

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON DEPARTMENT OF
5 LAND CONSERVATION AND DEVELOPMENT,
6 *Petitioner,*

7
8 vs.

9
10 DOUGLAS COUNTY,
11 *Respondent,*

12
13 and

14
15 WEBB BRIGGS LAND COMPANY,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2000-008

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Douglas County.

24
25 Lynne A. Perry, Assistant Attorney General, Salem, filed the petition for review and
26 argued on behalf of petitioner. With her on the brief were Hardy Myers, Attorney General
27 and Michael D. Reynolds, Solicitor General.

28
29 No appearance by respondent Douglas County.

30
31 Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring
33 and Mornarich, PC.

34
35 HOLSTUN, Board Member; BASSHAM, Board Chair; and BRIGGS, Board
36 Member, participated in the decision.

37
38 REMANDED

08/31/2000

39
40 You are entitled to judicial review of this Order. Judicial review is governed by the
41 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision amending the Myrtle Creek Urban Growth Boundary (UGB). The decision on review followed a remand from LUBA in *DLCD v. Douglas County*, 36 Or LUBA 26 (1999). We remanded the county’s earlier amendment of the Myrtle Creek UGB because we found the county failed to explain adequately why it rejected land other than that having predominantly Class I agricultural soils for inclusion in the amended UGB.¹

MOTION TO INTERVENE

Webb Briggs Land Company, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In our prior opinion, we set out the following relevant facts:

“The Myrtle Creek UGB encompasses the City of Myrtle Creek and an unincorporated area, referred to as ‘Tri City’ or the ‘Tri City Urban Growth Area,’ located south of the City of Myrtle Creek. The Tri City Urban Growth Area includes the Interstate Highway 5 (I-5) interchange with Pruner Road. The challenged decision extends the UGB south from its existing location at the I-5/Pruner Road interchange to include an 8.3-acre parcel owned by intervenor.

“The challenged decision also changes the comprehensive plan designation for the subject property from ‘Agricultural’ to ‘Community Commercial’ and changes the zoning map designation from ‘Exclusive Farm Use-Cropland’ to ‘Community Commercial.’ Intervenor proposes to develop the subject property with a restaurant, mini-mall, professional offices, retail store and motel. The proposed development would be served by a road running between a restaurant and a service station currently located south of Pruner Road near its intersection with I-5.” *DLCD v. Douglas County*, 36 Or LUBA at 28 (footnote omitted).

¹Both Statewide Planning Goal 3 (Agricultural Lands) and OAR 660-033-0020(1) define “agricultural land,” in part, based on the predominant soil classifications, as classified by the United States Department of Agriculture (USDA).

1 In our prior opinion, we also noted that the 8.3 acres to be included in the revised
2 UGB consist of predominantly Class I agricultural soils within the meaning of Goal 3. This
3 soil class is the highest agricultural soil classification and places the property’s soils within
4 the definition of “High Value Farmland,” as described in ORS 215.710 and
5 OAR 660-033-0020(8). In our review of the county’s earlier decision, we found the county
6 did not adequately explain why the subject property with predominantly Class I soils must be
7 included in the UGB to accommodate the general need identified by the county for
8 commercially planned and zoned land. Specifically, we found the county failed to
9 demonstrate a particular need for commercial land at a freeway interchange, failed to show
10 that alternative lands inside the UGB were unsuitable for commercial development and also
11 failed to adequately consider alternative lands outside the UGB. As we explained in our
12 prior opinion, “Class I agricultural lands such as the subject property are the lowest priority
13 for inclusion in the UGB to meet urban land needs.” *DLCD v. Douglas County*, 36 Or
14 LUBA at 35.

15 Following our remand, the county again concluded that the 8.3-acre subject parcel
16 was the only land available to meet its identified need for additional commercial land. That
17 is, the county again found that alternative lands both inside and outside the existing UGB are
18 not suitable to satisfy the identified need for additional commercial land inside the Myrtle
19 Creek UGB. In selecting the subject property and rejecting all alternative sites, the county
20 relied heavily on an “Alternative Site Analysis” that was prepared for intervenor by
21 Schofield & Associates. Record 258-570. The Alternative Site Analysis made use of a
22 “binary score” for each alternative site’s suitability for commercial use (0 = not suitable; 1 =
23 suitable). Record 268-69. It defined suitability to mean “whether the site could reasonably
24 accommodate any or all of” the need for additional commercial land based on the site’s
25 “physical attributes.” Record 269.

26 *** Each site was given a preliminary positive score (indicating suitable for
27 commercial use); then, the nine variables which were relevant were

1 considered for that site. The site’s score was changed to zero if any of the
2 relevant variables indicated the site was not suited for commercial use. Due
3 to the difference in criteria for sites inside and outside the UGB, not all
4 variables applied to every site. Commercial suitability was determined as the
5 multiplicative product of the site scores (0 or 1) of the pertinent criteria
6 variables.

7 “‘Commercial suitability’ as given by this analysis does **not** rate the relative
8 quality of the site for commercial use. Rather, a score of 1 indicates the site
9 meets at least the *minimum* standards for commercial use as to the variables
10 pertinent to the site.” *Id.* (Emphasis in original.)

