

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

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

7
8 vs.

9
10 CITY OF KLAMATH FALLS,
11 *Respondent,*

12 and

13
14
15 BADGER FLATS, LLP,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2017-047

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Klamath Falls.

24
25 Steven E. Shipsey, Assistant Attorney General, Portland, filed the
26 petition for review and argued on behalf of petitioner. With him on the brief
27 was Ellen Rosenblum, Attorney General, Salem.

28
29 Joanna Lyons-Antley, City Attorney, Klamath Falls, filed a joint
30 response brief and argued on behalf of respondent.

31
32 Gregory S. Hathaway, Portland, filed a joint response brief and argued
33 on behalf of intervenor-respondent. With him on the brief was Hathaway
34 Larson LLP.

35
36 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM Board
37 Member, participated in the decision.

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REMANDED

09/05/2017

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

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NATURE OF THE DECISION

Petitioner appeals a city decision that approves an urban growth boundary (UGB) amendment that adds 22.7 acres of land to the urban area that is included within respondent City of Klamath Falls’ (referred to in this opinion as respondent, Klamath Falls or the city) UGB.

MOTION TO INTERVENE

Badger Flats, LLP, the applicant below, moves to intervene on the side of respondent. No party opposes the motion, and it is granted.

REPLY BRIEF

Petitioner timely filed a reply brief to respond to argument in the joint response brief that petitioner failed to preserve issues presented in the petition for review. Intervenor-respondent and respondent (together respondents) move to strike the reply brief because petitioner did not file a request to file “the proposed reply brief,” as required by OAR 660-010-0039.

While OAR 660-010-0039 suggests that a request to file a reply brief should be made in a motion that is separate from the reply brief itself, our rule does not expressly require that the request be made in a separate motion. The first paragraph of petitioner’s reply brief is in substance a request to file the reply brief. Respondents’ motion to strike is denied. The reply brief is allowed.

1 **FACTS**

2 The Klamath Falls UGB includes approximately 24,000 acres—4,322
3 developed acres and 10,250 undeveloped acres. Petitioner contends the city’s
4 UGB “contains 1,241 acres of vacant employment land, about 250 acres of
5 which are already zoned for commercial uses[.]” Petition for Review 10. It is
6 undisputed that the urban area within the city’s UGB has adequate capacity to
7 satisfy the city’s urban land needs for the next 20 years.

8 A document that is the center of attention in this appeal is a July 21,
9 2009 “Economic Opportunities Analysis and Long-Term Urban Land Need
10 Assessment” (EOA) that the city adopted as a part of the city’s comprehensive
11 plan.¹ That EOA includes a “Technical Appendix” entitled “Subregional
12 Commercial Land Need Analysis” (Subregional Analysis). That Subregional
13 Analysis delineates four subregions: Klamath West, Klamath North, Klamath
14 East, and Klamath South. EOA, page 90. The four subregions extend some
15 distance out from the city and the existing UGB into rural lands in the county
16 and the Subregional Analysis includes the following explanation for how these
17 four subregional delineations were selected:

¹ The record does not include a copy of the EOA, but a complete copy of the EOA is included as an appendix to the petition for review.

1 “These delineations were selected to reflect physical & manmade
2 barriers, transportation corridors, and market conditions affecting
3 the commercial landscape in Klamath Falls.” *Id.*²

4 The EOA identifies a deficit of land in the Klamath West Subregion needed to
5 satisfy a short-term (five-year) commercial demand. That identified deficit
6 ranged from 27.1 acres (low) to 37.9 acres (high).³ The EOA includes Goal 3,
7 which provides in relevant part:

8 “GOAL 3: ASSURE AN ADEQUATE COMMERCIAL AND
9 INDUSTRIAL LAND BASE TO ACCOMMODATE THE
10 TYPES AND AMOUNT OF ECONOMIC DEVELOPMENT
11 AND GROWTH ANTICIPATED IN THE FUTURE, WHILE
12 ENCOURAGING EFFICIENT USE OF LAND AND PUBLIC
13 FACILITIES WITHIN THE KLAMATH FALLS URBAN AREA.

14 “* * * * *

15 “Policy 3-4: The City of Klamath Falls and Klamath County will
16 meet subregional land needs by maintaining a Short-Term Supply
17 of employment land consistent with subregional demand
18 estimates.” EOA 70.

² If there is any additional elaboration on how the four subregions were selected, the parties have not called it to our attention. The “Klamath West” Subregion is the roughly quarter of the area outside the city that extends from a line extending northwest from the city center to a line extending southwest from the city center. EOA 90. As just noted, the subareas extend out past the UGB.

³ The EOA is dated July 21, 2009. The five-year short-term demand estimate presumably extended from July 21, 2009 through July 21, 2014. It is now over three years past July 21, 2014. This is one of several anomalies in this matter that the parties do not address.

1 Intervenor owns 130+ acres located adjacent to, but outside, the city’s
2 UGB in what the EOA identifies as the Klamath West Subregion. That property
3 is zoned Forest Range and is presently in agricultural use.⁴ Intervenor applied
4 for the disputed UGB amendment to eventually construct Badger Flats
5 Lifestyle Center to satisfy the EOA’s identified Klamath West Subregion,
6 short-term need for commercial development. The challenged decision
7 explains:

8 “A critical component of the EOA is a reconciliation of sub-
9 regional supply and demand for land available for commercial
10 development within the County and City. * * *

11 “The EOA acknowledged that little, if any commercial retail
12 existed in the western sub-region of the City, and that only the
13 western sub-region had a short-term deficit of commercial land
14 with a net deficit range of 27.1 to 37.9 acres. The EOA further
15 acknowledged that because little commercial development existed
16 in the western sub-region that west side households were required
17 to take Hwy. 97 north or the Southside Bypass to access
18 commercial services on the east side of the City putting pressure
19 on the transportation infrastructure in the area.

20 “The EOA provided a Commercial Retail Development Pattern
21 Types Matrix that identified the various types of commercial retail
22 development that could meet the identified commercial needs of
23 the City. *The Matrix identified ‘Open Air Centers-Lifestyle*
24 *Centers’ as the type of commercial development that could meet*
25 *the identified short-term need for the western sub-region.*⁵ This

⁴ Intervenor’s property is irrigated, with predominately class 3 and 4 soils, and it is currently in agricultural use.

⁵ As we explain later, it is not entirely accurate to say the EOA identifies lifestyle centers as “*the type of commercial development that could meet the*

1 type of center is characterized as ‘community retail’ and has the
2 concentration of retailers similar to an enclosed mall, but with
3 open-air pedestrian connections between stores.

4 “The proposed Badger Flats Lifestyle Center will be an Open Air
5 Lifestyle Center and will satisfy the short-term need for
6 commercial retail in the western sub-region of the city. * * *”
7 Record 2 (emphasis added).

