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January 9, 2025

VIA EMAIL (DLCD.PR-UGB@dlcd.oregon.gov)

Attention: Periodic Review Specialist
Department of Land Conservation and Development
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Salem, OR 97301
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Re: Metro's 2024 UGB Amendment
Ordinance No. 24-1520
DLCD Objections
My Client: David Marks

To whom it may concern:

This firm represents David Marks, who owns property in the Stafford area that is part of Metro's urban reserves area. Pursuant to OAR 660-025-0140, Mr. Marks is submitting these objections to the Department of the Land Conservation and Development ("DLCD") regarding Metro Council's adoption of Ordinance No 24-1520, which amends the Metro regional Urban Growth Boundary ("UGB").

OAR 660-025-0140(2) provides that persons who participated orally or in writing in the local process leading to Metro's adoption of Ordinance No. 24-1520 may object to Metro's decision by filing objections with DLCD. To be valid, the objections must: (a) be in writing and filed with the DLCD no later than 21 days from the date Metro sent notice of its decision pursuant to OAR 660-025-0140(1); (b) clearly identify an alleged deficiency in Metro's decision sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the submittal is alleged to have violated; (c) suggest specific revisions that would resolve the objection; and (d) demonstrate that the objecting party participated orally or in writing in the local process leading to the final decision. OAR 660-025-0140(2). Mr. Marks submits the following in response to these requirements for objections.

A. The objections have been submitted no later than 21 days from the date of Metro's notice.

Metro issued the Notice of Urban Growth Boundary Amendment, Metro Council Ordinance No. 24-1520, as required under OAR 660-025-0140(1), on December 19, 2024. Mr. Marks filed

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these objections on January 9, 2025, within 21 days of Metro's notice. Therefore, these objections comply with OAR 660-025-0140(2)(a).

B. The objections clearly identify an alleged deficiency in Metro's decision sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the submittal is alleged to have violated.

Mr. Marks submits the following three objections to Ordinance No. 24-1520 and Metro's decision to amend the Metro regional UGB. Before addressing the specific objections, it is important to summarize Metro's obligations with respect to the Metro regional UGB amendment process.

Metro is responsible for coordinating land use planning in the tri-county region consisting of Clackamas, Multnomah and Washington County. ORS 195.025; ORS 268.380(1)(c); ORS 268.385. One of Metro's primary responsibilities is the adoption and management of the Metro regional UGB to ensure that the metropolitan regional housing and employment needs can be met. ORS 268.380-268.390; *Marks v. LCDC*, 327 Or App 708, 712-713, 536 P3d 995 (2023); *Sensible Transportation v. Metro. Service Dist.*, 100 Or App 564, 567, 787 P2d 498, rev. den., 310 Or. 70, 792 P2d 104 (1990). The Court of Appeals has repeatedly stated that in assigning Metro the responsibility for justifying, adopting, and securing acknowledgment of the metropolitan area UGB, the Oregon Legislative Assembly "presumably determined adoption and administration of the metropolitan area UGB required Metro's unique regional perspective, rather than leaving adoption and administration of the UGB to the large number of cities and counties making up the metropolitan area." *Marks*, 327 Or App at 712-713; *Sensible Transportation*, 100 Or App at 567. (Emphasis added).

As part of its UGB-related responsibilities, Metro is required to conduct a review of the metropolitan area UGB every six years to ensure that it continues to maintain a 20-year supply of urbanizable land within the UGB. ORS 197.299. Metro adopted Ordinance No. 24-1520 as part of its six-year review of the UGB. With respect to housing, Metro must demonstrate that its regional plan has "sufficient buildable lands within the urban growth boundary . . . to accommodate estimated housing needs for 20 years." ORS 197.296(2). Metro's needs analysis must be supported by substantial evidence. *City of West Linn v. LCDC*, 201 Or App 419, 440, 119 P3d 285 (2005). If Metro determines that the land supply is inadequate, it must expand the UGB or take other measures to ensure that the identified need can be accommodated. ORS 197.296(6); ORS 197.299(2); *Marks*, 327 Or App at 713.

In considering where to expand the UGB, Metro's analysis must comply with Goal 14, which includes four "boundary location" factors that Metro must consider when determining which urban reserve land to add to the UGB. Goal 14; *Marks*, 327 Or App at 713. The four boundary location factors are: "(1) [e]fficient accommodation of identified land needs; (2) [o]rderly and economic provision of public facilities and services; (3) [c]omparative environmental, energy, economic and social consequences; and (4) [c]ompatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB." *Id.* A decision to add land to the UGB must compare alternative areas based on a balancing of all these factors, rather than reliance on any one factor. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 17, 38

P3d 956 (2002); *1000 Friends of Or. v. Metro*, 174 Or App 406, 409–410, 26 P3d 151 (2001); *D.S. Parklane Dev., Inc. v. Metro*, 165 Or App 1, 25, 994 P2d 1205 (2000).

