IN THE COURT OF APPEALS OF THE STATE OF OREGON

HOUSING LAND ADVOCATES,
Petitioner,

v.

LAND CONSERVATION AND DEVELOPMENT COMMISSION, METRO, CITY OF HILLSBORO, CITY OF WILSONVILLE, CITY OF BEAVERTON, and CITY OF KING CITY,
Respondents.

Land Conservation and Development Commission No. 20UGB001910

Court of Appeals No. A173406

PETITIONER HOUSING LAND ADVOCATES' OPENING BRIEF

May 12, 2020

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding and Relief Sought

This is an appeal of an order of the Land Conservation and Development Commission (LCDC or Commission), Order 20-UGB-001910, entitled "In the Matter of Review of the Metro Urban Growth Boundary in the Manner of Periodic Review" issued on January 22, 2020. A copy of the order with findings and reasons relevant to this appeal is attached hereto at ER 3-30.

LCDC's order approves a 2,276-acre Metro Regional Urban Growth Boundary (UGB) expansion comprised of four expansion proposals submitted to Metro by the cities of Wilsonville, Hillsboro, Beaverton, and King City pursuant to 2017 Or Laws 199 (HB 2095) (App-23-25) and ORS 197.626(1).[1]

Petitioner seeks remand or reversal of LCDC's Order with instructions to deny or remand the regional UGB expansion for failure to demonstrate, as required by LCDC's statewide Urbanization Goal (Goal 14), that the identified need (single-family housing) cannot be "reasonably accommodated" within the existing Metro Regional UGB.

B. Nature of the Judgment Sought to be Reviewed

The judgment is a final order of the LCDC approving a Metro ordinance amending the Portland Metro Regional UGB.

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[1] See additional text of statutes, goals, and rules at App-1-25.

C. Statutory Basis for Appellate Jurisdiction

This Court has jurisdiction over this appeal pursuant to ORS 197.626(4), ORS 197.650 and ORS 197.651(2). App-20-22.

ORS 197.626(4) provides that "A final order of the commission under this section may be appealed to the Court of Appeals in the manner described in ORS 197.650 and 197.651." App-20. The subject order is an "other order" described in ORS 197.651(2). App-21

Petitioners timely filed their petition for review on February 12, 2020.

D. Nature of and Jurisdictional Basis for Agency Action

The Commission has jurisdiction over Metro UGB Expansions exceeding 100 acres under OAR 660-025-0175 and ORS 197.626(1)(a). App-7-8; 20.

E. Questions Presented on Appeal

1. Can a local government use its home rule charter as a defense against complying with statutory requirements intended to ensure adequate supplies of land for housing?
2. Can land zoned single-family residential designated as "Inner & Outer neighborhoods" be excluded from the land supply analysis required under Oregon's planning statutes and goals?
3. If a local government concedes in its final order that it did not consider the potential for additional homes in "existing single-family neighborhoods" does the order lack substantial evidence in the whole

record to support its conclusion that it must expand its urban growth boundary to provide sufficient land for single-family residential development?

F. Summary of Arguments

Oregon's Statewide Urbanization Goal (Goal 14) explicitly requires local and regional planning authorities (i.e. Metro) to demonstrate that the identified urban land need (including land needed for housing) which is the basis for a proposed UGB expansion "cannot be reasonably accommodated on land already within the existing urban growth boundary." This requirement is the beating heart of the Oregon land use program's commitment to assuring compact and efficient use of Oregon's existing urban areas while protecting the state's rural resource lands and natural areas.

This appeal challenges LCDC and Metro's approval of a 2,276-acre Metro Urban Growth Boundary expansion for the sole purpose of accommodating three percent of an identified 20-year need for additional single-family housing without demonstrating that the need can be "reasonably accommodated" by increasing current allowed densities anywhere, to any extent, in any "existing residential neighborhoods" anywhere inside Metro's current UGB.

Metro's position, accepted by LCDC, is that Metro's charter prohibits it from considering the option to increase land use efficiencies, however great the potential:

> "Metro Charter Section 5(b) prohibits Metro from requiring an increase in single-family neighborhoods identified in the Regional Framework Plan solely as Inner or Outer Neighborhoods." ER-29.
>
> "Metro's charter prohibits Metro from requiring any increased density in existing single family neighborhoods, which significantly limits its ability to achieve any further efficiency to address single family housing demand." Findings pp. 10-11, ER-34.

Petitioner disagrees with Metro's position, accepted by LCDC. Metro and LCDC misinterpreted and misapplied the "reasonably accommodate" standard of Goal 14 in determining that Metro could exclude consideration of "significant" additional capacity within the existing Metro UGB in whole on the basis of Metro's self-imposed prohibitions on requiring increased densities in any of Metro's existing single-family neighborhoods.

Metro is responsible for maintaining Oregon's largest urban growth boundary, encompassing 24 incorporated cities as well as urban unincorporated lands within Multnomah, Clackamas, and Washington Counties.

Metro's obligations under state land use statutes, goals, and rules include assuring that the Metro UGB includes sufficient buildable residential lands to meet identified housing needs, consistent with statewide land use goals, including the statewide Housing Goal (Goal 10), for the "next 20 years."

Metro's job is to implement, not to insulate. Metro must, and does, impose housing mix, density, and other obligations on its cities and counties to

accommodate needed housing, employment, and other urban lands consistent with its capacity projections and applicable statewide goals and statutes.

The fact that Metro Council chose to refer this charter amendment to its voters and then have it enacted gives it no more weight than it would have in an ordinary land use regulation. It is a substantive land use policy, not a constitutive organization measure.

Unless the Commission's approval of the subject UGB expansion is overturned, the Commission will have undermined a pillar of Oregon's state land use program for compact UGBs. Beyond Metro, LCDC's decision in this case, if sustained, will have provided a roadmap for local governments throughout Oregon to avoid the command of the Urbanization Goal (Goal 14) "to ensure efficient use of land," paving the way for unnecessary UGB expansions, continued regulatory redlining, and other charter-based evasions of state land use policy across the State of Oregon.

G. Statement of Facts

As recited in the Commission's order,

> "State law requires Metro to assess the capacity of the urban growth boundary (UGB) on a periodic basis and, if necessary, to increase the region's capacity for housing and employment for the next 20 years."
>
> "Metro's previous growth management decision was made in 2015 when Metro adopted the 2014 Urban Growth Report (UGR) via Ordinance No. 15-1361, which forecasted population and employment growth in the region to the year 2035, inventoried the supply of buildable land inside the UGB, and concluded there was sufficient land capacity for the next 20

years."

"[O]n December 14, 2017 the Metro Council adopted . . . amendments to Title 14 via Ordinance No. 17-1408, concluding that those amendments to the Metro Code 'will effectively implement House Bill 2095 and the directive of the Urban Growth Readiness Task Force to create a more flexible and outcomes-based approach for future UGB expansions in the Metro region;'

"[F]our cities submitted proposals to Metro for UGB expansions for housing by the May 31, 2018 deadline: the cities of Wilsonville, Hillsboro, Beaverton, and King City."

"[O]n September 27, 2018 the Metro Council adopted Resolution No. 18-4914, which provided Metro staff with direction to expand the UGB in all four areas. . ."

"[F]ollowing the Metro Council direction in Resolution No. 18-4914, Metro staff completed a housing needs analysis that identifies a need for additional land in the UGB to address single-family housing needs for both attached and detached housing. . ."

"[T]he four proposed expansion areas will add approximately 2,181 acres of urban reserve land to the UGB and provide approximately 6,100 single-family housing units. . ."

On December 4, 2018, HLA submitted comments to Metro, asserting, *inter alia*, that

"Goal 14 requires that '[p]rior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary.'" Metro Rec 1182-1206.

"Goal 10 provides that '[b]uildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.'"

> "Metro has an affirmative duty to ensure that the comprehensive plans of cities and counties within its jurisdiction address their respective affordable housing needs. . . . .
>
> "Metro also has the power to create and enforce Functional Plans and direct changes in city or county plans and land use regulations as needed to bring them into compliance with such Functional Plans." ER-54-64.

On December 13, 2018, the Metro Council adopted Ordinance 18-1427, providing that:

> "1. The UGB is amended to add the four areas shown on Exhibit A, attached and incorporated into this ordinance, to provide capacity for housing.
>
> " * * * * *
>
> "5. The 2018 Urban Growth Report attached as Exhibit E to this ordinance is hereby adopted as support for the Metro Council's decision to amend the Metro UGB to provide capacity for housing.
>
> "6. The Findings of Fact and Conclusions of Law attached as Exhibit F to this ordinance are hereby adopted to explain how this ordinance is consistent with state law and applicable Metro policies, and to provide evidentiary support for this decision."

Key excerpts from Exhibit F include the following:

> "Ordinance No. 18-1427 accepts the recommendation of Metro's Chief Operating Officer (COO) to expand the Urban Growth Boundary (UGB) to add approximately 2,181 acres of land in four locations in order to provide an adequate supply of land for housing in the Metro region over the next 20 years. These findings of fact and conclusions of law explain how the Metro Council decision complies with state and regional land use laws and policies." Findings p. 1, Rec. 1076.

"These findings address Statewide Planning Goals 10 and 14, ORS 197.295 – 197.314, OAR chapter 660 divisions 7 and 24, and RFP Policy 1.9.2. Metro's obligation to complete an inventory of buildable lands and analysis of housing need for purposes of ensuring a 20-year supply of land inside the UGB arises out of ORS 197.299. That statute directs Metro to undertake the inventory and analysis required under ORS 197.296(3) not later than six years after completion of the previous analysis. As part of the previous growth management decision in 2015, the Metro Council directed the Metro planning department to prepare a new UGR within three years, rather than six." Findings p. 6, Rec-1081. _____

"*****

"Prior to expanding the UGB, Goal 14 requires Metro to determine that the identified housing need 'cannot reasonably be accommodated on land already inside the UGB.' As described above and in Appendix 5A, Metro's analysis indicates that there is sufficient capacity inside the UGB for the projected multifamily need over the next 20 years. However, the analysis also identifies a need for additional single family homes that cannot be met on land already inside the UGB. As described above and in Appendix 2, Metro's buildable land inventory determines that the existing UGB has the capacity to provide 92,300 single family units. That single family capacity relies heavily on efficient use of land inside the UGB."

"Approximately 61 percent of the single family capacity already inside the UGB comes from infill. When that capacity is compared to growth projections, and under the needs analysis described above, even assuming the low end of the capture rate range there is an insufficient supply of land inside the UGB to meet the identified single family need. **Metro's charter prohibits Metro from requiring any increased density in existing single family neighborhoods, which significantly limits its ability to achieve any further efficiency to address single family housing demand**." Findings pp. 10-11, Rec-1085-1086. (Emphasis added).

On December 18, 2018, Metro submitted Ordinance 18-1427 for review and approval by DLCD/LCDC.

On January 30, 2019, Petitioner Housing Land Advocates (HLA) submitted objections to Metro's approval of the UGB expansion, excerpted below, under the heading "Preservation of Error." ER-35-54.

On July 1, 2019, DLCD's Director submitted his report, determining that HLA's objections were valid (ER-65-69) and included the following response to HLA's objections concerning the charter restriction:

> "Metro has determined that most of the projected housing need over the planning period, including 98,400 multifamily housing units and 92,300 single family housing units, may be accommodated within the existing UGB. Record at 1071. However, Metro determined that there is an anticipated gap of 6,100 single family units that cannot be accommodated within the current UGB. Based on this analysis, Metro concludes that the selected UGB expansion areas are needed to meet the need for additional land for single family housing."
>
> "Staff finds this conclusion is reasonable, based on the provided information and analysis, and consistent with the direction provided in ORS 197.296(6), Goal 14, and OAR 660-024-0050(4) regarding the accommodation of projected housing needs.
>
> "* * * * *
>
> "HLA seems to argue that Metro has not taken sufficient measures to force local governments to accommodate additional single-family residential capacity, perhaps because of Metro Charter Section (5)(b) (prohibiting mandated density increases in existing low-density residential neighborhoods within Metro's boundaries). However, the department determines that Metro's own assumptions and evidence, as well as the fact that the preponderance of new single-family residential development within the Metro area is expected to occur within the existing Metro UGB (92,300 of 98,400 units, or 93 percent of the 20-year need for such units), shows Metro compliance with the provisions of Goal 14 and ORS 197.296(6). Record at 298. Therefore, the department recommends that the commission reject this sub-objection."