8 In approving the disputed UGB amendment, the city considered
9 alternative sites for the lifestyle center, both inside the UGB and sites adjacent
10 to, but outside, the UGB. However the city only considered sites inside the
11 UGB and outside the UGB if those alternative sites were in the Klamath West
12 Subregion, which as noted extends outside the current UGB. The city
13 ultimately rejected all those Klamath West Subregion alternative sites because
14 they lacked one or more “site suitability characteristics,” which were developed
15 pursuant to OAR 660-024-0060(5).⁶

16 INTRODUCTION

17 The statewide planning goal standards, administrative rule standards, and
18 case law concerning UGB amendments are complex, to put it mildly. We begin
19 by discussing two Court of Appeals decisions that directly address the

identified short-term need for the western sub-region.” (Emphasis added.) A more accurate statement would be that the EOA identified Open Air Centers-Lifestyle Centers as one of a number of different types of commercial development, broken down into three types of target industries, that could meet the identified short-term need for the western sub-region. EOA, pages 43-45.

⁶ We set out and discuss OAR 660-024-0060(5) later in this opinion.

1 propriety of amending the Metro UGB based on subregional need.⁷ More
2 importantly, for purposes of this appeal, those cases address the propriety of
3 limiting the geographic scope of the alternatives analysis that is required by
4 state law before amending the Metro UGB. After we discuss those cases we
5 will discuss some differences between the standards that governed the UGB
6 amendments in those cases and the standards that govern the UGB amendment
7 in this appeal. And we then will set out and briefly discuss the required “site
8 suitability characteristics” for lifestyle centers that the city applied in this case,
9 which had the effect of eliminating any requirement to examine any
10 alternatives located outside the Klamath West Subregion and ultimately
11 eliminated all the alternative sites within the Klamath West Subregion, except
12 intervenor’s property. Respondents take the position that those limiting site
13 suitability characteristics are authorized by language in the versions of Goal 14
14 (Urbanization) and OAR Chapter 660, Division 24 [the Land Conservation and
15 Development Commission’s (LCDC’s) Goal 14 administrative rule] that apply

⁷ We note here, as did the Court of Appeals, that the term “subregion” is a shorthand term to describe a localized area or subarea of the larger “region” that constitutes all of the planning body’s territory. In the case of Metro, the entire region includes parts of three counties, the City of Portland and 23 other cities. In this appeal the pertinent “region” is the City of Klamath Falls and the portion of Klamath County that lies within or near the Klamath Falls UGB. As previously noted, the city’s EOA divides that “region” into four subregions. *See* n 2 and related text.

1 in this case.⁸ In three assignments of error, petitioner Department of Land
2 Conservation and Development (DLCD) takes the position that the site
3 suitability characteristics are not authorized by that goal and rule language.
4 DLCD also argues that in the circumstances presented in this appeal, the city’s
5 UGB may not be amended based on a sub-regional, short-term need for
6 commercially developable land in the Klamath West subregion.

7 **A. Subregional Need and Subregional Analysis of Alternatives**

8 The Court of Appeals’ decisions in *Residents of Rosemont v. Metro*, 173
9 Or App 321, 21 P3d 1108 (2001) and *City of West Linn v. LCDC*, 200 Or App
10 269, 113 P3d 935, *rev den* 339 Or 609 (2005), considered a prior version of
11 Goal 14. That version of Goal 14 provided that the establishment and change
12 of a UGB must be based seven factors (factors 1 and 2 were referred to as need
13 factors and factors 3-7 were referred to as locational factors) and must include
14 an analysis of alternatives before amending a UGB to address an identified land
15 need.

16 “Urban growth boundaries shall be established to identify and
17 separate urbanizable land from rural land. Establishment and
18 change of [UGBs] shall be based upon considerations of the
19 following factors:

⁸ The version of Goal 14 that applies in this case is the version that took effect April 28, 2006. The version of OAR Chapter 660, Division 24 that applies in this case is the version that was in effect prior to the amendments that took effect on January 1, 2016. We set out and discuss that text of Goal 14 and OAR Chapter 660, Division 24 later in this opinion.

- 1 “(1) Demonstrated need to accommodate long-range urban
2 population growth requirements consistent with LCDC
3 goals;
- 4 “(2) Need for housing, employment opportunities, and livability;
- 5 “(3) Orderly and economic provision for public facilities and
6 services;
- 7 “(4) Maximum efficiency of land uses within and on the fringe
8 of the existing urban area;
- 9 “(5) Environmental, energy, economic and social consequences;
- 10 “(6) Retention of agricultural land as defined, with Class I being
11 the highest priority for retention and Class VI the lowest
12 priority; and,
- 13 “(7) Compatibility of the proposed urban uses with nearby
14 agricultural activities.

15 “The results of the above considerations shall be included in the
16 comprehensive plan. In the case of a change of a boundary, a
17 governing body proposing such change in the boundary separating
18 urbanizable lands from rural land, *shall follow the procedures and*
19 *requirements as set forth in the Land Use Planning goal (Goal 2)*
20 *for goal exceptions.”* Goal 14 (effective 10/04/00) (emphasis
21 added).

22 The relevant Statewide Planning Goal 2 (Land Use Planning) exception
23 requirement, referenced in the italicized Goal 14 language above, allowed a
24 local government to adopt an exception to a goal if, among other things,
25 “[a]reas which do not require a new exception cannot reasonably accommodate
26 the use[.]” That Goal 2 requirement is also set out in statute. ORS
27 197.732(2)(c)(B). In the context of a UGB amendment under former Goal 14,
28 this exception standard required consideration of, among other things, whether

1 there are alternative sites inside the existing UGB that could satisfy any
2 identified urban land need, thus making it unnecessary to expand the UGB to
3 add rural lands to the urban area.

4 Additional complexity is added to the UGB amendment process by ORS
5 197.298, which establishes a priority for the types of rural land that may be
6 included inside a UGB via amendments to the UGB. Under ORS 197.298,
7 generally, lands are to be included inside the UGB to meet identified land
8 needs in the following order: (1) urban reserve lands, (2) exception and
9 nonresource lands, (3) marginal lands, (4) agricultural and forest lands. *See*
10 *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76, 90-92 (2016)
11 (discussing the interplay between the ORS 197.298 priorities and the Goal 14
12 locational factors when amending UGBs).⁹

13 **1. Residents of Rosemont**

14 In *Residents of Rosemont*, Metro expanded the Metro UGB to meet its
15 statutory obligation to include a 20-year supply of residential land inside the
16 UGB to meet Metro’s identified affordable housing need. Metro ultimately
17 amended the UGB to include portions of three urban reserve study areas, a total
18 of 830 acres, most of which was agricultural land zoned for exclusive farm use.
19 In doing so, Metro did not consider whether the identified need for affordable

⁹ As amended in 2013, the ORS 197.298 priorities apply only to Metro. The pre-2013 version of ORS 197.298 applied in *Residents of Rosemont* and *City of West Linn* and that pre-2013 version of ORS 197.298 applies in this appeal as well.

1 housing could be satisfied on lands located outside the identified subregion. In
2 *Residents of Rosemont*, the Court of Appeals concluded that approach was not
3 consistent with Goal 14:

4 “In order to satisfy the need factors of Goal 14, a subregional need
5 must be identified and evaluated in the context of the regional
6 needs. *See 1000 Friends of Oregon v. Metro*, 38 Or. LUBA 565
7 (2000) (slip op at 3-14) (LUBA concluded that Metro properly
8 identified a subregional need for housing and considered the role
9 that need plays in the context of the entire UGB and regional
10 need).

