directs Newberg to revise the findings to restate the livability needs so that it does not appear as an additional acreage need or an inclusion solely on livability needs.

Exception 7: Interpretation of OAR 660-021-0030(4)(a)

OAR 660-023-0030(3) establishes a set of priorities for a city to include land suitable for an urban reserve within an urban reserve. OAR 660-023-0030(4)(a) provides that land of lower priority under section (3) of the rule may be included if land of higher priority is found to be inadequate because

"Future urban services could not reasonably be provided to the higher priority area due to topographical or other physical constraints."

Up to now, this rule provision has been interpreted and applied on a case-by-case basis,

relying on principles of interpretation and court decisions such as *Hildenbrand v City of Adair Village*, 217 Or App 623, 177 P3d 40 (2008), which interpreted ORS 197.298(3)(b), the similarly worded provision regarding UGB amendments. On page 19, the Director's Report essentially recognizes this, stating:

“While the rule does not specify how a local government is to determine whether it is reasonable to provide urban services to a given area, the criterion clearly is subjective and may allow a local government to establish different elements in different situations to address reasonableness. * * *”

However, the Director's Report then proceeds to announce a new, generally applicable interpretation of OAR 660-021-0030(4)(a), as follows:

“The department understands [OAR 660-021-0030(4)(a)] generally as follows:

“‘Future urban services could not reasonably be provided’ means that a local government must show that it is not reasonable to provide urban services after analyzing topographical and physical constraints (e.g., slopes, water bodies, roadways) in the context of:

- the relative cost of providing urban services to constrained lands and to alternatives;
- the amount of land constrained (i.e., a high cost may be reasonable for serving a large area but not a small one); and
- the planning horizon (i.e., what is not unreasonable for a 25-year plan may be reasonable for a 45-year plan).^[4]

“Local governments must consider these conditions in light of the intent of urban reserves to ultimately urbanize exception land adjacent to existing urban areas, to avoid conversion of resource land to urban uses, and to provide for cost-effective provision of urban public facilities and services.” (Director's Report, p. 19)

ORS 197.040(1)(c)(A) requires LCDC to adopt by rule, in accordance with ORS chapter 183, or by Goal, “any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 197.” This statutory provision was enacted to ensure that policies of statewide application would be adopted only after notice and hearings, not during the middle of a review proceeding in a manner that blindsides the participants. The three-part test announced above is not something that Newberg could reasonably have anticipated or applied during the several years it spent in the urban reserve planning process. To require that it be applied on remand, and in other proceedings without notice

⁴ This parenthetical literally makes no sense, considering that “not unreasonable” means the same thing as “reasonable.”

to the public is what ORS 197.040(1)(c)(A) was intended to prevent.

Newberg also takes exception to the last paragraph in the quote above. It erroneously proclaims that the “intent of urban reserves” is (1) to urbanize exception land adjacent to urban areas, (2) to avoid conversion of resource land to urban uses, and (3) to provide for cost-effective provision of urban public facilities and services. This statement of intent is not found in the urban reserve statute, which provides that the purpose of urban reserves is “[t]o ensure that the supply of land available for urbanization is maintained.” ORS 195.145(1). OAR 660-021-0000 provides that the purpose of urban reserves is to reserve areas outside UGBs for eventual inclusion in an urban growth boundary and to [protect them] from patterns of development that would impede urbanization.” OAR 660-021-0010 (1) defines and Urban reserve as follows:

“Urban Reserve”: Lands outside of an urban growth boundary that will provide for:

- (a) Future expansion over a long-term period; and
- (b) The **cost-effective provision of public facilities and services** within the area when the lands are included within the urban growth boundary.”

(Emphasis added)

None of these provisions recognizes urbanizing exception areas or avoiding conversion of resource lands as being the primary purposes of urban reserves.

Requested Revisions: Delete the provisions in the second quote above from page 19 of the Director’s Report.

Exception 8: Interpretation of OAR 660-021-0030(2) and (3); Application of Goal 14 Locational Factors

Both Newberg and the Stuhls appealed the Remand Order on the ground that it misinterpreted OAR 660-021-0030(2) and (3) and the interrelationship between these rule provisions and the Goal 14 locational factors. The Director’s Order responds to these appeals as follows:

“The department agrees that the city undertook an extensive analysis that encompassed the full extent of Goal 14 locational factors. However, **the locational factors of Goal 14 apply to determine which lands of the same priority under OAR 660-021-0030(3) a local government should select in designating urban reserves.** The rule provides that “Inclusion of land within an urban reserve shall be based on the locational factors of Goal 14 *and a demonstration that there are no reasonable alternatives that will require less, or have less effect upon, resource lands.*” OAR 660-021-0030(2) (emphasis added). **The department’s concern, however, is that the analysis emphasized exceptions to the priorities scheme to the extent that the city’s decision resulted in two-thirds of land included in the URA comprising lower priority resource land.** The director

found that the URA decision did not support the conclusion that the Goal 14 factors provided adequate justification that certain exception areas could not ‘reasonably’ be served with public facilities.