Metro’s Regional Framework Plan (the “RFP”) provides Metro’s process and requirements for planning new urban reserve areas. Metro Code (“MC”) Chapter 3.07, Title 11. The purpose of the RFP is to implement Metro’s regional goals and objectives in a uniform and consistent manner throughout the region. MC 3.07.010; MC 3.07.020. Metro is obligated to ensure the urban reserves are timely planned to accommodate the regional growth and housing needs. ORS 195.145(4); OAR 660-027-0070(9).

MC 3.07.1425 sets forth the “factors and criteria for amendment of the UGB.” One of those factors includes “whether the area has been concept planned,” but it is certainly not the sole factor. MC 3.07.1425(d)(2). The RFP requires cities and counties to develop concept plans for future urban development of urban reserves areas “in conjunction with Metro” and requires the date for completion of the concept plans to be “jointly determined by Metro and the county and city or cities.” MC 3.07.1110(a). MC 3.07.1110(e) provides an exception to the general requirement that concept planning occur before land is added to the UGB. If Metro and the city are unable to reach agreement on the date for completion of the concept plan, “the Metro Council may nonetheless add the area to the UGB if necessary to fulfill its responsibility under ORS 197.299 to ensure the UGB has sufficient capacity to accommodate forecasted growth.” MC 3.07.1110(e).

Metro failed to comply with these requirements as part of its 2024 UGB amendment process in adopting Ordinance No. 24-1520 in three major ways. First, Metro erred by refusing to consider any urban reserve areas for inclusion in the 2024 UGB amendment unless a local jurisdiction provided a concept plan for that area. Second, Metro erred by only considering the Goal 14 boundary location factors after it had determined that it would limit its consideration to the Sherwood West area because that was the only urban reserve area for which Metro received a concept plan. Third, Metro’s housing and employment needs analysis is an outcome-driven determination designed to justify Metro’s decision to limit its consideration to the Sherwood West proposal and is not supported by substantial evidence.

1. Metro erred by refusing to consider any urban reserve areas for inclusion in the 2024 UGB amendment unless a local jurisdiction provided a concept plan for that area.

In *Marks*, the Court of Appeals specifically addressed the role of a concept plan in determining which urban reserve land to add to the UGB. Although the Court noted that Metro can consider a concept plan as one of the components affecting its decision, the Court concluded that Metro cannot base its decision solely on the existence of a concept plan under Goal 14.

The Court concluded that in considering where to expand the UGB, Metro’s analysis must comply with Goal 14 and the four “boundary location” factors. *Marks*, 327 Or App at 713. A decision to add land to the UGB must compare alternative areas based on a balancing of all these factors, rather than reliance on any one factor. *Id.*; *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 17 (2002); *1000 Friends of Or. v. Metro*, 174 Or App 406, 409–410 (2001); *D.S. Parklane Dev., Inc. v. Metro*, 165 Or App 1, 25 (2000).

The Court emphasized that Goal 14 and the implementing statutes and the administrative rules do not even reference a “concept plan,” and certainly do not require a concept plan as a prerequisite to inclusion in the UGB. *Id.* at 714. Metro’s policy for requiring a concept plan as a prerequisite for inclusion in the UGB is based solely on the Metro Code (“MC”), but the Metro Code cannot override the requirements under Goal 14, the statutes and the administrative rules. Additionally, the Metro Code only lists a concept plan as one of the factors to consider in amending the UGB and there are exceptions to concept planning requirements. *Id.*; MC 3.07.1425(c) & (d); MC 3.07.1110(a) & (e).

The Court concluded that Metro cannot avoid the Goal 14 requirement to study all urban reserve lands for inclusion in the UGB based solely on the lack of a concept plan. *Id.* at 715-716. The Court explained: “Metro cannot use the concept plan requirement [in MC 3.07.1110] to avoid the requirement of Goal 14 that it study all urban reserve lands, including the Stafford Area, for inclusion in the Metro UGB at the time of a UGB expansion analysis, and analyze such lands using the four factors for such an analysis found in Goal 14.” *Id.* at 737. If Metro identifies a need for additional land in the UGB to accommodate the regional need for housing and employment, it must determine which land to add by evaluating alternative urban growth boundary locations consistent with the boundary location factors of Goal 14. OAR 660-024-0060(1); *Id.* at 725. Metro must balance the boundary location factors of Goal 14 for all of the urban reserves areas and determine the UGB boundary location based on all the relevant factors. OAR 660-024-0060(3). Metro cannot use the concept plan requirement in MC 3.07.1110 to avoid the Goal 14 requirement that it study all urban reserve lands for possible inclusion in the Metro UGB. *Marks*, 327 Or App at 737.