11 “Here, Metro’s decision to expand the UGB in the Stafford-
12 Rosemont area appears to have been based *solely* on subregional
13 considerations of the kind reflected in factor 2. As the cities argue:

14 “Metro’s decision in this case was based solely on a
15 determination of need for affordable housing within three or
16 six miles of the Stafford and Rosemont intersection, and did
17 not consider whether that need could be accommodated
18 outside of the identified subregion.’ (Footnotes omitted.)

19 “We agree with the cities that Metro erred in that respect and that
20 LUBA accordingly erred in affirming that aspect of Metro’s
21 decision. To illustrate, there might be some *a priori* logic to the
22 proposition that persons employed on the rural fringe of
23 Clackamas County cannot be adequately accommodated by
24 housing on the urban fringes of Multnomah and Washington
25 Counties. However, there is no corresponding logic to the
26 proposition that Metro appears to have found decisive here, *i.e.*,
27 that a determinative housing need could be established solely by
28 reference to areas in close proximity to the preselected site of the
29 proposed UGB expansion and without *any* consideration of other
30 parts of the regional planning territory. Metro’s decision does not
31 explain why the affordable housing must lie within a six-mile
32 radius of the Stafford-Rosemont intersection, let alone why that
33 intersection may appropriately be treated as the nucleus of an
34 identifiable subregion or of the subregion to which virtually

1 exclusive consideration was given as the site of the expansion. We
2 hold that Metro’s present supportive showing for its decision does
3 not satisfy Goal 14 in this regard.” 173 Or App at 330-31
4 (emphasis in original).

5 We understand the Court of Appeals to have concluded in *Residents of*
6 *Rosemont* that under Goal 14, Metro could identify a subregional
7 (geographically localized) need for housing, but when considering alternatives
8 to amending the UGB to meet that subregional housing need, Metro could not
9 limit its consideration to lands within the subregion. That broader geographic
10 consideration of alternatives applies both to alternative sites inside the UGB
11 (which might obviate the need for a UGB amendment), and to alternative sites
12 outside the UGB which are subject to the priorities set out in ORS 197.298 and
13 the Goal 14 locational factors, if a UGB amendment is required to meet the
14 identified need.¹⁰

¹⁰ Our understanding of the required scope of the alternatives analysis under the Court of Appeals’ decision in *Residents of Rosemont* is arguably at odds with some language in our decision in *1000 Friends of Oregon v. Metro (Ryland Homes)*, 38 Or LUBA 565 (2000), *aff’d in part, rem’d in part*, 174 Or App 406, 26 P3d 151 (2001), which the Court of Appeals cited with approval in the above quoted text from *Residents of Rosemont*. In that decision LUBA stated, “[w]e see no error in limiting the geographic scope of Metro’s alternatives analysis to lands that can satisfy the identified needs.” 38 Or LUBA at 582. However, as we note later, a subtle distinction between subregional need and subregional analyses of alternatives has developed in the case law.

1 2. *City of West Linn*

2 Following the Court of Appeals’ decision in *Residents of Rosemont*,
3 LCDC adopted OAR Chapter 660, Division 26. Under those rules, in
4 approving an UGB amendment to add rural land to the urban area, Metro was
5 not required to consider alternative lands that are within the UGB that might be
6 appropriate to satisfy an identified subregional need “if the land is not within or
7 near the affected subregion.” *City of West Linn*, 200 Or App at 277. And
8 under the rules, if land that is *inside* the UGB and within or near the subregion
9 could not meet the subregional need, in considering whether to amend the UGB
10 to include land to meet the subregional need, Metro only needed to consider
11 lands *outside* the UGB, if that land outside the UGB was within or near the
12 subregion.¹¹ On appeal, the Court of Appeals invalidated the rules as
13 inconsistent with Goal 14.

14 “The problem with LCDC’s position is that it is possible to violate
15 the legal standard expressed in Goal 14—that is, that changes to
16 the UGB be justified based on the *regional* consideration and
17 application of the locational factors—but still comply with the
18 rules. We understand that the rules require the district to determine
19 the regional need based on the need factors of Goal 14 and then
20 allow the district to allocate that need to subregions if it can justify
21 the allocation. OAR 660–026–0020; OAR 660–026–0030. That
22 portion of the rules is consistent with our decision in *Residents of*
23 *Rosemont*. The deficiency in the rules, however, is that, in

¹¹ This meant that ORS 197.298 higher priority land for inclusion in the UGB that was not within or near the subregion, as well as rural lands that might be preferable for inclusion in the UGB under the Goal 14 locational factors, did not need to be considered under the rules.

1 directing a determination of how to accommodate the identified
2 need, the rules do not require regional application of the locational
3 factors but instead limit Metro’s consideration of lands that may
4 reasonably accommodate that need to those lands within the
5 existing UGB that are within or near each subregion. *See* OAR
6 660–026–0040. Although the rules require that the district must
7 justify its allocation of regional need to subregions, the findings
8 that the district must make do not require the region-wide
9 application of the locational factors to accommodate the regional
10 need. Thus, we conclude that the rules depart from the legal
11 standard expressed in Goal 14.

12 “We recognize that Metro’s authority extends over a large
13 geographic area and that, for that reason, a need for housing to
14 serve Washington County workers, for example, may not be well
15 served by providing housing in East Multnomah County, thus
16 necessitating a lengthy commute. We do not understand, however,
17 that a regional evaluation of the locational factors in Goal 14
18 would necessarily prevent the incorporation of land into the UGB
19 near those Washington County workplaces. It appears that such a
20 result might be obtained through application of the existing
21 processes applied in a manner that is consistent with Goal 14.
22 *Further, we recognize that the adoption and implementation of a*
23 *policy that allows Metro to accommodate an identified regional*
24 *need by considering only land within or near a particular*
25 *subregion may be a sound policy decision. Certainly it is a policy*
26 *decision that the legislature, and LCDC in its adoption of the*
27 *goals, is entitled to make. However, such a policy decision must be*
28 *implemented by appropriate amendments to the pertinent statutes*
29 *and goals.”* 200 Or App at 284-85 (underscoring and second
30 italics added; footnote omitted).

31 To simplify, the Court of Appeals in *City of West Linn* reaffirmed its
32 conclusion in *Residents of Rosemont* that Metro could, consistently with Goal
33 14, identify a subregional need for housing, and that DLCD’s rules to that
34 effect were not inconsistent with Goal 14. But the Court of Appeals held that

1 the part of the rules that authorized Metro to limit its consideration of
2 alternatives (both inside the UGB and outside the UGB) for satisfying that
3 subregional housing need to lands within or near the subregion, were
4 inconsistent with Goal 14.