11 The nine variables used to determine ultimate suitability are “each site’s access to
12 collector streets, commitment to residential use, likelihood of flooding, improvements not
13 shown on the master map, location, slope, soil suitability, public ownership, and 1999
14 subdivision history.” Record 268-69. The study explains that “[o]nly sites with positive
15 scores had land that was available and able to reasonably accommodate some or all of the
16 urban commercial use.”² Record 269-70. As stated earlier, only the subject 8.3-acre site, of
17 a total of 474 alternative sites, passed all the tests established in the study. The instant
18 dispute is over this latest effort to justify inclusion of the subject parcel in a revised Myrtle
19 Creek UGB.

20 **ASSIGNMENT OF ERROR**

21 **A. Introduction**

22 Petitioner asserts the subject 8.3-acre parcel should not have been added to the Myrtle
23 Creek UGB. According to petitioner, the county failed to show that other available lands are
24 not suitable for the identified need for commercial land. Petitioner makes a single
25 assignment of error challenging the county’s decision. The assignment of error is divided
26 into three subassignments of error, which in turn are divided into several parts, each

²The Alternative Site Analysis’ use of the concept “positive score” is somewhat misleading. Any site that received a score of “0” on any one of the nine factors was eliminated as unsuitable. For example if a site received a score of “1” on eight factors, meaning the site was suitable under those eight factors, and a score of “0” on the ninth factor, meaning it was unsuitable under that factor, it would receive an overall score of “0” and would be eliminated as unsuitable.

1 expressing a separate argument. Because we find the county’s rejection of alternative sites is
2 based on a misapplication of the governing criteria, we will not discuss each of petitioner’s
3 several assertions that individual alternative sites were improperly excluded. However, we
4 will discuss individual examples of site rejection as needed to illustrate our conclusions
5 about the county’s decision.

6 Petitioner’s major challenges are: (1) the county misconstrued the applicable law
7 when determining that no alternative sites could reasonably accommodate the need for
8 additional commercial land; (2) the county’s findings are not adequate to show that
9 alternative sites cannot reasonably accommodate the need; and (3) the county’s findings are
10 not supported by substantial evidence. Petitioner does not claim there is no need for
11 additional commercial land within the UGB, only that the county failed to show the subject
12 8.3-acre parcel is the only land that can reasonably accommodate that need.

13 We discussed the standards for adding land to a UGB in our prior opinion. *DLCD v.*
14 *Douglas County*, 36 Or LUBA at 34-37. Briefly, the addition of resource land to the city’s
15 UGB is permissible only upon a showing of compliance with statutory, administrative rule
16 and statewide planning goal criteria which encourage the use of land within the existing
17 UGB, rural nonresource land and rural land within areas for which an exception has been
18 taken.³ Use of resource land for urban uses, particularly high-quality agricultural and forest
19 land, is discouraged.

20 Goal 14 (Urbanization) includes seven factors, which govern the establishment and
21 change of UGBs. Petitioner claims two Goal 14 factors are violated by the county’s
22 decision. The two factors cited require that any conversion of rural land to urban land
23 provide for

³Resource land in this context means agricultural land as identified in the county’s comprehensive land use plan. As recited above, the 8.3-acre parcel at issue in this case is agricultural land.

1 “(4) Maximum efficiency of land uses within and on the fringe of the
2 existing urban area;

3 “* * * * *

4 “(6) Retention of agricultural land as defined, with Class I being the
5 highest priority for retention and Class VI the lowest priority[.]”

6 Also applicable are ORS 197.732(1)(c)(B), Goal 2, Part II(c),
7 OAR 660-004-0010(1)(c)(B) and 660-004-0020(2)(b). *DLCD v. Douglas County*, 36 Or
8 LUBA at 30. These standards require that the county first consider whether any lands
9 already within the UGB can reasonably be redesignated to accommodate the need for
10 commercial land and next consider whether lands outside the UGB, for which an exception
11 has already been taken, can reasonably accommodate the need.

12 Petitioner also alleges violation of these standards, as well as ORS 197.298. This
13 statute sets out a priority scheme for including lands within a UGB. The statute requires that
14 the county first consider exception and nonresource lands for inclusion in the UGB. If these
15 lands are not adequate to meet the need, then lands zoned for agricultural or forest use may
16 be included. However, if such resource lands are included, resource lands “of lower
17 capability as measured by the capability classification system or by cubic foot site class” are
18 to be added before lands of higher capability. ORS 197.298(2).

19 Because the subject 8.3-acre parcel is agricultural land having predominately Class I
20 soils, it is the very lowest priority for inclusion within a UGB. In our prior decision in this
21 matter we summarized the combined effect of the above-described rule, goal and statutory
22 requirements as follows:

23 “In summary, the lands included by the county in this case are Class I
24 agricultural soils. Such soils may be included to meet the identified need for
25 urban commercial land only if (1) there are no lands inside the UGB which
26 could reasonably accommodate that need and (2) there are no nonresource
27 lands, exception lands or Class II through Class VI agricultural lands outside
28 the UGB which could be included to satisfy the identified need.” *DLCD v.*
29 *Douglas County*, 36 Or LUBA at 37.

1 **B. County Application of the Governing Legal Standards**

2 Petitioner’s specific arguments are directed at only two of the factors used by the
3 county to reject alternative sites: (1) soil characteristics and (2) developed improvements.
4 We therefore limit our review and specific discussion to those factors. *See Neighbors for*
5 *Livability v. City of Beaverton*, 168 Or App 501, 507, ___ P2d ___ (2000) (LUBA does not
6 review land use decisions *per se*; it reviews “the arguments that the parties make about land
7 use decisions”).

