

1 BEFORE THE COURT OF APPEALS  
2 OF THE STATE OF OREGON

3 BENJFRAN DEVELOPMENT, INC., )  
4 Petitioner, )  
5 vs. )  
6 METROPOLITAN SERVICE DISTRICT, )  
7 Respondent, )  
8 and )  
9 RONALD CRISMAN, M. KATHLEEN )  
CRISMAN, JERRY ROSS, TERESA )  
10 ROSS, J.D. LANE, ELIZABETH )  
LANE, ANTOINE KANAAN, DIANA )  
11 KANAAN, JOSEPH ROBERT )  
BREIVOGEL, PATRICIA McINTYRE, )  
12 PATRICIA KLIEWER, WILLIAM )  
SCHAMBER, JANET TRAPP, )  
13 JONATHAN F. GRAY, JOHN R. )  
KEITH, SUSANNA B. KEITH, )  
14 DONNA J. LUSTOFF, WILLIAM E. )  
RYAN, VERDA TEALE, MICHAEL )  
15 FULTON, LINDA TINDLE, LIANNE )  
McNEIL, JOHN CHURCHILL for )  
16 NORTHWEST ENVIRONMENTAL )  
DEFENSE COUNCIL and )  
17 THE TUALATIN RIVERKEEPERS, )  
and 1000 FRIENDS OF OREGON, )  
18 )  
Intervenors-Respondent. )

LUBA No. 88-039  
FINAL OPINION  
AND ORDER

19  
20 Appeal from the Metropolitan Service District.

21 Gregory S. Hathaway, Virginia L. Gustafson and Todd A.  
22 Bradley, Portland, filed the petition for review and reply  
23 brief. With them on the brief was Hanna, Murphy, Jensen &  
Holloway. Gregory S. Hathaway argued on behalf of petitioner.

24 Daniel B. Cooper, Portland, filed a response brief and  
argued on behalf of respondent.

25 Peggy Hennessy, Mark J. Greenfield and Edward Sullivan,  
26

1 Portland, filed a response brief. With them on the brief was  
2 Mitchell, Lang & Smith. Peggy Hennessy argued on behalf of the  
individual intervenors-respondent.

3 Neil S. Kagan, Portland, filed a response brief and argued  
4 on behalf of intervenor-respondent 1000 Friends of Oregon.

5 Lawrence R. Derr, Portland, filed an amicus brief on behalf  
6 of The Associated Oregon Industries, The Oregon AFL-CIO, The  
Oregon Building Trades Council, The Portland Metropolitan  
Chamber of Commerce and Portland General Electric Company.

7 AFFIRMED 09/30/88

8 BAGG, Chief Referee; HOLSTUN, Referee, participated in the  
9 decision.

10 You are entitled to judicial review of this Order.  
11 Judicial review is governed by the provisions of ORS 197.850.

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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner asks that we reverse or remand a Metropolitan  
4 Service District (Metro) decision entitled

5 "In the matter of Contested Case No. 87-5, a Petition  
6 for a Major Amendment of the Urban Growth Boundary  
BenjFran Development Company." (Appendix A).<sup>1</sup>

7 The Metro decision denied a request by petitioner BenjFran  
8 Development, Inc. (BenjFran) to amend a portion of the  
9 Metropolitan Urban Growth Boundary (UGB) in Washington County.

10 JURISDICTION

11 Metro argues that the petitioner is seeking review of a  
12 legislative decision. A legislative decision, to deny a  
13 requested change to the UGB, is not appealable under  
14 ORS 197.620(1), according to Metro.

15 The statute provides:

16 "Notwithstanding the requirements of ORS 197.830(2)  
17 and (3), persons who participated either orally or in  
18 writing in the local government proceedings leading to  
19 the adoption of an amendment to an acknowledged  
20 comprehensive plan or land use regulation or a new  
21 land use regulation may appeal the decision to the  
Land Use Board of Appeals under ORS 197.830 to  
197.845. A decision to not adopt a legislative  
amendment or a new land use regulation is not  
appealable." (Emphasis added).

22 Metro explains that under ORS 268.390(3) (requiring it to adopt  
23 a UGB for the district) the UGB, like a comprehensive plan, is  
24 a statement of guiding policy; and, as such, a request to amend  
25 this guiding policy is a request for legislative action. Metro  
26 concludes we must dismiss this appeal.<sup>2</sup>

1           In Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.,  
2   287 Or 591, 601 P2d 769 (1979), the Supreme Court acknowledged  
3   that characterizing a process as an adjudication generally  
4   "presupposes that the process is bound to result in a decision  
5   and that the decision is bound to apply preexisting criteria to  
6   concrete facts." 287 Or at 602-603. The court went on to say  
7   that

8           "there are many laws that authorize the pursuit of one  
9   or more objectives stated in general terms without  
10   turning the choice of action into an adjudication.  
11   Thus a further consideration has been whether the  
12   action, even when the governing criteria leave much  
13   room for policy discretion, is directed at a closely  
14   circumscribed factual situation or a relatively small  
15   number of persons. The coincidence both of this  
16   factor and of preexisting criteria of judgment has led  
17   the court to conclude that some land use laws and  
18   similar laws imply quasijudicial procedures for  
19   certain local government decisions, as in Fasano v.  
20   Washington County Comm., 264 Or 574, 507 P2d 23 (1973)  
21   and Petersen v. Klamath Falls, 279 Or 249, 566 P2d  
22   1193 (1977) \* \* \*." 287 Or at 603.