5 There is an important point in *Residents of Rosemont* and *City of West*
6 *Linn* that arises more by implication than by the text of those opinions. The
7 subregional need that the Court of Appeals determined could be identified
8 under Goal 14 was a subregional need for *housing*, as opposed to a subregional
9 need for a *specified number of acres for development of housing that must be*
10 *located within that subregion*. In fact both cases stand for the proposition that
11 Metro may not assume that a subregional need for housing can only be satisfied
12 by constructing housing on land that is physically located within that
13 subregion, because such an assumption is inconsistent with Goal 14 and the
14 ORS 197.298 priority scheme for adding rural lands to the UGB.¹²

15 Respondents dismiss the significance of *Residents of Rosemont* and *City*
16 *of West Linn* because they both concerned Metro rather than an individual city
17 and because *City of West Linn* addressed rules that applied only to Metro.

¹² In the underscored language in *City of West Linn*, the Court of Appeals seems to be drawing a subtle distinction between considering *proximity*, in determining whether an alternative site is a suitable alternative, and simply eliminating alternative sites if they are not located in the subregion. The language we quoted earlier from our decision in *1000 Friends of Oregon v. Metro (Ryland Homes)*, see n 9, can be read to blur that distinction.

1 However, both of those decisions were based on Goal 14 which applies to both
2 Metro and to cities outside Metro. And both of those cases concerned efforts to
3 limit the required geographic scope of the alternative sites that were considered
4 to meet the identified subregional need to less than the entire region, just as
5 respondents in this appeal have eliminated any obligation to consider any
6 alternative sites for meeting the Klamath West Subregional short-term need for
7 commercial development outside the Klamath West Subregion. Therefore,
8 absent some other basis for distinguishing those cases, both of those cases
9 remain relevant in determining whether the city's decision here to limit
10 consideration of alternative sites for meeting the identified unmet need in the
11 Klamath West Subregion for accessible commercial development is consistent
12 with Goal 14.

13 Goal 14 was amended after the Court of Appeals' decisions in *Residents*
14 *of Rosemont* and *City of West Linn*. That Goal 14 amendment might provide a
15 basis for distinguishing *Residents of Rosemont* and *City of West Linn* and
16 authorizing the city to approach the Goal 14 analysis in the manner that it did
17 in this case. We next turn to the amended version of Goal 14 and the
18 administrative rule that LCDC adopted to elaborate on that Goal 14
19 amendment.

20 **B. Amended Goal 14**

21 Relevant text from the prior version of Goal 14 that was at issue in
22 *Residents of Rosemont* and *City of West Linn* was set out earlier. The

1 subsequently amended version of Goal 14 (effective 04/28/06) that applies in
2 this appeal is set out below:

3 **“Land Need**

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

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

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

13 *“In determining need, local government[s] may specify*
14 *characteristics, such as parcel size, topography or proximity,*
15 *necessary for land to be suitable for an identified need.*

16 “Prior to expanding an urban growth boundary, local governments
17 shall demonstrate that needs cannot reasonably be accommodated
18 on land already inside the urban growth boundary.

19 **“Boundary Location**

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

24 “(1) Efficient accommodation of identified land needs;

25 “(2) Orderly and economic provision of public facilities and
26 services;

27 “(3) Comparative environmental, energy, economic and social
28 consequences; and

1 “(4) Compatibility of the proposed urban uses with nearby
2 agricultural and forest activities occurring on farm and forest land
3 outside the UGB.” (Italics and underscoring added.)

4 While Goal 14 was changed in a number of ways, the key changes are
5 the italicized and underscored text above. First, the italicized text expressly
6 authorizes local governments to “specify characteristics, such as parcel size,
7 topography or proximity, necessary for land to be suitable for an identified
8 need.”¹³ As we have already noted, the Court of Appeals in *West Linn* arguably
9 suggested proximity could be a requirement under Goal 14 that in appropriate
10 cases might eliminate more distant alternatives from consideration, but the
11 amendment to Goal 14 eliminates any doubt by expressly permitting use of
12 proximity as a site suitability characteristic. And the companion rule that
13 LCDC adopted expressly allowed local governments to exclude alternative
14 sites that do not possess the required proximity to be eliminated from
15 consideration, on that basis alone. *See* n 13. And under the rule, higher
16 priority lands need not be considered for a UGB amendment, if they do not
17 have a required site suitability proximity characteristic. Second, prior Goal

¹³ This italicized Goal 14 language was also adopted and elaborated upon in OAR 660-024-0060(5) (effective 04/16/09), which provides:

“If a local government has specified characteristics such as parcel size, topography, or proximity that are necessary for land to be suitable for an identified need, a local government may limit its consideration to land that has the specified characteristics when it conducts the boundary location alternatives analysis and applies ORS 197.298.”

1 14’s awkward incorporation of the goal exception requirement as the
2 mechanism for requiring consideration of alternatives was replaced by the
3 underscored language that expressly requires a demonstration that any
4 identified land needs “cannot reasonably be accommodated on land already
5 inside the urban growth boundary,” before proceeding with a consideration of
6 candidate rural sites for a UGB amendment to meet that need. And assuming a
7 need is identified, and that need cannot reasonably be accommodated on land
8 that is already inside the UGB, this version of Goal 14 carries forward with
9 immaterial changes the former Goal 14 and statutory requirement that land
10 outside the UGB be included according to the priorities set out in ORS 197.298
11 and the Goal 14 locational factors (now called boundary factors), albeit subject
12 to the required site suitability characteristics.

13 **C. The City’s Site Suitability Characteristics**

14 After citing OAR 660-024-0060(5) as authority for doing so, *see* n 13,
15 the applicant identified seven “site suitability characteristics”:

16 “The following site suitability characteristics are necessary to
17 satisfy the short term commercial need in the western sub-region:

18 “(1) the property must be within the western sub-region as
19 identified in the EOA;

20 “(2) the property must be inside the UGB, or outside and
21 adjacent to the City’s UGB;

22 “(3) the property must be approximate[ly] 22 acres in size to
23 allow for the efficient economic development of a Lifestyle
24 Center contemplated by the EOA;

1 “(4) the property must have commercial[ly] developable terrain
2 so the property can be developed at a reasonable cost which
3 is a cost that is commensurate with the cost of developing
4 the project on the Badger Flats property;

5 “(5) the property must be ‘available for purchase’ to meet the
6 identified short term need. ‘Available for purchase’ means
7 the site was examined for the presence of ‘for sale’ signs or
8 any other evidence it was being marketed;

9 “(6) urban services can be provided to the property in an orderly
10 and economic manner and be free of moderate/severe
11 constraints to meet the definition of ‘Short-Term Supply’
12 land set out in the EOA; and

13 “(7) the property must have acceptable primary and emergency
14 vehicle access—access which will provide smooth flow of
15 primary traffic (customers and commercial vehicles) and no
16 impediments to emergency vehicles during peak customer
17 traffic.” Urban Growth Boundary and Zone Change
18 Application, Badger Flats LP, Tab 10 (hereafter UGBZCA
19 Tab 10) 13.¹⁴

20 With that lengthy introduction, we turn first to petitioner’s second
21 assignment of error.

22 **SECOND ASSIGNMENT OF ERROR**

23 As we have already explained, under the applicable (04/28/06) version of
24 Goal 14, if a need is identified under the two Goal 14 Need factors:

25 “Prior to expanding an urban growth boundary, local governments
26 shall demonstrate that needs cannot reasonably be accommodated
27 on land already inside the urban growth boundary.”