> [Fn 5:l] "The HLA objection also raises issues regarding Metro Code Chapter 3.07, which HLA correctly characterizes as 'meant to implement ORS 197.296.'" HLA Objection, p. 8. Thus, this report will not separately discuss Metro's compliance with Metro Code Chapter 3.07." ER-55-64.

On July 11, 2019, HLA submitted its response to the Director's report, including the following concerning the charter restriction:

> "Exception Three: . . . The Department incorrectly deferred to Metro's findings when, among other things, Metro interpreted its Charter to restrict any 'increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods.'"
>
> "Thus, Metro failed to examine whether the existing urban growth boundary can accommodate the need for additional single-family housing and it failed to address the social outcomes of the proposed UGB expansion. The Commission should sustain HLA's Objection and remand this decision for a UGB that accounts for maximum efficiency within the existing boundary."
>
> "Simply put, a proposed UGB expansion which categorically excludes the vast majority of existing lands planned and zoned for single-family residential use from any density increases to meet an identified need for more single-family housing does not 'demonstrate' that those needs cannot be 'reasonably accommodated' on lands 'already inside the UGB.'" ER-70-84.

On July 26, 2019, LCDC voted to approve the UGB expansions and to adopt the Director's report and responses, including the above-quoted excerpts concerning the charter restriction. ER-3.

On January 22, 2020, the Commission issued its final order. ER-30.

II. PETITIONER'S STANDING

Housing Land Advocates (HLA) is a 501(c)(3) charitable corporation. Its mission is to advocate for land use policies and practices that ensure an adequate and appropriate supply of affordable housing for all Oregonians. Affidavit, Petition for Judicial Review. Petitioner submitted timely written testimony to Metro, opposing the subject UGB expansions on multiple grounds including that Metro had failed to establish that the existing boundary could not reasonably accommodate the identified need. ER-55-64. Petitioner submitted timely objections and exceptions on multiple grounds, including lack of information that existing UGB capacity could reasonably accommodate the identified need, to DLCD and LCDC. ER-35-54.

III. FIRST ASSIGNMENT OF ERROR

The Commission made a decision unlawful in substance when it erroneously interpreted and applied provisions of law (i.e., ORS 197.296, Goal 2, Goal 14, Goal 10, OAR 660, Division 24) and made a decision not supported by an adequate basis in fact, adequate statement of reasons, or substantial evidence in approving Metro's proposals to expand the Portland Metro Area Urban Growth Boundary (Metro UGB). Specifically:

a. The Commission misinterpreted and misapplied the Statewide Urbanization Goal's requirement that Metro must, as a prerequisite to expanding its regional UGB, "demonstrate" that the identified need "cannot be reasonably accommodated" within the existing UGB.

b. The Commission erroneously rejected HLA's objections that Metro could not exempt from Goal 14's required demonstration all "existing residential neighborhoods" from any increases in allowed single-family home densities, based wholly or in part on Metro's self-imposed charter and plan restrictions purporting to prevent Metro from requiring any increases in allowed densities in any existing single-family neighborhoods inside Metro's current UGB.

c. The subject charter and plan restrictions are pre-empted insofar as they enable Metro and its member jurisdictions to evade the requirements of land use statutes, goals, and rules as set forth herein.

A. Preservation of Error

Petitioner raised the "reasonable accommodation" issue before Metro and DLCD (ER-22-30; -35-54). Metro's findings and Buildable Lands Inventory (BLI) do not provide a specific citation to the Charter amendment and do not reference the Functional Plan provision at all. HLA located both provisions, provided text and citations, and addressed them specifically in its objections below. ER-48.

HLA's January 30, 2019, objections included the following concerning Metro's reliance on charter and functional plan restrictions to exclude existing single-family neighborhoods from its demonstration of what the existing Metro UGB can "reasonably accommodate":

"Metro Charter Limitations – At pp. 10-11 of Metro's findings, there is a remarkable statement that appears to exempt from consideration any changes to existing single-family neighborhoods, based on an interpretation of Metro Charter, Section 5(b), which provides in relevant part:

> "'(b) Density Increase Prohibited. Neither the Regional Framework Plan nor any Metro ordinance adopted to implement the plan shall require an increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods.[Fn]'"

"Thus, Metro determined it must expand the boundary because it couldn't require additional efficiencies in single-family areas within the plans and land use regulations of cities and counties in the region and, consequently, didn't look for these efficiencies. In fact, as shown below, Metro conducted no analysis of areas other than the four cities that requested additional urban lands through this inspection."

"The subject decision is not supported by substantial evidence or adequate findings supporting Metro's determination of need for expansion of the current UGB because Metro unlawfully excluded any consideration of existing neighborhoods."

"[Fn] Metro"'s Functional Plan includes a provision that implements the charter restriction. Section 3.07.1220 provides that 'Metro shall not require any city or county to authorize an increase in the residential density of a single-family neighborhood in an area mapped solely as Neighborhood.' Like the underlying charter provision, this language is also preempted or, if not preempted, disables Metro from providing DLCD and LCDC with a legally and factually supportable urban growth boundary expansion submittal." ER-48.

"Metro made the following finding concerning the capacity of existing neighborhoods:

> "'. . . there is an insufficient supply of land inside the [existing Metro] UGB to meet the identified single-family need. Metro's charter prohibits Metro from requiring any increased density in existing single-family neighborhoods, which significantly limits its ability to achieve any further efficiency to address single family [attached and detached] housing demand.'"

> "Metro's findings do not set forth the referenced charter text. They do not identify, quantify, or assess the potential capacity of those lands to accommodate the identified need absent the referenced self-imposed restriction on Metro's ability to comply with the statutory requirements of ORS 197.296 and the Urbanization Goal to demonstrate a lack of capacity before expanding an Urban Growth Boundary." ER-49.

B. Judicial Review

This court recently summarized its standards of review in UGB expansion cases as follows:

> "A final LCDC order approving a UGB amendment "may be appealed to the Court of Appeals in the manner described in ORS 197.650 and 197.651." ORS 197.626(2). However, ORS 197.651(9)(b) provides that the court '[m]ay not substitute its judgment for that of [LCDC] as to an issue of fact.' Indeed, pursuant to ORS 197.651(10), the court must reverse or remand the order only if the court finds it to be '[u]nlawful in substance or procedure,' '[u]nconstitutional,' or '[n]ot supported by substantial evidence in the whole record as to facts found by the commission.' As we noted in *Barkers Five, LLC v. LCDC*,261 Or.App. 259, 285 n. 18, 323 P.3d 368 (2014), the standard of review of LCDC orders in ORS 197.651(10) is "substantively akin to our standard of review of Land Use Board of Appeals orders. . . ."
>
> "The 'unlawful in substance' review standard . . . for review of LCDC orders under ORS 197.651(10)—is for 'a mistaken interpretation of the applicable law.' *Mountain West Investment Corp. v. City of Silverton*, 175 Or.App. 556, 559, 30 P.3d 420 (2001). In *Dimone v. City of Hillsboro*, 182 Or.App. 1, 6 n. 5, 47 P.3d 529 (2002), we explained that the 'unlawful in substance' standard 'is the functional equivalent of the 'erroneously interpreted a provision of law' standard in ORS 183.482(8)(a) that is applicable to our review of an order in a contested case issued by a state administrative agency." *Zimmerman v. Land Conservation*, 274 Or App 512, 361 P.3d 619 (2015).

Statutes referenced at App-12-22.

The meaning of the statewide goals and statutes is a matter of state law on which LCDC owes no deference to Metro, and on which a reviewing court owes only "some," if any deference, to the Commission. As the Oregon Supreme Court said *1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 752 P2d 271(1988):

> "Ordinarily lawmakers expect courts themselves to decide disputed legal issues . . . This court has recognized that in some circumstances an agency's interpretation of a legal rule 'though not binding is entitled to our careful consideration.' *Knapp v. City of North Bend*, 304 Or 34, 741 P2d 505 (1987).
>
> "* * * * *
>
> "LCDC's claim of deference depends on what LCDC has done. *Compare Branscomb v. LCDC*, 297 Or 142, 145, 681 P12d 124 (1984) ('some deference' to LCDC's interpretation of its own rule), *with 1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 369, 703 P2d 207 (1984) (LCDC interpretation overturned as a '*de facto* amendment' of a goal)." 305 Or at 392.

In *Lane County,* the Supreme Court did not defer. It held that LCDC erred

> ". . . in allowing the county to provide that existence of a forest management plan *ipso facto* allows construction of a dwelling or mobile home as being 'necessary and accessory' to whatever the forest management plan may contain." 305 Or at 393.

Answering this question, the Court said, "does not call for any form or version of judicial 'deference' to agency action." *Id.*

Even goal amendments receive no judicial deference when the result is inconsistent with the statutory framework of Oregon's land use system. *1,000 Friends v. LCDC*, 292 Or 735, 744-642 P2d 1158 (1982).

Some issues involve "mixed questions of law and fact," which requires "separating the elements of the mixture that are 'facts' from those that interpret the law" before applying the appropriate standards of review. *McPherson v. Employment Division*, 285 Or. 541, 591 P.2d 1381, 1385 (1979).[2]

LCDC's determination that Metro's findings and record "demonstrate" that the existing Metro UGB "cannot reasonably accommodate" the three-percent remnant of the identified need for single-family housing is such a mixed question. It requires LCDC to correctly apply a legal standard to evidentiary facts.

In reviewing for compliance with Goal 2's requirement of an "adequate basis in fact," i.e., substantial evidence, the question before the court is whether the Commission "properly stated and applied the substantial evidence rule" and whether its order was therefore "'unlawful in substance.'" *Zimmerman*, above, at 274 Or App 523.

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[2] See, e.g, *Stop the Dump Coal. v. Yamhill Cnty*., 364 Or. 432, 446, 435 P.3d 698 (2019) ("Although the question whether a proposed nonfarm use meets the farm impacts test ultimately depends in part on the facts, that question also depends on whether the local government applies the correct test supplied by ORS 215.296(1). And how a 'significant' change or cost increase in farm or forest practices is determined is a question of law.")

The evidentiary question of law on judicial review is whether LCDC incorrectly applied its substantial evidence review test, however correctly stated, because it applied that test using the wrong substantive legal standard or because the result is "so at odds with LCDC's evaluation" that the court can infer that LCDC misunderstood or misapplied the proper standard. *Barkers Five* at 323 P3d 368, 420.

C. Commission Scope of Review

ORS 197.633(3) provides that, in such proceedings,

> "The commission shall confine its review of evidence to the local record. The commission's standard of review:
>
> "(a) For evidentiary issues, is whether there is substantial evidence in the record as a whole to support the local government's decision.
>
> "(b) * * * * *
>
> "(c) For issues concerning compliance with applicable laws, is whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. . . . For purposes of this paragraph, 'complies' has the meaning given the term 'compliance' in the phrase 'compliance with the goals' in ORS 197.747."

D. Argument

ORS 197.175(1), 197.274, 197.296, 197.299, 197.302, 197.626, and 268.380 require Metro to exercise its planning and zoning responsibilities, including regional UGB expansions and periodic buildable land supply updates, in accordance with state land use statutes and the statewide planning goals.

LCDC's Urbanization Goal (Goal 14) provides that:

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

Metro Charter Section 5(b) provides in relevant part:

> "Density Increase Prohibited. Neither the Regional Framework Plan nor any Metro ordinance adopted to implement the plan shall require an increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods." ER-48.

Section 3.07.1220 of Metro's Functional Plan provides that

> "Metro shall not require any city or county to authorize an increase in the residential density of a single-family neighborhood in an area mapped solely as Neighborhood."

Nowhere in the findings or records of LCDC or Metro are "single family neighborhoods" further defined, identified, quantified, or evaluated, except to say that they constitute a "significant" source of additional capacity to meet the identified need inside the current Metro Regional UGB. ER-27-28.

Metro made only one scant yet revealing finding as to whether any increases in allowed minimum densities, however minor, in any of its existing single-family neighborhoods, however few, could reasonably accommodate an identified need, however small, for additional capacity for single-family dwellings:

> ". . . there is an insufficient supply of land inside the [existing Metro] UGB to meet the identified single-family need. Metro's charter prohibits Metro from requiring any increased density in existing single-family neighborhoods, which **significantly** limits its ability to achieve any further efficiency to address single family [attached and detached] housing demand." (Emphasis added) ER-34.

