BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MALINOWSKI FARM and GREGORY P. MALINOWSKI,
Petitioners,

vs.

METRO,
Respondent,

and

MICHAEL H. JENKINS, SANG B. KIM, CHRIS WARREN
and LEXINGTON HOMES,
Intervenors-Respondent.

LUBA No. 2000-036

FINAL OPINION
AND ORDER

Appeal from Metro.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Metro.

William C. Cox, Gary P. Shepherd and Timothy v. Ramis, Portland, filed the response brief. With them on the brief was Ramis Crew Corrigan and Bachrach. William C. Cox argued on behalf of intervenors-respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 09/14/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal Metro's amendment of the Portland Metropolitan Region's urban growth boundary (UGB) to include an 18.85-acre tract zoned for exclusive farm use (EFU).

MOTIONS TO INTERVENE

Michael H. Jenkins, Sang B. Kim, Chris Warren and Lexington Homes (intervenors) move to intervene on the side of respondent. There is no opposition to their motions, and they are allowed.

FACTS

The subject property is a rectangular 18.85-acre tract zoned EFU. Soils on the subject property consist of Class III and IV agricultural soils. The property is bounded on the west, south and east by land within the UGB that is zoned R6 (residential, six units per acre). The Washington/Multnomah County line forms the northern boundary of the subject property. Land to the north within Multnomah County is zoned and used for agricultural uses. The subject property was previously included in the UGB, but it was removed in 1982, in part because the owner and Metro did not expect the surrounding property to develop with urban services in the foreseeable future.

The subject property slopes southwest from an elevation of 410 feet at the northeast corner to a low of 360 feet at the southwest corner, with an average slope of five percent.[1] Petitioners own six parcels zoned R6 that adjoin the subject property to the east, within the UGB. The western four parcels of petitioners' property (hereafter, the Malinowski property) are generally at a higher elevation than the subject property, and within the same drainage basin. The lowest point of the Malinowski property is its southwestern corner, at approximately 400 to 410 feet. South of the Malinowski property and the subject property is

[1]All property elevations in this opinion are expressed in feet above mean sea level.

an east-west ridge that forms the southern boundary of the drainage basin in which both properties lie. Adjacent to the south of the subject property is a recently approved subdivision, the Greenwood Hill subdivision. The northern portion of the Greenwood Hill subdivision straddles the east-west ridge. As a condition of approving the Greenwood Hill subdivision, the developer is required to install a sanitary sewer trunkline within Greenwood Drive at an elevation of 402 feet. South of the Malinowski property is a large low density residential area known as Dogwood Park.

On December 1, 1998, intervenors Jenkins and Kim submitted a petition for a "locational adjustment" to include the subject property within the UGB, pursuant to Metro Code (MC) 3.01.035(b) and (c). Under those provisions, Metro may add up to 20 acres to the UGB upon findings of compliance with criteria that implement Statewide Planning Goal 14 (Urbanization), factors 3 through 7.[2] A Metro hearings officer conducted a review of the

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[2]MC 3.01.035(b) and (c) provide in relevant part:

> "(b) Locational adjustments shall be limited to areas outside designated urban reserve areas. All locational adjustment additions and administrative adjustments for any one year shall not exceed 100 net acres and no individual locational adjustment shall exceed 20 net acres. * * * Completed locational adjustment applications shall be processed on a first come, first served basis.
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> "(c) All petitions for locational adjustments except natural area petitions shall meet the following criteria:
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> "(1) Orderly and economic provision of public facilities and services. A locational adjustment shall result in a net improvement in the efficiency of public facilities and services, including but not limited to, water, sewerage, storm drainage, transportation, parks and open space in the adjoining areas within the UGB. Any area to be added must be capable of being served in an orderly and economical fashion.
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> "(2) Maximum efficiency of land uses. The amendment shall facilitate needed development on adjacent existing urban land. Needed development, for the purposes of this section, shall mean consistent with the local comprehensive plan and/or applicable regional plans.
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> "(3) Environmental, energy, economic and social consequences. Any impact on regional transit corridor development must be positive and any limitations imposed by the presence of hazard or resource lands must be addressed.

petition and recommended approval to the Metro Council. On March 2, 2000, the Metro Council approved the petition for a locational adjustment.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that Metro violated MC 3.01.035(c)(4)(A) and (B) and made a decision not supported by substantial evidence in concluding that retention of the subject property outside the UGB would preclude urbanization of the Malinowski property and make provision of urban services to that property impracticable. Petitioners also argue that Metro interpreted and applied MC 3.01.035(c)(4)(B) inconsistently with Goals 2 (Land Use Planning) and 14.