¹⁴ We have reformatted the seven site suitability characteristics to facilitate references to them.

1 If land within the urban growth boundary “cannot reasonably * * *
2 accommodate[]” the identified need, a local government may then apply the
3 ORS 197.298 priorities and Goal 14 Boundary Location factors to potential
4 lands outside the UGB to select the appropriate land for a UGB amendment.
5 *See 1000 Friends of Oregon v. LCDC*, 244 Or App 239, 255-66, 259 P3d 1021
6 (2011) (McMinnville) (explaining how the ORS 197.298 priorities and Goal 14
7 Boundary Location factors are applied). DLCD argues the city considered the
8 six sites inside the UGB and the seven sites outside the UGB together and
9 therefore “conflated two distinct and sequential inquiries under Goal 14 and
10 OAR 661-024-0050(4)”.¹⁵ Petition for Review 24.

11 We consider under the third assignment of error below DLCD’s
12 contention that in evaluating the sites in some cases the city selected
13 intervenor’s site as “the most suitable site” rather than asking whether an

¹⁵ OAR 661-024-0050(4) (effective 04/16/09) provides:

“If the inventory demonstrates that the development capacity of land inside the UGB is inadequate to accommodate the estimated 20-year needs determined under OAR 660-024-0040, the local government must amend the plan to satisfy the need deficiency, either by increasing the development capacity of land already inside the city or by expanding the UGB, or both, and in accordance with ORS 197.296 where applicable. Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB. If the local government determines there is a need to expand the UGB, changes to the UGB must be determined by evaluating alternative boundary locations consistent with Goal 14 and OAR 660-024-0060.”

1 alternative site inside the UGB could “reasonably * * * accommodate[]” the
2 identified need. However, we conclude petitioner’s remaining arguments under
3 the second assignment of error provide no basis for remand.

4 Petitioner is correct that the logical sequence suggested by Goal 14 is to
5 look first at alternative sites within the UGB and then, only if the sites inside
6 the UGB cannot reasonably accommodate the identified need, would the local
7 government proceed to consider sites outside the UGB. But in this case the
8 city did consider the sites inside the UGB first (Sites 1, 2, 3, 4, 11, 12, 13)
9 [UGBZCA Tab 10, pages 15-52] and then considered the sites outside the UGB
10 (Sites 5, 6, 7, 8, 9 and 10) [UGBZCA Tab 10, 52-81].

11 The second assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 Under the third assignment of error, petitioner challenges six of the
14 seven site suitability characteristics that the city applied to eliminate all the
15 identified alternatives to amending the UGB, except intervenor’s property, as
16 the only site with all the site suitability characteristics necessary to develop the
17 Badger Flats Lifestyle Center to meet the identified subregional short-term
18 need for commercial development. We address those challenges separately
19 below.

20 **A. “The Property Must be Within the Western Sub-Region as**
21 **Identified in the EOA” (First Site Suitability Characteristic)**

22 Initially, respondents contend petitioner did not object to the first site
23 suitability characteristic, and therefore has waived its right to challenge that

1 site suitability characteristic at LUBA. ORS 197.835(3).¹⁶ The record shows:
2 “DLCD raised the concern that the applicant was only looking at potential
3 commercial land in the western sub-region of the city and not the entire urban
4 area.” Record 158. DLCD adequately preserved its right to challenge the first
5 site suitability characteristic. *See Boldt v. Clackamas County*, 107 Or App 619,
6 623, 813 P2d 1078 (1991) (ORS 197.763(1) “requires no more than fair notice
7 to adjudicators and opponents, rather than the particularity that inheres in
8 judicial preservation concepts.”).

9 The first site suitability characteristic is at the heart of the parties’
10 dispute in this appeal. Following *Residents of Rosemont* and shortly after the
11 Court of Appeals’ invalidation of OAR chapter 660, division 26, in *West Linn*
12 on June 15, 2005—a rule that expressly allowed Metro to geographically limit
13 the alternatives analysis required by Goal 14 and state statute—LCDC
14 amended Goal 14, effective April 28, 2006. As we have already explained, that
15 new Goal 14 and OAR 660-024-0060(5) language allows local governments to
16 specify “size, topography or proximity” as site suitability characteristics and to
17 limit consideration of alternative sites to land that has the specified
18 characteristics. *See* n 10. Stripped to its essence, respondents take the position

¹⁶ ORS 197.835 limits LUBA’s scope of review, and ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 the new “proximity” language in Goal 14 and OAR 660-024-0060(5) give the
2 city broad authority to geographically limit the scope of the required
3 alternatives analysis in this case to the Klamath West Subregion, making the
4 first site suitability characteristic appropriate under Goal 14 and OAR 660-024-
5 0060(5).

6 We see nothing in the language of LCDC’s 2006 Goal 14 and
7 administrative rule amendments that suggest LCDC intended to not only revive
8 a form of the recently invalidated OAR chapter 660, division 26 authority for
9 Metro to limit the alternatives analysis to a subregion, but to also extend that
10 authority beyond the large multi-jurisdictional Metro area to individual cities of
11 any size. Whatever the scope of that Goal 14 and OAR 660-024-0060(5)
12 language, it does not authorize the city to divide the city into four subregions
13 based on “physical and manmade barriers, transportation corridors, and market
14 conditions affecting the commercial landscape in Klamath Falls.” EOA 90. And
15 while we leave open the possibility that a local government might be able to
16 identify needs in those subregions that may *only* be satisfied by development of
17 land that is located within or near those subregions, *i.e.*, within a defined
18 proximity to an identified local need, the city has not done so here.
19 Identification of such subregional needs in a way that requires that they can
20 only be satisfied on lands within the subregion may be permissible under Goal
21 9 (Economic Development), but delineating four subregions based on “physical
22 and manmade barriers, transportation corridors, and market conditions

1 affecting the commercial landscape in Klamath Falls” is not a permissible way
2 to geographically limit the alternatives analysis required under Goal 14 and
3 application of the priorities required by ORS 197.298.

4 It is one thing to say the alternative sites for meeting an identified short-
5 term subregional need for jobs or shopping opportunities, or both, that exists in
6 Klamath West Subregion must be located within a specified “proximity” of the
7 shoppers and potential employees that generate the identified need or that
8 alternative sites for meeting that need must be within some stated proximity of
9 necessary or supporting improvements.¹⁷ But it is quite another thing to say
10 that the short-term, subregional need for jobs and shopping opportunities can
11 *only* be satisfied on lands that are located within the Klamath West Subregion.
12 The most obvious flaw in that latter reasoning is that for some of those

¹⁷ In fact, as we have already noted, the Court of Appeals in *West Linn* recognized that proximity might be a relevant factor in deciding whether land is a suitable alternative, even before Goal 14 was amended to expressly allow consideration of “proximity”:

“We recognize that Metro’s authority extends over a large geographic area and that, for that reason, a need for housing to serve Washington County workers, for example, may not be well served by providing housing in East Multnomah County, thus necessitating a lengthy commute. We do not understand, however, that a regional evaluation of the locational factors in Goal 14 would necessarily prevent the incorporation of land into the UGB near those Washington County workplaces. It appears that such a result might be obtained through application of the existing processes applied in a manner that is consistent with Goal 14.”
200 Or App at 284-85.