Petitioner contends that:

1. The charter and functional plan provisions are preempted insofar as they are inconsistent with the requirements of ORS 197.296, Goal 14, Goal 10, and LCDC's rules interpreting those goals and statutes;

2. In applying these self-imposed restrictions inconsistently with state land use laws, Metro has disabled itself from making the demonstration of insufficient existing UGB capacity legally required to allow expansion of Metro's regional UGB to address residential land needs that could otherwise be met in whole or part through increases to allowed densities in Metro's existing single-family neighborhoods.

3. The Commission misconstrued and misapplied the term "reasonably accommodate" in the Urbanization Goal (Goal 14) and the Urbanization interpretive rule, entrenching existing low-density single-family zoning as a barrier to maintaining compact urban growth forms through increased efficiency and capacity of existing UGBs.

4. The Commission misinterpreted and misapplied its substantial evidence review standard because it misinterpreted and misapplied the term "reasonably accommodate" in its evaluation of the evidence in the record.

As Metro's finding acknowledges, Metro simply omitted from its demonstration of compliance with LCDC's Urbanization and Housing Goals a "significant" source of existing regional UGB capacity to address a small remnant of the need for single-family housing that is the basis for the subject UGB expansions.

Aside from the adjective "significant," neither Metro's findings nor its evidentiary record sheds any light on the potential of increasing allowed densities in Metro's "existing residential neighborhoods" to reasonably accommodate the identified need over the next 20 years. They do not say where those lands are, what their current density limits are, or what allowed-density increases could reasonably be expected to yield over the applicable 20-year planning period. They cast no light on whether, where, and what kind of density increases could "reasonably accommodate" the identified need. They tell LCDC and this court nothing about how or whether such increases could make the existing UGB more efficient. They reveal nothing about how or whether such increases would enable Metro and its jurisdictions to undo the region's history of exclusionary zoning and better achieve the affordability, accessibility, and locational requirements of

Oregon's statewide housing goal.[3] LCDC does not remedy the deficiency with its vague reference to "locally adopted measures." LCDC does not identify those measures. It does not say how and whether those measures would qualify as "efficiency measures" within the meaning of ORS 197.296. It does not say where and whether those measures currently apply or where and whether they are at all likely to take effect at any time, much less in time to address the identified needs.

Then there's the puzzling argument that the existing Metro UGB can handle 97% of the identified need anyway, so it need not consider whether the 3% remnant could reasonably be accommodated through increased densities anywhere in Metro's existing single-family neighborhoods. As LUBA once said of a city's argument that it didn't need to coordinate with other cities unless it was depriving them of their fair share of manufactured housing, the Commission's logic is "self-refuting." *Creswell Court LLC v. City of Creswell*, 35 Or LUBA 234 (1998).

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[3] The United States Supreme Court recently recognized in *Ramos v. Louisiana*, 590 U.S. ___ (2020), Slip Op 2, Oregon's rule permitting nonunanimous jury verdicts could be traced to the rise of the Ku Klux Klan and racial, ethnic and religious discrimination of minorities. Others have made similar links to the region's historic practice of exclusionary zoning and redlining during the same era, has its roots in segregation. See "Portland's Historical Context of Racist Planning" at page 9, https://beta.portland.gov/sites/default/files/2019-12/portlandracistplanninghistoryreport.pdf

1. Preemption

Metro is a creature of statute. ORS Ch. 268. The statutes that created Metro give it limited home rule powers, but they give it no greater latitude to depart from substantive state policy than Oregon's home rule cities and counties. That latitude is limited to "constitutive" provisions relating to the organization and operation of local government. *La Grande/Astoria v. PERB*, 281 Or 137, 148-49, 576 P2d 1204 (1978).

Under the home rule provisions of the Oregon Constitution, local charters may not excuse local and regional governments from following substantive state law. "It is not the label that matters but the role of the provision in local self-government." *City of La Grande v. Public Employees Retirement Bd*., 284 Or 173, 178, 586 P.2d 765 (Or., 1978). Thus, in *Stadelman v. City of Bandon*, 173 Or App 106, 20 P 3d 857 (2001), *rev den* 333 Or 73, 36 P3d 974 (2001) this court held that statutes regulating landfill permitting were "preemptive to the extent of their inconsistency with the [city's] charter provisions."

As the Supreme Court said in *City of Portland v. Dollarhide*, 300 Or 490, 714 P2d 220, 228 (1986),

> "The essential test for displacement of local ordinances (civil or criminal) by state law is whether the local rule is 'incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive.'"

Metro's self-inflicted charter and functional plan handicaps fail this test. They are clearly incompatible with the reasonable accommodation analysis required by Goal 14 as well as with the equity, affordability, and access analyses required by Goal 10, Goal 14, and Oregon's needed housing statutes. They render the current submittal legally and factually insufficient to support the proposed UGB expansions.

They are also facially invalid to the extent that they prevent Metro from carrying out its long-term statutory and statewide goal responsibilities. These duties include maintaining rolling 20-year residential land supplies. ORS 197.299 requires Metro to "complete the inventory, determination and analysis required under ORS 197.296(3) not later than six years after the previous inventory, determination and analysis." It requires Metro to accommodate at least one-half of that need within one year and the rest of the need within two years. Metro must require any changes in member city and county plans and zoning ordinances necessary to demonstrate that those member jurisdictions will do what is necessary, when necessary, to meet Metro's, and their own, obligations under Oregon's state land use statutes, goals, and rules.

This artifice under Metro's charter undermines the principles of housing access, equity, and affordability implemented by the statewide Housing Goal and Needed Housing Statutes.

Because the state has entrusted Metro with responsibilities assigned to individual cities and counties elsewhere in Oregon, these locational requirements are especially important. Metro is the state's designated gatekeeper, charged with assuring that its member cities and counties meet their Goal 10 obligations to provide their "fair share" of "least cost" housing at prices and rents throughout the Metro region in locations and at rents and prices that are affordable by and accessible to all Oregonians.

As HLA said in its objections below,

> "Goal 10 and ORS 197.296(9) . . . require Metro, unencumbered by self-imposed plan, ordinance, or charter restrictions, to 'ensure that land zoned for needed housing is [planned] in locations appropriate for [needed] housing types * * *.' Excluding the vast bulk of the region's residential areas from consideration is both unlawful and unconscionable, considering the regional scale and scope of Metro, the diversity of its housing needs, and the potential for dilution of state housing policy throughout Oregon's largest and most populous urban area. Because the state has entrusted Metro with responsibilities assigned to individual cities and counties elsewhere in Oregon, these locational requirements are especially important as Metro is the gatekeeper to assure that its cities and neighborhoods meet their Goal 10 obligations to provide their 'fair share,' of 'least cost' housing at prices and rents throughout the Metro region in locations and at rents and prices that are affordable by and accessible to all Oregonians. Goal 10; *1000 Friends v. Lake Oswego*, 2 LCDC 138, 143-153 (1981); *1000 Friends v. Milwaukie*, 3 LCDC 1, 5-6 (1979); *Seaman v. Durham*, 1 LCDC 283, 288-293 (1978); *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998)." ER-51.

In short, Metro's job is to implement state land use policy, not to "interpose a nonconductor"[4] between statewide land use policy and local preferences, whether those preferences be for higher densities in rural areas or lower densities in urban areas.

2. What it means to "demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary."

As recently summarized by this court in *Cascade Wildlands v. Dept. of Fish and Wildlife,* 300 Or App 648, 655, 455 P3d 950, 955 (2019),

> " * * * * * [W]e examine the text, in context, of the measure, which provides the best evidence of the legislature's intentions. *Dept. of Human Services v. J. C.*, 365 Or 223, 230, 444 P3d 1098 (2019); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). We also consider legislative history to the extent that it is pertinent, *Schutz v. La Costita III, Inc*., 364 Or 536, 544, 436 P3d 776 (2019), and are mindful that we are obligated to 'consider proffered legislative history only for whatever it is worth—and what it is worth is for the court to decide.'"

The same methodology applies to agency rules, including LCDC goals:

> "We discern the intended meaning of an administrative rule by examining the text of the rule and its context (including other provisions of the same rule, other rules in *pari materia* with the rule in question, the statute authorizing the rule, and other related statutes), together with any relevant statement of agency intent in the rule adoption process or in the application of the rule by the authoring agency in other proceedings." *1000 Friends of Or. v. Jackson Cnty*., 292 Or App 173, 187, 423 P.3d 793 (2018).

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[4] *Donnell v. Herring-Hall-Marvin Safe Co.,* 208 U.S. 267, 273, 28 S.Ct. 288, 289 (1908) (Holmes, J., on corporations as liability shields for shareholders).

The interpretation of goal requirements is a question of law upon which LCDC may not defer to Metro. *1000 Friends v. LCDC* (Lane Co.), *above*. The most relevant context varies with the land use goal or statute interpretation at issue. *1000 Friends of Or. v. Jackson Cnty* at 291 Or App 187 (agricultural lands goal); *Benjfran Development, Inc. v. Metropolitan Service Dist.*, 767 P.2d 467, 95 Or.App. 22 (1989) (economic development goal).

Here, Metro's regional UGB expansion is based on a residential land need established pursuant to LCDC's Urbanization and Housing Goals and Oregon's Needed Housing Statutes.[5] These statutes and goals are therefore key to whether the Urbanization Goal's "reasonableness" determination is possible in this case: As a matter of law, can Metro, LCDC or this court determine whether the existing Metro UGB can "reasonably" accommodate some or all of Metro's identified need for single-family dwellings while categorically excluding from consideration Metro's undefined but admittedly "significant" class of existing single-family neighborhoods? The text and context of the reasonable accommodation requirement make it clear that the answer is "No."

As noted, Goal 14 provides that

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[5] See Liberty, "*Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*," 30 Boston Coll. Env. Affairs LR 589-95 (2003), for an in-depth examination of the deep connection between LCDC's Urbanization and Housing Goals within the broader context of Oregon's land use statutes.

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

LCDC hasn't directly interpreted the terms "demonstrate" or "cannot reasonably be accommodated." But their meaning in context is clear:

OAR 660-024-0050(4), LCDC's interpretive rule on this issue, provides that:

> "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 applicable rules at OAR 660-024-0060 or 660-024-0065 and 660-024-0067." [Emphasis added].

The urbanization rule also provides that other goals apply to UGB expansions, with specified exceptions. OAR 660-024-0020. Goal 2, Planning, and Goal 10, Housing, are not excepted and are therefore directly applicable.

The Urbanization Goal, the Planning Goal (Goal 2), and the Needed Housing Statute place the burden of "demonstration," both by facts and reasoning, squarely on the local or regional authority proposing the UGB expansion. It is something "local governments," including Metro "shall" do.

This language does not delegate the determination of reasonableness to Metro or to any other local or regional land use planning authority — quite the opposite. The response by local and regional planning authorities that "We'd rather not" has never, since the goals were adopted in 1974, been a sufficient "reason" to allow departures from a state land use goal requirement, whether that goal involves resource protection, urbanization, or housing.

The "reasonably accommodate" requirement as a prerequisite to urban growth boundary expansion has been part of the UGB amendment process from the beginning. Prior to amendments folding the requirement into the body of the Urbanization Goal, it was incorporated by reference to the Goal Two Exception process. As this court has said in that context:

> ". . . Goal 14 requires that a UGB change 'follow the procedures and requirements as set forth in the Land Use Planning goal (Goal 2) for goal exceptions.' The standards for such an exception include a determination that '[a]reas which do not require a new exception cannot reasonably accommodate the use.' . . . The exception standard requires an evaluation of whether land inside of a UGB can be developed in a way that eliminates or minimizes the need to expand a UGB." *1000 Friends of Or. v. Conservation*, 244 Or.App. 239, 259 P.3d 1021 (2011).

Goal 14 was amended on April 28, 2005 to consolidate procedural and substantive duplication and overlap. LCDC adopted rules interpreting the amended goal shortly thereafter. OAR 660-024-0000-660-024-0080.