23           In Estate of Gold v. City of Portland, 87 Or App 45, 740  
24   P2d 812 (1987), the court concluded that all the factors noted  
25   in Strawberry Hill 4 Wheelers need not be present before a  
26   decision may be classified quasi-judicial. Specifically, the  
27   court said it is not absolutely required that the process be  
28   bound to result in a decision. The court noted

29           "[t]he needs for protection of the fact-finding  
30   process and of the small numbers of persons interested  
31   in the circumscribed factual situation are not  
32   lessened with respect to the decision that was made  
33   simply because the city was not required to make a  
34   decision. Under the circumstances, it is not only  
35   permissible to characterize the decision as  
36   quasi-judicial, notwithstanding that the process was  
37   not bound to result in a decision; that

1 characterization is unescapable. Every factor for  
2 requiring quasi-judicial protection is present. The  
3 city could have decided to do nothing. However,  
4 having elected to make a decision to approve the  
5 amendment, it was required to act quasi-judicially."  
6 87 Or App at 52. (Emphasis in original).

7 In this case, Metro applied statewide planning goals (which  
8 the parties agree are the applicable preexisting criteria) to  
9 the requested change. In addition, the three ownerships  
10 involved are a geographically discrete area, small in  
11 comparison with the entire urban area included in the UGB. See  
12 Allison v. Washington County, 24 Or App 571, 575, 548 P2d 188  
13 (1976). These facts distinguish this case from one in which  
14 the policies affecting the urban growth boundary generally or a  
15 significant portion of the urban growth boundary are amended.

16 Because we find this decision does not involve adoption or  
17 amendment of general policy, but rather applies existing  
18 standards to specific property in Washington County, we  
19 conclude the decision is quasi-judicial. Sunnyside  
20 Neighborhood League v. Clackamas Co. Comm., 280 Or 3, 10-11,  
21 569 P2d 1063 (1977). The exception for denial of legislative  
22 amendments in ORS 197.620(1) is not applicable.

#### 23 FACTS

24 Petitioner desires to develop an Advance Performance  
25 Standards (APS) Regional Industrial Park. Petitioner advises  
26 that APS Regional Industrial Parks are an important trend "in  
the increasingly competitive national industrial real estate  
market." Petition for Review 6. Generally, such parks

1 include a minimum of 500 acres, are characterized by strict  
2 performance standards, and tend to draw industry to the region,  
3 according to petitioner.<sup>3</sup> The Portland metropolitan area has  
4 smaller (i.e., less than 500 acres) industrial parks with APS  
5 characteristics. (Appendix A-69). However, the Portland  
6 metropolitan area does not have an APS Regional Industrial  
7 Park, as do other major metropolitan areas elsewhere in the  
8 country.

9 The proposed site includes approximately 472.08 acres in  
10 one ownership, and two other ownerships add an additional 11.14  
11 acres. The property is now used for the production of clover,  
12 winter wheat and livestock. It is located on the south side of  
13 the Tualatin Valley Highway between 209th Avenue and 229th  
14 Avenue near the city of Hillsboro.

15 Hearings on the application were conducted before a Metro  
16 hearings officer in October and November of 1987. In February  
17 of 1988, the hearings officer issued his report and  
18 recommendation. It denied the request and included a finding  
19 that the change in the UGB was not necessary to attract  
20 industry needed to provide employment opportunities in the area.

21 On March 10, 1988, petitioner BenjFran filed exceptions to  
22 the hearings officer's report and recommendation. On April 28,  
23 1988 the Metro Council considered oral argument on petitioner's  
24 appeal. The hearing was continued until May 12, 1988 at which  
25 time the council adopted Order No. 88-18 denying the requested  
26 change in the UGB. This appeal followed.

1 FIRST ASSIGNMENT OF ERROR

2 "Metro misconstrued the requirements of statewide Goal  
3 14, Factor 2, by excluding from its determination of  
4 need the consideration of accommodating economic  
5 development activities that would create employment  
6 opportunities and liveability as recognized by  
7 ORS 197.707 et seq. and statewide Goal 9 (Economic  
8 Development)."

9 In order to establish or change a UGB, Goal 14  
10 (Urbanization) requires consideration of seven "factors."<sup>4</sup>

11 The first two of these seven factors require a showing of need:

12 "(1) Demonstrated need to accommodate long-range urban  
13 population growth requirements consistent with  
14 LCDC goals;

15 "(2) Need for housing, employment opportunities, and  
16 livability; \* \* \*."

17 Metro's order and petitioner's challenge focus on the second of  
18 these factors.

19 Petitioner argues that any test used to interpret the  
20 requirements of Factor 2 of Goal 14 must include consideration  
21 of Goal 9, (Economy of The State). Goal 9 seeks "[t]o  
22 diversify and improve the economy of the state." Petitioner  
23 complains that while Metro found petitioner's proposed APS  
24 Regional Industrial Park would be "helpful" in meeting the  
25 area's need for "employment opportunities and liveability"  
26 (Appendix A-78), Metro found the request did not satisfy Factor  
2 of Goal 14. Metro used the wrong test, according to  
petitioner, in that Metro erroneously applied what petitioner  
calls the "sufficient growth" test, a test which ignores Goal 9.