1 Klamath West Subregion shoppers and potential employees near the
2 boundaries of Klamath West Subregion, lands in adjoining subregions will be
3 closer (more proximate) than at least some of the more distant lands inside the
4 Klamath West Subregion.

5 The parties did not provide with their briefs any legislative history that
6 might help explain the intended meaning of the 2006 Goal 14 amendment and
7 the related administrative rule. But a January 19, 2005 DLCD staff report
8 prepared for the February 3, 2005 hearing on the Goal 14 amendments that
9 ultimately took effect in 2006 indicates the intent in allowing “proximity” to be
10 a site suitability characteristic that can eliminate the need to consider
11 alternative sites that lack the required proximity was much more limited:

12 “New proposed language in the ‘needs’ section indicates that ‘in
13 determining need, local government may specify characteristics,
14 such as parcel size, topography or proximity, necessary for land to
15 be suitable for an identified need.’ This is an important insertion
16 intended to assert a previously unstated principle of Goal 14 that
17 was central to the commission’s decision regarding the North
18 Plains UGB amendment. The commission agreed when North
19 Plains declared that it not only needed new land in the UGB to
20 provide for housing need but this land also needed to have
21 ‘walkable’ access to downtown. In other words, the need
22 determined by North Plains was not simply housing, it was for
23 housing that had special characteristics, in this case ‘proximity’ to
24 downtown. * * *” January 19, 2005 DLCD Staff Report regarding
25 Goal 14 Amendments and Related Rules (February 3, 2005
26 hearing) 3.

27 The appeal of OAR chapter 660, division 26 that ultimately led to the *City of*
28 *West Linn* decision on June 15, 2005 was pending at the time of the January 19,

1 2005 staff report. If DLCD had intended the authority for “proximity” site
2 suitability characteristics to authorize relatively small cities to divide the
3 jurisdiction into four subregions and thereby limit the required Goal 14 UGB
4 amendment alternatives analysis to sites within those subregions, we believe
5 there would be something in the legislative history that would support such a
6 broad reading of the authorization for a “proximity” site suitability
7 characteristic. There is none, and in fact the legislative history is not consistent
8 with such a broad reading of that language.

9 We agree with petitioner that the Goal 14 and OAR 660-024-0060(5)
10 authority to establish “proximity” site suitability characteristics and “to limit its
11 consideration to land that has the specified characteristics when it conducts the
12 boundary location alternatives analysis and applies ORS 197.298” does not
13 authorize the city to divide the city into four subregions based on “physical and
14 manmade barriers, transportation corridors, and market conditions affecting the
15 commercial landscape in Klamath Falls,” and to limit its consideration of
16 alternative sites inside and outside the UGB to sites that are located in the
17 Klamath West Subregion. The city’s reliance on Goal 14 and OAR 660-024-
18 0060(5) to do so is based on a misconstruction of the Goal and rule. ORS
19 197.835(9)(a)(D).¹⁸

¹⁸ ORS 197.835(9)(a)(D) requires LUBA to reverse or remand a land use decision if it “[i]mproperly construed the applicable law[.]”

1 Petitioner’s challenge to the first site suitability characteristic is
2 sustained.

3 **B. “The Property Must be Inside the UGB or Outside and**
4 **Adjacent to the City’s UGB” (Second Site Suitability**
5 **Characteristic)**

6 Petitioner’s only argument in support of its challenge to the city’s second
7 site suitability characteristic is to repeat its objection that the city did not
8 properly sequence its consideration of lands inside the UGB before considering
9 lands outside the UGB. We have already rejected that argument, and it provides
10 no basis for challenging the second site suitability characteristic.

11 Petitioner’s challenge to the second site suitability characteristic is
12 denied.

13 **C. “The Property Must be Approximately 22 acres in Size to**
14 **Allow for the Efficient Economic Development of a Lifestyle**
15 **Center Contemplated by the EOA” (Third Site Suitability**
16 **Characteristic)**

17 Petitioner contends this site suitability criterion improperly substitutes
18 what intervenor wishes to develop on its property (a lifestyle center) for the
19 short-term subregional need identified in the EOA (a short-term, subregional
20 deficit of commercial land of between 27.1 and 37.9 acres).

21 As we noted earlier, the EOA does not identify a lifestyle center or
22 intervenors’ proposed lifestyle center as *the* short-term subregional need. In
23 fact, as we noted earlier, the EOA identifies a variety of regional, community

1 and neighborhood commercial uses that could satisfy the identified need.¹⁹
2 The decision nowhere attempts to explain why the general need for between
3 27.1 and 37.9 acres of land for commercial development must be satisfied on a
4 single 22-acre site and by intervenor’s proposed lifestyle center.

5 The city’s reliance on Goal 14 and OAR 660-024-0060(5) to develop
6 and apply site suitability characteristic 3 is based on a misconstruction of the
7 Goal and rule. ORS 197.835(9)(a)(C).

8 Petitioner’s challenge to the third site suitability characteristic is
9 sustained.

10 **D. “The Property Must Have Commercially Developable Terrain**
11 **so That the Property Can be Developed at a Reasonable Cost**
12 **Which is a Cost That is Commensurate With the Cost of**
13 **Developing the Project on the Badger Flats Property” (Fourth**
14 **Site Suitability Characteristic)**

15 Petitioner contends that using “the cost of developing intervenor-
16 respondent’s project as the benchmark for suitability” represents a
17 misconstruction of Goal 14 and OAR 660-024-0060(5). Petition for Review
18 30. Petitioner contends that while the *reasonableness* of the cost of providing
19 public facilities and services might be a legitimate consideration in applying

¹⁹ While lifestyle centers are mentioned in the EOA, other identified commercial uses range from “coffee shops and neighborhood markets” on small acreages) to “Department Stores” and “Regional Malls,” which require much larger sites. EOA 44-45.

1 the Goal 14 Boundary Location factors,²⁰ the question that must be answered in
2 ruling out alternative sites that are already inside the UGB is whether the
3 identified need “cannot reasonably be accommodated” on such sites. That is
4 not the same thing as asking whether developing those sites that are already
5 inside the UGB would be more expensive than developing the Badger Flats
6 site.

7 Respondents contend that the city in fact cited development constraints
8 associated with the sites inside the UGB and did not reject sites simply because
9 developing those sites would be more expensive to develop than the Badger
10 Flats site. For some of the sites that may be accurate, but again under Goal 14
11 the issue regarding those sites is whether they “cannot reasonably * * *
12 accommodate[]” the identified need. The fact that some development
13 constraints exist at the sites that are already inside the UGB does not
14 necessarily mean those sites “cannot reasonably * * * accommodate[]” the
15 identified need. The city’s decision to reject sites inside the UGB simply
16 because they have site constraints that may make development difficult applies
17 the wrong standard.