A. Background

The issues under this assignment of error revolve around the practicability of providing urban services, specifically sanitary sewer, to the Malinowski property. Four options were presented to Metro below and will be discussed in this opinion. Option 1 runs a 300-foot gravity sewer line from the Malinowski property westward directly onto the adjacent subject property, and connects to facilities that would be built on the subject property if it is included in the UGB and urbanized. Option 2A runs a gravity/pump sewer line from the Malinowski property south at an approximate elevation of 420 feet and then west 900 feet through several residentially developed properties to connect to the trunkline

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> "(4) Retention of agricultural land. *When a petition includes land with Agricultural Class I-IV soils designated in the applicable comprehensive plan for farm or forest use, the petition shall not be approved unless it is factually demonstrated that:*
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> "(A) *Retention of any agricultural land would preclude urbanization of an adjacent area already inside the UGB, or*
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> "(B) *Retention of the agricultural land would make the provision of urban services to an adjacent area inside the UGB impracticable*." (Emphasis added.)

within the Greenwood Hill subdivision. Option 2B runs a gravity/pump sewer line westward from the Malinowski property through a Bonneville Power Administration (BPA) power line easement that adjoins and crosses the southern portion of the subject property. The proposed sewer line then runs south to connect to the trunkline within the Greenwood Hill subdivision.[3] Option 3 runs a gravity/pump sewer line south from the Malinowski property at approximately 420 feet through several residentially developed properties and then along 137th Avenue for approximately 4,000 feet to connect with an existing sewer trunkline in Laidlaw Road.

In addition, testimony was submitted below regarding a fifth alternative, which runs from the Greenwood Hill subdivision through one adjoining residentially developed property (the Lindell property) to the southwest corner of the Malinowski property. We refer to this alternative as the Lindell alternative.

B. Evidentiary Standard

As an initial matter, petitioners argue that, because MC 3.01.035(c)(4) requires that compliance with either MC 30.01.035(c)(4)(A) or (B) be "factually demonstrated," a slightly different standard must be applied to any inquiry into the evidentiary foundation for Metro's decision. The appropriate inquiry under MC 3.01.035(c)(4), petitioners argue, is whether substantial evidence in the whole record supports Metro's conclusion that the required factual demonstration has been made. According to petitioners, the difference in the present case is that, whereas a consultant's opinion on some topic might normally constitute substantial evidence on that topic, the factual demonstration requirement mandates that substantial evidence be presented as to the *facts* that form the basis for that opinion. As explained below, petitioners argue that some of the evidence Metro relied upon consists only of unsupported opinions by intervenors' consultants.

[3]The precise length of the new sewer line required for option 2B is not clear, but it appears to be approximately the same length as for Option 2A.

Intervenors do not challenge petitioners' understanding of MC 3.01.035(c)(4) on this point. Our scope of review under ORS 197.835(9)(a)(C) is whether Metro's decision is "supported by substantial evidence in the whole record." Substantial evidence consists of evidence that a reasonable person could accept as adequate to support a conclusion. *Younger v. City of Portland*, 305 Or 346, 356, 752 P2d 262 (1988). It is not clear to us whether and how our scope of review under ORS 197.835(9)(a)(C) is altered in addressing evidentiary challenges to Metro's conclusions under MC 3.01.035(c)(4). However, we need not resolve that issue, because the only potential difference that petitioners identify in the present case is with respect to certain opinions by intervenors' consultants. We conclude below that Metro's findings of compliance with MC 3.01.035(c)(4) are supported by substantial evidence in the whole record, notwithstanding the deficiencies that petitioners identify in some of the evidence Metro relied upon.

C. MC 3.01.035(c)(4)(B): Provision of Urban Services

1. "Impracticable"

The arguments under this subassignment of error turn on Metro's application of the "impracticability" standard in MC 3.01.035(c)(4)(B). *See* n 2. The Metro Code does not define "impracticable," and we are not directed to any portion of the challenged decision where Metro adopts an express interpretation of that term. It is not clear whether Metro's findings contain an implicit interpretation of that term. Intervenors argue that the challenged findings adequately demonstrate Metro's understanding that the relevant inquiry under MC 3.01.035(c)(4)(B) is not whether alternatives to providing urban services are "impossible," but whether such alternatives are timely, realistic and available. *See* Record 43 (a finding that a gravity flow line from Greenwood Drive is "possible" but "not sufficiently timely or certain to be practicable and available"); Record 46 (Including the subject property under Option 1 "is not absolutely necessary" to provide sewer services to the Malinowski property, but the alternatives are not "realistic" solutions, because of the necessity for

"extensive topographical adjustments," the "consent of intervening property owners" and the disturbance of vegetation).

However, petitioners contend that MC 3.01.035(c)(4)(B) implements Goals 2 and 14, in particular Goal 14, factor 6 (retention of agricultural land), and that Metro's express or implicit interpretations of MC 3.01.035(c)(4)(B) must be consistent with those goals. ORS 197.829(1)(d);[4] *Oregonians in Action v. LCDC*, 121 Or App 497, 502, 852 P2d 1010 (1993); *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 609 n 54 (*Parklane I*), *aff'd* 165 Or App 1, 994 P2d 1205 (2000). Thus, petitioners argue, to the extent Metro interprets MC 3.01.035(c)(4)(B) inconsistently with either Goal 2 or 14, no deference is owed that interpretation.