The "reasonably accommodate" standard was folded into the amended Urbanization goal without substantive change. In both versions, it expresses "a

strong preference that nonresource lands, including lands within existing Urban Growth Boundaries (UGBs), be utilized for nonresource uses before resource land is committed to such uses." See, e.g., *1000 Friends of Oregon v. Marion County*, Or LUBA (LUBA No. 92-085, slip op 9/9/1992).[6] This Court has already recognized that demonstration of an existing UGB's inability to "reasonably accommodate" an identified need is an indispensable prerequisite to further consideration of a proposed expansion. *DLCD v. City of Klamath Falls & Badger Flats, LLP*, 290 Or App 495, 416 P.3d 326, 330 (2018).

The alternatives analysis has always included establishing that the existing UGB cannot reasonably accommodate the need to be addressed. It has never been a low barrier. Facts and findings establishing that exception lands or lands already within an urban growth boundary have topographic, political, or other constraints "are, without more, inadequate to demonstrate that such . . . lands cannot reasonably accommodate the proposed residential use." *Id*. *See also, Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001) (The "reasonably accommodate" inquiry "is whether the areas that do not require a new exception can accommodate the use at all, not whether they can do so as efficiently or beneficially as the proposed exception area might."); *Vincep v. Yamhill County*, LUBA No. 2006-157 (Or LUBA 3/21/2007) ("There are many

[6] For in-depth history and context, see Sullivan, "*Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*," 47 Urban Lawyer 165 (2015).

urban uses that might gain some competitive advantage by location in a rural setting, conveniently near to but not within an urban growth boundary. If OAR 660-014-0040(2) and (3) are to perform their intended purpose, a case must be made that a 'rural setting' or 'rural ambiance' truly is an essential or necessary characteristic for proposed urban development. . ."); *1000 Friends of Or v. LCDC (McMinnville)*, 244 Or.App. 239, 259 P.3d 1021 (2011) ("The exception standard requires an evaluation of whether land inside of a UGB can be developed in a way that eliminates or minimizes the need to expand a UGB.").

Compact, efficient urban development is a core value at the heart of Oregon's land use program, extending beyond housing to protection of resource lands and avoiding unnecessary costs of extending public facilities and services. The importance of efficient use of existing urban lands permeates the statutes, goals, rules, and case law that comprise Oregon's unique systems of state land use regulation. As a recent DLCD study put it:

> "With the passage of Senate Bill 100, the Oregon statewide land-use program became law in 1973. Its iconic requirement is that every city have an Urban Growth Boundary (UGB) to (1) protect resource lands outside the boundary, and (2) encourage more efficient (denser) development patterns inside the boundary."[7]

[7] *Analysis of Land Use Efficiency in Oregon Cities* (2015), p. 1. www.oregon.gov/lcd/UP/Documents/UO_Report_LandUseEfficiency_UGB_2015.pdf

Goal 14's stated purposes include "to ensure efficient use of land," and the goal calls out "efficient accommodation of identified land needs" as key to deciding whether as well as where to expand urban growth boundaries.

The Housing Needs Statute, ORS 197.296, which outlines the methodology for determining both need and capacity, makes density a key element at every stage, using the term "density" 19 times. See App-12-16. LCDC's earliest decisions interpreting the Statewide Housing Goal, remanded local government density restrictions. *Kneebone v. Ashland*, 3 LCDC 131 (1979); *Seaman v. Durham*, 1 LCDC 283 (1978).

Here, there was no consideration of rezoning to increase densities, modestly or otherwise, in any, much less in a few, some, most, or all of Metro's existing residential neighborhoods. Indeed, there was no quantification of additional residential densities of any kind that might reduce or obviate the need to expand the boundary at all. There was no consideration, evaluation, or balancing of Goal 14 factors. There was no consideration of whether or how such density increases would enable Metro and its constituent jurisdictions to achieve compliance with the statewide Housing Goal. There was no evaluation of whether existing density restrictions undermine Metro's "aggressive" assumptions about potential infill in those areas.

In *1000 Friends v. LCDC*, 292 Or 735, 744-642 P2d 1158 (1982), the Oregon Supreme Court held that LCDC cannot, by goal or rule, "make all land

within city limits available for urban development . . . without regard to the policies of the goals generally."

Allowing existing city limits to constitute *per se* urbanization, said the Court in *1000 Friends*, would be to entrench "A type of uncoordinated land use" that was "the historical process by which municipal boundaries had been designated." *Id.*

So here, to allow a regional or local government to *ipso facto* exclude all lands within the limits of Metro's existing residential neighborhoods unavailable to address an identified need for a UGB expansion would be to entrench neighborhood limits without regard to "the historical process by which" those *de facto* boundaries were established. It would be to exclude those neighborhoods without regard to what their varying density limits. It would do so without regard to what their part has been and will be in current and future compliance by Metro and its constituent jurisdictions with the Housing Goal's requirements concerning regional fair share, housing accessibility, affordability, and locational diversity in the region and its constituent communities. It would do so without regard to long-term effects on future UGB expansions.

This is not a close question. Local and regional land use authorities cannot, by *ipse dixit*, take "significant" capacity-increasing options off the table any more than they can take "reasonable alternatives" off the table in justifying reasons exceptions. To allow Metro's charter and plan restrictions to exempt existing

single family neighborhoods from consideration for density increases under the Urbanization Goal's "reasonably accommodate" standard is to entrench self-imposed density restrictions in all Metro single-family zones, "without regard to the policies of the goals generally," and of the Housing and Urbanization Goals in particular.

In an effort to deflect HLA's objection, LCDC, borrowing from Metro's response to HLA's objections, makes an odd sort of "confession and avoidance" argument. It says that Metro can completely disregard what Metro concedes is a "significant" source of additional capacity, because Metro has been so "aggressive" in other respects that only three percent of the identified need remains unmet without a UGB expansion. ER-27.

As HLA said below, Metro's response, is "not just a *non sequitur*. It is a reverse sequitur." ER-78. It establishes that Metro, with the Commission's blessing, chose to omit any meaningful investigation, analysis, or consideration of reasonable capability of a "significant" source of additional capacity to absorb such a tiny remnant of the identified need.

Given the small remnant of the identified need to be accommodated, it may be that Metro need mandate only modest and dispersed increases in zoned minimum densities to be able to maintain its existing UGB, at least until the next six-year-update. It might also be that Metro will be able to get through that

update without another UGB expansion if it is required to implement the Housing and Urbanization goals and related statutes as they apply elsewhere in Oregon.

Can Metro know the answer if there is nothing in the record telling it, among other things, what and where existing neighborhoods are, what the various minimum densities are in those neighborhoods, and what increasing zoned densities would yield to address the identified need, consistent with applicable goals? See *Seaman v. Durham*, *Countryside Properties, Inc. v. Mayor and Council of Borough of Ringwood*, 500 A.2d 767, 205 N.J.Super. 291 (N.J. Super., 1984) and *AMG Realty Co. v. Warren Tp*., 504 A.2d 692, 207 N.J.Super. 388 (N.J. Super., 1984).

It cannot. Neither can the Commission nor this Court.

Density, as a tool for protecting resource lands, a barrier to affordable housing, and a source of additional UGB capacity, is a recurring motif in Oregon's needed housing and urbanization statutes, goals, and rules.[8]

Oregon's Needed Housing Statute expressly identifies increasing "densities" through "amendments" to regional framework and functional plans, as well as local comprehensive plans and land use regulations. This context makes clear that reliance on existing densities is part of the baseline capacity analysis, while increasing capacity through rezonings and amendments to comprehensive, framework, and functional plans are necessary to a determination

[8] See Liberty, at fn 4, above.

of what an existing UGB can reasonably and efficiently accommodate without expansion into new territory.

The subject UGB expansion begins with ORS 197.296, requiring Metro and non-Metro cities over 25,000 to follow a prescribed methodology when undertaking any "legislative review" of a UGB. As described by this court in *1000 Friends (McMinnville), above*, at 244 Or App 256-57, 259 P3d 1031-32:

> "ORS 197.296(3) requires an analysis of 'housing need by type and density range * * * to determine the number of units and amount of land needed for each needed housing type for the next 20 years.' If those needs cannot be met within the existing UGB through rezonings or infill, then the locality must '[a]mend its urban growth boundary to include sufficient buildable lands to accommodate housing needs.'" ORS 197.296(6)(a)." [Emphasis added]

ORS 197.296(6) provides that:

> "If the housing need determined pursuant to subsection (3)(b) of this section is greater than the housing capacity determined pursuant to subsection (3)(a) of this section, the local government shall take one or more of the following actions to accommodate the additional housing need:
>
> "(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years. As part of this process, the local government shall consider the effects of measures taken pursuant to paragraph (b) of this subsection. * * * * *;"
>
> "(b) Amend its comprehensive plan, regional framework plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at ***densities*** sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary. . . ."

> (c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection." (Emphasis added).

OAR 660-008-0010, interpreting the statewide housing goal (Goal 10), states:

> "The mix and ***density*** of needed housing is determined in the housing needs projection. Sufficient buildable land shall be designated on the comprehensive plan map to satisfy housing needs by type and ***density*** range as determined in the housing needs projection. The local buildable lands inventory must document the amount of buildable land in each residential plan designation."

LCDC has a rule defining residential lands "density." OAR 660-024-0040(8)(j)(E) provides that "Density" means the number of dwelling units per net buildable acre. Another rule recognizes that rezoning to allow greater densities is a means of implementing the goal. OAR 660-025-0040(8)(j) provides that "Zone To Allow" or "Zoned to Allow" means that the comprehensive plan and implementing zoning shall allow the specified housing types and densities under clear and objective standards and other requirements specified in ORS 197.307(4) and (6)."

We don't know what kinds of densities exist in Metro's existing single-family neighborhoods. They could well include a range of restrictions, including but by no means limited to acreage limits, floor-area ratio (FAR) limits, lot-size limits, and land-division limits. They could also restrict excess capacity far more in some neighborhoods than others. "Median" density, referenced in Metro and

Commission findings, is useless. It reveals nothing about which cities and neighborhoods have minimums above, below, or near the mean, or how those minimums relate to actual densities in different neighborhoods.[9]

3. Substantial Evidence

A local and regional government proposing a UGB expansion has at least these obligations: first, of developing a factual record sufficient to enable it to determine what enhancements in the existing capacity of the current UGB are reasonable without regard to self-imposed exclusion zones; second, determining what a preponderance of the evidence shows that enhanced capacity to be;[10] and third, adopting findings of fact and reasons explaining how those facts establish that the identified need "cannot," not "may not," be accommodated by enhancements, including reductions in zoned density minimums, in ways that are "reasonable" in light of other applicable goals, especially the most directly applicable goal, Housing.

In performing its review for substantial evidence in the whole record, LCDC must not only recite the appropriate test; it must also apply that test correctly. As this court has put it, where LCDC has correctly recited the test, ".

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[9] For how reliance on median community income can distort housing "fair share" analysis, *see Countryside Properties, Inc.*, 500 A.2d 767, 205 and *AMG Realty Co.*, 504 A.2d 692.

[10] Preponderance of the evidence is the minimum standard for the initial finder of facts. *Friends of Yamhill County, Inc. v. Bd. of Commissioners of Yamhill County*, 351 Or 219, 264 P 3d 1265 (2011).

. . we will affirm unless the evidence is 'so at odds' with LCDC's evaluation that we can infer that LCDC 'misunderstood or misapplied' the proper standard." *Barkers Five, LLC v. Land Conservation*, 261 Or.App. 259, 348, 323 P.3d 368 420 (2014).

Here, LCDC found that there was substantial evidence to support a capacity estimate even though it was an undisputed matter of record that Metro had chosen not to consider the potential capacity of any of what it had to admit, and did admit, is a "significant" source of capacity.

Why? It is not because that source could not "reasonably accommodate" the remnant need within the meaning of Goal 14's UGB expansion standard. Not at all. It is because Metro simply prefers to expand its UGB over increasing densities in any of its existing single-family neighborhoods.

That preference is not evidence of lack of capacity. It may be a fact, but it is not a fact that Metro or LCDC can rely on to establish what the existing UGB can reasonably accommodate.