According to petitioner, Metro's test utilizes three

1 assumptions. The first assumption is that at the time the UGB  
2 was acknowledged, it contained an adequate supply of sites for  
3 industrial use to ensure economic development opportunities in  
4 the region to the year 2000. The second assumption is that the  
5 amount of growth occurring in the region until the year 2000 is  
6 dependent upon Metro's population projections. The third  
7 assumption is that if it can be shown that some industrial  
8 growth is occurring within the UGB, and if this growth is  
9 consistent with Metro's initial population projections, an  
10 economic development proposal creating new employment will be  
11 characterized as "helpful," rather than "necessary."

12 Petitioner advises that under this test, unless a proposal  
13 may be characterized as "necessary,"<sup>5</sup> there is no  
14 justification for including the additional land within the UGB  
15 to accommodate the proposal. Petition for Review 17.

16 Petitioner complains that under this test, Metro will decline  
17 to add land to the UGB even if the addition of new land would  
18 create employment opportunities, diversify the area's economy,  
19 give the region a competitive tool for attracting new  
20 industries that may otherwise locate in other areas, and  
21 accommodate a legitimate economic development activity as  
22 recognized in ORS 197.712 and Statewide Planning Goal 9.<sup>6</sup>

23 Petitioner argues Metro's utilization of population  
24 projections under Factor 2 to determine whether the UGB needs  
25 change is an improper construction and application of Goal 14.  
26 Petitioner argues, for example, if the population is declining

1 because of a poor economy, under the sufficient growth test

2 "[i]t would not be possible to amend the UGB to create  
3 jobs, because it could not be shown that the projected  
4 population needed more jobs than could be produced if  
all industrial land already within the UGB were  
developed." Petition for Review 20-21.

5 Petitioner characterizes Metro's reliance on population  
6 estimates as backwards. Petitioner asserts that economic  
7 development and jobs create population growth, not vice-versa.

8 Petitioner summarizes Metro's sufficient growth approach as  
9 one creating a growth containment line. BenjFran asserts the  
10 function of the UGB is to manage growth, not to serve as a  
11 growth containment line. Petition for Review 18-19.

12 Petitioner adds Metro's approach prevents effective competition  
13 for economic development in a dynamic market place. The result  
14 is stagnation, according to petitioner, and Metro's test makes  
15 it impossible for the region to respond to emerging economic  
16 development trends. In sum, the test puts the Portland  
17 metropolitan area at an economic disadvantage compared to other  
18 metropolitan areas with which it must compete. We understand  
19 petitioner to allege this condition is contrary to Goal 9's  
20 requirement "[t]o diversify and improve the economy of the  
21 state," and the more detailed economic development requirements  
22 in ORS 197.712.

23 Metro replies that the "sufficient growth test" which  
24 petitioner claims Metro applied is not a new test or an attempt  
25 to develop a new standard at all. According to Metro, it is  
26 simply Metro's response to petitioner's contention that there

1 is a need for its proposed amendment as is required by Goal  
2 14. According to Metro, petitioner's argument is that Metro  
3 should expand the UGB in order to stimulate growth. Metro  
4 found, contrary to petitioner's position, that there was  
5 sufficient growth occurring in the area, and no stimulation by  
6 adding land for a APS Regional Industrial Park was needed.

7 Metro found

8 "BenjFran has not demonstrated that an APS Regional  
9 Industrial Park is needed to attract the industry that  
10 is needed in order to provide employment opportunities  
and liveability to the Portland Metropolitan Area's  
projected population." Appendix A-79.

11 Metro points out that petitioner did not show that there is  
12 any particular industry needing the site proposed.<sup>7</sup>

13 Petitioner only sought to show that an APS Regional Industrial  
14 Park would be preferred by some general industry firms which  
15 may locate elsewhere if Portland fails to offer an APS Regional  
16 Industrial Park. See, Footnote 10, infra. There is no showing  
17 of a lack of industrial land within the UGB suitable for  
18 general industry, according to Metro.

19 We agree with Metro's characterization of the "sufficient  
20 growth test" as simply Metro's answer to petitioner's claims.

21 Metro found:

22 "[i]ndustrial growth sufficient to provide employment  
23 opportunities and liveability is occurring and is  
24 expected to continue occurring and that existing land  
within the UGB is meeting and will continue to meet  
the needs for industrial growth." Appendix A-79.

25 We believe this finding is adequate to respond to petitioner's  
26 charge that the UGB should be amended to promote needed

1 industrial development.

2 We agree. Metro is not required to amend its UGB to  
3 provide appropriate land to accommodate every new industrial  
4 land marketing technique enjoying success in other major urban  
5 real estate markets. As Metro noted, such an extreme view of  
6 its obligation under Goal 14 is not warranted even if the  
7 amendment would attract industrial firms that may otherwise go  
8 elsewhere. Indeed, petitioner's view would require Metro to  
9 amend the UGB without consideration of whether loss of such  
10 firms threatens the industrial and employment growth Metro  
11 assumed would occur when it drew the UGB.

12 With respect to petitioner's claim about Metro's obligation  
13 to consider Goal 9 and ORS 197.707 et seq., we find first that  
14 ORS 197.712(3) provides that comprehensive plan land use  
15 regulations must be in compliance with the law at the time of  
16 first periodic review. Metro is not yet subject to its first  
17 periodic review. Metro need not reach a decision on whether  
18 Metro wishes to take additional steps to stimulate growth until  
19 the time of periodic review.