Petitioners contend that the MC 3.01.035(c)(4)(B) "impracticability" standard is an implementation of Goal 2, Part II(c)(2), which requires a finding that "[a]reas which do not require a new exception cannot reasonably accommodate the use." *See also* OAR 660-004-0010(1)(c)(B)(ii) (changes to an established UGB shall require findings demonstrating that areas not requiring a new exception cannot reasonably accommodate the proposed use). Petitioners point out that in *Parklane I*, the Board held that the "reasonably accommodate" standard is not satisfied by evidence that alternative sites not requiring an exception cannot accommodate the proposed use "as well as" the preferred resource lands. Petitioners argue that the pertinent inquiry under MC 3.01.035(c)(4)(B), similar to that under Goal 2, Part II(c)(2) and OAR 660-004-0010(1)(c)(B)(ii), is not whether the preferred alternative is the

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[4]ORS 197.829(1)(d) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "* * * * *
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

"best" or most efficient alternative, but whether alternatives not requiring the urbanization of agricultural land can reasonably provide urban services to lands within the UGB. As described further below, petitioners argue that Metro's findings and the evidence relied upon fail to demonstrate that the alternatives to Option 1 cannot reasonably provide urban services to the Malinowski property.

We agree with petitioners that Metro's interpretation and application of MC 3.01.035(c)(4)(B) must be consistent with Goals 2 and 14, which that provision implements.[5] It follows that to the extent the challenged decision contains an interpretation of the impracticability standard, that interpretation is not subject to the principle of deference described at ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). While the exact antecedents of the MC 3.01.035(c)(4)(B) impracticability standard are not clear, we agree with petitioners that the standard appears to perform a limited version of the functional role that Goal 14, factor 6 and Goal 2, Part II(c)(2) play in the context of more comprehensive UGB amendments: ensuring appropriate consideration for agricultural retention, and ensuring that agricultural land is included in the UGB only when nonagricultural lands cannot reasonably accommodate the proposed use.[6] Although there are

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[5]Intervenors point out that locational UGB adjustments under MC 3.01.035 are not subject to direct review for compliance with Goals 2 and 14. *League of Women Voters v. Metro. Service Dist*., 99 Or App 333, 338, 781 P2d 1256 (1989). However, we do not understand intervenors to dispute that to the extent MC 3.01.035 implements Goals 2 and 14, Metro's interpretation and application of that provision must be consistent with those goals.

[6]OAR 660-004-0010(1)(c)(B) requires that, when a local government changes an established UGB, it shall follow the procedures and requirements set forth in Goal 2, Part II. Goal 2, Part II(b) requires that, in the context of an irrevocably committed exception, a demonstration must be made that "existing adjacent uses and other relevant factors make uses allowed by the applicable goal *impracticable*." (Emphasis added.) Notwithstanding that lexical similarity, petitioners do not argue that Metro's impracticability standard is an implementation of the Goal 2, Part II(b) impracticability standard, possibly because the standards for adopting an irrevocably committed exception are not readily applicable to UGB amendments. Petitioners are correct that the Goal 2, Part II standard most pertinent to retention of agricultural land in the context of UGB amendments is the Goal 2, Part II(c)(2) "reasonably accommodate" standard. *See* OAR 660-004-0010(1)(c)(B) (changes to an established UGB must demonstrate compliance with Goal 14 and the four factors set forth at Goal 2, Part II(c)). Because intervenors do not contend otherwise, we assume for purposes of this opinion that the MC 3.01.035(c)(4)(B) impracticability standard is intended to implement Goal 2, Part II(c)(2) as well as Goal 14, factor 6.

obvious textual and contextual differences between the two standards, we agree with petitioners that the impracticability standard must be interpreted to be at least as protective of agricultural land as the reasonably accommodate standard.[7] As petitioners point out, the reasonably accommodate standard is not satisfied by a demonstration that alternate sites not requiring a new exception are inferior in certain respects to the preferred resource site, if those alternative sites can nonetheless reasonably accommodate the proposed use. *Parklane I*; *Residents of Rosemont v. Metro*, ___ Or LUBA ___ (LUBA Nos. 99-009/010, June 16, 2000). We believe a similar construct is appropriate for the impracticability standard at MC 3.01.035(c)(4)(B).