“The specific factual situation in *Hildenbrand* is distinguishable from the situation in Newberg which proposes a broad exception to the priorities across a wide area proposed in Newberg. Unlike Adair Village, which was expanding its UGB, Newberg is planning for urbanizable land needed beyond the 20-year horizon provided for in the city’s UGB. Moreover, Newberg is planning for in excess of 1,000 acres for which the cost of urban services can be spread over many uses over a longer period. **Local jurisdictions have some discretion in applying the location factors in Goal 14, and the statutory/rule priorities, but statutory and goal policy sideboards continue to exist, and the director found that the extant URA location decision was contrary to the intent of the commission’s urban reserve policy.**” (Bold added; italics in original. Director’s Report, p. 21)

The first sentence emphasized in bold in the quote above is taken not from the Urban Reserve Rule, but rather from the Goal 14 Rule for UGB amendments, specifically OAR 660-024-0060(1)(b). The problem with this unauthorized borrowing is that the planning sequence described in ORS 197.298 for UGB amendments is different from that of OAR Chapter 660, Division 21 for urban reserves. In ORS 197.298, section (1) both establishes the priority system and says that other “requirements established by rule addressing urbanization” apply to including land within a UGB.⁵ Thus, the priorities and the Goal 14 locational factors must be applied together, at the same level of analysis, and LCDC has adopted OAR 660-024-0060(1) to tell people how to do this.

On the other hand, OAR 660-023-0030 sets out a series of numbered provisions that must be applied sequentially⁶. *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 20-21, 994 P2d 1205 (2000). Section (1) requires a city to determine the amount of land needed for at least a 10-year supply, and no more than a 30-year supply, beyond the time frame used to establish its UGB. Section (2) establishes a second step, requiring a city study lands near the UGB for **suitability** for inclusion in urban reserves. Section (2) also

⁵ ORS 197.298(2) further elaborates on the priority system, with regard to difference in priority between resource land with higher and lower agricultural or forest soils capability. A provision parallel to ORS 197.298(2) is included within the urban reserve priority system, in OAR 660-021-0030(3)(c).

⁶ The express language of the urban reserve rule reinforces that the provisions are to be applied sequentially. OAR 660-021-0030 (2) states, “Inclusion of land within an urban reserve shall be based upon the locational factors of Goal 14 and a demonstration that there are no reasonable alternatives that will require less, or have less effect upon, resource land. Cities and counties cooperatively, and the Metropolitan Service District for the Portland Metropolitan Area Urban Growth Boundary, shall **first** study lands adjacent to, or nearby, the urban growth boundary for suitability for inclusion within urban reserves, as measured by the factors and criteria set forth in this section. Local governments shall **then** designate, for inclusion within urban reserves, that suitable land which satisfies the priorities in section (3) of this rule.” (Emphasis added)

requires that inclusion of land within a urban reserve be based upon the locational factors of Goal 14. Thus, under the Urban Reserve Rule, the locational factors of Goal 14 must be applied **before** performing a priority analysis, for the purpose of identifying land suitable for use as urban reserve, and so long as there are “no reasonable alternatives that will require less, or have less effect upon, resource land.” Section (3) then provides that “land found suitable for an urban reserve [as provided in section (2)] may be included within an urban reserve” according to the priorities of section (3). Finally, section (4) establishes certain exceptions to the priority scheme of section (3). The important distinction is that the single step expressed in ORS 197.298(1) is divided into three sequential steps in OAR 660-021-0030(1) – (3). Consequently, provisions from the Goal 14 UGB amendment rule interpreting ORS 197.298(1) simply cannot be transferred to interpret OAR 660-021-0030.

Newberg also takes exception to the second sentence emphasized in bold in the sentence above. Basically, it says that the **results** of a city’s application of the provisions of OAR 660-021-0030(4) establishing two categories of exceptions to the priority system determine whether the city’s interpretation of those provisions was correct. In other words, there can be no correct interpretation of OAR 660-021-0030(4) that depends only on the text and context of this section. If the Department and/or Commission does not like the results of applying any given interpretation of OAR 660-021-0030(4), then that interpretation could not have been correct. This is a Catch-22 for cities attempting to apply the rule to their particular circumstances.

The final sentence emphasized in the quote above is essentially meaningless. Who can say what “statutory and goal policy sideboards” are? What is the “intent” of the commission’s urban reserve policy? How is a city supposed to know how to apply these nebulous concepts? As mentioned in the previous exception, the “purpose” for the Urban Reserve Rules expressed in OAR 660-021-0000 is to plan for areas outside UGBs “to be reserved for eventual inclusion in an urban growth boundary and to be protected from patterns of development that would impede urbanization.” In *D.S. Parklane, Inc., supra* 165 Or App at 5, the Court held that the designation of urban reserves is governed **only** by OAR Chapter 660, Division 21, and other standards specifically cited therein, not by “sideboards” or by unadopted policy “intents.”

Requested Revisions: Delete the provisions on page 22 of the Director’s Report quoted above, and sustain the appeals of Newberg and the Stuhrs, based upon the correct interpretation of the relationship between OAR 660-021-0030(2) and (3) and the Goal 14 locational factors, as described above, without reliance on nebulous concepts such as “statutory and goal policy sideboards” and “the intent of the commission’s urban reserve policy.”

Exception 9: Exclusion of Southwest study area

Newberg did not include the southwest study area in the urban reserve based on the findings and substantial evidence in the record that (1) the area is not suitable for inclusion in the urban reserve based on consideration of the Goal 14 locational factors,

and (2) future urban services could not reasonably be provided to the area due to topographical or other physical constraints. Newberg provided findings and substantial evidence in the record to support these conclusions.