Metro made it clear from the beginning and throughout the 2024 urban growth process that the only urban reserve areas it was willing to consider and did in fact consider for inclusion in the UGB are those areas for which a local jurisdiction provided a concept plan. The 2024 Urban Growth Management Decision: Metro Chief Operating Officer/Staff Recommendations, dated August 26, 2024 (the “Draft 2024 Report”), explained the approach as follows:

Today, the greater Portland region is facing a housing shortage crisis. In addition, there is agreement across the region that attracting more family-wage industrial jobs will help our communities thrive. However, it is also clear that simply providing more land won't necessarily result in jobs and housing. Experience has shown that certain conditions must be in place to ensure that UGB expansion areas produce housing and jobs in a near term time frame. Time and time again we have seen that development occurs successfully where there is a commitment from city leaders and community members, where there is a plan for paying for needed infrastructure, and where there is market demand. If these ingredients aren't present, new urban growth is extremely slow if it happens at all.

For those reasons, in 2010 the Metro Council adopted a policy to only expand the UGB into urban reserve areas that have been concept planned by a local government and that demonstrate readiness to be developed. In the current 2024 UGB cycle, the City of Sherwood is the only city that has prepared a concept plan and proposed a UGB expansion, and they have shown that these elements are in place. Sherwood’s

readiness for new urban growth provides an opportunity to address the regional land needs identified in the draft 2024 Urban Growth Report (UGR).

Consequently, Metro staff recommend that the Metro Council consider expanding the UGB to include the Sherwood West urban reserve. Staff further recommend that the Council consider placing conditions on this expansion to ensure that the land is used efficiently and will support regionally identified needs. These conditions could reinforce the City of Sherwood's concept plan for the expansion area by improving housing affordability and protecting industrial lands so that they produce well-paying jobs in the manufacturing sector. Draft 2024 Report, p.1-2. (Emphasis added).

The Metro staff issue statement that accompanied the Draft 2024 Report, dated August 20, 2024, confirmed that Metro only considered urban reserve areas for which a local jurisdiction had completed a concept plan: "To ensure that areas added to the UGB are ready for growth, it is the Metro Council's policy to only expand the UGB in urban reserves that have been concept planned by a city or a county." Metro Staff Issue Statement, p.2.

Metro's policy of only expanding the UGB into urban reserve areas that have been concept planned by a local government is the reason that Metro only considered the Sherwood West urban reserve area for inclusion in the UGB. That is why the Draft 2024 Report did not analyze the Goal 14 boundary location factors or address any of the other urban reserve areas.

The final 2024 Urban Growth Report, dated December 5, 2024 (the "2024 Urban Growth Report") confirmed that this Metro policy is the underlying reason why Metro only considered the Sherwood West area for inclusion in the UGB. The 2024 Urban Growth Report explained:

Since 2010, it is the Metro Council's policy to only expand the UGB into urban reserves that have been concept planned by a local jurisdiction. Metro provides grant funding for cities seeking to complete concept plans for urban reserves. Title 11 of Metro code lays out concept planning requirements.

* * * * *

For the 2024 growth management decision, one city, Sherwood, has proposed a UGB expansion in the Sherwood West urban reserve. 2024 Urban Growth Report, p.9-10. (Emphasis added).

Since Sherwood was the only Metro local jurisdiction to provide a concept plan, Metro only considered the area Sherwood West area proposed for expansion.

Metro's Findings of Fact and Conclusions of Law (Appendix F) supporting Ordinance No. 24-1520 also confirmed that Metro's consideration of urban reserve areas for inclusion in the UGB was limited to those areas that have been concept planned by a local jurisdiction. Metro's Findings of Fact and Conclusions of Law clearly explain this policy:

In 2010, the Metro Council adopted a policy of taking an outcomes-based approach to future growth management decisions. This policy is based in part on Metro's experience with prior UGB expansions into areas where there was no existing plan for governance, development, or financing of needed infrastructure; unfortunately, those areas have often failed to develop. The history of Metro UGB expansions over the last 20 years clearly demonstrates that land readiness is more important than land supply for addressing housing needs and job growth. In order to increase the likelihood that development will actually occur in new UGB expansion areas, Metro now requires advance planning for areas that cities want to annex and urbanize. In 2010, Metro adopted amendments to Title 11 of the Urban Growth Management Functional Plan requiring cities to adopt concept plans for urban reserve areas prior to those areas being added to the UGB.

* * * * *

This 2024 UGB decision is the second application of Metro's new approach to UGB expansions. Consistent with the directives of the Task Force and the Metro Council, in 2017 Metro staff created a process where interested cities may submit proposals for UGB expansions. In 2018, four cities submitted proposals; however, in 2024 only the City of Sherwood submitted a concept plan proposal to Metro by the May 31, 2024 deadline. Appendix F, p.1-2. (Emphasis added).