8 **1. Soil Characteristics**

9 The county rejects several sites because the soils have characteristics that pose
10 “severe” limitations for certain building activity.⁴ The Alternate Site Analysis explains:

11 “**Soil Characteristics.** Were the site’s soil characteristics a severe limitation
12 for building improvements? Score 0 if yes, 1 if no. Sites were scored 0 if
13 USDA soil data indicated that the soil type present had severe limitations on
14 constructing improvements due to soil characteristics affecting foundation

⁴The USDA Soil Survey User’s Guide explains:

“Severe soil limitation is the rating given soils that have one or more properties unfavorable for the rated use, such as steep slopes, bedrock near the surface, flooding hazard, high shrink-swell potential, a seasonal high water table, or low bearing strength. This degree of limitation generally requires major soil reclamation, special design or intensive maintenance. Some of these soils, however, can be improved by reducing or removing the soil feature that limits use; but, in many situations, it is difficult and costly to alter the soil or to design a structure to compensate for a severe degree of limitation.” Record 396.

The USDA survey manual, also part of the record, defines a “severe” soil limitation rating as follows:

“Requires unacceptable risk to use the soil if not appreciably modified. Special design, a significant increase in construction cost, or an appreciably higher maintenance cost is required for satisfactory performance over an acceptable period of time. A limitation that requires removal and replacement of the soil would be rated severe. The rating does not imply that the soil cannot be adapted to a particular use, but rather that the cost of overcoming the limitation would be high.

“Some soils have such extreme limitations that they should be avoided for certain uses unless no reasonable alternatives are available. Such soils have one or more features that are so unfavorable for the use that the limitation is extremely difficult and expensive to overcome. For example, shallow bedrock or inundation for a long duration are extreme limitations for onsite sewage disposal and for underground utilities. The rating of very severe is sometimes used for such extreme cases.” Record 197-98.

1 stability, other than slope or flooding (both considered separately), such as
2 wetness, ponding, shrink-swell, or rock outcrops. * * *” Record 277.

3 Although the USDA soil interpretation summaries that were used in the Alternative Site
4 Analysis include ratings for a number of different categories, the Alternative Site Analysis
5 focused exclusively on the “Building Site Development” category.⁵ Record 422-541.
6 Within the Building Site Development category, limitations are given for six separate uses.
7 “Small Commercial Buildings,” is one of the six specified use categories, and the only use
8 category that was examined under this factor.⁶ We understand the Alternative Site Analysis
9 to have rejected sites that have soils that have severe limitations for “Small Commercial
10 Buildings” with regard to “wetness, ponding, shrink-swell, or rock outcrops.”

11 We note at the outset that our review of the USDA information on soil characteristics
12 leads us to conclude that the soil characteristics do not signal that a “severe” limitation
13 necessarily means land is either impossible or very expensive to develop. Generally, the
14 “severe” limitation means some form of “major soil reclamation, special design, or intensive
15 maintenance” may be needed in order to make the site useable for some specified uses (in
16 this case small commercial buildings). Record 396. An examination of the many “Soil
17 Interpretations Record” sheets in the record shows that the soil limitations ratings apply to a
18 limited universe of uses, and a “severe” limitation affecting one listed use may not affect
19 another use. Record 422-541. For example, soils falling within class “175C” have “severe”
20 soil limitations for “Local Roads and Streets” but only have “moderate” soil limitations for
21 “Small Commercial Buildings.” Record 472.

⁵Other categories include “Sanitary Facilities,” “Construction Material,” “Water Management,”
“Recreational Development,” “Capability and Yields per Acre of Crops and Pasture,” “Woodland Suitability,”
“Windbreaks,” “Wildlife Habitat Suitability,” and “Potential Native Plant Community.”

⁶The others are “Shallow Excavations,” “Dwellings Without Basements,” “Dwellings With Basements,”
“Local Roads and Streets,” and “Lawns, Landscaping and Golf Fairways.”

1 With that said, there is no dispute that there are practical effects associated with
2 “severe” soil limitations. The effects vary among soil types, however, and the USDA Soil
3 Survey only very generally discusses “average” costs associated with a “severe” soil
4 limitation. Petitioner argues that a “severe” soil limitation, in and of itself, is not sufficient to
5 establish that a particular property is, in fact, unreasonably expensive to develop for any
6 particular land use. Nonetheless, intervenor defends the county’s use of this data to establish
7 an essential threshold that must be met for land to be considered reasonably capable of being
8 put to commercial use.

9 According to intervenor, the USDA Soil Survey does give a general idea of the cost
10 of improving a site with “moderate” and “severe” soil limitations.⁷ For example, intervenor
11 recites that with respect to the “shrink-swell” potential of soil, a characteristic that has
12 relevance for building foundations, the additional cost of construction for a “typical
13 building” (1,200 square feet) will be 17 percent for a “moderate” shrink-swell potential and
14 39 percent for a “severe” shrink-swell potential. Record 58.