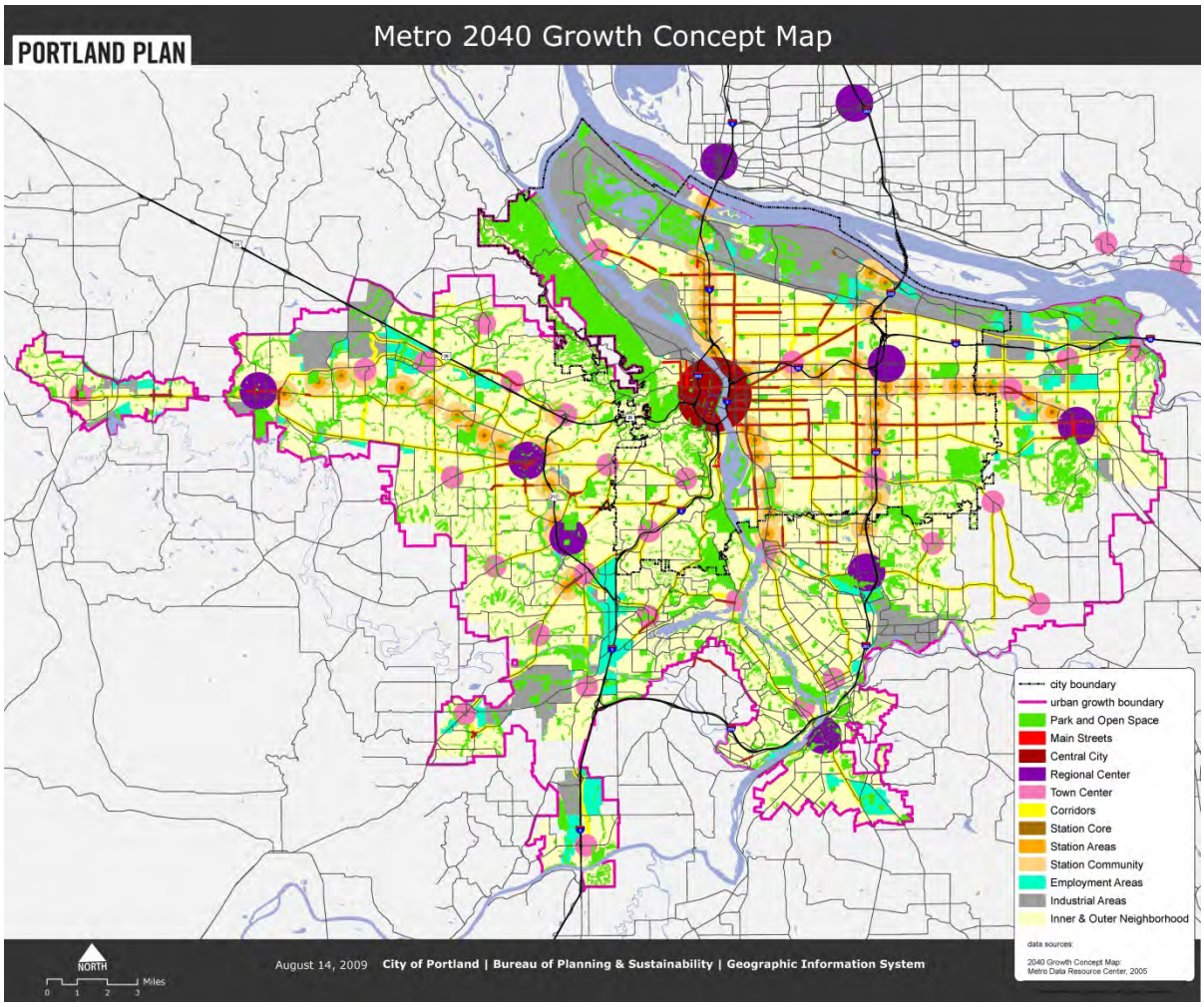
LCDC's application of its substantial evidence test here is, as this court said of LCDC's application of that test in *Barkers Five*, "so at odds" with LCDC's determination. . . . that it gives rise to an inference that LCDC misunderstood its standard of review." See also, *1000 Friends v. LCDC (Lane County), above* (LCDC erred in treating voluminous data on parcel sizes as

substantial evidence supporting county finding of need for forest management dwelling).

LCDC's misapplication of its substantial evidence test is a direct result of its misinterpretation and misapplication of Goal 14's substantive "reasonable accommodation" standard. Thus compounded, LCDC's errors, if allowed to stand, will bind Metro and LCDC not only for this UGB expansion, but for all future UGB expansion proposals involving urban residential land needs that could otherwise be "reasonably accommodated" within the meaning of Goal 14.

Here, the 20-year, single-family-dwelling need and corresponding capacity of the existing Metro UGB with no Metro-imposed increases in density in "existing single-family neighborhoods" are evidentiary facts.

The 20-year, single-family dwelling capacity of the existing Metro UGB with various density increases and corresponding reasonably foreseeable increases in density in existing residential neighborhoods would also be evidentiary facts if they were in the record. They are not, and their absence is fatal both as a matter of law and as a matter of substantial evidence.



IV. CONCLUSION

Oregon's state land use statutes and goals do not allow Metro or any other local or regional planning authority to establish or perpetuate internal urban residential growth boundaries. Such regulatory redlining prevents efficient use of large reservoirs of urban residential lands. It perpetuates *de facto* internal growth boundaries around what is no doubt the largest untapped source of existing capacity for single-family residential infill. It undermines principles of compact and efficient urban development implemented by the Urbanization, Energy, and Public Facilities Goals.

Upon reversal or remand, Metro should be required to take all reasonable measures to reasonably accommodate the 3% remnant of the identified need in compliance with the Urbanization Goal and with the Statewide Housing Goal.

Key to the reasonableness and adequacy of that analysis will be detailed information and analysis concerning the quantities, locations, distribution, and current maximum densities in each existing neighborhood as well as existing and potential disparate impacts on populations protected by state and federal fair housing laws.

DATED: May 12, 2020.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 9995 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING

I certify that on May 12, 2020, I filed the original of the **PETITIONER HOUSING LAND ADVOCATES' OPENING BRIEF** with the State Court Administrator at the following address via the Court's ECF filing system:

ATTN: Records Section
State Court Administrator
Supreme Court Building
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Salem, OR 97301-2563

DATED: May 12, 2020.

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CERTIFICATE OF SERVICE

I certify that on May 12, 2020, I served a true copy of this **PETITIONER HOUSING LAND ADVOCATES' OPENING BRIEF** on:

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Index of Stipulated Shortened Record

LCDC Order on Judicial Review

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF REVIEW OF THE METRO URBAN GROWTH BOUNDARY IN THE MANNER OF PERIODIC REVIEW	))))	**APPROVAL ORDER 20-UGB-001910**

This matter came before the Land Conservation and Development Commission (Commission) on July 26, 2019, as a referral of a Metro ordinance relating to a legislative amendment of the Metro regional urban growth boundary (UGB) and conforming amendments to the Metro Code. The Commission fully considered the Metro submittal, the written record, the written argument and oral presentations of the objectors and Metro, the report of the director of the Department of Land Conservation and Development (department), and the exceptions to that report.

I. INTRODUCTION

A. Procedural History

The Metro UGB amendment submittal before the Commission for review is comprised of Metro Ordinance No. 18-1427 and Exhibits A through F.

1. On November 1, 2018, Metro provided the department notice of a proposed amendment to its UGB of greater than 100 acres pursuant to OAR 660-018-0020.

2. On December 13 and 18, 2018, Metro adopted Ordinance No. 18-1427, a UGB expansion to provide capacity for housing to the year 2038.

3. On January 10, 2019, the department received notice of adoption of the UGB amendment.

4. On or before January 31, 2019, seven parties timely filed an objection pursuant to OAR 660-025-0140(2). They were:

   Marion County
   1000 Friends of Oregon (1000 Friends)
   Housing Land Advocates (HLA)
   Ron Johnson (Johnson)
   Karl Swanson (Swanson)
   Fran Warren (Warren)
   Michael Donoghue (Donoghue)

5. On May 10, 2019, the director referred this matter to the Commission for a decision on the submittal pursuant to OAR 660-025-0150(1)(c).

6. On July 1, 2019, the department issued a staff report. The report recommended approval of the submittal. The report found all the objections filed to be valid with the exception of a portion of the Warren objection, but recommended their rejection by the Commission. The report found a portion of the Warren objection to be invalid.

7. On July 11, 2019, the department received six exceptions to the staff report. Exceptions were filed by the Marion County, 1000 Friends, HLA, Donoghue, the City of Wilsonville, and the City of Hillsboro.[1]

8. On July 18, 2019, the department issued a supplemental staff report in response to the exceptions, continuing to recommend that the Commission reject the objections and approve the submittal.

9. On July 26, 2019, the Commission heard this matter, receiving a staff report; materials from the local record from Metro, the objectors, and other affected local governments; and oral argument from Metro, the objectors, and other affected local governments.[2] At the close of the hearing, the Commission moved to reject the objections and approve the submittal, with findings and conclusions as set forth in this order.

B. Description and Overview of UGB Expansion Submittal

Based on feedback from local jurisdictions, community organizations, and state agencies, Metro took a different approach to expanding the UGB, adopting an outcomes-based approach. This approach change by Metro began back in 2010 with adoption of the urban and rural reserves.[3] Metro now requires that concept plans in an urban reserve area be adopted by local

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[1] OAR 660-025-0160(5) provides, in part:

> "The persons specified in OAR 660-025-0085(5)(c) may file written exceptions to the director's report within 10 days of the date the report is sent[.]"

OAR 660-025-0085(5)(c) provides, in part:

> "Participation in the hearing is limited to:
> "(A) The local government or governments whose decision is under review;
> "(B) Persons who filed a valid objection to the local decision in the case of commission hearing on a referral;
> "(C) Persons who filed a valid appeal of the director's decision in the case of a commission hearing on an appeal; and
> "(D) Other affected local governments."

Both Hillsboro and Wilsonville are "other affected local governments" because some of the area selected by Metro for UGB expansion is adjacent to their municipal boundaries, and the cities expect to annex and authorize urban development in those areas.

[2] Metro, two of the objectors (1000 Friends and HLA), and four affected local governments (Beaverton, Hillsboro, King City, and Wilsonville) provided materials from the local record and argument at the July 26, 2019 Commission hearing.

[3] The urban and rural reserves adoption has had a complicated subsequent history. After remand by the Court of

governments planning to annex and provide public services to areas covered in the concept plan before consideration for, and potential addition to, the Metro UGB. The Metro Council adopted six desired outcomes into the Regional Framework Plan (RFP).[4]

When Metro adopted its growth management decision in 2015, Metro Ordinance No. 15-1361, the Metro Council determined that Metro did not need to expand the UGB. However, Metro determined that it would:

- Produce a new urban growth report within three years, earlier than the statutorily required six years,
- Continue working with Clackamas and Multnomah County to finalize the urban and rural reserves designations, and
- Work with regional partners to explore possible improvements to the region's growth management process.

In preparation for this work, Metro established an Urban Growth Readiness Task Force.[5] Metro incorporated that task force's recommendations into Metro Ordinance No. 17-4764, which is intended to balance certainty and flexibility in the UGB process and develop requirements that provide expectations for cities proposing residential UGB expansions.

Based on the changes described above, four cities submitted concept plans for UGB expansion proposals: Beaverton, Hillsboro, King City and Wilsonville. The total area of the requested expansions was 2,181 acres. These four proposals constitute Metro's submittal for its UGB expansion based on housing needs identified in the Urban Growth Report.

In June 2018, Metro established a City Readiness Advisory Group (CRAG) to review the four cities' proposals. The CRAG consisted of private and public sector experts in affordable housing, parks planning, residential and mixed-use development, multimodal transportation and equity. The CRAG presented its findings to various Metro advisory bodies and the Metro Council.

Appeals, *Barkers Five, LLC v. LCDC*, 261 Or App 259 (2014); legislation to resolve urban and rural reserve issues in Washington County, codified at ORS 195.144; and Commission approval of Metro's urban and rural reserves resubmittal in 2017 for Clackamas and Multnomah Counties; the Oregon Court of Appeals affirmed the Commission's order in *Barkers Five, LLC v. LCDC*, 299 Or App 726 (2019).

[4] The desired outcomes as adopted:

1. People live, work and play in vibrant communities where their everyday needs are easily accessible.
2. Current and future residents benefit from the region's sustained economic competitiveness and prosperity.
3. People have safe and reliable transportation choices that enhance their quality of life.
4. The region is a leader on climate change, on minimizing contributions to global warming.
5. Current and future generations enjoy clean air, clean water and healthy ecosystems.
6. Equity exists relative to the benefits and burdens of growth and change to the region's communities.