The Department rejects these findings and states, “The city seems to propose that the amount of evidence in its proceeding is sufficient to override established priorities of statute and rule that focus urbanization away from resource land to areas of existing development.” (Director’s Report p. 24) We take exception this characterization. Newberg has done what statute and rules require: apply the Goal 14 locational factors, and the OAR 660-00 OAR 660-021-0030 (3) and (4) priorities.

Conversely, the Department is asking Newberg to entirely overlook the required Goal 14 locational factors, and established priorities of statute and rule that require efficient development patterns and orderly and economic provision of public facilities and services. We understand these to be mandatory steps, not optional. The Department states of Page 21 of the report, “Local jurisdictions have some discretion in applying the location factors in Goal 14, and the statutory/rule priorities, but statutory and goal policy sideboards continue to exist, and the director found that the extant URA location decision was contrary to the intent of the commission’s urban reserve policy.” (Director’s Report, p. 21). The report says this without defining what “goal policy sideboards” are, or stating what the “intent of the commission’s urban reserve policy” is. We request that the purpose and definition of the urban reserves as defined in rule be included in the report. OAR 660-021-0000 lists the purpose of the urban reserve rule:

“Purpose

This division authorizes planning for areas outside urban growth boundaries to be reserved for eventual inclusion in an urban growth boundary and to be protected from patterns of development that would impede urbanization.”

OAR 660-021-0010 (1) defines and Urban reserve as follows:

“‘Urban Reserve’’: Lands outside of an urban growth boundary that will provide for:

- (a) Future expansion over a long-term period; and
- (b) The **cost-effective provision of public facilities and services** within the area when the lands are included within the urban growth boundary.”
(Emphasis added)

The rules clearly place a high priority on the economics and efficiency of providing public facilities and services to an urban reserve area. While the rules place emphasis on including rural exception areas prior to resource land in the urban reserve, the rules clearly envision that resource lands, even high value resource lands, will be included in some urban reserves to provide expansion over a long-term period and to provide for cost-effective provision of public facilities and services.

Further, the report recommends that the commission “remand the local government decision with direction to include land in the Southwest study area” (Director’s Report, p. 29) If Newberg were to include the southwest area, it would be required to make positive findings that the area would provide for the “cost effective provision of public facilities and services”, that it met the following Goal 14 Locational factors:

- (1) Efficient accommodation of identified land needs;
- (2) Orderly and economic provision of public facilities and services;
- (3) Comparative environmental, energy, economic and social consequences; and
- (4) Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB

and that urban services could reasonably be provided to the area despite topographical and physical constraints. In other words, it would have to find:

- (1) That fully developed rural residential subdivisions in the Southwest area are suitable lands for future urban development.
- (2) That the side, rear, and front yards of rural residential homesites would be the most efficient location to put new apartments, houses, schools, churches, parks, and shopping centers.
- (3) That constructing a new wastewater treatment plant or extending sewer lines two miles to the existing plant to serve scattered infill lot development would be the most orderly and economic way to provide public facilities and services, as opposed to other areas.
- (4) That building a new wastewater plant or pumping sewage two miles across a creek canyon would be more energy efficient and environmentally sound than developing in areas that could use the existing wastewater plant.
- (5) That disrupting existing established neighborhoods would have better social consequences than developing in areas where compact urban development consisting of complete communities and walkable neighborhoods could be developed.
- (6) That providing urban sewer lines, water lines, storm drains, police protection, fire protection, streets and sidewalks in a haphazard fashion to odd scattered lots in developed rural residential areas would be more orderly and economic, and have better economic consequences than developing new compact urban neighborhoods with full services.

In short, the Department is requesting that Newberg (1) do the impossible, (2) ignore the law, or (3) lie through its teeth.

Requested Revisions: We ask the report be revised to recommend that the commission acknowledge that Newberg legitimately excluded the Southwest area, and accept the adopted findings that the area is not suitable for inclusion based on the Goal 14 locational

factors under OAR 660-021-0030(2), or legitimately should be excluded based on the exception allowed under OAR 660-021-0030(4)(a).

As stated in our appeal, our findings show that the southwest area should not be included based on BOTH the Goal 14 factor AND the “reasonably serviceable” exception. However, if an area is not found suitable for inclusion based on the Goal 14 factors, it is not necessary to apply the “reasonably serviceable” exception. Thus, we would accept a remand that directs Newberg to revise its findings to apply exceptions to the priorities only to land that is suitable for inclusion in an urban reserve based on its Goal 14 locational factor assessment.

We request that the hitherto-unadopted interpretation of OAR 660-021-0030(4)(a), as explained in Exception 7, also be stricken from the report.

Exception 10: Northeast area

Newberg excluded portions of the Northeast study area from the urban reserve, as it did in 1995, based on the findings and substantial evidence in the record that (1) the area is not suitable for inclusion in the urban reserve based on consideration of the Goal 14 locational factors, and (2) future urban services could not reasonably be provided to the area due to topographical or other physical constraints. Newberg provided findings and substantial evidence in the record to support these conclusions.

The department states, “the director found that the city had not demonstrated, consistent with urban reserve policy, that provision of the future urban services to the area is unreasonable given that the city’s water plan is not an adopted comprehensive plan policy” (Director’s Report, p. 26). The presumption that Newberg should develop a master water plan and adopt it as part of its comprehensive plan before adopting an urban reserve is ludicrous. The Commission should simply accept that information in the water plan is factual information that can be used to guide decisions about whether an area can be served in an orderly and economic manner.