That view is consistent with the ordinary meaning of "impracticable." *Webster's Third New Int'l Dictionary*, 1136 (unabridged ed 1981) defines "impracticable" as "not practicable: incapable of being performed or accomplished by the means employed or at command: INFEASIBLE[.]" Impracticable is thus synonymous with "infeasible." The Court of Appeals recently discussed the concepts of practicability and feasibility, in the context of a tort standard imposing liability for injuries caused by a product design where "practicable alternatives" exist:

> "In the abstract, 'practicable' and 'feasible' are synonymous. *See Webster's Third New Int'l Dictionary*, 1780, 831 (unabridged ed 1993) (defining 'practicable' as 'capable of being put into practice, done, or accomplished' and 'feasible' as 'capable of being done, executed, or effected.'). The same source identifies 'feasible' as the primary synonym of 'practicable' and 'practicability' as the primary synonym of 'feasibility.' *Id*. In *Wilson* [*v. Piper Aircraft Corporation*, 282 Or 61, 577 P2d 1322 (1978)], however, the court employed 'feasibility' to refer to whether an alternative was *technically* possible (*i.e. could* it be done?) and 'practicable' to refer to concrete considerations of cost and impact on overall utility (*i.e.*, would it make sense to do it?). *See* 282 Or at 67-71. We view practicability as, necessarily, encompassing both concepts: A design cannot be 'practicable' in the *Wilson* sense unless it is first 'feasible.' Accordingly, we use 'practicable' to connote

[7]We do not understand petitioners to argue that the impracticability standard must be interpreted to be *more* protective of agricultural land than the reasonably accommodate standard.

both." *McCathern v. Toyota Motor Corp.*, 160 Or App 201, 220 n 15, 985 P2d 804 (1999).

Thus, "practicable" has two distinct connotations: technical possibility, and prudential balancing of costs and other relevant considerations. *See also* OAR 660-004-0028(3) (a demonstration of impracticability for purposes of taking an irrevocably committed exception does not require a demonstration that every use allowed by the applicable goal is impossible). We perceive no reason in the present case why the impracticability standard under MC 3.01.035(c)(4)(B) should not also carry the connotations discussed in *McCathern*, *i.e.*, an alternative is impracticable under MC 3.01.035(c)(4)(B) where it is either technically infeasible or, based on all relevant considerations, including considerations of cost, it would not be a feasible alternative.

Stated differently, an alternative means of providing urban services to lands within the UGB (and thus urbanizing those lands) is impracticable where it would not be feasible, for fiscal or other relevant reasons, to employ that alternative to urbanize those lands.[8]

2. Relevant Time Frame

Only one other issue must be addressed before turning to petitioners' challenges to Metro's conclusion that Options 2A, 2B and 3 are impracticable. Petitioners explain that Metro's decision is predicated on the notion that provision of urban services must be made immediately to the Malinowski property, notwithstanding the fact that petitioners are

[8]A word of caution is in order where the focus is exclusively on costs to find that an alternative is impracticable. Except perhaps in the most extreme case, the total cost of providing any particular urban service and the comparative costs of any identified alternative means of providing any particular urban service are, in and of themselves, irrelevant. The cost of providing any particular urban service is but one of the costs associated with urban development. Even an expensive alternative may not render development impracticable, if the total cost of extending a particular service is nevertheless small compared to other costs of development of the property or the cost can be shared by a large number of ultimate users of the property. It is possible that the economic feasibility of developing a particular property could depend on providing one or more urban services via the cheapest alternative means for doing so, but that certainly need not be the case. In this appeal, as far as the cost of the alternatives is concerned, the relevant question is whether the *total* cost of developing the Malinowski property utilizing the alternatives for providing sewer service that do not require adding agricultural land to the UGB is so high that a reasonable person would not proceed with urban development if limited to those alternatives. If so, they are not practicable alternatives.

currently farming that property and have no present intention of urbanizing that land. Metro rejected petitioners' argument on this point, concluding that the Malinowski property must be treated as if it were developing immediately, regardless of the present owners' current intentions. However, petitioners argue, Metro treats lands to the south and east of the Malinowski property very differently, finding that those lands will not be developed at urban densities within a relevant time frame, and thus those lands should not be considered for purposes of providing urban services to the Malinowski property. Petition for Review 32. Petitioners contend that Metro suffers from a temporal "cognitive dissonance" on this point. *Id.* at 33. We understand petitioners to argue that, in evaluating the practicability of providing urban services to the Malinowski property, Metro must apply a consistent set of assumptions regarding the relevant time frame. To be consistent, petitioners argue, Metro must assume either that all property within the UGB will develop at urban densities immediately, or that all such property will develop whenever each owner wishes. It is inconsistent to assume, as Metro does, that the Malinowski property will develop at urban density immediately but other lands within the UGB will not.

We see no error in Metro's conclusion that the current intentions of the present owners of the Malinowski property are not determinative, and thus that Metro's analysis can legitimately assume that those lands may require urban services within the immediate future. Given that assumption, it is consistent for Metro to consider the timely ability of alternative lands to provide urban services to the Malinowski property. In doing so, it would be difficult if not impossible for Metro to consider the possibility, timing and location of entirely speculative future development. In the absence of facilities planning documents, land use proposals, or other sources of information that indicate with some certainty the probable location and timing of nearby development, Metro did not err in refusing to consider the ability of undeveloped or underdeveloped lands within the UGB to provide urban services to the Malinowski property.