[5] The task force consisted of mayors, county commissioners, the department, 1000 Friends, and the Home Builders Association of Metropolitan Portland.

On August 28, 2018, Metro's Chief Operating Officer (COO) made an UGB recommendation to the Metro Council. The COO recommendation was to expand the UGB in the four proposed concept plan areas. The recommendation included adding conditions of approval to stimulate a mix of housing types. The COO recommendation also included that Metro staff study changes in the economy and "refresh the 2040 Growth Concept" in 2019. The COO also recommended an expansion of the Metro UGB by 4.88 acres in North Hillsboro to alleviate a public health hazard related to a failing septic system. On December 13, 2018, Metro Council adopted Ordinance No. 18-1427 to expand the UGB for the purpose of providing housing capacity for the next 20 years. Ordinance No. 18-1427 included additional conditions of approval on land added to the UGB, which reinforce comprehensive planning in the four UGB expansion areas and specific citywide requirements for the individual cities. Metro amended condition A.2[6] of Exhibit C to Ordinance No. 18-1427 on December 18, 2018 to clarify the variety of housing types allowed outright in the expansion areas.

The final Urban Growth Report (UGR) is included as Exhibit E to Ordinance No. 18-1427. Record at 23-1046. The UGR analysis includes the buildable land inventory, reporting on residential development trends, housing needs analysis, and other components intended for Metro to meet their legal requirements.

C. The Written Record for This Matter

1. Written materials provided at the July 26, 2019 hearing by the department, Metro, affected local governments, and objectors.

2. The July 18, 2019 DLCD supplemental staff report responding to the exceptions.

3. Six exceptions filed on July 11, 2019

4. The July 1, 2019 DLCD staff report, including responses to objections.

5. Metro correspondence, pursuant to OAR 660-025-0130(4)(a), identifying material in the record responsive to objections, dated March 12, 2019.

6. Seven objections filed on or before January 31, 2019.

7. Metro Ordinance No. 18-1427, including attached exhibits, submitted January 10, 2019 listed as follows: Metro Ordinance No. 18-1427

Exhibit A – UGB Expansion Areas Map, Record at 16
Exhibit B – Administrative Amendment Map, Record at 17
Exhibit C – Conditions of Approval on Land Added to the UGB, Record at 18
Exhibit D – Title 14 Urban Growth Boundary Map, Record at 22
Exhibit E – 2018 Urban Growth Report, Record at 23

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[6] The four cities shall allow, at a minimum, single family attached housing, including townhomes, duplexes, triplexes, and fourplexes, in all zones that permit single family housing in the expansion areas.

Exhibit F – Finding of Fact and Conclusions of Law, Record at 1047-1066

8. Metro Staff Report dated November 28, 2018 regarding Metro Ordinance No. 18-1427, Record at 1067
Attachment 1 – Map of proposed Advance Road UGB expansion, Record at 1074
Attachment 2 – Map of proposed Beef Bend South UGB expansion, Record at 1075
Attachment 3 – Map of proposed Cooper Mountain UGB expansion, Record at 1076
Attachment 4 – Map of proposed Witch Hazel Mountain UGB expansion, Record at 1077
Attachment 5 – Map of proposed UGB expansion to address health hazard from failing septic system, Record at 1078
Attachment 6 – Washington County Department of Health and Human Services letter, Record at 1079
Attachment 7 – DEQ Existing System Evaluation Report, Record at 1080

II. COMMISSION'S REVIEW

A. Jurisdiction

The Commission has exclusive jurisdiction to review certain UGB amendments pursuant to ORS 197.626, OAR 660-024-0080, and OAR 660-025-0040(2)(a). ORS 197.626(1) provides, in pertinent part:

> "A local government shall submit for review and the Land Conservation and Development Commission shall review the following final land use decisions in the manner provided by periodic review for a work task under ORS 197.633 * * *:
>
> "(a) An amendment of an urban growth boundary by a metropolitan service district that adds more than 100 acres to the area within its urban growth boundary[.]"

The submittal expands the Metro UGB by adding approximately 2,181 acres – more than 100 acres. Record at 14-16. The Commission concludes that review of the Metro UGB submittal is within the exclusive jurisdiction of the Commission.[7]

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[7] In addition, ORS 197.825(2) provides:

> "The jurisdiction of the [Land Use Board of Appeals]:
>
> "* * * * *
>
> "(c) Does not include a local government decision that is:
>
> "(A) Submitted to the Department of Land Conservation and Development for acknowledgment under ORS * * * 197.626 * * *, unless the Director of the Department of Land Conservation and Development, in the director's sole discretion, transfers the matter to the board[.]"

The director did not transfer this matter to the Land Use Board of Appeals.

B. Scope of Review

Where the Commission reviews a UGB amendment submittal under ORS 197.626, it does so "in the manner provided for review of a periodic review task." ORS 197.626(1). That review is to determine whether the decision amending the UGB and any related matters, comply with the applicable statewide planning goals, their implementing rules, and applicable state statutes. OAR 660-025-0175(1)(a). The commission confines its review of evidence to the Metro record. ORS 197.633(3). In reviewing the Metro UGB submittal for compliance with the foregoing, the Commission also considers the objections and exceptions leveled against that submittal.

C. Standard of Review

The Commission reviews the submittals in the manner provided for periodic review. ORS 197.626(1)(a). Review in the manner of periodic review is subject to the standard of review provided in ORS 197.633(3):

> "(a) For evidentiary issues, is whether there is substantial evidence in the record as a whole to support the local government's decision.
>
> "(b) For procedural issues, is whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.
>
> "(c) For issues concerning compliance with applicable laws, is whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The commission shall defer to a local government's interpretation of the comprehensive plan or land use regulations in the manner provided in ORS 197.829. For purposes of this paragraph, 'complies' has the meaning given to the term 'compliance' in the phrase 'compliance with the goals' in ORS 197.747."

Thus, on review, the Commission considers whether the submittal is consistent with the applicable statutes, goals, administrative rules, Metro's regional framework plan, the Metro functional plan, and is supported by substantial evidence. OAR 660-025-0160(2)(a) and (c). The UGB submittal is a legislative decision. *Homebuilders Assn. of Metropolitan Portland v. Metro*, 184 Or App 663, 57 P3d 204 (2002). The Goal 2 requirement for an adequate factual base requires that a legislative land use decision be supported by substantial evidence. *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Where the evidence in the record is conflicting, if a reasonable person could reach the decisions that the Metro made in view of all the evidence in the record, the choice between conflicting evidence belongs to Metro. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995); *Barkers Five, LLC v. LCDC*, 261 Or App 259, 349, 323 P3d 368 (2014). Because the submittal embodies both basic findings of fact and inferences drawn from

those facts, substantial evidence review involves two related inquiries: "(1) whether the basic fact or facts are supported by substantial evidence, and (2) whether there is a basis in reason connecting the inference to the facts from which it is derived." *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271, 639 P2d 90 (1981). Where substantial evidence in the record supports Metro's adopted findings concerning compliance with the goals and the Commission's administrative rules, the Commission nevertheless must determine whether the findings lead to a correct conclusion under the goals and rules. *Oregonians in Action v. LCDC*, 121 Or App 497, 504, 854 P2d 1010 (1993).

There is no statute, statewide planning goal or administrative rule that generally requires that legislative land use decisions be supported by findings. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122, 132 (2008). However, there are instances where the applicable statutes, rules or ordinances require findings to show compliance with applicable criteria. In addition, where a statute, rule or ordinance requires a local government to consider certain things in making a decision, or to base its decision on an analysis, "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). Such findings serve the additional purpose of assuring that the Commission does not substitute its judgment for that of the local government. *Id.*; *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304, 314 (2004).

Finally, the Commission also considers the objections and exceptions. In reviewing objections, the Commission only need consider those that "make an explicit and particular specification of error by the local government." *1000 Friends of Oregon v. LCDC*, 244 Or App 239, 268, 259 P3d 1021 (2011).

D. Applicable Law

Statutes

Land use regulation in Oregon is a creature of statute. *Homebuilders Assn. of Metropolitan Portland*, 184 Or App at 671. Discussing the statutory provision related to Metro's responsibility for the UGB, the Court of Appeals summarized, "the statutes call upon Metro to continually monitor the supply of buildable land for housing and other needs and take action needed to ensure a 20-year supply of such land within the UGB." *Id.* at 666-667. The Commission considers this Metro submittal against those statutory obligations relating to UGB amendments and requirements to satisfy identified housing needs.

ORS 197.296 includes requirements for planning for residential land needs for metropolitan service districts, such as Metro, related to Metro's RFP. ORS 197.296(2) requires Metro, as part of a legislative review of its regional framework plan, to demonstrate that the regional framework plan provides sufficient buildable lands to accommodate estimated housing needs for 20 years. ORS 197.296(3), (4), and (5) establish requirements and guidelines for preparation of a buildable lands inventory and housing needs analysis by type and density and in accordance with ORS 197.303, statewide planning goals, and rules relating to housing. ORS 197.296(6) requires Metro to accommodate a deficit in 20-year housing land supply needed by either expanding the Metro UGB, amending the regional framework plan to increase residential

capacity within the existing UGB, or adopt a combination of these measures. ORS 197.296(7) and (9) require Metro, if taking measures to increase residential capacity within the existing UGB, to include implementation measures designed to ensure that such capacity increases are demonstrably more likely to occur.

ORS 197.298 governs the priority of any lands to be added to the Metro UGB. First priority for additions to the UGB are lands in Metro's urban reserve. Next priority are lands designated as lands identified as "exception" or "nonresource" land. Next priority are lands designated as "marginal" lands, only applicable to designated lands in Washington County. Lowest priority are lands designated for agriculture or forest uses, and within this category lands with higher agricultural or forest capabilities as measured by soil type or cubic foot site class. Limited exceptions to this priority methodology are authorized in ORS 197.298(3).

ORS 197.299 requires Metro to complete the inventory, determination, and analysis of residential land need and residential buildable lands required by ORS 197.296(3) not later than six years after the completion of the previous inventory, determination, and analysis. Metro may undertake those statutory requirements sooner.

Goals and implementing administrative rules

Goal 2 establishes a land use planning process and policy framework as a basis for all decisions and actions related to use of land. Goal 2 also requires an adequate factual base for such decisions and actions.

Goal 14 establishes requirements for amending UGBs, determining land need within UGBs, and establishing the boundary location for UGBs. The Commission adopted OAR chapter 660, division 24 to provide guidance and requirements for completing the land need and location determinations under Goal 14. Goal 14 includes a requirement that Metro consider whether land needs can be accommodated within an existing UGB before considering expansion of the UGB.[8]

OAR 660-032-0030 provides requirements for the Metro population forecast that supports the demonstrated need to accommodate long-range urban population. OAR 660-024-0040 includes requirements for determining land need in setting a UGB. OAR 660-024-0050 requires Metro to inventory land inside the UGB to determine whether lands already within the boundary can accommodate 20-year land needs, and inventory suitable vacant and developed land designated for residential, employment, and other land uses. OAR 660-024-0060 describes Metro's required methodology for conducting a boundary location alternatives analysis. Division 24 incorporates or recognizes other administrative rules by reference, including these relevant to Metro: OAR chapter 660, division 7, Metropolitan Housing, regarding residential land need; OAR chapter 660, division 12, Transportation Planning, regarding need for land for

[8] Goal 14 provides, in part:

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

transportation facilities; and OAR chapter 660, division 9, regarding economic development and needed employment land.

Goal 10 is to "provide for the housing needs of citizens of the state." Metro and other local governments must inventory buildable lands for residential use and "plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density." For the area within the Metro UGB, Goal 10 is implemented by OAR chapter 660, division 7, commonly known as the Metropolitan Housing Rule. Division 7 interprets application of Goal 10 specifically to the Portland Metropolitan Area urban growth boundary. The Metropolitan Housing Rule contains definitions of the terms "buildable land" and "needed housing," includes the requirement for clear and objective standards as they relate to residential development, includes requirements for a mix of housing types for new construction, includes minimum residential density standards, and explains the process for the computation of buildable lands, among other standards. Other rule provisions require cities within Metro's boundaries to: 1) provide opportunity for a construction mix of new housing that is at least 50 percent attached single-family or multi-family;[9] and 2) provide for minimum densities of six, eight, or ten units per net buildable acre, depending upon the size of the city.[10] Division 7 assigns Metro responsibility for regional coordination and determining

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[9] OAR 660-007-0030 provides, in part:

> "(1) Jurisdictions other than small developed cities must either designate sufficient buildable land to provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing or justify an alternative percentage based on changing circumstances[.]"