15 The county appears to have adopted these estimated “average” additional costs as part
16 of its justification for rejecting a number of alternative sites. The county findings address the
17 importance of soil characteristics as follows:

18 “Soil Characteristics. — Viable commercial sites are located on USDA soil
19 types which show no, slight, or moderate limitation for improvements, based
20 on the physical-mechanical characteristics of the soil. Sites with soil types
21 which the USDA categorized as having *severe* limitations for commercial
22 improvements were deemed not to be viable commercial sites. USDA data
23 indicated that construction costs at such sites will be on average 39% higher
24 because of measures needed to attempt to mitigate the severe soil limitation
25 compared to sites which did not have such limitations. The 39% increase is
26 an unproductive cost and is deemed sufficiently material to make sites with
27 severe limitations to be unavailable to ‘reasonably’ accommodate new
28 commercial use. DLCDC challenged the validity of this variable, and the

⁷Intervenor’s citation to section 621.09 of the USDA National Soil Survey Handbook appears in the
“Applicant’s Rebuttal Statement” at Record 58. We do not find the cited document in the record, but accept
intervenor’s recitation of its content.

1 applicant responded at length and with a certified expert’s opinion. We find
2 the greater weight of the evidence to be on the side of the applicant and adopt
3 the applicant’s analysis.” Record 1-Q (emphasis in original).

4 Petitioner discounts the added cost discussion and argues that the existing Myrtle
5 Creek Comprehensive Plan already incorporated soil considerations when it established the
6 UGB. Petitioner says the county’s instant rejection of sites for inclusion in the UGB based
7 on a single such consideration is error. To bolster the argument, petitioner points to the
8 Myrtle Creek Comprehensive Plan, which sets out several factors for consideration in
9 deciding whether land should be part of the UGB. For lands within the UGB, the city’s
10 comprehensive plan states that the factors to be considered for including land within the
11 UGB include

12 “* * * their proximity to the City, previous development patterns, existing
13 land uses, topography, soil characteristics, existing transportation (road)
14 systems, ease of public facility extensions, and the need to include a sufficient
15 amount of land to provide for a variety of land use and development options
16 over the course of the planning period. * * *” Myrtle Creek Comprehensive
17 Plan (MCCP) 12-14 (as cited in the Petition for Review at 7).

18 Petitioner expands its argument, citing ORS 197.712(2)(c), which requires that
19 comprehensive plans and land use regulations provide for an adequate supply of sites of
20 suitable sizes, types, locations and service levels for industrial and commercial uses,
21 consistent with comprehensive plan policies. For commercial and industrial development,
22 the Land Conservation and Development Commission’s implementing rule for Goal 9
23 (Economic Development) defines a “suitable” site as a site that either provides for the site
24 requirements of the proposed commercial or industrial use or can be expected to so provide.
25 OAR 660-009-0005(5). Petitioner argues, therefore, that in the process of inventorying
26 commercial lands, site constraints were already taken into account. We understand petitioner
27 to claim some of the land that is already inside the UGB must be suitable for commercial
28 purposes because soil limitations have already been considered in the Myrtle Creek
29 Comprehensive Plan. Petitioner also complains that the county rejected too many sites on

1 the basis of a general soil description, while at the same time ignoring some “severe” soil
2 limitations that apply to the 8.3-acre site that it selected for inclusion in the UGB. Record
3 438.⁸

4 Intervenor replies that the mention of soil characteristics in the comprehensive plan
5 does not mean that soils were carefully considered or that each site was evaluated for soil
6 suitability for particular kinds of uses. In particular, intervenor argues that simply because
7 alternative sites inside the UGB may be buildable for residential purposes does not mean
8 those sites are suitable for commercial purposes. According to intervenor, a residential user
9 may be more willing to spend money to improve the site than a commercial operator who
10 must consider the need to make an adequate return on the investment. Worth noting in this
11 regard is the following argument in intervenor’s brief:

12 “Ultimately, findings that a site with severe limitations is unavailable are
13 based on an economic analysis. With modern engineering, at great cost,
14 virtually any problem can be overcome. The issue is not whether the site can
15 accommodate the need, but whether the site can reasonably accommodate the
16 need. OAR 660-004-0020(2)(b)(C). The county showed the economic basis
17 for its decision. The USDA soil limitation ratings are based on the relative
18 anticipated cost of corrective measures for the limitation factors. The
19 county’s decision to adopt the USDA soil limitations as valid indicators of
20 whether a site can reasonably accommodate commercial development is
21 consistent with the purposes for which the USDA soil limitations were
22 designed, which include land use planning.” Intervenor-Respondent’s Brief
23 43 (record citations omitted).

24 Whether an alternative site can reasonably accommodate an identified need is a
25 multi-faceted inquiry. Intervenor’s argument may correctly state a purely market-based
26 rationale for rejecting sites, but that rationale does not obviate the requirement that
27 alternative lands be rejected only if they cannot reasonably accommodate the identified need.
28 OAR 660-004-0020(2)(b)(B) provides that when showing why other areas that do not require

⁸The soils on the subject property have severe limitations for “Local Roads and Streets” and severe “Flooding” limitations for “Small Commercial Development.” As noted earlier, the county did not consider soil limitations for “Local Roads and Streets” and used different maps and data to consider flood limitations.