18 We agree with petitioner that the fourth site suitability factor, which the
19 city used to reject alternatives if they could not be developed at “a cost that is
20 commensurate with the cost of developing the project on the Badger Flats

²⁰ Goal 14 (04/28/06) Boundary Location factor (2) is “[o]rderly and economic provision of public facilities and services[.]”

1 property,” (UGBZCA Tap 10, 13) or simply because those sites face
2 development constraints, is based on a misconstruction of Goal 14 and OAR
3 660-024-0060(5), and neither the goal nor the rule permit application of such a
4 site suitability characteristic. ORS 197.835(9)(a)(D).

5 Petitioner’s challenge to the fourth site suitability characteristic is
6 sustained.

7 **E. “The Property Must be ‘Available for Purchase’ to Meet the**
8 **Identified Short Term Need. ‘Available for Purchase’ Means**
9 **the Site was Examined for the Presence of ‘For Sale’ Signs or**
10 **any Other Evidence it was Being Marketed” (Fifth Site**
11 **Suitability Characteristic)**

12 Petitioner argued below that a site suitability characteristic that requires
13 that an alternative site be listed for sale is not authorized by Goal 14 or OAR
14 660-024-0060(5):

15 “Whether a property is listed for sale is not a valid suitability
16 characteristic to be used to eliminate sites from consideration.
17 Development is not contingent on a site being for sale, since
18 property owners can choose to develop their own properties or
19 may be holding onto land until they are approached by a potential
20 buyer.” Record 191.

21 Respondents respond that the fifth site suitability characteristic is within the
22 discretion granted to the city by OAR 660-024-0060(5).

23 The precise scope of the discretion that OAR 660-024-0060(5) grants the
24 city to develop site suitability characteristics is admittedly less than clear.
25 However, it is important to remember that site suitability characteristics can be
26 applied to eliminate sites that are already within the UGB (sites that are

1 preferred over rural sites located outside the UGB), and was done so here.
2 Given the consequences that flow from site suitability characteristics, we
3 conclude that requiring that sites be currently available for purchase sets too
4 low a threshold, impermissibly narrows the statutory, goal and rule alternatives
5 analyses, and is not authorized by Goal 14 and OAR 660-024-0060(5). ORS
6 197.835(9)(a)(D).

7 Petitioner’s challenge to the fifth site suitability characteristic is
8 sustained.

9 **F. “Urban Services Can be Provided to the Property in an**
10 **Orderly and Economic Manner and be Free of**
11 **Moderate/Severe Constraints to Meet the Definition of ‘Short-**
12 **Term Supply’ Land Set Out in the EOA” (Sixth Site**
13 **Suitability Characteristic)**

14 Petitioner makes and develops two cognizable arguments under this
15 assignment of error challenging the sixth site suitability characteristic. First,
16 petitioner contends that the city erred in applying the sixth site suitability
17 characteristic to reject some sites, in part, because they are not already zoned
18 commercial, concluding they cannot satisfy short-term need, when the site the
19 city ultimately selected (intervenor’s property) is also not zoned commercial
20 and the challenged decision does not apply commercial zoning to intervenor’s
21 property. Second, petitioner argues the city rejected one site within the UGB
22 already zoned for commercial use (the Crossroads site – Site 4) because “[t]he
23 EOA specifically provides that Site 4 is constrained to meet the short term
24 commercial need in the western sub-region * * *.” UGBZCA Tab 10, 37.

1 Petitioner contends that subsequent to adoption of the EOA, ODOT adopted an
2 Interchange Area Master Plan that eliminates all or some of the constraints.

3 Respondents appear to take the position that the above arguments are not
4 within the scope of the third assignment of error. Petitioner’s third assignment
5 of error states “[t]he challenged decision improperly construes the Boundary
6 Location Alternatives Analysis under OAR 660-024-0060.” Petition for
7 Review 26. The third assignment of error alleges the city misconstrued the
8 authority granted by OAR 660-024-0060(5) to specify characteristics, by
9 imposing the sixth site suitability characteristic to disqualify sites that are not
10 zoned commercial at the same time it selected a site that is not zoned
11 commercial. That argument is within the scope of the third assignment of
12 error. The second argument is probably more accurately characterized as a
13 findings or substantial evidence argument, but we do not agree the second
14 argument departs so significantly from the third assignment of error that it
15 should not be considered.

16 On the merits, we agree that it is inconsistent with Goal 14 and OAR
17 660-024-0060(5) to specify site suitability characteristics to require that a site
18 already be zoned for commercial use. The impropriety of such a site suitability
19 characteristic is demonstrated here by the fact the city selected intervenor’s site
20 even though it is not zoned commercial, presumably because the city expects
21 the rezoning will not be difficult to complete in time to satisfy the short-term
22 subregional need. ORS 197.835(9)(a)(D).

1 Regarding the second argument, we agree the city improperly relied on
2 the statement in the EOA that the Crossroads site is constrained, without
3 addressing petitioner’s contention that the Interchange Area Master Plan
4 removes those constraints.

5 For the reasons explained above, the third assignment of error is
6 sustained.

7 **FIRST ASSIGNMENT OF ERROR**

8 The arguments under petitioner’s first assignment of error are lengthy
9 and take a number of turns. We have already addressed some of those
10 arguments in deciding the second and third assignments of error. In the first
11 assignment of error, petitioner makes two arguments:

12 “In this assignment of error, petitioner DLCD will demonstrate as
13 a matter of law that: (1) absent a demonstration that the City’s 20-
14 year need for commercial land cannot be met in its existing UGB,
15 amending an urban growth boundary for a ‘subregional short-term
16 need for additional commercial land’ is not in compliance with the
17 statewide planning goals; and (2) any such amendment would
18 need to evaluate alternative boundary locations for the entire UGB
19 consistent with ORS 197.298 and the Boundary Location factors
20 of Goal 14.” Petition for Review 5.

21 **A. City Must Consider Entire UGB in Applying ORS 197.298 and**
22 **the Boundary Location Factors**

23 We address the second argument first. In resolving petitioner’s
24 challenge to the first site suitability characteristic, we have already effectively
25 agreed with petitioner’s second argument. To explain that agreement we start
26 with a caveat that we have already discussed. OAR 660-024-0060(5) provides:

1 “If a local government has specified characteristics such as parcel
2 size, topography, or proximity that are necessary for land to be
3 suitable for an identified need, a local government may limit its
4 consideration to land that has the specified characteristics when it
5 conducts the boundary location alternatives analysis and applies
6 ORS 197.298.”