[10] OAR 660-007-0035 provides:

> "The following standards shall apply to those jurisdictions which provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing:
>
> "(1) The Cities of Cornelius, Durham, Fairview, Happy Valley and Sherwood must provide for an overall density of six or more dwelling units per net buildable acre. These are relatively small cities with some growth potential (*i.e.* with a regionally coordinated population projection of less than 8,000 persons for the active planning area).
>
> "(2) Clackamas and Washington Counties, and the cities of Forest Grove, Gladstone, Milwaukie, Oregon City, Troutdale, Tualatin, West Linn and Wilsonville must provide for an overall density of eight or more dwelling units per net buildable acre.
>
> "(3) Multnomah County and the cities of Portland, Gresham, Beaverton, Hillsboro, Lake Oswego and Tigard must provide for an overall density of ten or more dwelling units per net buildable acre. These are larger urbanized jurisdictions with regionally coordinated population projections of 50,000 or more for their active planning areas, which encompass or are near major employment centers, and which are situated along regional transportation corridors.
>
> "(4) Regional housing density and mix standards as stated in OAR 660-007-0030 and sections (1), (2), and (3) of this rule do not apply to small developed cities which had less than 50 acres of buildable land in 1977 as determined by criteria used in Metro's UGB Findings. These cities include King City, Rivergrove, Maywood Park, Johnson City and Wood Village."

whether the UGB contains adequate buildable land to satisfy the 20-year need for housing.[11] Further, the rule specifies when the local jurisdictions within Metro are to evaluate or reevaluate the new housing construction mix and minimum density standards.[12]

In addition to state law, planning goals, and administrative rules, the Commission reviews Metro provisions for compliance with applicable Metro regional framework plan standards related to housing and the urban growth boundary. Title 11 of the Urban Growth Management Functional Plan, Planning For New Urban Areas, requires local governments to prepare concept plans for new urban areas with housing prior to inclusion into the UGB and specifies the contents of the concept plans. Title 14, Urban Growth Boundary, prescribes criteria and procedures for amendments to the UGB that will achieve stated objectives: creation of a clear transition from rural to urban development, provision of an adequate supply of urban land to accommodate long-term population and employment, and development in a compact urban form.

III. COMMISSION EVALUATION

The Commission reviews the UGB amendment submittal to determine whether Metro Ordinance No. 18-1427 complies with the applicable statewide planning goals, statutes, and administrative rules, identified in Section II. D. ORS 197.633(3)(c). In its review for compliance with the applicable statewide planning goals, ORS 197.747 provides:

> "'compliance with the goals' means the comprehensive plan and regulations, on the whole, conform with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature."

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[11] OAR 660-007-0050 provides:

> "(1) At each periodic review of the Metro UGB, Metro shall review the findings for the UGB. They shall determine whether the buildable land within the UGB satisfies housing needs by type and density for the region's long-range population and housing projections.
>
> "(2) Metro shall ensure that needed housing is provided for on a regional basis through coordinated comprehensive plans."

[12] OAR 660-007-0060 provides:

> "(1) The new construction mix and minimum residential density standards of OAR 660-007-0030 through 660-007-0037 shall be applicable at each periodic review. During each periodic review local government shall prepare findings regarding the cumulative effects of all plan and zone changes affecting residential use. The jurisdiction's buildable lands inventory (updated pursuant to 660-007-0045) shall be a supporting document to the local jurisdiction's periodic review order.
>
> "(2) For plan and land use regulation amendments which are subject to OAR 660, Division 18 [post-acknowledgment plan amendments], the local jurisdiction shall either:
>
> "(a) Demonstrate through findings that the mix and density standards in this Division are met by the amendment; or
>
> "(b) Make a commitment through the findings associated with the amendment that the jurisdiction will comply with provisions of this Division for mix or density through subsequent plan amendments."

The Metro submittal includes Exhibit F, Findings of Fact and Conclusions of Law, that presents Metro's determination of compliance with all relevant statewide planning goals. Record at 1047-1066. The Commission has reviewed those findings and concludes that the UGB amendment submittal complies on the whole with the goals. Additionally, the Commission makes the following focused conclusions.

Coordination

Goal 2 provides "[e]ach plan and related implementation measure shall be coordinated with the plans of affected governmental units."[13] As used in Goal 2, a regional framework plan is "coordinated" once "the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible." ORS 197.015(5). Previously, the Commission has stated the coordination requirement as follows:

> "the coordination requirement is satisfied where Metro has engaged in an exchange of information regarding an affected governmental unit's concerns, put forth a reasonable effort to accommodate those concerns and legitimate interests as much as possible, and made findings responding to legitimate concerns." LCDC Order 05-WKTASK-001637 at 10.

Metro detailed its coordination efforts with local governments and state agencies in its findings. Record at 1049-1051. The Commission concludes that Metro satisfied the coordination requirement through the Metro Technical Advisory Committee, the Metro Policy Advisory Committee, and direct information exchanges with the affected cities: Beaverton, Hillsboro, King City, and Wilsonville.

Population Projections

Goal 14 identifies the required considerations for changes to urban growth boundaries, as follows:

> "Establishment and change of urban growth boundaries shall be based on the following:
>
> "(1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments[.]"

OAR 660-032-0030 implements ORS 195.036 by requiring Metro to issue a coordinated population forecast for the region and providing methodology standards.[14]

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[13] Goal 2 defines "Affected Governmental Units" as "those local governments * * * which have programs, land ownerships, or responsibilities within the area included in the plan."

[14] OAR 660-032-0030 provides:

"(1) Metro, in coordination with local governments within its boundary, shall issue a coordinated population forecast for the entire area within its boundary, to be applied by Metro and local governments within the boundary as the basis for a change to a regional framework plan, comprehensive plan or land use regulation, when such change must be based on or requires the use of a population forecast.

* * * * *

123. The Commission concludes that Metro has complied with the MHR by implementing the "buildable lands" provisions of division 7 in preparing its buildable lands inventory.

Housing Needs Analysis

ORS 197.296(3)(b) and (5) govern Metro's determination of needed housing for the 20-year planning period.[19] Appendix 5: Residential Development Trends provides the indicator data required by ORS 197.296(5) and ORS 197.301. Record at 245-286. The Commission finds that Metro included data on urban residential development that occurred in terms of the number, density, record at 254; and average mix of housing types, record at 255; including trends in density and average mix of housing types of urban residential development, record at 283; demographic and population trends, record at 272-273, 275; economic trends and cycles, record

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[19] ORS 197.296 provides, in part:

> "(3) In performing the duties under subsection (2) of this section, a local government shall:
>
> "* * * * *
>
> "(b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years.
>
> "* * * * *
>
> "(5)(a) "Except as provided in paragraphs (b) and (c) of this subsection, the determination of housing capacity and need pursuant to subsection (3) of this section must be based on data relating to land within the urban growth boundary that has been collected since the last periodic review or five years, whichever is greater. The data shall include:
>
> "(A) The number, density and average mix of housing types of urban residential development that have actually occurred;
>
> "(B) Trends in density and average mix of housing types of urban residential development;
>
> "(C) Demographic and population trends;
>
> "(D) Economic trends and cycles; and
>
> "(E) The number, density and average mix of housing types that have occurred on the buildable lands described in subsection (4)(a) of this section.
>
> "(b) A local government shall make the determination described in paragraph (a) of this subsection using a shorter time period than the time period described in paragraph (a) of this subsection if the local government finds that the shorter time period will provide more accurate and reliable data related to housing capacity and need. The shorter time period may not be less than three years.
>
> "(c) A local government shall use data from a wider geographic area or use a time period for economic cycles and trends longer than the time period described in paragraph (a) of this subsection if the analysis of a wider geographic area or the use of a longer time period will provide more accurate, complete and reliable data relating to trends affecting housing need than an analysis performed pursuant to paragraph (a) of this subsection. The local government must clearly describe the geographic area, time frame and source of data used in a determination performed under this paragraph."

at 274, 279, 280, 283; and the number, density and average mix of housing types that have occurred on the buildable lands, record at 257, 263-264. The Commission concludes that Metro compiled the data relating to land within the UGB as required by ORS 197.296(5).

The Housing Needs Analysis (HNA) provides a complete analysis of land available within the existing UGB for housing and a projection of housing needs over the planning period, including analysis of income level and housing affordability data. Record at 287. As summarized in the November 28, 2018 Metro staff report, projected housing needs, expressed in the number of needed new dwelling units, over the 2018-2038 planning period are as follows:

7-county MSA new households, 2018 to 2038 (midpoint of range):	279,000
7-county MSA new dwelling units (apply 5% vacancy rate):	293,000
Metro UGB new dwelling units (capture rate range = 67.2%):	196,900
Metro UGB new multifamily dwelling units (MF rate = 50%)	98,400
Metro UGB existing multifamily capacity (midpoint of range)	203,500
Metro UGB new single-family dwelling units (SF rate = 50%)	98,400
Metro UGB existing single-family capacity (attached & detached)	92,300
Unmet single-family dwelling unit (attached and detached) need	6,100

Record at 63, 1071.

In summary, the HNA concludes that the existing Metro UGB includes "ample land planned for multifamily housing" to satisfy the 20-year need for such land, but a deficit of land needed to accommodate the 6,100 needed single-family homes identified above. Record at 1071. The November 28, 2018 Metro staff report notes that "the proposed 2,181 gross acres of UGB expansions will provide a total of approximately 6,100 single family housing units along with approximately 3,100 multifamily units, for a total of approximately 9,200 homes." Record at 1071. The Commission concludes that Metro's HNA derives the anticipated housing demand over the planning period with the consideration of available data and use of a sound methodology, consistent with the requirements of ORS 197.296(3)(b) and (5).

Reconciliation of Residential Buildable Lands Inventory and Housing Needs Analysis

ORS 197.296(6) governs the process by which Metro reconciles any shortfalls found in the residential buildable lands inventory in providing a 20-year supply of housing as determined

by the HNA.[20] Statewide Planning Goal 14 and OAR 660-024-0050 describe requirements for Metro to consider for amendments to its UGB.[21]

Metro has determined that most of the projected housing need over the planning period, including 98,400 multifamily housing units and 92,300 single-family housing units, may be accommodated within the existing UGB. Record at 1071. However, Metro determined that

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[20] ORS 197.296(6) provides:

> "If the housing need determined * * * is greater than the housing capacity determined * * * the local government shall take one or more of the following actions to accommodate the additional housing need:
>
> "(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years. As part of this process, the local government shall consider the effects of measures taken pursuant to paragraph (b) of this subsection. The amendment shall include sufficient land reasonably necessary to accommodate the siting of new public school facilities. The need and inclusion of lands for new public school facilities shall be a coordinated process between the affected public school districts and the local government that has the authority to approve the urban growth boundary;
>
> "(b) Amend its * * * regional framework plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary. A * * * metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures; or
>
> "(c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection."

[21] Regarding land need, Goal 14 provides:

> "Establishment and change of urban growth boundaries shall be based on the following:
>
> "(1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments, * * * and
>
> "(2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2). In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need. Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary."