1 a new exception cannot reasonably accommodate the use, “[e]conomic factors can be
2 considered *along with other relevant factors in determining that the use cannot reasonably*
3 *be accommodated in other areas.*” (Emphasis added.) An economic factor such as increased
4 development costs that may be associated with particular soils is not, then, a legitimate sole
5 determinative factor in deciding whether an alternative site can or cannot reasonably
6 accommodate the use. Such is particularly the case when the evidence concerning those
7 increased costs is very generalized and is presented only as an “average” cost based on an
8 assumed (1,200 square foot) example of commercial improvement. The intended use is
9 commercial; and, as the rule states and as we have said before, increased development costs,
10 even accurately stated increased development costs, should not be the sole criterion for
11 determining whether a use can or cannot be reasonably accommodated on other than resource
12 lands. *1000 Friends of Oregon v. Marion County*, 18 Or LUBA 408, 423 (1989). The
13 county assigned unjustified significance to increased costs as a means to justify its reliance
14 on some “severe” soil limitation ratings as the reason to reject a number of alternative sites.⁹
15 In this case, the county’s rejection of sites on this single basis represents a misapplication of
16 the rule, goal and statutory requirement that alternative sites be used if they can reasonably
17 accommodate the identified need.¹⁰

18 We assume that the lands currently included in the UGB are available for urban use.
19 This assumption is not rendered invalid simply because the sites chosen for urban use,
20 including residential, industrial and commercial use, have soil or other characteristics
21 rendering the sites less than ideal to develop. Relevant statutory and administrative rules do

⁹Of the 159 alternative sites inside the UGB, soil characteristics were a factor for rejecting 27 sites. Of the 87 alternative sites in exception areas outside the UGB, soil characteristics were a factor for rejecting 41 sites. Of the 228 alternative resource land sites outside the UGB, soil characteristics were a factor for rejecting 31 sites.

¹⁰Some of the rejected sites were rejected based on other factors as well. Nevertheless, the methodology employed by the Alternative Site Analysis is flawed because it allowed some sites to be rejected solely on the basis of soil characteristics.

1 not require that the land that is chosen for development be easy or cheap to develop. Natural
2 conditions vary around the state, and it may be that the conditions in the subject area do not
3 easily lend themselves to development. Even where land may be somewhat difficult to
4 develop, compensating factors may make the land suitable for urban use.

5 In the instant case, the “severe” soil limitations that the county treats as determinative
6 can only be assumed to result in “average” increased costs of development of 39 percent for
7 small commercial buildings. This assumed limitation may be helpful in siting uses that
8 conform to the example, but it does not address the question of whether, given all relevant
9 considerations, a particular alternative site is not reasonably available to meet, or partially
10 meet, the generally stated need for additional commercial land.¹¹ Again, the need for
11 commercial land is not for land that is suitable for a particular commercial use, but for
12 unspecified commercial uses. The Alternative Site Analysis rejects sites based on a single
13 characteristic that *may* mean a particular site will require improvements before *some*
14 commercial buildings may be constructed. This characteristic might have no impact on a
15 commercial use that utilizes existing structures and minimal impact on a use requiring
16 development that does not conform to the 1,200 square foot example. Before the county can
17 assume this circumstance makes a site an “unreasonable” alternative, it must determine that,

¹¹Intervenor correctly notes that while the USDA percentage cost increase estimates for soils with severe soil limitations are based on a 1,200 square foot building as an example, the USDA’s explanation of the scope of “small commercial buildings” is not limited to 1,200 square foot buildings.

“Small Commercial Buildings, as considered here, have the same requirements and features as described for dwellings. The main difference for commercial buildings is a reduction of slope limits for each limitation class. Canneries, foundries, and the like are not considered here because foundation requirements generally would exceed those of ordinary 3-story dwellings.” Record 400.

This description of small commercial buildings compares them to residential buildings. Larger commercial buildings that have requirements that exceed the requirements of an “ordinary 3-story dwelling[.]” may not be limited by severe soils in the same way that small commercial buildings may be limited, because they have different foundation requirements. As we discuss more fully in our consideration of petitioner’s substantial evidence challenge, it is not clear what relevance, if any, the increased cost figures have for larger commercial buildings that may have different foundation requirements.

1 indeed, the site will be so difficult or expensive to use that it cannot reasonably accommodate
2 the identified need. We do not find the county performed this analysis with respect to the
3 sites petitioner claims were mistakenly rejected because of soil characteristics.

4 In reaching this conclusion, we are mindful that OAR 660-004-0020(2)(b)(C) says
5 that the alternative site standard can be met by “a broad review of similar types of areas
6 rather than a review of specific alternative sites.” More detailed analysis is only required if
7 persons produce evidence that other specific sites can more reasonably accommodate the
8 proposed use. *Id.* Here, of course, petitioner has pointed out possible alternative sites.¹²

9 More importantly, we do not find the county’s method, using as it does a single site
10 characteristic to dispose of an alternative site, to be consistent with OAR 660-004-
11 0020(2)(b)(B). The county’s error may be understood as one that treats individual factors
12 that admittedly are relevant to whether a site may reasonably accommodate commercial uses
13 as if each of the factors alone were absolutely essential for commercial use. Given that the
14 city’s need is for additional commercial land, rather than land for a particular kind of
15 commercial use, it is highly questionable that any single factor should determine whether a
16 site can reasonably accommodate the identified need.¹³ The nine factors the county used to
17 evaluate sites are all relevant site considerations, but the county does not offer a satisfactory

¹²We do not agree with intervenor’s charge, made in response to several of petitioner’s complaints about rejected alternative sites, that petitioner waived such complaints because the sites were not mentioned below. Petitioner appeared below and made clear its objection to use of soil characteristics and other single-issue characteristics as justification for elimination of alternative sites. Record 75-78, 236-38. No further specificity is required to preserve the issue for our review.