Metro is legally obligated to base its UGB expansion decision on Goal 14 and the implementing statutes and the administrative rules. Goal 14 and the implementing statutes and the administrative rules do not even mention the concept plan factor, and certainly do not permit Metro to limit its UGB amendment decision to this sole factor. Although MC 3.07.1425 provides that a concept plan can be one of the factors to consider as part of Metro's UGB amendment process, it is not the sole factor and MC 3.07.1425 does not permit Metro to limit its consideration to urban reserve areas that have been concept planned. MC 3.07.1425(d). In *Marks*, the Court concluded that Metro cannot avoid the Goal 14 requirement to study all urban reserve lands for inclusion in the UGB based solely on the lack of a concept plan. *Id.* at 715-716.

The 2024 UGB amendment process that led to Ordinance No. 24-1520 clearly did not comply with these Goal 14 requirements or MC 3.07.1435. The Goal 14 compliant approach, which Metro used for decades until it abandoned this approach in 2018, requires Metro to: (1) first determine the need to add land to the UGB to address the 20-year housing and employment needs; and (2) second determine where that expansion should occur to best accommodate those needs using the Goal 14 boundary location factors. *See also* MC 3.07.1435(b) & (c). For the 2024 UGB amendment decision, Metro took the opposite approach. First, Metro adopted a formal policy and publicly announced up front that it will only consider urban reserve areas for including in the UGB if a local jurisdiction requests inclusion and submits a concept plan. Since the City of Sherwood was the only local jurisdiction to do so for 2024 and did so for a relatively small area, Metro limited its consideration to the City of Sherwood's proposal and was forced to justify a limited expansion of the UGB by adopting lower growth and housing need models. As Metro admitted in its findings, it is an "outcome driven process" designed to limit UGB expansions to concept planned areas. Appendix F, p.1.

By taking this approach, Metro is effectively abandoning its obligation under Goal 14 and the implementing statutes and the administrative rules to take a regional approach to Metro UGB expansion decisions and abdicating its authority to the individual local jurisdictions. As the Court explained in *Marks*, the Oregon legislature granted Metro the authority to administer the regional UGB because it “required Metro’s unique regional perspective, rather than leaving adoption and administration of the UGB to the large number of cities and counties making up the metropolitan area.” *Marks*, 327 Or App at 712-713. Metro’s policy of allowing local jurisdictions to determine when and where the UGB expansion occurs by only considering areas that are concept planned by a local jurisdiction is the opposite of that legislative directive and process. Metro is allowing the local jurisdictions to dictate when and where the regional UGB expansions will occur, effectively abdicating its authority over UGB expansions to the cities in contravention of the legislature’s intent.

If DLCD does not reject Metro’s approach and require Metro to use a regional UGB amendment process that complies with Goal 14 and the implementing statutes and the administrative rules, the Metro regional housing and employment needs will be subject to the whims of local jurisdictions for the foreseeable future. What happens if the Metro regional housing and employment needs outpace the number of local jurisdictions interested and willing to provide a concept plan? What happens if no local jurisdiction submits a concept plan in the next six-year review process? What happens if there is a significant need for more housing and employment opportunities in a particular area of the Metro region but none of the surrounding local jurisdictions submit a concept plan? Allowing local jurisdictions to dictate when and where the Metro UGB expansion occurs is not only inconsistent with *Marks*, Goal 14 and the implementing statutes and the administrative rules, it is a recipe for disaster that will significantly constrain our ability to meet the housing and employment needs of the Metro region for decades to come.

2. Metro erred by only considering the Goal 14 boundary location factors at the end of the process after it had already determined that it would limit its UGB expansion consideration to the Sherwood West area.

Mr. Marks submitted written comments to Metro regarding the Draft 2024 Report on July 23, 2024 and testified at the September 26, 2024 Metro Council public hearing for this matter, raising the issues and arguments noted in Section B.1 above. One of the issues Mr. Marks highlighted in his comments was the fact that the Draft 2024 Report clearly does not comply with the Goal 14 boundary location factors because the report doesn’t even mention the Goal 14 boundary location factors, let alone address them. Since Metro only considered the Sherwood West area, Metro had no reason or basis for considering the Goal 14 boundary location factors as it already limited its consideration to the Sherwood West area. The same is true with respect to the final 2024 Urban Growth Report – there is not a single reference to Goal 14 or the Goal 14 boundary location factors.

Recognizing this major flaw in Metro’s process, Metro staff attempted to compensate for this deficiency by drafting a Goal 14 boundary location factors analysis (Appendix 7) and supplementing the 2024 Urban Growth Report with this analysis at the last minute. Although Appendix 7 purports to comply with the Goal 14 boundary location factor requirements, it is an after-thought designed to give the mere appearance that Metro followed the required process. Appendix 7 was drafted in late October of 2024, well over a year after Metro commenced the 2024

Urban Growth Report process, months after the public comment period expired and a month after the September 26 public hearing. Appendix 7 is Metro's first and only analysis of the Goal 14 boundary location factors. Metro cannot credibly claim that this last-minute addition in response to a legal issue raised by an objecting party is sufficient to address the Goal 14 requirements. Metro's attempt to cover up this flaw in its decision by adopting Appendix 7 after-the-fact is both transparent and wholly inadequate.