With the foregoing understanding of the impracticability standard, we turn to petitioners' challenges to Metro's alternatives analysis.

3. Evidence Regarding Impracticability of Alternative Sites

Metro concludes in the challenged decision that the only practicable gravity sanitary sewer service that could be provided to the Malinowski property is through the subject property, *i.e.* Option 1. Metro rejected as impracticable the other three identified means to provide sewer services to the Malinowski property.

> "* * * Including the subject property in the UGB increases the net efficiency of sewer service, because it enables the [applicants] to serve properties east of the subject property (the Malinowski properties) with a gravity flow sewer line. Unified Sewerage Agency (USA) rules prohibit use of a pump station to serve land in the UGB if the sewer is within 5000 feet, which it is in this case.
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> "* * * Alternative routes for gravity flow sewer service are not practicable or available. It was alleged that sewers could be extended to the Malinowski properties through the powerline right of way south of the subject property [Option 2B] within the existing UGB. However, sewer lines do not extend to the powerline right of way now. Sewer lines serving the Greenwood Hill subdivision were stubbed in NW Greenwood Drive south of the site. Gravity sewers could be extended to the Malinowski properties from this stub [Option 2A]. However, there is no legal right for a sewer to cross all intervening properties at this time, and topography between Greenwood Drive and the western portion of the Malinowski property may impede gravity flow service to that area even if a line is extended from Greenwood Drive. Therefore the gravity flow line from Greenwood Drive, while possible, is not sufficiently timely or certain to be practicable and available." Record 43.
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> "* * * The Council acknowledges that it is not absolutely necessary to include the subject property in the UGB to provide sewer services. The Malinowski properties could theoretically be served by extending a sewer line from the southwest, from the existing stub in Greenwood Drive [Options 2A and 2B] or from the south up 137th Avenue [Option 3]. Expert testimony established that this is not a realistic solution. Based on the topography in the area and the statement from the USA, such alternative routes for sewer lines would require extensive topographical adjustments and the consent of intervening property owners. There is no legal right for a sewer to cross all intervening properties at this time. The evidence also indicates that existing residential development and vegetation, including trees, would be disturbed thus making such alternatives impracticable and uncertain." Record 46.

Metro then concludes with respect to MC 3.01.035(c)(4)(B) that

> "* * * retaining the subject property as agricultural land will make the provision of urban services to adjacent properties inside the UGB impracticable. Sewer service cannot be provided to the Malinowski properties by means of a pump station or other practicable alternative." Record 48

Petitioners argue that Metro's conclusions on the impracticability of Options 2A, 2B and 3 are not supported by substantial evidence. According to petitioners, a November 5, 1998 letter from Nora Curtis, Manager of the Engineering Division of the Unified Sewerage Agency, is the only expert evidentiary support for Metro's conclusion that Option 1 is the only practicable means to provide a gravity sewer line to the Malinowski property. That November 5, 1998 letter states in relevant part:

> "Currently, gravity sanitary service to the four parcels [that comprise the Malinowski property] within the UGB immediately east of the [subject property] can not be provided from within the UGB. Without an extraterritorial extension of gravity sanitary sewer through the [subject property], sanitary service to those parcels could only be provided through the installation of a pump station." Record 1048.

However, petitioners argue that Ms. Curtis' November 5, 1998 letter is based on then-current circumstances, and that Ms. Curtis subsequently modified her opinion based, apparently, on more recent proposed developments in the area, specifically the pending development of the Greenwood Hill subdivision and potential infill development within Dogwood Park. According to petitioners, an April 27, 1999 Washington County staff report in the record reports a conversation with Ms. Curtis to the effect that, depending on when and how the area south of the subject property and the Malinowski property is developed or redeveloped, Options 2A, 2B and 3 would be "available" means to supply gravity sewer service to the Malinowski property.[9] Petitioners contend that the only other evidence

[9]The staff report states as follows:

> "When gravity sewer service is within 5,000 feet of a developing property, USA requires the developer of that property to extend service to that point rather than using a pump station. Ms. Curtis said, based upon the sewer service information provided by the applicant's

regarding the impracticability of Options 2A, 2B and 3 come from opinions expressed by the applicants' consultants. As described below, the applicants' consultants submitted testimony and other evidence to the effect that intervening property ownership, topography, interference with existing trees and wetlands, and the length and cost of constructing the sewer lines described in Options 2A, 2B and 3 render those options impracticable. Petitioners contend that there is no evidence that those consultants are engineers or possessors of similar expertise and therefore their opinions are not sufficient to demonstrate the impracticability of Options 2A, 2B and 3. Petitioners submit that the only reliable evidence in the record is Ms. Curtis' comments, as reported in the April 27, 1999 staff report, that Options 2A, 2B and 3 are available means to supply gravity sewer service to the