20 Second, we fail to understand how Metro's decision is not  
21 consistent with Goal 9. That is, we find nothing to suggest  
22 that Metro has ignored or violated Goal 9 by declining to  
23 accept petitioner's view of the desirability of enlarging its  
24 UGB to accommodate an APS Regional Industrial Park. See Lima  
25 v. Jackson Co., 3 Or LUBA 78 (1981), 56 Or App 619, 643 P2d 355  
26 (1982).

1 One other matter raised by intervenor-respondents warrants  
2 attention. As pointed out by individual intervenors, the first  
3 two factors of Goal 14 presumably were in balance at the time  
4 the UGB was acknowledged. That is, at the time of  
5 acknowledgement, the UGB was drawn to accommodate,

6 "(1) Demonstrated need to accommodate long-range urban  
7 population growth requirements consistent with  
LCDC goals;

8 "(2) Need for housing, employment opportunities, and  
liveability."

9  
10 As found by Metro, no change in population forecasts occurred  
since acknowledgment justifying alteration of the UGB.

11 Intervenor-respondents, while supporting Metro's decision,  
12 believe Metro was mistaken when it found "failure to show an  
13 increase in the projected population is not equivalent to a  
14 failure to show 'need' under Goal 14." Appendix A-50.

15 Intervenor-respondent quarrel with Metro's view that need may  
16 be found upon consideration of Goal 14, Factor 2 without an  
17 increase in the projected growth of the urban population. We  
18 understand intervenors-respondent to argue that land may be  
19 added to the UGB only when necessary to provide for an increase  
20 in estimated population levels.

21 We find nothing in Goal 14 to suggest that enlargement of  
22 the acknowledged UGB necessarily must be preceded by an  
23 increase in projected population. See Home Builders Ass'n v.  
24 MSD, 2 Or LUBA 25, 31 (1980). We are cited to no authority  
25 holding otherwise.<sup>8</sup>  
26

1 We do not believe Metro's approach to this question  
2 necessarily precludes development of an APS Regional Industrial  
3 Park inside the UGB, providing a developer is able to find a  
4 sufficient site within the UGB. Further, we see nothing in  
5 Metro's decision that necessarily precludes Metro from finding  
6 a UGB amendment is needed to allow an APS Regional Industrial  
7 Park, provided it first, consistent with Goal 14, Factors 1 and  
8 2, demonstrates a need for such land. We believe such need  
9 could be demonstrated by (1) increasing projected populations,  
10 (2) amending the economic, employment and other assumptions  
11 Metro applied to those population figures in originally  
12 justifying the UGB, or (3) doing both.

13 The first assignment of error is denied.

14 SECOND ASSIGNMENT OF ERROR

15 "Even if Metro's sufficient growth test were legally  
16 valid, Metro's determination that sufficient growth is  
17 occurring and will continue to occur is not supported  
18 by substantial evidence in the whole record because it  
19 is based on inaccurate assumptions and factual  
20 misinterpretation, and ignores uncontradicted contrary  
21 evidence in the record."

19 Petitioner advises that our review for substantial evidence  
20 requires consideration of "the unique evidence in each case."  
21 Younger v. City of Portland, 305 Or 346, 358, 752 P2d 262  
22 (1980). Our evaluation must, according to petitioner, consider  
23 all of the evidence, not merely that evidence supporting the  
24 local government determination. Given this test, petitioner  
25 argues that Metro's finding that sufficient growth is  
26 "occurring and is expected to continue occurring and that

1 existing land within the UGB is meeting and will continue to  
2 meet the needs for industrial growth" is not supported by  
3 substantial evidence in the whole record. Appendix A-79.

4 Petitioner argues that Metro's analysis answered three  
5 questions: (1) Whether some growth is occurring in the region;  
6 (2) Whether some industrial growth is occurring in the region;  
7 and (3) Whether the growth is sufficient "such that the  
8 proposed project which would attract industry to the region is  
9 not needed." Petition for Review 29. Petitioner states the  
10 first of these tests is based upon evidence of Oregon's total  
11 population growth and growth occurring in Washington County in  
12 particular. Petitioner argues these figures represent "natural  
13 increases only and do not account for out migration during this  
14 recession." Id. Petitioner argues that Metro did not consider  
15 that nearly 90,000 people left the state and 12,000 of the  
16 90,000 left from the Portland area. See, Book 1, Part 3, memo  
17 of Greg Hathaway at 22-23. Petitioner argues, then, there was  
18 a net population growth during the period of 1980 to 1986 of  
19 only 26,344 persons.

20 Petitioner also sites Metro's employment figures, and  
21 argues that relying on these figures is error because Metro  
22 failed to consider evidence that while showing total employment  
23 in the area grew by some 19,200 jobs between 1986 and 1987, the  
24 "base labor force grew by only 7,000." Petition for Review 30.<sup>9</sup>

25 Petitioner states the evidence in the record supports the  
26 conclusion that growth is not occurring, rather than Metro's

1 conclusion that growth is occurring. In particular, petitioner  
2 argues there is evidence that the region is not experiencing  
3 adequate growth in basic industries. See, exhibit 31. By  
4 basic industries, we understand petitioner to mean  
5 manufacturing jobs. See Petition for Review, p. 31, note 15.