Further, the inference is that if the water data were in the acknowledged comprehensive plan, then it would be a sufficient basis for making decisions. If the Department feels this way, then why did it reject the City’s needs analyses that are in the comprehensive plan?

The Report on page 26 states, “Finally, the Findings Report conclusion that the cost of urban services (including water, sewer, and storm drainage) is among the highest of all study areas is not supported by corroborating information to explain the analysis of costs.” Newberg actually did include a public facilities cost analysis that is in the record (Record pp. 3150 and 3204). Newberg can provide additional background information that supports these conclusions if requested, but given that the area fails to meet the requirements for inclusion in the urban reserve on other grounds, this is not necessary.

The Director’s Report on page 29 recommends that the Commission “Remand the local government decision to include land the Southwest study area and the Northeast study

area to accommodate residential needs and corresponding institutional lands the local government believes are appropriately sited nearby so as to achieve community objectives for livability.” Similar to the Southwest area, asking Newberg to include the Northeast study area would be asking us to do the impossible, ignore the Goal 14 locational factors and the “unreasonable service” allowed exception, or lie. We would need to say fully developed rural residential subdivisions are “suitable” for future urban development. We would need to say that having the school district, a commercial developer, the parks district, or a private school purchase a number of lots in a hillside subdivision, demolish the homes, and construct a school, shopping center, or park on the slope would be an “efficient accommodation of land needs.” We would need to ignore the “social consequences” of including the area, as required by Goal 14. We would need to say that extending water service through several pressure zones and constructing new reservoirs to serve a haphazard arrangement of infill lots would be an “orderly and economic” way to provide public facilities and services. We cannot do these things, thus we must request that the commission sustain our objection.

Requested revision: We ask that the report be revised to recommend that the Commission sustain Newberg’s objection and acknowledge that Newberg legitimately excluded the Northeast area, and accept the adopted findings that the area is not suitable for inclusion in the urban reserve based on the Goal 14 locational factors, or legitimately should be excluded based on the exception allowed under OAR 660-021-0030(4)(a). As an alternative, we would accept a remand that directs Newberg to revise its findings to apply the priorities and exceptions only to land that is suitable for inclusion in an urban reserve based on its Goal 14 locational factor assessment.

We request that the hitherto-unadopted interpretation of OAR 660-021-0030(4)(a), as explained in Exception 7, also be stricken from the report.

Exception 11: Corral Creek Road Intervening Resource Land

Newberg included both exception and agricultural land in the Corral Creek Road North area and the Wilsonville Road NW and exception areas, citing as justification the “intervening” land criterion under OAR 660-0210030(4)(b).

On Page 27 of the report, the Department states that Newberg “. . . concludes with little explanation that an exception area not contiguous to the existing UGB should be urbanized and necessitates the urbanization of high value resource land to accomplish this.”

First, we take exception to the statement “concludes with little explanation.” A very detailed explanation is including in the findings, with substantial evidence cited many places. Our appeal cites the references. In addition, a simple look at the map shows that it is obvious that this area would qualify under the exception.

Second, the Department interjects the opinion that the Corral Creek Road North exception areas should be excluded from the urban reserve because they are 350 feet

away from the UGB. We find this outcome surprising, and one that the Commission should easily reject.

Third, the Department states, “the lower priority resource land is among the best farmland evaluated by the city for potential inclusion in the URA . . .” (Director’s Report, p. 26) This is not correct: it is in fact some of the poorer agricultural lands within the study area (Record p. 3157). In any case, the OAR 660-0210030(4)(b) exceptions contain nothing that directs any consideration of the soil type of the land excepted.

Requested Revision. We request that the Commission sustain our objection and acknowledge that the resource land portion of Corral Creek Road North was correctly included in the Urban Reserve as intervening resource land under OAR 660-021-0030(4)(b).

Exception 12: Wilsonville Road NW Intervening Area

Newberg included the Wilsonville Road NW area in the urban reserve, citing as justification the “intervening” land exception under OAR 660-021-0030(4)(b), in that including this land is necessary to include the Wilsonville Road exception area also into the urban reserve.

As referenced above, the Department recommends that 116 acres of exception land in the Wilsonville Road exception area be excluded from the urban reserve because including this area also would require including some intervening agricultural land. We find this outcome surprising. We feel the “intervening” exception is designed to do exactly as Newberg has proposed: include exception land into the urban reserve.

Nevertheless, upon review of the findings, we have found that the Wilsonville Road NW area can be included in the urban reserve without taking an “intervening” exception. We would be willing to revise the findings to address this issue.

Requested Revision. As noted in our appeal, we would accept a remand with directions to reassess the Wilsonville Road NW area and not apply the subsection (4)(b) intervening exception unless this area would otherwise need to be excluded due to the subsection (3) priorities.