The Goal 14 boundary factors should have been one of the first things Metro evaluated in this process to determine where the need for a UGB expansion is greatest and best served. That is precisely why MC 3.07.1435 requires Metro to first "determine whether there is a need to amend the UGB" and second "[i]f the Council determines there is a need to amend the UGB, the Council shall evaluate areas designated urban reserve for possible addition to the UGB." MC 3.07.1435(b) & (c). As the Court explained in *Marks*, Metro must consider the Goal 14 location factors when determining which urban reserve land to add to the UGB. *Marks*, 327 Or App at 713. After Metro determines the 20-year housing and employment needs of the region, the Goal 14 location factors should have been the criteria Metro used to evaluate *where* to expand the UGB to meet these regional needs.

Instead, Metro took the opposite approach. Metro's policy of limiting UGB expansions to those urban reserve areas that have been concept planned by a local government meant that Metro pre-determined where the UGB can be expanded before the process even started. Since the City of Sherwood was the only local jurisdiction to submit a concept plan, the City of Sherwood decided where to expand the UGB. The Goal 14 location factors are irrelevant under this outcome driven process if Metro is only willing to consider areas that are concept planned. Not only did this approach violate Goal 14, but it forced Metro to adopt lower growth rate projections to justify this outcome driven approach as explained in Section B.3 below.

Appendix 7 itself makes it clear that Metro's concept plan policy is the determining factor and the boundary factors analysis is designed to give the appearance of compliance with Goal 14. It acknowledged that Metro's UGB expansion approach is an "outcome-based approach" based on the concept plan requirement.¹ For Factor 1, Appendix 7 acknowledged that "the primary consideration in evaluating whether an urban reserve could efficiently accommodate an identified land need is whether it has an adopted concept plan under Title 11 of Metro's Urban Growth Management Functional Plan." Appendix 7, Introduction and Methodology, p.6. For Factor 2, Appendix 7 noted that a key consideration is "[w]hether there is a locally-adopted concept plan for the expansion area"

¹ Appendix 7A acknowledges: "The equitable distribution aspect of this factor is intended to help ensure that housing and employment opportunities are shared equitably throughout the region, and not always clustered entirely in one location. However, this goal has generally been given the least amount of weight in deciding where to expand the UGB, largely due to the policy shift undertaken at the direction of the regional Urban Growth Readiness Task Force to apply an outcomes-based approach to growth management decisions considering specific UGB expansion proposals submitted by cities. That policy shift also resulted in amendments to the Metro Code that place an emphasis on choosing locations for UGB expansions where there is a city that has an adopted concept plan for a possible expansion area and, thereby, demonstrates greater readiness to do more detailed comprehensive planning for that area, to annex it, and ultimately to regulate its urbanization." Appendix 7A, p.5. (Emphasis added).

and concluded that “[o]nly one urban reserve, the Sherwood West Urban Reserve, has a locally-adopted concept plan.” Appendix 7, Introduction and Methodology, p.7 & 11.

Metro’s evaluation of every urban reserve area except for the Sherwood West area includes the following statement: “Prior to land being included in the UGB, a more detailed concept plan, consistent with the requirements of Metro’s Urban Growth Management Functional Plan Title 11, is required.” See e.g. Appendix 7, Part 1, Beaver Creek Bluffs Urban Reserve, p.9. For the Sherwood West area, Metro stated the following:

As noted in the Introduction and Methodologies section of Appendix 7, as well as in Attachment 3, the Sherwood West Urban Reserve is the only urban reserve to have an adopted concept plan for its future urbanization. Having this concept plan significantly increases the likelihood that the reserve will actually develop and be able to efficiently provide residential and employment land opportunities within a reasonable timeframe. Appendix 7, Part 2, Sherwood West Urban Reserve, p.2.

Metro relied heavily on the Sherwood West concept plan throughout its evaluation of this urban reserve area.

Metro ruled out consideration of the Borland, Rosemont and Stafford urban reserve areas because of a 2019 inter-governmental agreement (the “Three-Party IGA”) between the cities of Lake Oswego, Tualatin, and West Linn that prohibits any of those cities from completing a concept plan until December 31, 2028. Appendix 7, Attachment 2. As part of the *Marks* case, Mr. Marks is challenging this Three-Party IGA and a Five-Party IGA that preceded it on the grounds that these IGAs violate Goal 14 and Metro’s RFP because they grant the cities the unilateral authority to dictate the timing of UGB expansion in this area by giving them complete control over the timing of the concept plan.