6 Petitioner next argues Metro improperly interpreted gross  
7 employment projections to show that there will be some 120,000  
8 new jobs in Washington County between the years 1983 to 2005.  
9 Record 51. Petitioner argues that Metro's projection does not  
10 distinguish between industrial and non-industrial jobs and  
11 therefore is not useful in answering questions about demand for  
12 industrial land. We understand petitioner to argue that  
13 regional and state growth requires the Portland metropolitan  
14 area to be more competitive with the other urban areas.  
15 Petitioner's point is the area will be more competitive if the  
16 APS Regional Industrial Park is allowed.

17 Metro argues the evidence shows there is no need for  
18 additional industrial land in general within the UGB. Metro  
19 based this conclusion on evidence in the record showing there  
20 is land available to meet the needs of industry for the  
21 region. We find this evidence is sufficient to sustain Metro's  
22 conclusion that the requested industrial land need not be added  
23 to the UGB. Metro cites a discussion in the hearings officer's  
24 report showing that there is considerable vacant and available  
25 land suitable for general industries.<sup>10</sup> Appendix A-122-127.  
26 Therefore, while there may be some preference by some

1 industrial firms for an APS Regional Industrial Park, there is  
2 sufficient land to meet the general industrial purposes in the  
3 region and no need to amend the UGB.

4 If we accept petitioner's notion that slow growth may show  
5 a need to change the UGB to stimulate the economy, there is  
6 evidence in the record to support petitioner's position.  
7 However, as discussed under the first assignment of error, we  
8 do not believe Metro was obliged to accept petitioner's  
9 position that this lack of strong growth means a UGB change is  
10 required. Even petitioner's evidence shows there is some  
11 growth in the region, albeit not as much growth as petitioner  
12 may wish or as much growth as might be possible with an  
13 inventory of industrial land capable of responding to all  
14 contemporary industrial marketing techniques. The evidence of  
15 recent employment and development trends is sufficient to  
16 constitute substantial evidence for Metro's conclusion that the  
17 UGB need not be amended as petitioner requests to stimulate the  
18 area's economy.

19 Finally, in attacking Metro's decision on evidentiary  
20 grounds, petitioner's burden is considerable. As we noted in  
21 Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159,  
22 163-164 (1985), we may remand a local government's denial of  
23 land use approval on evidentiary grounds, only if we can say  
24 petitioner sustained his burden of proof as a matter of law.  
25 See also, Weyerhaeuser v. Lane County, 7 Or LUBA 42, 46  
26 (1982). The evidence petitioner cites does not show that

1 Metro's original population projections were wrong. Neither is  
2 the evidence petitioner cites sufficient to show Metro's view  
3 that added industrial land is not needed is mistaken as a  
4 matter of law. We conclude the petitioner did not show, as a  
5 matter of law, that the urban growth boundary must be enlarged.

6 The second assignment of error is denied.

7 THIRD ASSIGNMENT OF ERROR

8 "Metro erred in failing to follow the procedures  
9 applicable to this UGB amendment proceeding, in that  
10 Metro departed from its prior expressed policy and  
11 standards without explaining or justifying its reason  
12 for doing so, and failed to announce the 'sufficient  
13 growth' test sufficiently in advance of the decision  
14 to enable petitioner a fair opportunity to address the  
15 import of the test."

16 Petitioner advises that Metro directed its staff to prepare  
17 a statement summarizing how applicants are to demonstrate a  
18 need under Goal 14. The result was a November 6, 1986 memo.  
19 Record, Book III, exhibit 18, pp. A1-A5. Petitioner concludes  
20 that Metro's staff, drawing on prior Metro decisions, correctly  
21 believed that Metro's UGB amendment policy required no  
22 discussion of population growth.<sup>11</sup> Petitioner then complains  
23 that population growth is a basis for the decision in this case  
24 adverse to petitioner. Petitioner also argues that because the  
25 November 6, 1986 memo shows Metro should be guided by  
26 procedures employed in its prior cases, and because petitioner  
views the present case to be a departure from those prior  
cases, Metro was obliged to inform the applicant of its "new"  
standard for review.

1           Petitioner advises ORS 197.835(8)(a)(B) authorizes this  
2 Board to reverse or remand a local government determination  
3 where the local government did not follow procedures applicable  
4 to the matter before it in a manner which prejudices the  
5 substantial rights of the petitioner. Petitioner argues that  
6 it was prejudiced by not having the prior rules and standards  
7 applied in a consistent fashion.<sup>12</sup>

8           Metro explains it did not announce the "sufficient growth  
9 test" prior to its application because the test is not a test  
10 at all. Metro says it applied Goal 14, Factor 2, not a new  
11 standard when it rejected petitioner's application. In  
12 addition, the memo claimed by petitioner as establishing the  
13 standard is simply a memo. Metro explains the memo was never  
14 approved by the council and was not subject to acknowledgement  
15 by LCDC. The applicable standard, according to Metro, exists  
16 in Goal 14.

17           Intervenor 1000 Friends of Oregon reminds us that in  
18 BenjFran Development Co. v. MSD, supra, we stated that the  
19 standard in Goal 14, Factor 2 does not require further  
20 elaboration. Petitioner had the opportunity to introduce  
21 evidence sufficient to satisfy Goal 14 and simply did not do so.