Overall Request

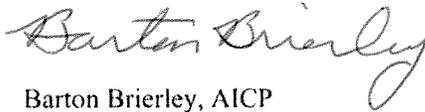
We request that the report be modified to give credit where credit is due; to recognize that Newberg has substantial evidence in the record to support its urban reserve designation, and that this designation complies with the requirements of the urban reserve rule. We are willing to revise findings if desired or to provide additional study if needed, but overall we request the report recommend the following motion:

Move that the commission approve the urban reserve designation decision based on the city’s findings, evidence within the record, and written and oral argument;

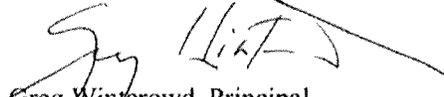
and move that the commission sustain the objections of the City of Newberg, sustains Objection 2 and 3 from Mike and Cathy Stuhr, and reject the objections of 1000 Friends of Oregon/Friends of Yamhill County and Amy and Lee Does and Objection 1 from Mike and Cathy Stuhr.

If you have any questions on this, please contact Barton Brierley at 503-537-1212 or barton.brierley@ci.newberg.or.us.

Sincerely,



Barton Brierley, AICP
Planning and Building Director
City of Newberg



Greg Winterowd, Principal
Winterbrook Planning



Corinne Sherton
Johnson & Sherton PC

cc: Steve Oulman, Lee and Amy Does, Sid Friedman, Grace Schaad, Lane Shetterly, Cathy Stuhr, Yamhill County Staff – Ken Friday

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May 26, 2009

*Via Fax – (503) 378-5518
and Hand Delivery*

John Van Landingham, Chair
Land Conservation and Development Commission
c/o Mr. Richard Whitman
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301

Re: Exceptions of Mike and Cathy Stuhr to Director's May 14 Report on Appeal of
DLCD Remand Order of Urban Reserve File No. 2008-005 (Order 001767) – City of
Newberg

Agenda Item 15, June 4-5, 2009, LCDC Meeting

Chair Van Landingham and Members of the Commission:

My clients, Mike and Cathy Stuhr, appellants, submit their exceptions to the Director's report to the Commission in this matter, dated May 14, pursuant to OAR 660-015-0160.

As a preliminary matter, the Director's May 14 report characterizes the two main questions presented in this appeal of the Newberg urban reserve area (URA) as follows:

- "1. What level of showing is required when determining land need to be accommodated within an urban reserve area?
- "2. What is the burden on a local government to demonstrate that urban services cannot reasonably be provided to an area in order to include resource land in an urban reserve while bypassing higher priority exception land?" (Director's May 14 report, page 2.)

While these questions generally address the correct issues, my clients would quibble with the first question, with its use of the phrase "land need." "Land need" is not found in the relevant provision of the urban reserve rule, OAR 660-021-0030(1). Rather, the



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rule speaks in terms of an “estimated. . . supply of developable land beyond the 20-year time frame used to establish the urban growth boundary.” “Land need” is a term of art derived from the Goal 14 “land need” factors. By incorporating “land need” into the question it suggests the answer that the land need factors of Goal 14 must apply. My clients do not accept that proposition – which is the very point at issue in their first exception, below – and would restate the question as follows:

1. What level of showing is required when determining the estimated land supply to be designated as an urban reserve area?

My clients accept the second question as stated by the department, but note that the issues raised in this appeal address not only the “burden on a local government,” but also the proper standard of review to be applied by the department and the Commission in reviewing the Newberg URA.

Having clarified the main questions presented in this appeal, my clients assert that the department has gotten to the wrong answers by (1) hewing to a rigorous application of the Goal 14 land need factors as required elements and approval criteria for designation of an urban reserve; and (2) applying the wrong burden on the city to the determination of land to be included in the urban reserve, particularly with regard to the exclusion of higher priority lands based on findings that the higher priority lands cannot reasonably be served with future urban services, and by misconstruing the department’s own standard of review.

First Exception – Disallowance of Appellants’ Objection to the Application of Goal 14 “land need” factors to the determination of the “amount of land” to be included in Urban Reserve under OAR 660-021-0030(1).

From the outset, the department has interpreted the required level of showing of the estimated land supply for the purpose of designating an urban reserve under OAR 660-021-0030(1) as being the same as the showing of “land need” required for an urban growth boundary amendment under Goal 14. The rule and the goal are not the same, and the application of the Goal 14 land need factors as required elements and approval criteria for designation of an urban reserve is not supported either by the text or the context of the urban reserve rule or Goal 14.

The clear textual difference between OAR 660-021-0030(1) and Goal 14, as they relate to



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“land need,” can be made apparent by a side-by-side comparison of the two:

OAR 660-021-0030(1)

“Urban reserves shall include an *amount of land estimated to be at least a 10-year supply and no more than a 30-year supply of developable land beyond the 20-year time frame used to establish the urban growth boundary*. Local governments designating urban reserves shall adopt findings specifying the particular number of years over which the designated urban reserves are intended to provide a supply of land.” (Emphasis added.)

Goal 14

“To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.

“Urban Growth Boundaries

“Urban growth boundaries shall be established and maintained by cities, counties and regional governments to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land. Establishment and change of urban growth boundaries shall be a cooperative process among cities, counties and, where applicable, regional governments. An urban growth boundary and amendments to the boundary shall be adopted by all cities within the boundary and by the county or counties within which the boundary is located, consistent with intergovernmental agreements, except for the Metro regional urban growth boundary established pursuant to ORS chapter 268, which shall be adopted or amended by the Metropolitan Service District.

“Land Need



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“Establishment and change of urban growth boundaries shall be based on the following:

“(1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments; and

“(2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2).