¹³We do not mean to say that a county could never justify eliminating an alternative site based on a single factor. However, to do so, the county must adopt findings that demonstrate that the presence of a necessary factor or absence of a limiting factor is essential to meet the identified need, making it reasonable to eliminate the site from further consideration no matter how much other factors may compensate for the missing factor. As we explain below, the county’s findings do not do so with regard to soil characteristics, and the evidence to which we are cited would not support such findings.

1 reason to treat the “severe” soil limitation as a make-or-break standard for accepting or
2 rejecting a site.¹⁴

3 2. **Developed Improvements**

4 We reach a similar conclusion with respect to petitioner’s challenge to another of the
5 county’s factors, “Developed Improvements.”¹⁵ For example, the county rejected a site
6 because it had a limiting soil characteristic and also because the “site has a two-story utility
7 building of historic significance which is used in the operation of the property for boarding.”
8 Record 57. Petitioner contends that the findings and the Alternate Site Analysis do not
9 explain why the site could not be more intensely developed or why existing development
10 precludes the site from being put to the proposed commercial use.¹⁶ More to the point, the
11 county’s discussion does not show why this possible impediment is a sufficient reason, in
12 and of itself, to conclude that the property cannot reasonably accommodate *any* commercial
13 use. Is the building of a type that cannot be adapted to commercial use? Why does its
14 historical significance bar its use or partial use for commercial purposes? The county’s

¹⁴We note in addition that the county also appears to have rejected parcels if only a portion of the parcel includes “severe” soil limitations. This practice has the effect of excluding a site that may be quite suitable for commercial use simply because a portion of it may be expensive to improve. For all the county knows, the portion with soil limitations might not be needed for particular commercial uses. As with the county’s use of soil characteristics alone to reject alternative sites, this practice also does not correctly apply the site selection criteria in ORS 197.298, 197.732, Goal 14, factors 4 and 6 and OAR chapter 660, division 4.

¹⁵Of the 159 alternative sites inside the UGB, the developed improvements factor was a basis for rejecting 53 sites. The Alternative Site Analysis explains:

“Developed Improvements. Was the alternate site improved or in productive urban use? Score 0 if yes, 1 if no. This criterion applied only to sites within the UGB. This variable was developed to score sites shown as vacant on the master map that were in fact improved with dwellings, part of a residential compound with a dwelling under one ownership, or improved with other occupied or used structures, including nonassessable public improvements. The improvements included manufactured dwellings and dwellings built after the master map database was finalized.” Record 272.

¹⁶Petitioner appears to refer to the proposed hotel and other uses slated for the applicant’s 8.3-acre parcel. Petition for Review 18. We note again the need stated is not for land for the proposed specific use, but land for commercial uses generally. Whether or not the site will serve the specific use desired for the 8.3 acres is not material to this discussion.

1 unexplained reliance on the cited improvements to eliminate the site from further
2 consideration is error.

3 **3. Conclusion**

4 Before agricultural land with predominately Class I soils can be designated for urban
5 use, alternative sites must be given more careful consideration than was given under the soil
6 characteristics and developed improvements factors. Our conclusion might be different if the
7 commercial need the county had identified and justified were a need for a particular kind of
8 commercial use. In that case, if the needed commercial use required large parcels or direct
9 rail, freeway or airport access, then sites lacking these characteristics but otherwise suitable
10 for general commercial uses could not reasonably accommodate the identified special
11 commercial need. Such is not the case here, however. In the instant case the identified need
12 is for additional commercial land, rather than land for particularized commercial uses with
13 particularized requirements for development.

14 We add that we are mindful of intervenor's protest that simply because a site has once
15 been included in an inventory of urban lands does not mean it should be regarded as
16 available for commercial use. Intervenor advises, in essence, that the city's UGB was
17 designed to meet a wide range of needs, and simply because sites within the UGB that are
18 currently designated for urban use are now found not suited for commercial use does not
19 mean they cannot be put to other urban uses. Moreover, intervenor argues that just because
20 some lands currently inside the UGB that are poorly suited to commercial development have
21 been zoned for and put to such commercial use in the past does not mean those mistakes
22 should be repeated in the future.

23 Although we might agree with intervenor in the abstract, here the factors identified in
24 the Alternative Site Analysis suggest that lands currently within the UGB cannot reasonably
25 accommodate commercial use, even though those same factors are present on some lands that
26 are currently planned for and in commercial use. That fact lends at least some indirect

1 support to petitioner’s argument and our conclusion that the county improperly used the soil
2 characteristics and developed improvements factors to eliminate individual sites from further
3 consideration. Although those factors may accurately indicate that those sites have problems
4 that make them less than ideal, the county has failed to adequately justify those factors as an
5 independently sufficient basis for eliminating sites with those factors from further
6 consideration as reasonable alternative sites.