Appendix 7 provides scores for the Goal 14 factors for each area, but neither Appendix 7 nor the 2024 Urban Growth Report explain how Metro weighed these various scores other than to make clear that the concept plan is the predominate factor. For example, the Bendemeer, Brookwood Parkway, Grahams Ferry, Holly Lane-Newell Creek Canyon, Rosa, Sherwood North and Wilsonville Southwest urban reserve areas all received comparable or better overall scores than the Sherwood West area. Appendix 7, Attachment 3. Metro does not explain why it concluded that Sherwood West is the best, better or only candidate when so many other urban reserve areas had similar scores. The reason is obvious - Sherwood West was the only urban reserve area with a concept plan.

DLCD cannot and should not endorse Metro’s backward approach to analyzing the Goal 14 boundary location factors. After Metro determines the 20-year housing and employment needs of the region, Metro should have used the Goal 14 location factors to evaluate *where* to expand the UGB to meet these regional needs. The Goal 14 boundary factors should have been one of the first things Metro evaluates in this locational process to determine where the need for a UGB expansion is greatest and best served, not an after-thought. Metro’s approach was clearly designed to give the appearance that it determined the location of the UGB expansion based on the Goal 14 boundary

location factors when it is obvious from the record that Metro determined the location based solely on its concept plan requirement.

3. Metro's housing and employment needs analysis is an outcome-driven determination that is not supported by substantial evidence.

The whole purpose of Metro's six-year review of the Metro area UGB is to ensure there is a 20-year supply of urbanizable land within the UGB to satisfy the regional housing and employment needs. ORS 197.299; *Marks*, 327 Or App at 713. If Metro determines that the land supply is inadequate, it must expand the UGB or take other measures to ensure that the identified need can be accommodated. ORS 197.296(6); ORS 197.299(2); *Marks*, 327 Or App at 713. Therefore, Metro must first determine if there is a need for additional urbanizable land within the UGB to satisfy the 20-year housing and employment needs, and if so determine the best location(s) to expand the UGB to accommodate that need based on the Goal 14 boundary location factors. *Id.*; MC 3.07.1435(b) & (c). Metro's needs analysis must be supported by substantial evidence. *City of West Linn v. LCDC*, 201 Or App at 440.

Once again, Metro's approach to evaluating the supply of urbanizable land within the UGB to accommodate the Metro regional housing and employment needs over the next 20 years was backwards. First, Metro announced that it will only consider a UGB expansion for an area that has been concept planned. Since the City of Sherwood was the only local jurisdiction to submit a concept plan, and the area is relatively small, Metro was forced to adopt a housing and employment needs analysis that justified such a small expansion. Indeed, it is unclear what Metro could have done if the housing and employment needs exceeded the amount of land Sherwood proposed as part of the Sherwood West concept plan since Metro did not adopt the housing and employment needs analysis until the end of the process.

There are several things in the record that make it clear Metro determined the amount of additional urbanizable land necessary to accommodate the housing and employment needs to justify its outcome-driven concept plan approach. As a result, Metro's housing and employment needs analysis is not supported by substantial evidence.

Metro's housing needs determination is inconsistent with Metro's own housing needs analysis. As noted in Econorthwest's Existing Housing Needs Report, there is an existing need for 23,700 additional housing units in the Metro region to meet current demands. Appendix 8A. The Regional Housing Needs Analysis concluded that there is a need for a significant number of new housing units to address the future growth needs, ranging from 179,500 units under the high growth model, 149,500 under the baseline growth model and 119,600 under the low growth model. In total, this data demonstrates that there is a need for 143,300 to 203,200 new housing units in the Metro UGB to satisfy the 20-year needs of the region. Appendix 8. Metro's conclusion that the existing and future housing needs over the next 20 years is only 3,100 new housing units is inconsistent with Metro's own housing needs analysis.

Instead of acknowledging this need for a significant amount of new housing units, Metro relied on lower-end growth projections and its "latitude" to assume a need for less housing units due to the uncertainty of predicting future trends to justify its outcome-driven approach. 2024 Urban Growth

Report, p.38-39. The Draft 2024 Report concluded that the Metro Council has wide “latitude to determine whether additional housing capacity is needed to accommodate potential household growth,” but Metro did not cite any authority for this assumption. Draft 2024 Report, p.37. (Emphasis added). The sole basis for this alleged latitude is the “uncertainty” in predicting future trends. Draft 2024 Report, p.37-38. Metro adopted this approach as part of its decision. 2024 Urban Growth Report, p.38-39.

Contrary to Metro’s claim, there is no authority for Metro to disregard or minimize the facts and data based on this assumption. The uncertainty in predicting future trends cannot be used as a basis for ignoring the actual data and analysis because Metro’s entire process of evaluating the needs of the region for the next 20 years is inherently uncertain. If the mere uncertainty in predicting future trends was sufficient to override the facts and data, there would be no reason to do a detailed analysis of the housing needs in the first place.