22           We find no error. We agree with respondent Metro that no  
23 new test was applied, and the applicable standard is found in  
24 Goal 14. The fact a staff memo exists suggesting that Metro  
25 should consider a particular need analysis is not binding on  
26 the Metro Council. There is nothing to show the staff memo

1 constitutes an ordinance or declaratory ruling expressing  
2 Metro's official view of how to apply Factor 2 of Goal 14.

3 As the individual intervenors note, Metro's decision in  
4 this case is not controlled by prior UGB amendment decisions.  
5 Whether or not Metro correctly applied the applicable standard  
6 in prior cases is not the issue. What matters is whether Metro  
7 applied the appropriate test in this application. S&J Builders  
8 v. City of Tigard, 14 Or LUBA 708, 711-712 (1986).

9 The third assignment of error is denied.

10 FOURTH ASSIGNMENT OF ERROR

11 "Metro misconstrued the requirements of Goal 2, Part  
12 II(c), (alternative sites) by requiring BenjFran to  
13 identify and analyze unspecified parcels of property  
14 under multiple ownership and zoned for other than  
15 industrial use in addition to conducting a detailed  
16 study of possible existing alternative sites within  
17 and contiguous to the UGB."

18 Goal 2, Part II(c) requires an analysis of alternative  
19 sites. The analysis is conducted to determine that areas not  
20 requiring a new exception cannot reasonably accommodate the  
21 use. An LCDC interpretive rule exists explaining this  
22 requirement in the goal.

23 "This alternative areas standard can be met by a broad  
24 review of similar types of areas rather than a review  
25 of specific alternative sites. Initially, a local  
26 government adopting an exception need assess only  
whether those similar types of areas in the vicinity  
could not reasonably accommodate the use. Site  
specific comparisons are not required of a local  
government taking an exception, unless another party  
to the local proceeding can describe why there are  
specific sites that can more reasonably accommodate  
the proposed use. A detailed evaluation of specific  
alternative sites is thus not required unless such  
alternative sites are specifically described with

1 facts to support the assertion that the sites are more  
2 reasonable by another party during the local  
exceptions proceeding." OAR 660-04-020(1)(b)(C).

3 Petitioner complains that no party identified any other  
4 parcels which could satisfy the need for an APS Regional  
5 Industrial Park. Petitioner advises it conducted an extensive  
6 study of specific parcels within and contiguous to the UGB  
7 before finding that no alternative sites existed. Petitioner  
8 complains that Metro required petitioner to identify and  
9 justify exclusion of sites in addition to petitioner's  
10 extensive analysis of similar parcels within and adjacent to  
11 the UGB. This requirement, according to petitioner, is  
12 contrary to the express language of OAR 660-04-020(1)(b)(C),  
13 quoted supra.

14 In addition, petitioner argues Metro's requirement that  
15 petitioner justify excluding properties under multiple  
16 ownership and zoned for other than industrial uses violates the  
17 "purpose and intent of the Goal 2 alternative sites  
18 requirement." Petition for Review 46. Petitioner points to  
19 1000 Friends of Oregon v. LCDC, 302 Or 526, 731 P2d 1015 (1987)  
20 in which the court approved an analysis considering only  
21 alternative sites zoned for the proposed use. Further,  
22 consideration of sites under multiple ownership "has never been  
23 addressed as a requirement of an alternative sites analysis,"  
24 according to petitioner. Petition for Review 47.

25 Metro replies that petitioner incorrectly restricted its  
26 analysis of alternative sites by looking to only those held in

1 one ownership, zoned industrial and presently available on the  
2 real estate market. Metro found the search too narrow. Metro  
3 argues that the issue is not what is available at this moment,  
4 but what will be available during the time period petitioner  
5 stated the park would need to be marketed. Metro discounts  
6 petitioner's argument against requiring it to examine the sites  
7 under multiple ownership because the site petitioner seeks to  
8 include in the UGB is itself under multiple ownerships.

9 Intervenor-respondent 1000 Friends of Oregon argues that  
10 because Metro concluded the UGB amendment was not justified  
11 under Goal 14, Factors 1 and 2, findings and conclusions  
12 adopted regarding Goal 2, Part II were unnecessary. As a  
13 consequence, 1000 Friends argues the Board need not reach the  
14 merits of this assignment of error. However, 1000 Friends adds  
15 that should we reach this issue, the alternative sites analysis  
16 required by Metro was appropriate. If an amendment to the UGB  
17 to include land under multiple ownership and zoned for  
18 agricultural use is reasonable, then a review of similar areas  
19 within the UGB not requiring an exception is also reasonable,  
20 according to 1000 Friends.

21 We agree with 1000 Friends and the individual  
22 intervenors-respondent, the alternative sites analysis is  
23 meaningless unless need has already been shown under Factors 1  
24 or 2 of Goal 14. Because no need has been shown, Metro was not  
25 obliged to make findings on the alternative sites analysis.  
26 However, in case we are mistaken in our analysis of Metro's

1 decision under Goal 14, Factor 2, we will review petitioner's  
2 charge.