7 We conclude the county’s Alternative Site Analysis is helpful in understanding the
8 conditions extant in the Myrtle Creek area, but it does not provide an adequate justification
9 for rejecting all 473 alternative sites. The county’s chosen method of rejecting a site because
10 of a single characteristic such as a “severe” soil limitation rating or because a parcel is
11 partially developed, mistakenly limits consideration of alternative sites to those that have no
12 impediments to development. The legal standard does not call for site selection based on
13 lack of impediments.¹⁷ The legal standard calls for site selection based on a multifaceted
14 consideration that must recognize and accommodate as much as possible the state policy to
15 preserve agricultural land unless no other land is reasonably available to meet the identified
16 need. *Residents of Rosemont v. Metro* ___ Or LUBA ___ (LUBA Nos. 99-009 and 99-010,
17 June 16, 2000), slip op 34-38, *appeal pending*.

18 Petitioner’s subassignment of error alleging that the challenged decision misconstrues
19 the applicable law is sustained.

20 **C. Adequacy of the County’s Findings**

21 Petitioner next argues that the county’s findings are not adequate to show that
22 alternative sites cannot reasonably accommodate the commercial land need. Fairly read,
23 petitioner’s concern in this subassignment of error is that the county failed to explain why

¹⁷Again, we do not mean to say that a single serious impediment could not be so difficult to overcome that other potentially mitigating relevant factors need not be considered. However, neither the soil characteristics factor nor the developed improvements factor, as described and applied in the Alternative Site Analysis, are sufficient to ensure that the sites that are eliminated based on those factors have such a serious impediment.

1 particular soil characteristics are an essential prerequisite to commercial use. According to
2 petitioner, the county may not reject a site based on one characteristic without finding that
3 characteristic essential to the use. *See Benjfran Dev. v. Metro Service District*, 15 Or LUBA
4 319, 323 (1987) (explaining that a mere preference for a site does not meet the “cannot
5 reasonably accommodate” exceptions standard in Goal 2). Petitioner correctly asserts that an
6 economic justification for preferring a resource land site over an alternative site does not
7 necessarily establish that the alternative site cannot reasonably accommodate the use. *1000*
8 *Friends of Oregon v. Marion County*, 18 Or LUBA at 423. According to petitioner, an
9 alternative site may not be rejected without an explanation of why costs and development
10 constraints make the site an unreasonable alternative. *See 1000 Friends of Oregon v. Metro*
11 *Service Dist.*, 18 Or LUBA 311, 328-30 (1989) (stating principle). Petitioner’s complaint,
12 then, is that the county’s findings fail to demonstrate compliance with the controlling
13 standards.

14 For essentially the same reasons we have concluded the county misconstrued the
15 applicable law, we conclude the county’s findings are inadequate. As we commented earlier,
16 simply because a site may require the expenditure of money to improve the site to the point
17 that commercial development is feasible does not, of itself, mean the site cannot reasonably
18 accommodate commercial development. In the instant case, the county explained the soils
19 on several alternative sites have “severe” limitations, but the county did not show the soils
20 are incapable of supporting some form of commercial use or development. The county
21 simply concludes that a 39 percent “average” increase in cost in order to mitigate “severe”
22 soil limitations is “an unproductive cost and is deemed sufficiently material to make sites
23 with severe limitations to be unavailable to ‘reasonably’ accommodate new commercial use.”
24 Record 1-Q. This assertion does not adequately explain why sites with “severe” soil
25 limitations for some commercial uses cannot reasonably accommodate *any* commercial use.
26 The statement that the county “deems” an average site improvement cost to be

1 “unproductive” is conclusional. It does not provide an adequate basis for the county’s
2 ultimate conclusion, *i.e.*, that it can be assumed that all sites with “severe” soil limitations for
3 some purposes cannot reasonably accommodate any commercial development.

4 As previously noted, the 39 percent cost increase is an “average” figure and is based
5 on an assumed small commercial development. Record 58. Therefore, any cost increase
6 attributable to “severe” soil limitations at any particular site for any particular commercial
7 development could be significantly lower. Just as importantly, even if we accept the
8 county’s finding that a site with “severe” soil limitations will cost 39 percent more to
9 develop than other sites with no such limitation, that finding fails to recognize that any such
10 cost increase could be offset by other positive factors so that commercial development can
11 reasonably be accommodated notwithstanding the “severe” soil limitations.¹⁸

12 Any factors that the county wishes to develop and apply in determining whether lands
13 can reasonably accommodate commercial development must be developed and applied with
14 more of a recognition of the legislature’s explicit mandate to protect agricultural land from
15 conversion to urban use. Because the legislature placed such importance on preservation of
16 high-value agricultural land and put it at the bottom of the list of lands available for
17 conversion to urban use, eliminating alternative sites based on a single factor requires that
18 the county carry a heavy burden to explain why eliminating that site based on that single
19 factor is justified. Factors that may have the effect of eliminating alternative sites because
20 they are somewhat more expensive to develop are inadequate to demonstrate the eliminated
21 alternative site cannot reasonably accommodate the identified need. *1000 Friends of Oregon*
22 *v. Marion County*, 18 Or LUBA at 423. The county’s findings do not demonstrate that the
23 additional cost of developing on soils with “severe” limitations for some commercial uses is

¹⁸For example, any soil limitations at a given site could easily be outweighed by ready and convenient access to auto-driving customers that would be provided by a proximate freeway interchange or access to pedestrian customers in a central business district.