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> representatives, gravity sewer service to the [Malinowski property] is available from two different locations as shown on Attachment A.
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> "Option [2] would connect the Malinowski properties to the sewer line in proposed Greenwood Hill Subdivision, either at the terminus of NW Greenwood Drive or at the north east corner of this development. Construction plans for sewer and storm water for this subdivision have not yet been submitted to USA. Once plans are submitted, USA will determine whether or not a sewer line will be required to be extended along the northern portion of the development as shown on Attachment A [Option 2B]. If a line is extended to that point, gravity sewer service would be within approximately 250 feet of the Malinowski properties. However, Ms. Curtis said, USA may not require sewer to [be] provided along the north property line of this development, but only through NW Greenwood Drive, because gravity service can be provided to the Malinowski properties through the northern most lots in Dogwood Park as shown on Attachment A [Option 2A].
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> "Option [3] would connect the Malinowski properties to sewer in NW Laidlaw Road through NW 137th Avenue. Under this option, if the Malinowski properties were to develop prior to sewer service being extended up NW 137th Avenue, the developer of the Malinowski properties would be required to extend the sewer line from Laidlaw Road to these properties. * * *
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> "Ms. Curtis said that providing sewer service to the Malinowski properties through the [subject property] is most efficient in terms of USA standards, e.g., the properties would drain through [their] natural drainage basin, [and] the sewer lines would be in streets. In this particular situation, she said it would not be problematic if the Malinowski properties drained through the drainage basin that the Greenwood Hill Subdivision is in because both drain to the Rock Creek Treatment Plant. She also said that sewer lines can be constructed within easements rather than public streets. Because of the length of sewer required, providing sewer service to the Malinowski properties via NW 137th Avenue would be the most expensive if the Malinowski properties were to develop prior to property south and southeast. If these properties were developed prior to the Malinowski properties, it would bring sewer closer to the Malinowski properties, thereby reducing the cost to extend sewer to the Malinowski properties." Record 790.

Malinowski property. Consequently, petitioners argue, the record does not contain substantial evidence showing that the retention of the subject property as agricultural land would make the provision of sewer service to the Malinowski property impracticable.

Intervenors respond, and we agree, that Metro's conclusion that Options 2A, 2B and 3 are impracticable is supported by substantial evidence. Whatever weight is given to the comments of Ms. Curtis as reported in the April 27, 1999 staff report, those comments do not undermine the evidence supporting Metro's finding that Options 2A, 2B and 3 are impracticable in the sense described above.[10] Moreover, we disagree with petitioners' broad contention that Metro erred in relying upon the testimony submitted by intervenors' consultants. One such piece of testimony is a report from a site designer and planning consultant in a regional company that provides engineering, consulting, planning and surveying services. The report estimates that Option 1 will require 300 feet of new sewer line and cost approximately $15,000 to construct. Record 803. With respect to Option 2A, the report estimates the cost of construction at $60,000 to $70,000, with the costs of easements ranging from $40,000 to $130,000. *Id.* Another report in the record by a senior planner at a private planning company estimates the cost of constructing Option 2A at $170,000 to $180,000. Record 798. The same report notes that Option 2A requires crossing into a different drainage basin, may require a pump station, and would cross steep wooded slopes. *Id.* With respect to Option 3, the report notes similar difficulties, with estimated construction costs of its 4,000-foot line exceeding $250,000. Petitioners do not offer any basis to question the credentials of these consultants and, except as described below, do not raise specific challenges to the reliability of evidence that those consultants submitted.

Petitioners argue first that the cost and difficulty of acquiring easements for Options

[10]Ms. Curtis' comments appear to go to the technical feasibility of those alternatives, assuming certain development or redevelopment in the Greenwood Hill subdivision and Dogwood Park, and do not address the other sense of "impracticable" described above.

2A and 3 are irrelevant, because the local sewer agency typically requires dedication of sewer easements to benefit uphill properties when approving development. Thus, petitioners argue, whenever property owners intervening between the Greenwood Hill subdivision and the Malinowski property decide to redevelop their residential property, any easements necessary to serve the latter will be dedicated without cost. However, as discussed above, Metro was

not required to adopt assumptions regarding the timing and location of speculative future developments.[11]

Petitioners next argue that Metro erred in rejecting alternative routes based on topographic considerations. Petitioners point out that the sewer line developed in the Greenwood Hill subdivision is placed in the same kind of steep ground as that between the subdivision and the Malinowski property, and argue that steep topography is not a fatal impediment to sewer provision from the south of the Malinowski property. If topography were the only factor Metro considered in concluding that alternative routes were impracticable, we would agree with petitioners. However, topography was only one factor in Metro's determination; we see no error in taking into account steep terrain or other difficulties in evaluating whether provision of urban services is impracticable.