3 We find Metro's alternative sites analysis methodology to  
4 be appropriate in the circumstances presented in this  
5 proceeding. Petitioner's refusal to consider land and multiple  
6 ownerships resulted in an unreasonably limited review of  
7 alternative areas given petitioner's need for a site of 500  
8 acres or larger. Petitioner's own site involves more than one  
9 ownership. While petitioner may be able to justify eliminating  
10 from consideration areas requiring consolidation of numerous  
11 small ownerships, it must explain why it is reasonable to limit  
12 its consideration to single ownerships of more than 500 acres.  
13 We conclude, therefore, that Metro was correct in requiring  
14 petitioner to consider sites in multiple ownerships.

15 We are more reluctant to fault petitioner for not examining  
16 sites within the UGB zoned for other than industrial uses. To  
17 require a developer to consider land within the UGB zoned for  
18 any purpose presents a nearly impossible task for a developer.  
19 However, in cases such as this where in excess of 500 acres of  
20 property is required, we find it reasonable to require  
21 petitioner to consider sites with appropriate physical and  
22 urban service qualities necessary for APS Regional Industrial  
23 Parks in other zones or explain why entire zoning districts  
24 shall be eliminated from consideration.

25 The fourth assignment of error is denied.

1 FIFTH ASSIGNMENT OF ERROR

2 "Metro misconstrued the requirements of the Goal 14,  
3 Factor 5 environmental factors by arbitrarily and  
4 erroneously requiring BenjFran to establish the costs  
5 of all mitigation measures in addition to  
6 demonstrating that reasonable solutions exist to  
7 resolve or mitigate any potential environmental  
8 impacts."

9 Goal 14, Factor 5 requires consideration of "Environmental,  
10 energy, economic and social consequences;" when establishing or  
11 amending a UGB. In this assignment of error, petitioner  
12 complains that the hearings officer required BenjFran to show  
13 the cost of mitigation measures as well as showing that  
14 reasonable solutions exist to mitigate any potential  
15 environmental impact. The hearings officer found that it was  
16 only necessary to find that reasonable solutions exist for  
17 potential adverse impacts, but the hearings officer also found  
18 that petitioner had not shown the available solutions were  
19 "reasonable." Appendix A-109. The hearings officer based his  
20 conclusion on the fact that the cost of such measures was not  
21 explained. Petitioner argues this finding applies a new  
22 standard. BenjFran argues the hearings officer's failure to  
23 inform the parties of his intention to include a cost analysis  
24 requirement in the Goal 14, Factor 5 discussion deprived  
25 BenjFran of the opportunity to present evidence to satisfy this  
26 requirement. We understand petitioner to argue it was  
prejudiced by this failure.

While we conclude Metro's construction of its "reasonable"  
solutions requirement to include some demonstration of

1 financial feasibility is correct, we have some difficulty  
2 agreeing the obligation includes a duty to present a detailed  
3 financial demonstration as 1000 Friends argues. We are  
4 particularly concerned that the first time the financial  
5 feasibility demonstration requirement is explicitly stated is  
6 in the hearings officer's report. See Commonwealth Properties  
7 v. Washington County, 35 Or App 387, 400, 582 P2d 1384 (1978).

8       However, while petitioner argues he was prejudiced because  
9 he was denied the opportunity to present evidence of financial  
10 feasibility to the hearings officer, he did not request an  
11 opportunity to submit such evidence after the hearings  
12 officer's report was issued. The Metro Code expressly allows  
13 for such requests. Metro Code 2.05.035(c). Petitioner may not  
14 now complain he was denied the opportunity to submit evidence  
15 showing his proposed mitigation measures are financially  
16 feasible.

17       The fifth assignment of error is denied.

18       The decision is affirmed.

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FOOTNOTES

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The record submitted by Metro in this proceeding does not contain pages with consecutive numbers as required by OAR 661-10-025(4)(a)(D). Metro's decision is included as an appendix to the petition for review. For clarity, and to be consistent with the parties' form of citation in this proceeding, we will cite to portions of Metro's decision included in the petition for review as "Appendix \_\_\_\_\_." Other portions of the record are cited as "Record, Book \_\_\_\_\_, p. \_\_\_\_\_, or exhibit \_\_\_\_\_").

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We note Metro treated petitioner's request as a contested case proceeding under its rules. Notwithstanding this fact, Metro claims the decision is legislative and that ORS 197.620(1) applies no matter how the case was processed below.

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3

Metro's order includes the following definition of an APS Regional Industrial Park given by petitioner:

"An APS Regional Industrial Park is of a size and scale which permits large scale open space features and consistent landscaping and design throughout which meet APS standards. Finished lot prices in APS Regional Industrial Parks average \$2.04 per square foot nationally. Average absorption rates for these facilities in other cities is 52 acres per year. An APS Regional Industrial Park must be at least 500 acres in size and achieve the following characteristics:

"1. Finished lot prices of all sizes and types priced at \$2.00 per square foot, a price which is competitive for the nation as a whole, and therefore attractive to the majority of types and sizes of general industrial end-users.

"2. Sufficient size to control the environment and provide the flexibility to offer sites in a variety of sizes, while assuring compatibility of adjacent uses by creating buffered areas grouping different types of users.

"3. Landscaping and circulation, including minimum setbacks of 50 feet, and shared open space areas, amounting to a minimum of 20 percent of the total

1 site, and other recreational, business and social  
2 services which assure a high quality, human scale  
3 environment. A major water feature (e.g. lake) would  
4 contribute significantly to the environmental quality  
of the park and converts the need for substantial  
drainage systems into an asset which adds value to the  
entire park.