Metro’s housing capacity numbers are not supported by substantial evidence. Table 9 summarizes Metro’s residential capacity assumptions that it used for purposes of the 2024 growth management decision. 2024 Urban Growth Report, p.33. Metro explained that these assumptions are based on Appendix 2, which describes a range of capacity depending on market responses, and concluded that the final assumptions in Table 9 are within these ranges. There are multiple problems with Metro’s housing capacity assumptions. The numbers in Table 9 do not match the numbers or conclusions provided in Appendix 2. Even if the numbers in Table 9 are within the ranges in Appendix 2, Metro failed to explain why it chose the specific numbers it chose and the basis for its conclusion. Metro appears to erroneously assume that it has the discretion to pick any number so long as it is within the range in Appendix 2.

Metro admitted that the housing capacity gap figures are based on several demand and capacity scenarios that can materially change the results depending on what assumptions are adopted by Metro, but Metro selected a particular scenario without explaining the basis for that selection. The 2024 Urban Growth Report explained:

Depending on the above factors, the UGB capacity gaps for accommodating existing and future housing needs vary. The draft UGR’s ranges were developed using several illustrative demand and capacity scenarios that sought to apply consistent economic reasoning in any given scenario. The three demand scenarios are as previously described, now paired with four capacity scenarios. See Appendix 8 for more detail. These scenarios are not the only ones that could be considered plausible. Instead, these scenarios are intended to provide information to support decision making. Slight changes to assumptions about demand, capacity, or housing mix would produce different results. 2024 Urban Growth Report, p.39. (Emphasis added).

Metro selected scenario 3 without explaining why: “Metro is relying on Scenario 3 as the basis for its growth management decision since it represents the most likely conditions for population growth, growth capacity, and housing mix.” 2024 Urban Growth Report, p.41. Given Metro’s admission that the UGB capacity gap is heavily dependent on which scenarios Metro selects,

Metro's conclusory statement is wholly insufficient to demonstrate that its housing capacity determination is supported by substantial evidence.

Metro's conclusion that the housing needs over the next 20 years is only 3,100 new housing units is clearly an outcome-driven determination designed to justify Metro's concept plan policy. The Sherwood West proposal will provide 3,120 new housing units. It is a statistical anomaly that the Sherwood West proposal would just so happen to supply 20 more units than the total number of new housing units necessary to accommodate the Metro regional housing needs over the next 20 years. Given the range of a need for 143,300 to 203,200 new housing units in the to satisfy the 20-year needs of the region, the fact that the Sherwood West proposal will meet that demand within a 20-unit range is either a statistical miracle or a clear indication that Metro's housing needs analysis is an outcome-driven determination designed to justify Metro's concept plan policy. Considering all of the evidence in the record, it is clearly the latter.

Had Metro considered other urban reserve areas for possible inclusion in the UGB as required by Goal 14, it would conclude that there are other areas that clearly have a need for additional urban lands. As an example, the City of Tualatin's 2019 Housing Needs Analysis concluded there is an existing lack of affordable housing and lack of capacity to accommodate certain other housing types. Tualatin is unable to accommodate these housing needs without a UGB expansion. Had Metro considered Tualatin's Housing Needs Analysis, it clearly would have concluded there is a specific need for additional urban lands in this location. By refusing to even consider other cities housing needs analysis or similar information, Metro is disregarding its responsibility to determine where the best locations for expanding the UGB in compliance with Goal 14.

Every local jurisdiction that commented on the Draft 2024 Report and the housing and employment needs analysis concluded that Metro was underestimating the Metro regional needs and should rely on a higher growth model. The City of Portland, Clackamas County, Washington County, the City of Gresham and other local jurisdictions all submitted comments to this effect. The City of Portland's comments summarized the concerns of these local jurisdictions well:

Metro is narrowly framing this decision as to whether or not the Sherwood West expansion area should be brought into the UGB. The UGR has broader implications for the region in terms of how we expect to grow in a way that is equitable and meets other regional goals, such as reducing carbon emissions.

The Urban Growth Report (UGR) is an opportunity to frame future regional planning discussions such as the regional housing production strategy, a refresh of the 2040 Growth Concept, and a regional economic development strategy.

Our concern is that the UGR is underestimating population and housing growth, underestimating residential capacity; underestimating industrial job growth, overestimating industrial land supply and underestimating commercial land supply. BPS staff raise the following issues with methodology and assumptions to better align with regional policy objectives, which are described in detail below.

Draft 2024 Urban Growth Report Public Comment Report, dated August 2024,
p.104. (Emphasis in original).

Surprisingly, Metro effectively ignored these local jurisdictions comments and concerns. The 2024 Urban Growth Report and findings do not acknowledge or respond to the local jurisdictions' comments and concerns at all.

DLCD must scrutinize Metro's housing needs analysis to ensure it is fact-driven and not outcome-driven determination because it will have ramifications beyond the 2024 UGB amendment decision. Metro's forecast will provide the basis for Metro's regional housing production strategy, and it will be provided to the State (OHCS/DAS) to establish the jurisdiction level housing targets.