“In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need.

“Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary.” (Emphasis added.)

It is obvious from a comparison of the text of the rule and the goal that they are about two very different things. The urban reserve rule is about *estimating* a supply of land beyond the 20-year time frame of the urban growth boundary. With the exception of three phrases in the preamble to Goal 14 (those being “[t]o provide for an orderly and efficient transition from rural to urban land use, * * * to ensure efficient use of land, and to provide for livable communities,” none of which suggest that the land need factors set forth in the goal should be applied to the designation of an urban reserve), Goal 14, in its relevant part, is about



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establishing and changing urban growth boundaries.¹

The designation of urban reserve areas is governed by the urban reserve rule. *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 5, 994 P2d 1205 (2000). The objective of the rule, as stated by the court in *Parklane*, "is to provide for the planning of *future expansions of urban growth boundaries* (UGBs) through the designation of urban reserve areas that are next to existing UGBs, that are 'to be protected from patterns of development which would impede' their *eventual urbanization*, OAR 660-021-0000, and that will *eventually 'be included within [the UGBs]* before inclusion of other lands.' OAR 660-021-0060(1)." *Id.* (Emphasis added.)

Given the far future-looking nature of the urban reserve rule, it is not logical or reasonable that a city should be held to showing a "demonstrated need" for land, as it is when it amends its UGB. If a city *could* demonstrate a land need under the Goal 14 need factors it should be amending its UGB, not designating an urban reserve. This point illustrates the practical problem of applying the Goal 14 land need factors as required elements and review criteria for designating an urban reserve.

As noted in the my clients' appeal letter of April 30, it is entirely appropriate that Newberg approached the designation of its urban reserve with the Goal 14 land need factors in mind, since those land need factors will have to be satisfied when the UGB is eventually amended, but that does not make those factors applicable by law at the point of designating the urban reserve.² Neither does the city's utilization of an Economic Opportunities Analysis (EOA) as part of its urban reserve planning make an EOA or Goal 9 applicable to the designation of an urban reserve. Goal 9 applies by its terms to requirements for economic development planning for "urban areas;" designation of land as urban reserve does not make it an urban area. The Goal 9 rule, from which the EOA requirement derives, "applies to comprehensive plans for areas *within urban growth*

¹ Goal 14 also addresses "boundary location" factors, which - unlike the need factors - are expressly incorporated into the urban reserve rule, OAR 660-021-0030(2); "urbanizable land," which is specific to land within UGBs (and is not relevant to the urban reserve rule or this appeal); as well as "unincorporated communities," "single-family dwellings in exception areas" and "rural industrial development," none of which are likewise relevant to this appeal.

² As noted in my clients' appeal letter, they do not concede that the city did not, in fact, satisfy the Goal 14 need factors in its submittal; it is their position that the city did not have to.



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boundaries." OAR 660-009-0010(1). (Emphasis added.) As with Goal 14, generally, Goal 9 and the Goal 9 rule will apply when the city expands its UGB, but they do not apply to the designation of an urban reserve.³

The context of section (1) of OAR 660-021-0030 supports the same conclusion as the textual analysis of the rule and goal with regard to the application of the Goal 14 land need factors to urban reserves.

As stated in the Director's May 14 report, the designation of an urban reserve is a two-step process. First, a local government estimates a supply of developable land needed beyond the period of the UGB. OAR 660-021-0030(1). Second, the local government undertakes a location analysis to identify lands appropriate to be included in the URA. OAR 660-021-0030(2). See Director's May 14 report, page. 6.

As to the second step – the location analysis – section (2) of the rule expressly incorporates the location factors of Goal 14:

"Inclusion of land within an urban reserve shall be based upon the locational factors of Goal 14 * * *"

It is significant that section (2) of the rule specifically refers to the Goal 14 location factors in determining land to include in the URA, while section (1) of the rule makes no similar reference to the Goal 14 land need factors in terms how the land supply is to be estimated.

³ This is the same as what the department recognized in its response to the objections of Grace Schaad and Lee M. and Amy L. Does in this case. They objected that the city had not addressed the issue of adequate transportation facilities (Goal 12) in the Corral Creek Road north, Corral Creek Road south and Wilsonville Road northeast areas. In the Director's Decision and Order dated April 10, the department rejected their objection as being untimely, stating:

"Until such time as the city expands the Newberg UGB, land included in the URA is not 'urban' * * *. [T]he city is obligated by state law to plan for urban services and facilities when it brings land into the UGB. The objectors cite no legal requirement obligating the city to undertake such planning at the time of designating the URA." Director's Decision and Order dated April 10, p.20.

Likewise, the department has not cited any legal requirement obligating the city to make a showing of demonstrated land need under the Goal 14 need factors (which will be required when it brings land into the UGB) at the time of designating the URA.



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If it was understood that Goal 14 applied directly to the urban reserve rule, there would have been no point in expressly incorporating the Goal 14 location factors in section (2) of the rule. This lack of parallel references to Goal 14 in these two related sections of the rule implicates the principle that where a statute or administrative rule uses a particular term in one section, but omits it in a parallel and related provision, it can be inferred that the term or provision does not apply in the section from which it has been omitted. *Perlenfein and Perlenfein*, 316 Or 16, 22, 848 P2d 604 (1993).