5 "4. Sufficient size to accommodate one or more substantial  
anchor end-users.

6 "5. A long life and sufficient size to identify the  
7 industrial park with the region and assure a market  
8 presence regionally, nationally, and internationally,  
over a period of 10 to 20 years.

9 "6. An adequate marketing budget for the life of the  
10 project, to promote the facility regionally,  
nationally, and internationally and to provide a  
long-term presence in the marketplace.

11 "7. An adequate return for investors at a minimum of 25  
12 percent per year.

13 "To be economically feasible, an APS Regional Industrial  
14 Park must be located in the midst of a sizeable and growing  
15 pool of skilled and semi-skilled workers, and within an  
area where developed infrastructure (roads, sewer, and  
water) is already present." Appendix A-54-55.

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17 "\* \* \* \* \*

18 "Establishment and change of [UGBs] shall be based upon  
considerations of the following factors:

19 "(1) Demonstrated need to accommodate long-range urban  
20 population growth requirements consistent with LCDC  
goals;

21 "(2) Need for housing, employment opportunities, and  
22 livability;

23 "(3) Orderly and economic provision for public facilities  
and services;

24 "(4) Maximum efficiency of land uses within and on the  
25 fringe of the existing urban area;

26 "(5) Environmental, energy, economic and social

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consequences;

"(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,

"(7) Compatibility of the proposed urban uses with nearby agricultural activities.

"\* \* \* \* \*." Statewide Planning Goal 14.

5

We understand "necessary" in this context to be the equivalent of "need" in Factor 2 of Goal 14.

6

ORS 197.712(2)(a) requires "[c]omprehensive plans shall include analysis of economic patterns, potentialities, strengths and deficiencies as they relate to state and national trends." ORS 197.712(2)(B) requires "[c]omprehensive plans shall contain policies concerning the economic development opportunities in the community."

Local government comprehensive plans are not required to comply with ORS 197.712 until periodic review under ORS 197.640. ORS 197.712(3). The Metro UGB has not yet been subjected to its first periodic review.

7

The fact some firms may prefer an APS Regional Industrial Park over conventional industrial parks does not itself establish a need. Benjamin Franklin Development, Inc. v. Metropolitan Service District, 15 Or LUBA 319, 322 (1987). Rather, in the absence of increased population projections, petitioner must present substantial evidence for Metro to conclude the existing inventory of developable industrial land is no longer sufficient because it lacks one or more characteristics needed to achieve the industrial development assumptions upon which the UGB is founded. This task is complicated by the fact lagging industrial development may have causes totally unrelated to land availability. In addition, if Metro fails to find as petitioner requests based on the evidence submitted, petitioner's burden on appeal is to demonstrate that the evidence could only lead a reasonable decisionmaker to conclude the amendment is justified and that its request is justified as a matter of law. See discussion, infra.

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2 We add, 1000 Friends of Oregon's view of population  
3 projections and its narrow application of Goal 14, Factor 1  
4 ignores the final enjoiner in Factor 1 that the UGB include  
5 land needed to accommodate the population "consistent with LCDC  
6 goals." The goals expressly include goals for housing, (Goal  
7 10), and economic development and employment opportunities  
8 (Goal 9). Further, most goals address liveability, whether  
9 directly or indirectly. In our view, rigid separation of  
10 Factors 1 and 2 into independent mandatory criterion ignores  
11 the obvious overlaps between the two factors.

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9 Petitioner does not explain what it means by "base labor  
10 force."

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11 The hearings officer referred to "general industry" as  
12 follows:

13 "Heavy manufacturing is giving way to lighter  
14 industry, and some geographic areas are competing  
15 successfully for this new industry because of the  
16 availability of skilled labor and the presence of  
17 magnet facilities and infrastructure which give  
18 industry the ability to successfully compete in  
19 today's national and international marketplace. This  
20 'new' industry is not defined by high technology  
21 firms, but rather by firms which are users of new  
22 technology in the production process. These firms can  
23 be referred to as general industry, to differentiate  
24 them from heavy industry, which characteristically is  
25 engaged in processing raw materials. High technology  
26 firms are a type of general industrial firm, but the  
significance of high tech firms alone as a source for  
rapid economic expansion has been overplayed.  
Currently, 70 percent of industrial space in the  
United States is occupied by general industrial type  
firms." Appendix A-55-56.

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24 The staff memo provides a three step process for  
25 determining need. The first is the need for a particular use  
26 must be shown. Secondly, the cite characteristics must  
reasonably accommodate the needed use, and lastly, a shortage  
of land must be identified with the identified characteristics

1 within the UGB must be demonstrated.

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3 Additionally, petitioner argues that Metro refused to take  
4 notice of its own draft study of updated population trends.  
5 This study, according to petitioner, contradicts the findings  
6 of the hearings officer. The study was petitioner's only  
7 chance to attempt to answer the hearings officer's conclusion  
8 about population and economy growth with current information.  
9 Petitioner says had it been advised that population would be  
10 central to the decision, it could have taken efforts to meet  
11 the burden. As it stands, BenjFran believes it was treated  
12 prejudicially.

13 We do not believe petitioner argues Metro's refusal to  
14 consider petitioner's evidence was error. Rather, petitioner's  
15 argument is rather that it was not given notice and adequate  
16 opportunity to prepare an argument against using increased  
17 population as the chief UGB amendment criterion.  
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