1 so onerous that it may be assumed that sites with such soils cannot reasonably accommodate
2 commercial development.

3 Finally, while we do not find it particularly helpful or necessary to address each of
4 petitioner’s complaints about individual alternative site rejections, we do add that petitioner
5 contends that the findings do not explain why the subject 8.3-acre parcel was not itself
6 excluded because of “severe” soil limitations. The record shows the soils on the subject site
7 have “severe” limitations for small commercial buildings (because of flooding) and also for
8 local roads and streets (because of strength).¹⁹ As we understand the argument, for
9 petitioner, consistency would require that this site also be rejected.

10 The soil characteristics factor, as described and applied in this case, did not address
11 flooding; flooding limitations were addressed separately using National Flood Insurance
12 Program maps. Similarly, as developed and applied in this case, the soil characteristics
13 factor limited its analysis to small commercial development and did not address limitations
14 on construction of local roads and streets. Petitioner does not sufficiently develop an
15 argument concerning these aspects of the soil characteristics factor to provide a separate
16 reason for remand. However, petitioner’s argument does raise a question concerning
17 whether the subject parcel is really better suited to serve commercial needs, or part of them,
18 than other sites that may have been rejected based on similar limitations. As we have already
19 concluded, the soil characteristics and developed improvements factors, as described and
20 applied in the challenged decision, establish too low a threshold for rejecting sites based on
21 those factors.

22 Petitioner’s subassignment of error that the county’s findings are inadequate is
23 sustained.

¹⁹Petitioner also says the soils on the subject property have “severe” limitations for utilities. Petition for Review 22. We do not find this limitation listed in the cited portion of the record.

1 **D. Petitioner’s Substantial Evidence Challenge**

2 Petitioner’s final assertion of error is that the county’s decision is not supported by
3 substantial evidence. As we understand petitioner’s argument, use of the USDA soil data
4 does not support the conclusions of unsuitability the county draws.²⁰ Specifically, petitioner
5 cites the USDA narrative that expresses caution in using the soil limitation information. In
6 the “interpretations” section of the soil survey manual, the agency advises that the
7 interpretations are made for construction of small buildings; roads, streets and utilities; lawns
8 and landscaping around buildings. While stating that these uses may require high capital
9 expenditures in relatively small areas, the manual also says that, usually, onsite evaluation is
10 necessary. Record 207. The manual also says

11 “Construction and maintenance of buildings belongs primarily to architecture
12 and engineering. Additionally, large multistory structures are generally
13 supported by footings placed below the depth of soil survey examination. Soil
14 survey interpretations are not, therefore, a definitive source of information for
15 building construction. Important interpretative soil properties for small
16 buildings and accessory installations such as roads and utilities include slope,
17 inundation, mass movement, potential frost action, depth to bedrock and to
18 cemented pans, shrink-swell, rock fragments >75mm, erodibility, subsidence,
19 and soil strength.” *Id.*

20 Petitioner’s point is that the evidence about soil limitations and the “average” cost
21 associated with mitigating negative soil characteristics does not furnish sufficient evidentiary
22 support for the county’s conclusion that sites should be rejected on the basis of a “severe”

²⁰As part of its argument, petitioner refers to another USDA soil classification, that of “extreme.” It regards this classification as one describing soils with such extreme limitations that they should be avoided for certain uses unless no reasonable alternatives are available. According to petitioner, it necessarily follows that the agency does not view “severe” soils as unreasonable alternatives.

Petitioner misreads the USDA guide. The agency does not mention a separate category of “extreme.” Rather, the agency states that a rating of “very severe” is sometimes given to soils having extreme limitations, but that description is in the context of the agency’s discussion of “severe” soils. Record 197-98. Notwithstanding petitioner’s apparent mistake in reading the USDA guide, petitioner’s point remains valid. The county’s decision is not supported by substantial evidence showing that the “severe” soil limitations on some alternative sites mean those sites cannot reasonably accommodate commercial use of those sites. As discussed earlier, the “severe” limitation, by itself, does not present so severe an obstacle to use as to justify rejecting the site as not available.

1 soil limitation. Petitioner is correct. Substantial evidence is evidence a reasonable person
2 would rely upon to support a conclusion. *Dodd v. Hood River County*, 317 Or 172, 179, 855
3 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). With
4 an understanding of the assumptions and limitations that underlie the USDA soils data that
5 were relied upon in the Alternative Site Analysis, a reasonable person would not rely on
6 those data to conclude that sites rated to have “severe” soil limitations for small commercial
7 uses, for that reason alone, cannot reasonably accommodate any commercial use. Again, the
8 need for commercial land is for general commercial land, not for a particular parcel or
9 particular kind of commercial use. Site rejection solely on the basis of a single relevant
10 factor does not meet the applicable rule, goal and statutory standards, and the evidence about
11 site characteristics and their consequences to which we are cited in this record does not
12 support a finding that the applicable standards are met.

13 **CONCLUSION**

14 We remand the county’s decision because we find the county misapplied the
15 standards applicable to UGB amendments in Goal 14, OAR chapter 660, division 4 and
16 ORS 197.732 and 197.298. ORS 197.835(9)(a)(D). We also remand the decision because
17 the county’s findings are inadequate and are not supported by substantial evidence in the
18 record. ORS 197.835(9)(a)(C).

19 The county’s decision is remanded.