Finally, petitioners argue that Metro erred in rejecting alternative routes on the grounds that they require removal of mature trees. Petitioners argue that the Greenwood Hill subdivision plat calls for removal of many of the trees on that property, and if infill development in Dogwood Park occurs, many of the trees intervening between the subdivision and the Malinowski property will be removed in any case. Petitioners also argue that Option 2B, which uses the treeless BPA easement, would impact very few mature trees. However, as discussed above, Metro was not required to take into account the existence of entirely speculative future development. Although Metro's findings do not explain how the removal of mature trees relates to impracticability, petitioners do not argue that that factor is an

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[11]Petitioners also point to a letter at Record 734 from one of the intervening property owners, Mr. Lindell, expressing willingness to grant an easement along his northern property line, as evidence that an alternative line could run along the eastern border of the Greenwood Hill subdivision, through the voluntary easement described in the letter, across the BPA easement, to connect with development on the Malinowski property. Petitioners raised the issue of this alternative on February 3, 2000, during the Metro Council's first reading of the ordinance adopting the challenged decision, as evidence that easements across intervening properties could be obtained. Record 88. Intervenors respond that the close of the evidentiary record occurred June 1, 1999, and that Metro did not err in failing to consider such an untimely-submitted alternative. Petitioners do not dispute that the Lindell alternative was not submitted before the close of the record below, or provide any basis in Metro's code or relevant statutory provisions that would require the Metro Council to consider it. We agree with intervenors that, in these circumstances, Metro was not required to consider the Lindell alternative.

irrelevant consideration. Further, as discussed below, Metro found, based on substantial evidence, that Option 2B suffers from a number of difficulties that cumulatively render it an impracticable option, notwithstanding that it does not require removing mature trees.

4. Conclusion

Petitioners have not demonstrated that Metro erred in finding that Options 2A, 2B and 3 are impracticable means under the present circumstances for providing urban services to the Malinowski property, or that Metro's findings are not supported by substantial evidence. Option 2A requires connection to a trunkline in a different drainage basin, may require use of a pump station in contravention of USA regulations, would require removal of a number of mature trees, would cost significantly more than Option 1, and would require acquisition of several easements across residentially developed property. Option 2B has many of the same flaws and, as intervenors point out, the additional difficulty that the BPA will not allow structures in the right of way or anything that interferes with its transmission towers. Option 3 suffers from similar difficulties, but requires 4,000 feet of new sewer line and is considerably more expensive than the other options.[12] A reasonable person could conclude, as Metro did, that retention of the subject property as agricultural land makes the provision of urban services to the Malinowski property impracticable.

This subassignment of error is denied.

D. MC 3.01.035(c)(4)(A): Provision of Urban Services

Petitioners also challenge Metro's finding of compliance with MC 3.01.035(c)(4)(A). *See* n 2. Metro concluded, for the same reasons expressed under MC 3.01.035(c)(4)(B), that

[12]As noted earlier, the cost of providing urban services, or one urban service, is not a particularly determinative factor in assessing impracticability, especially where that cost can be shared by a large number of ultimate users of the property. In this case, the relevant portion of the Malinowski property is approximately half the size of the 18-acre subject property. Developed at maximum density under applicable zoning, the Malinowski property would yield a relatively small number of residential units. In that circumstance, a large difference between alternatives in the costs of providing sewer service can be more significant than would be the case if those costs are spread over a larger development.

the retention of the subject property as agricultural land would preclude the urbanization of the Malinowski property. Petitioners challenge that conclusion for the same reasons discussed above. However, petitioners also argue that MC 3.01.035(c)(4)(A) imposes a different and higher standard than MC 3.01.035(c)(4)(B). Petitioners contend that the ordinary meaning of "to preclude" is "to make impossible." We understand petitioners to argue that Metro's conclusion that provision of urban services to the Malinowski property is "impracticable" absent inclusion of the subject property is insufficient to demonstrate that urbanization of the Malinowski property is thereby precluded or rendered impossible.

We need not resolve whether MC 3.01.035(c)(4)(A) imposes a higher standard than MC 3.01.035(c)(4)(B). MC 3.01.035(c)(4) allows inclusion of agricultural land if either (A) or (B) is satisfied. Our conclusion above that Metro did not err in finding compliance with MC 3.01.035(c)(4)(B) renders it unnecessary to resolve petitioners' challenges to Metro's findings under MC 3.01.035(c)(4)(A).

This subassignment of error is denied.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that Metro erred in failing to address and find compliance with the requirements of ORS 197.298.[13] According to petitioners, ORS 197.298 is directly

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[13]ORS 197.298 provides:

> "(1) In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities:
>
> > "(a) First priority is land that is designated urban reserve land under ORS 195.145, rule or metropolitan service district action plan.
> >
> > "(b) If land under paragraph (a) of this subsection is inadequate to accommodate the amount of land needed, second priority is land adjacent to an urban growth boundary that is identified in an acknowledged comprehensive plan as an exception area or nonresource land. Second priority may include

applicable by its terms to decisions that include land within an urban growth boundary, and nothing in the statute purports to except from its application the locational UGB amendments allowed under MC 3.01.035. *See Foland v. Jackson County*, 311 Or 167, 180 n 10, 807 P2d 801 (1991) (state statutes are directly applicable to land use decisions according to their terms).