7 Where a local government has specified a proximity characteristic that is within
8 OAR 660-024-0060(5)’s grant of authority to local governments, that
9 proximity requirement could have the effect of removing some alternative sites
10 from consideration, both inside the UGB and outside the UGB, if those sites do
11 not satisfy the proximity site suitability characteristic.²¹ The primary problem
12 in this case is that the first site suitability characteristic eliminates any
13 obligation to consider sites outside the Klamath West Subregion, based on the
14 EOA’s division of the city into four subregions, rather than on any
15 demonstration that any short-term subregional need for shopping opportunities
16 and employment can only be satisfied on properties that are located within the

²¹ Another oddity that the parties do not address is the fact that OAR 660-024-0060(5) specifically states the site suitability characteristics may limit the geographic application of the “boundary location alternatives analysis and appli[cation of] ORS 197.298,” but does not expressly say that the geographic scope of the consideration of alternative sites *within* the UGB can be geographically constrained to sites that satisfy any applicable proximity site suitability characteristics. But while the rule does not specifically mention consideration of alternative sites inside the UGB, the more general Goal 14 authority to “specify characteristics such as parcel size, topography or proximity, necessary for land to be suitable for an identified need” logically could only mean that those characteristics may limit the consideration of all alternatives, both inside and outside the UGB.

1 Klamath West Subregion. The EOA and the first site suitability characteristic
2 simply assume that is the case. Such an assumption is not authorized by Goal
3 14 or OAR 660-024-0060(5) to geographically limit the alternatives analyses
4 that are required both inside and outside the UGB.

5 However, with the above caveat, we agree that the city must consider the
6 entire area inside the UGB and the perimeter of the entire UGB when
7 considering alternative sites under Goal 14 and OAR 660-024-0060(5).

8 **B. Unless There is a 20-Year Need for Commercial Land That**
9 **Cannot Be Met in the City’s Existing UGB, the UGB May Not**
10 **Be Amended to Satisfy a Subregional Short-Term Need for**
11 **Additional Commercial Land**

12 The basis for a short-term need (five years) for additional commercial
13 land in the Klamath West Subregion is not explained in the EOA, the city’s
14 decision, or the parties’ briefs.²² However, petitioner does not challenge the
15 city’s presumption that there is, in fact, a short-term need for additional
16 commercial lands within the Klamath West Subregion, and for purposes of this
17 opinion we assume there is, or was, such a short-term need. Instead, petitioner

²² We have already noted the anomaly that the five-year period identified in the EOA apparently ended in 2014. We could speculate that the “short-term” duration of the need for additional commercial land derives from access constraints affecting Alternative Site 4, the “Crossroads” site, which is a vacant 47-acre commercially zoned site within the UGB and the West Subregion. If so, it is possible that once those constraints are removed, there will no longer be an unmet short-term need for additional commercial land within the Klamath West Subregion (as well as no unmet long-term need). As noted above, petitioner argues that those constraints have now been removed.

1 advances a categorical argument that under no circumstances can a local
2 government seek to amend its UGB based on a short-term need.

3 There is a certain amount of logic to petitioner’s 20-year need argument.
4 The city has an abundant supply of land inside the UGB that is either already
5 zoned commercial or could be zoned commercial to meet its 20-year
6 commercial needs. That surplus of urban commercial land presumably includes
7 an amount of land that is sufficient to meet the identified subregional, short-
8 term need. If that land is located where it cannot meet the subregional need or
9 for some reason it cannot be developed quickly enough to meet the short-term
10 subregional need, and it remains inside the UGB at the same time additional
11 land is brought into the UGB to meet the short-term subregional need, the
12 surplus urban land supply within the UGB will be exaggerated. Petitioner’s
13 categorical rule would force the city to pursue alternatives other than amending
14 the UGB to satisfy that short-term subregional need.²³

15 Nevertheless, we decline to adopt the categorical rule that DLCD urges
16 us to adopt—that a lack of 20-year need under Goal 14 need factor 1

²³ One of those alternatives would be to rezone some residential land that is already included within the Klamath West Subregion. As we have already explained the city rejected some sites inside the UGB and inside the Klamath West Subregion based on the site suitability factors, some of which we have determined are improper under Goal 14. It is possible that in applying appropriate site suitability characteristics, the city will identify one or more sites inside the UGB that could be rezoned to meet the identified short-term subregional need.

1 categorically precludes a UGB amendment to correct a short-term subregional
2 need. That categorical rule is not clearly expressed in the text of Goal 14 or
3 OAR chapter 660, division 24. LCDC is fully capable of amending the goal
4 and rule if it wishes to impose such a categorical rule.

5 As we have already discussed, it is clear that the Court of Appeals has
6 recognized the concept of subregional need in the context of amendments to
7 the Metro UGB to add land to meet 20-year land needs, although it has not
8 endorsed subregional analysis of alternative sites under former Goal 14. There
9 is no text in the Goal that expressly allows Metro to break its 20-year land
10 needs into subparts of the jurisdiction. How that subregional need should
11 interact with the need for a 20-year supply of urban land is at best unclear,
12 under the existing Goal and rule. How short-term need might interact with
13 Goal 14 factor 1's requirement that need be consistent with "a 20-year
14 population forecast," when there is an adequate supply of urban land to meet
15 the 20-year needs, is even less clear.

16 In a case that is not cited or discussed by the parties, the Court of
17 Appeals addressed a similar question. *Baker v. Marion County*, 120 Or App
18 50, 852 P2d 254 (1993). In *Baker* the county found an applicant had not
19 demonstrated need under the first of Goal 14's need factors (long-range urban

1 population growth requirements).²⁴ The petitioner in *Baker* argued that a need
2 for the UGB could be justified solely on Goal 14’s second need factor (need for
3 housing, employment opportunities, and livability). The Court of Appeals
4 rejected the argument:

5 “[E]ven if the proposal complied with one of the two factors, that
6 would not suffice to show need, at least without appropriate
7 consideration of and weight being accorded to the proposal's
8 failure to satisfy the other factor. The need factors are
9 interdependent and, aside from his mistaken contention that
10 compliance with either one is per se sufficient, petitioner does not
11 argue that the county or LUBA misapplied the two factors in
12 combination. * * *” 120 Or App at 54 (citations omitted).

13 In *Baker*, while the Court of Appeals rejected petitioner’s argument that
14 the second need factor *alone* might suffice to demonstrate need for a UGB
15 amendment, it did not go so far as to say a failure to show need under Goal 14
16 factor 1 precludes a finding of need for a UGB amendment under Goal 14
17 factor 2. The court only held that a need justified solely under Goal 14 factor 2
18 would not suffice to demonstrate need for a UGB amendment “without
19 appropriate consideration of and weight being accorded to the proposal's

²⁴ At the time of that case, the Goal 14 need factors provided the need factors to be considered in connection with a UGB amendment were as follows:

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

“(2) Need for housing, employment opportunities, and livability[.]” 120 Or App at 52.

1 failure to satisfy the other [need] factor.” *Id.* at 54. Extending and applying the
2 rule in *Baker* to the question we face here, the city might be required give
3 appropriate consideration and weight to the fact that there is an abundant
4 supply of land to satisfy the city’s 20-year need for urban land, but the fact that
5 the city has an adequate 20-year supply does not categorically foreclose a
6 finding that a UGB amendment is justified to correct a short-term subregional
7 shortage of land.

8 Although we agree with petitioner’s second argument under the first
9 assignment of error, we decline to adopt the categorical reading of Goal 14 that
10 petitioner advances in its first argument under the first assignment of error.

11 The first assignment of error is sustained, in part.

12 The city’s decision is remanded.