The text and context of the urban reserve rule support the conclusion that the Goal 14 land need factors do not apply to the determination of the estimated land supply under the rule. To the extent the department would apply the Goal 14 need factors as required elements and approval criteria in designating an urban reserve, such a requirement conflicts with the urban reserve rule. The rule takes precedence over other goals and rules that are inconsistent with it. *D. S. Parklane*, 165 Or App at 22.

The Director's Decision and Order (April 10) found that Newberg has "demonstrated a need for 1,665 acres of land to accommodate urban uses to the year 2040." (Director's Decision and Order, p. 9.) The Director's May 14 report affirmed that conclusion. (Director's May 14 report, p. 7.) (Only the erroneous application of a specific Goal 14 land need analysis persuaded the director in his May 14 report to reject the city's determination of the acres of estimated land supply and recommend a remand on that determination.) Therefore, having satisfied the requirements of the urban reserve rule for estimating a land supply for the URA, the director's remand on that issue should be overturned and the city's determination of estimated land supply should be upheld.⁴

Second Exception - Application of wrong standard on city to justify whether "future urban services could not be reasonably provided" in order to include resource land in an urban

⁴ The Director's May 14 report misstates the point of the Sturh's objection on this issue. It says:

"The department understands this objection to mean that a local government planning for urban reserves should only identify a gross acreage of needed land without consideration of specific land needs." Director's May 14 report, page 8.

In fact, as noted above and in the Sturh's appeal letter of April 30, a local government *should* take anticipated land needs into account when establishing an urban reserve. But this appeal is not about what a local government *should* do; it's about what a local government is *required* to do under the rule, and what criteria the department may properly apply in reviewing the designation of a URA.

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reserve while bypassing higher priority exception land; and the department's standard of review.

As noted above, the second step in the determination of an urban reserve, after the land supply has been estimated, is to determine which lands to include. OAR 660-021-0030(2). That determination is guided by the Goal 14 "locational factors." Those factors are stated as follows:

"The location of the urban growth boundary and changes to the boundary shall be determined by evaluating alternative boundary locations consistent with ORS 197.298 and with consideration of the following factors:

- "(1) Efficient accommodation of identified land needs;
- "(2) Orderly and economic provision of public facilities and services;
- "(3) Comparative environmental, energy, economic and social consequences; and
- "(4) Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB."

ORS 197.298, referred to in the above quoted language of the goal, is the statute that guides the priority of lands to be included when a local government expands its UGB. The prioritization requirements in ORS 197.298(1): urban reserves, exception land, marginal land, and resource land, are substantially reflected in the urban reserve rule, OAR 660-021-0030(3).

ORS 197.298(3), however, "relaxes the prioritization requirements in certain circumstances." *Hildenbrand v. City of Adair Village*, 217 Or App 623, 633, 177 P 3d 40 (2008). That section provides:

- "(3) Land of lower priority under subsection (1) of this section may be included in an urban growth boundary if land of higher priority is found to be inadequate to accommodate the amount of land estimated in subsection (1) of this section for one or more of the following reasons:



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“(a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands;

“(b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints; or

“(c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.”

Two of these provisions for relaxation of the prioritization requirements in ORS 197.298 are mirrored almost *verbatim* in the urban reserve rule, OAR 660-021-0030(4), which provides:

“(4) Land of lower priority under section (3) of this rule may be included if land of higher priority is found to be inadequate to accommodate the amount of land estimated in section (1) of this rule for one or more of the following reasons:

“(a) Future urban services could not reasonably be provided to the higher priority area due to topographical or other physical constraints; or

“(b) Maximum efficiency of land uses within a proposed urban reserve requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.”⁵

Section (5) of OAR 660-021-0030 provides that “[f]indings and conclusions concerning the results of the above consideration [i.e., the application of the priority “exceptions” in section (4)] shall be adopted by the affected jurisdictions.”

In this case the Director’s May 14 report acknowledges “that the city undertook an extensive analysis that encompassed the full extent of Goal 14 locational factors.” (Director’s May 14 report, page 21.) The department further acknowledges that “a local

⁵ It is noteworthy that the first basis provided in ORS 197.298(3) for not including higher priority land in a UGB, that being “[s]pecific types of identified *land needs* cannot be reasonably accommodated on higher priority lands” (emphasis added), is not included in the urban reserve rule. This omission lends further support to the conclusion that “specific types of land needs” is not a consideration for designation of an urban reserve, as we have argued is the correct interpretation of the rule.



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government may 'pass over' higher priority land for inclusion in a URA when it determines urban services could not reasonably be provided due to topographical or other physical constraints" (Director's May 14 report, page 19), and that, when it does so, "[t]he local government is not obligated to show that it is impossible to provide services, but that it is unreasonable to provide" them, due to those constraints. *Id.* The department also acknowledges that "the rule does not specify how a local government is to determine whether it is reasonable to provide urban services to a given area" and that "the criterion clearly is subjective and may allow a local government to establish different elements in different situations to address reasonableness." *Id.*

Having acknowledged all of that, however, the department nevertheless establishes its own criteria for determining what it means that "future urban services could not reasonably be provided,"⁶ and declares that "[l]ocal governments "must consider these conditions. . .to avoid conversion of resource land to urban uses, and to provide for cost-effective provision of urban public facilities and services." That is, after acknowledging that the rule does not specify how a local government is to determine the issue of reasonableness, and that the criterion "clearly is subjective," and allows a local government "to establish different elements in different situations to address reasonableness," the department proceeds to declare a new and decidedly less subjective and less flexible set of criteria that *must* be addressed. Not only does the department declare that these criteria must be addressed, but that they must be addressed "to avoid conversion of resource land to urban uses." (Emphasis added.) This standard, "to avoid conversion of resource land to urban uses," fails to acknowledge the proper use and application of the circumstances in ORS 197.298(3) and OAR 660-021-0030(4) that expressly authorize the relaxation of the prioritization requirements in ORS 197.293(1) and OAR 660-21-0030(3) to permit the inclusion of resource land in an urban reserve. In so doing, the department has effectively substituted its judgment and its preferences for the city's, and has not given due consideration to the city's findings and conclusions that support its decision.