Further, petitioners contend that Metro's failure to apply ORS 197.298 is not harmless error, or one that can be cured by finding that the evidence clearly supports compliance with the statute.[14] Petitioners argue that

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resource land that is completely surrounded by exception areas unless such resource land is high-value farmland as described in ORS 215.710.

"(c) If land under paragraphs (a) and (b) of this subsection is inadequate to accommodate the amount of land needed, third priority is land designated as marginal land pursuant to ORS 197.247 (1991 Edition).

"(d) If land under paragraphs (a) to (c) of this subsection is inadequate to accommodate the amount of land needed, fourth priority is land designated in an acknowledged comprehensive plan for agriculture or forestry, or both.

"(2) Higher priority shall be given to land of lower capability as measured by the capability classification system or by cubic foot site class, whichever is appropriate for the current use.

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

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

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

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

[14]ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the

> "exception areas are located nearby, adjacent to the pre-existing UGB. Application of the prioritization scheme of ORS 197.298 might have convinced Metro that expansion of the UGB in this area was not really desirable after all, and that this expansion would be prohibited. If it had addressed the requirements of this statute, Metro's decision should have been different." Petition for Review 7-8.

Intervenors respond that ORS 197.298 is applicable by its terms only to UGB amendments predicated on an identified "need."[15] However, intervenors argue, locational adjustments are not based on any finding or identification of need. *League of Women Voters*, 99 Or App at 338; *see also* ORS 197.298(1)(b), (c) and (d) (if land under the preceding paragraph "is inadequate to accommodate the amount of land needed * * *"). Consistent with the foregoing, intervenors point out, Metro's code provisions governing legislative UGB amendments that are based on an identification of a Goal 14, factor 1 and 2 need specifically require compliance with ORS 197.298. By contrast, Metro's code provisions governing locational adjustments do not require compliance with the statutory priorities.

Further, intervenors contend that application of ORS 197.298 would conflict with application of Metro's locational adjustment provisions. Intervenors point out that MC 3.01.035(b) prohibits locational UGB adjustments involving land within designated urban reserve areas. *See* n 2. However, ORS 197.298(1) assigns first priority to lands within urban reserve areas. Intervenors argue that application of ORS 197.298 to locational UGB adjustments would frustrate the function and purpose of the acknowledged locational adjustment process.

> record and remand the remainder to the local government, with direction indicating appropriate remedial action."

[15]Intervenors also argue that the issue of compliance with ORS 197.298 was never raised below with sufficient specificity to afford Metro and other parties an adequate opportunity to respond, and thus that issue is waived. ORS 197.763(1); 197.835(3). In a reply brief, petitioners cite to multiple points in the record where an opponent raised the issue of whether Metro's decision must discuss and demonstrate compliance with ORS 197.298. Record 90, 93, 727. Petitioners also point to a response to that testimony by intervenors' counsel, at Record 720, as evidence that the issue was raised with sufficient specificity to allow Metro and other parties an adequate opportunity to respond. We agree with petitioners that the issue of whether Metro's decision must comply with ORS 197.298 was raised below and is not waived.

Petitioners are correct that ORS 197.298 appears to apply to *any* decision that includes land within an urban growth boundary, and thus, by its terms, would seem to apply to land included within the UGB under Metro's locational adjustment provisions. However, intervenors are also correct that an identification of need for additional land appears to be an essential predicate for application of the statutory priorities.[16] Petitioners do not suggest any way to apply ORS 197.298 according to its terms to a UGB amendment, such as the present one, that is not predicated upon a demonstration of need under Goal 14, factors 1 and 2. The fact that exception areas are located nearby can do nothing to satisfy any identified need in this case, because no need is identified.[17]

In short, the text and context of ORS 197.298 indicate that it is intended to be applied, and can only be applied, to UGB amendments based on a demonstration of need under Goal 14, factors 1 and 2. Because locational adjustments under MC 3.01.035 do not require and are not based upon a demonstration of need, ORS 197.298 is inapplicable. Metro did not err in failing to apply the statutory priority scheme.

The first assignment of error is denied.

Metro's decision is affirmed.

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[16]We note that ORS 197.298 refers several times to "land needed." *See* n 13.

[17]The nearest thing to a demonstration of a need in this case is Metro's conclusion, under MC 3.01.035(c)(4), that inclusion of the subject property is necessary to provide urban services to the Malinowski property, because alternative sites within the UGB are impracticable. Petitioners do not suggest that any exception or higher priority lands outside the UGB could provide urban services to the Malinowski property.