Metro's housing and employment needs analysis is an outcome-driven determination that is not supported by substantial evidence. Metro must be required to reevaluate the regional housing and employment needs over the next 20 years using a fact and data drive approach, not an outcome-driven approach designed to justify Metro's concept plan policy.

Based on the arguments set forth in this Section B, these objections comply with OAR 660-025-0140(2)(b).

C. Suggest specific revisions that would resolve the objections.

Unfortunately, there is only one option available to resolve Mr. Marks' objections – Metro must redo the process for the six-year review of the UGB in a manner consistent with Goal 14 and the implementing statutes and administrative rules. Metro's primary error is fundamental and undermines the entire process. Metro's decision to limit its consideration to the Sherwood West area infected the entire process. Metro's conclusion regarding the housing and employment needs over the next 20 years was designed to justify an outcome-driven concept plan policy. Metro's refusal to consider other urban reserve areas resulted in Metro failing to apply the Goal 14 boundary location factors in a reasonable and objective manner. As the City of Portland noted, Metro did not conduct the six-year review process in a manner consistent with Goal 14 because Metro narrowly framed the decision as whether or not the Sherwood West expansion area should be brought into the UGB.

We anticipate that Metro will argue that DLCD should deny these objections because requiring Metro to redo the process will be too time-consuming and burdensome. Not only is that not a valid legal or policy basis for affirming Metro's fundamentally flawed approach to this process, but there are two additional reasons why DLCD should reject this argument.

First, Metro has known that its concept plan policy is legally flawed for several years and elected not to change course. Mr. Marks filed a petition for enforcement with LCDC on February 6, 2020 and argued that Metro's new policy of limiting UGB expansions to areas that have been concept planned violates Goal 14 and the implementing statutes and administrative rules. In the *Marks* decision, in which the Court resolved the jurisdictional issue in our favor and remanded the petition for enforcement back to LCDC to decide the substantive issues, the Court clearly indicated that Metro is not entitled to limit UGB expansions to those areas with a concept plan. Mr. Marks

forewarned Metro early in this six-year review process through written and oral testimony that it will be required to redo the process if it does not address the fundamental errors created by its concept plan policy. Metro has only itself to blame for failing to take corrective actions earlier in the process.

Second, this six-year UGB review decision is far too important to not resolve and correct now. Metro will not consider the housing and employment needs of the region until 2030. Waiting six more years to correct Metro's decision is far too long and will have long-lasting consequences for the region. There is an existing housing deficit of 23,700 units that will continue to grow exponentially over the next six years. The longer this deficit is allowed to grow, the harder it will be to correct it in the future. Metro's forecast will provide the basis for Metro's regional housing production strategy, and it will be provided to the State (OHCS/DAS) to establish the jurisdiction level housing targets. DLCD needs to act now to correct this problem before it is too late.

Therefore, these objections comply with OAR 660-025-0140(2)(c).

D. Demonstrate that the objecting party participated orally or in writing in the local process leading to the final decision.

Mr. Marks submitted written comments to Metro on July 23, 2024 and November 19, 2024 and testified at the September 26, 2024 and November 21, 2024 public hearings before the Metro Council. Mr. Marks raised the issues stated in these objections in his oral and written testimony. Therefore, these objections comply with OAR 660-025-0140(2)(d).

Conclusion

Metro's whole approach to this six-year UGB expansion review has turned the process on its head. The Oregon legislature granted Metro the authority to administer the regional UGB because it "required Metro's unique regional perspective, rather than leaving adoption and administration of the UGB to the large number of cities and counties making up the metropolitan area." *Marks*, 327 Or App at 712-713. Metro's approach is the opposite of that legislative directive and process. Metro is allowing the local jurisdictions to dictate when and where the regional UGB expansions will occur, effectively abdicating its authority over UGB expansions to the cities in contravention of the legislature's intent.

Not only is Metro's approach to this UGB expansion process inconsistent with *Marks*, Goal 14 and the implementing statutes and administrative rules, but it will exacerbate the current housing crisis in the Metro region. The Metro region clearly does not have a sufficient housing supply and many residents are priced out of the market. That trend will only worsen over time. DLCD needs to provide leadership on this issue and ensure that Metro complies with the required Goal 14 process and is willing to make the hard decisions necessary to address the difficult housing supply and housing affordability issues plaguing our region. The first step in doing so is to ensure the 2024 UGB expansion process follows the requirements of Goal 14 and the implementing statutes and administrative rules.

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We appreciate your consideration of our objections and look forward to addressing this issue further with DLCD.

Very truly yours,

HATHAWAY LARSON LLP

A handwritten signature in dark ink, reading "E. Michael Connors". The signature is written in a cursive, flowing style with a large, stylized "E" and "C".

E. Michael Connors

EMC/ep

cc: Roger Alfred, Office of Metro Attorney (via email)
David Marks (via email)