In *Hildenbrand*, the court affirmed LUBA's application of the "substantial evidence in the

⁶ Those criteria are:

- The relative cost of providing urban services to constrained lands and to alternatives;
- the amount of land constrained; and
- the planning horizon. Director's May 14 report, page 19.



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whole record" standard in approving the city's decision to include certain lower-priority land in expanding its UGB, over higher-priority land, on the basis that urban services could not reasonably be provided to the higher priority land. Neither LUBA nor the Court of Appeals applied any fixed or formal criteria to the city's determination. It was enough for LUBA that there was substantial evidence in the record to support the city's decision, and the court affirmed that evaluation. 217 Or App at 635.

The department attempts to distinguish *Hildenbrand* on the bases that (1) *Hildenbrand* involved expansion of a UGB (and not designation of a URA), and (2) Newberg is applying planning for more land "for which the cost of urban services can be spread over many uses over a longer period." (Director's May 14 report, page 21.) The first point is a distinction without a difference; in either case, the city's actions must be consistent with the applicable statutes, goals and administrative rules. As to the second point, there is nothing in the urban reserve rule (or in any relevant goal) that suggests the application of the criteria in ORS 197.298(3) and OAR 660-021-0030(4) for relaxation of the prioritization requirements applies any differently based on the number of acres involved or the period of time under consideration. If the local government has taken those factors into consideration (as Newberg did) and if there is evidence in the record to support its decision (as there is), it should be upheld.

Finally, the department seeks to distinguish *Hildenbrand* by pointing out that it involved an appeal to LUBA (and from LUBA to the Court of Appeals), which is governed by ORS 197.835 (LUBA scope of review), while "the director and the commission are additionally and more broadly tasked with determining whether an urban reserves designation submittal complies with the statewide planning goals." (Director's May 14 report, page 22.) While that is true, the department's review is not standardless, or so broad as to allow it to substitute its judgment for the city's, where the city's decision is based on substantial evidence in the record.

The standard by which the department must review whether the submittal complies with the goals is the substantial evidence standard. *City of West Linn v. LCDC*, 201 Or App 419, 431, 119 P 3d 285 (2005). *City of West Linn* involved a review for compliance with the goals of a Metro decision in periodic review to expand its UGB.⁷ 201 Or App at 422. The court

⁷ In the Director's May 14 report in this case, the department likewise points out that its review of the Newberg URA is for compliance with the statewide planning goals (page 22) and in the manner of



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held that "the standard LCDC was required to apply," in evaluating Metro's population estimate, was "one of substantial evidence, which is the evidence that, after reviewing the whole record, a reasonable person would find adequate to support a finding." 201 Or App at 431. That is, even allowing that the department and the commission are "tasked with determining whether an urban reserves designation complies with the statewide planning goals," that review standard is the substantial evidence standard. In this case, as in *City of West Linn*, "[p]ersons of reasonable understanding could - and, in fact, do - differ over the evidence" that the city relied upon, but "[n]othing, however, suggests that the conclusions [Newberg] drew from the evidence were unreasonable." *Id.*

Taken together, *Hildenbrand* and *City of West Linn* support the city's designation of land to be included in the urban reserve in this case, based - as it is - on substantial evidence in the whole record.

Further, while the department addresses at length the priority of lands in the urban reserve rule, it fails to acknowledge the full import of ORS 195.137(2), which defines "urban reserve" to mean land outside a UGB that will provide for

"(a) Future expansion over a long-term period; and

"(b) The cost-effective provision of public facilities and services within the area when the lands are included within the urban growth boundary."

Under this statute, which provides the authority for the urban reserve rule, "cost-effective provision of public facilities and services" is a pre-eminent, definitional consideration, entitled to greater weight than the department has given it in its review. This statute, too, supports the city's URA submittal based on consideration of the "cost-effective provision of public facilities and services."

Based on the foregoing, and the evidence in the record, the director's remand order should be reversed and the city's URA submittal be upheld as complying with the requirements of the urban reserve rule.



ATTORNEYS AT LAW

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Thank you for your consideration.

Yours very truly,

A handwritten signature in black ink, appearing to read "Lane P. Shetterly".

LANE P. SHETTERLY
lane@siso-law.com

cc: Mr. Barton Brierly
City of Newberg (via email)

Ms. Corrine Sherton (via email)

Mr. John O'Neil
Mr. Matt Wellner
Metropolitan Land Group (via email)

Mr. and Mrs. Mike Stuhr (via email)

Mr. Sid Friedman
Ms. Mary Kyle McCurty
1000 Friends of Oregon (via email)