OAR 660-024-0050 provides:

> "(4) 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 applicable rules at OAR 660-024-0060 or 660-024-0065 and 660-024-0067."

there is an anticipated gap of 6,100 single-family units that cannot be accommodated within the current UGB. Based on this analysis, Metro concludes that the selected UGB expansion areas provide the additional land needed to meet its identified need for single-family housing. The Commission finds that Metro's reasoning is supported by the HNA information and analysis, and is consistent with the direction provided in ORS 197.296(6), Goal 14, and OAR 660-024-0050(4) regarding the accommodation of projected housing needs.[22]

Employment Land Analysis

OAR 660-024-0050(1) requires an inventory and analysis of employment land, including suitable and vacant and developed land, when evaluating or amending a UGB. Required content and methodologies for that analysis are provided in OAR 660-009-0015.[23]

While by its terms, OAR 660-009-0015 applies only to "cities and counties," OAR 660-024-0050(1) requires Metro, prior to expanding its UGB, to address provisions within OAR 660-009-0015 through its inventory. Metro has provided the required review of national, state, regional, county, and local trends. Record at 232-244. Analysis and mapping of employment land site characteristics is provided in Appendix 6. Record at 304-333. This analysis includes the required identification of needed site types, inventory of industrial and other employment lands, and assessment of community economic development potential. Metro compared the employment forecast to the buildable land inventory in detail in the UGR, and concluded that there is no regional need to expand the UGB for employment needs. Record at 35-37. Based on its analysis of economic opportunities under OAR 660-009-0015, Metro determined that sufficient employment lands exist within the current UGB to meet employment land needs over the 20-year planning period. Metro asserts in Exhibit F to Ordinance No. 18-1427 Findings of Fact and Conclusions of Law, that Goal 9 does not otherwise apply to Metro specifically. Record at 1066. The Commission agrees. *See* OAR 660-009-0010(1) ("This division applied to comprehensive plans for areas within urban growth boundaries." Metro plans are not a comprehensive plan. ORS 197.015(16)). The Commission concludes that the employment lands

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[22] Additional analysis and findings regarding consideration of reasonable accommodation measures under OAR 660-024-0050(4) are included later in the portion of this order responding to objections.

[23] OAR 660-009-0015 provides, in part:

> "Cities and counties must review and, as necessary, amend their comprehensive plans to provide economic opportunities analyses containing the information described in sections (1) to (4) of this rule. This analysis will compare the demand for land for industrial and other employment uses to the existing supply of such land.
>
> "(1) Review of National, State, Regional, County and Local Trends. * * * * *
>
> "(2) Identification of Required Site Types. * * * * *
>
> "(3) Inventory of Industrial and Other Employment Lands. * * * * *
>
> "(4) Assessment of Community Economic Development Potential. * * * * *"

the urban reserve areas, Metro has provided a complete analysis of public facilities and services needed to serve each area, along with consideration of the boundary location factors of Goal 14 for each area. Therefore, the Commission concludes that Metro's boundary location analysis is consistent with ORS 197.298, Goal 14, and OAR 660-024-0060.

Schedule for Accommodating Needed Housing

Metro is to complete the inventory, determination, and analysis of residential land need and residential buildable lands required by ORS 197.296(3) not later than six years after the completion of the previous inventory, determination, and analysis. Metro adopted the 2014 UGR in 2015, less than six years ago, and has now adopted the 2018 UGR. Record at 1047-1048. The Commission concludes that the submittal complies with ORS 197.299.

Administrative Amendment

Metro made an administrative UGB amendment for a 4.88 acre parcel in North Hillsboro that has a failing septic system, thereby allowing the City of Hillsboro to provide sewer service to the property. Metro has included a condition of approval for this UGB expansion that prohibits intensification of existing rural commercial uses on the site until a concept plan is completed for the surrounding area within the urban reserve. Record at 1063. Metro relied on information regarding options for providing relief for the failing septic system from Washington County. Record at 1078. Metro's determination regarding this parcel is consistent with Goal 14, in that the failing septic system is evidence of a demonstrated need to connect this existing development to a public sewer system, which requires expansion of the UGB.

Metro Review Criteria:

The Commission review the submittal for compliance with the Metro functional plan under ORS 197.633(3)(c).[25] However, the Commission applies a more deferential standard of review than it does in reviewing for compliance with the statutes, goals, and administrative rules. ORS 197.633(3)(c); ORS 197.829.

Urban Growth Management Functional Plan, Title 11: Planning for New Urban Areas

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[25] ORS 197.633(3) provides, in part:

> "The commission's standard of review:
>
> "* * * * *
>
> "(c) For issues concerning compliance with applicable laws, is whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The commission shall defer to a local government's interpretation of the comprehensive plan or land use regulations in the manner provided in ORS 197.829. For purposes of this paragraph, 'complies' has the meaning given the term 'compliance' in the phrase 'compliance with the goals' in ORS 197.747."

In its "Conditions of Approval on Land Added to UGB," Metro *inter alia* included conditions that the four cities meet the requirements of MC 3.07.1120 "Planning for Areas Added to the UGB" and established a four-year time-period for the four cities to complete the planning requirements of Title 11; designated the four cities responsible for adopting comprehensive plans and land use regulations to allow urbanization in accordance with concept plans; applied the 2040 Growth Concept design type designations "Neighborhood" to each expansion area; designated a minimum number of homes for each expansion area; and provided other conditions Metro deems necessary to ensure the addition of land complies with applicable planning laws (*e.g.* ORS 197.312(5), OAR chapter 660, division 7). The Commission finds that the submittal establishes that Metro has complied with the provisions of Title 14.

IV. CONSIDERATION OF OBJECTIONS AND EXCEPTIONS

A. Objections Received

The department received objections from the following parties.[28]

1. Marion County
2. 1000 Friends
3. HLA
4. Johnson
5. Swanson
6. Warren
7. Donoghue

B. Validity of Objections

OAR 660-025-0140(2) governs determination of the validity of objections. All of the objection received were filed within the required 21-day period. All of the letters of objection were timely and demonstrated that the objectors participated during the Metro's hearings process. The department found that the objections meet OAR 660-025-0140(2)(a) and (d). The department found that portions of Objection 6 (Fran Warren) did not satisfy OAR 660-025-0140(2)(b) because it did not clearly identify an alleged deficiency in the submittal either by providing adequate detail regarding the portion of submittal alleged to be deficient or identifying what relevant law, goal, or rule was violated. The Commission did not consider the invalid portion of Objection 6. OAR 660-025-0140(3).

C. Commission Consideration of Objections and Exceptions

All seven objectors listed above presented objections to the Commission. For each valid objection that the Commission considers, it must either sustain or reject it based on the statewide planning goals, applicable statutes, or administrative rules. OAR 660-025-0140(6).

The director issued a report to the Commission on July 1, 2019, 24 days prior to the scheduled Commission meeting.[29] The report recommended approval of the UGB expansion

[28] In its staff report, the department's responses to objections used the numbering displayed for identification only; the numbers have no other significance.
[29] OAR 660-025-0160(3) and (4) provide:

proposal and rejection of all the objections. In response, the department received exceptions to the director's report from six parties, on or before July 11, 2019. Four of the exceptions (1000 Friends, HLA, Marion County, and Donoghue) were filed by objectors. The other two exceptions (Hillsboro and Wilsonville) were filed by other affected local governments.[30] In response to the exceptions, the director issued a supplemental staff report on July 17, 2019. The director did not revise the department's recommendation based upon the exceptions.[31]

1. Marion County

Marion County submitted an objection letter with two primary issues of concern: Goal 2 and Goal 11. The county's objection regarding Goal 2, Land Use Planning is that there is not enough information in the record for a decision, particularly with regard to a United States Army Corps of Engineers' proposal to reallocate water storage and free-flow river water resources in

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"(3) In response to a referral or appeal, the director may prepare and submit a report to the commission.

"(4) The department must send a copy of the report to the local government, all persons who submitted objections, and other persons who appealed the director's decision. The department must send the report at least 21 days before the commission meeting to consider the referral or appeal."

[30] OAR 660-025-0160(5) provides, in part:

"(5) The persons specified in OAR 660-025-0085(5)(c) may file written exceptions to the director's report within 10 days of the date the report is sent. Objectors may refer to or append to their exceptions any document from the local record, whether or not the local government submitted it to the department under OAR 660-025-0130."

OAR 660-025-0085(5)(c) provides:

"Participation in the hearing is limited to:

"(A) The local government or governments whose decision is under review;

"(B) Persons who filed a valid objection to the local decision in the case of commission hearing on a referral;

"(C) Persons who filed a valid appeal of the director's decision in the case of a commission hearing on an appeal; and

"(D) Other affected local governments."

Both Hillsboro and Wilsonville submitted concept plans to Metro intended to justify expansion of the Metro UGB in the vicinity of those cities, so they are "other affected local governments."

[31] OAR 660-025-0160(5) provides, in part:

"The director may issue a response to exceptions and may make revisions to the director's report in response to exceptions. The department may provide the commission a response or revised report at or prior to its hearing on the referral or appeal. A revised director's report is not required to be sent at least 21 days prior to the commission hearing.

the Willamette River system. The Goal 11, Public Facilities issue relates specifically to water and the water rights for the Willamette River. The county has concerns that, because some of the Metro expansion areas would be supplied water from the Willamette River watershed, Marion County may lose some of its existing water rights, which will have a negative effect on agriculture and food processing aspects of its local economy. The county's letter also references Goal 3, 10, 12 and 14; however, only Goal 2 and Goal 11 have sufficient explanations and suggested remedies in the objection. The letter concludes with a suggestion that Marion County is amenable to alternative resolution of this dispute.[32] In its exception to the director's staff report, Marion County provides additional information regarding its concern for Goal 12 impacts, noting the I-5 bottleneck at the Boone Bridge over the Willamette River in Wilsonville and the potential for impacts to Marion County communities to the south that are as yet not addressed by the Oregon Department of Transportation's Wilsonville facility plan.

The Commission rejects this objection. The county did not provide evidence into the record, beyond its letter to Metro in December 2018, regarding water rights for the Willamette River. Without providing such evidence and developing its contentions further thereon, it is unclear whether and to what extent water rights for Marion County, would be compromised or diminished by increased use of water in the Willamette River watershed for Portland Metro area jurisdictions. Regarding the transportation issue, the Commission would note that all proposed Metro UGB expansions, in Wilsonville and elsewhere, are north of the I-5 Boone Bridge in Wilsonville, and Marion County provides no additional evidence that these UGB expansions will additionally burden the bridge. Marion County does not establish how Metro should have taken their expressed concerns into account in the submittal that is before the Commission. Neither the objection nor the exception provide the Commission any basis to sustain this objection.

2. 1000 Friends of Oregon (1000 Friends)

1000 Friends objected to Metro's UGB decision on a number of grounds, described individually below.

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[32] ORS 197.010(3) provides:

> "The equitable balance between state and local government interests can best be achieved by resolution of conflicts using alternative dispute resolution techniques such as mediation, collaborative planning and arbitration. Such dispute resolution techniques are particularly suitable for conflicts arising over periodic review, comprehensive plan and land use regulations, amendments, enforcement issues and local interpretation of state land use policy."

OAR 660-025-0085 provides, in part:

(2) The commission shall take final action on an appeal or referral of a completed work task within 90 days of the date the appeal was filed or the director issued notice of the referral unless:

(a) At the request of a local government and a person who files a valid objection or appeals the director's decision, the department may provide mediation services to resolve disputes related to the appeal. Where mediation is underway, the commission shall delay its hearing until the mediation process is concluded or the director, after consultation with the mediator, determines that mediation is of no further use in resolution of the work program or work task disagreements;

in minimizing contributions to global warming" in particular, as being unmet. Again, the Commission is not reviewing for whether Metro satisfied MC 3.07.1425(d)(5) as an independent approval criterion.

Metro's obligation under MC 3.07.1425(d)(5) is to consider "whether the city responsible for preparing the concept plan has taken actions to advance Metro's six desired outcomes." The six desired outcomes adopted by the Metro Council are intended to be high level goals and policy statements for the region. The outcomes are intended to add greater flexibility to the process as well as to create an outcomes approach. Metro's findings state:

> "all four cities have taken steps and adopted plans and policies that advance Metro's six desired outcomes, as described in the CRAG comments and the city proposals. While it cannot be said that each city has taken steps that directly advance all six of the outcomes, the cities have demonstrated progress toward those outcomes." Record at 1061.

Each of the cities' proposals address this factor. Record 2838-2840, 2850-2857, 2866-2871, and 2883-2887. While the Commission agrees with 1000 Friends that Metro may have provided a more developed analysis of each cities' steps taken to advance the six outcomes, it cannot be said that Metro neither applied nor evaluated the factor in MC 3.07.1425(d)(5). Again, on balance, Metro concludes that each city could take more actions to advance the six desired outcomes. The Commission understands that consideration of this factor does not weigh in favor of or against any proposal. As discussed above, Metro gave the most weight to other factors, efficient accommodation of identified land needs and orderly and efficient provision of public facilities and services, in determining that the four expansion areas better met the housing need. Record at 1060. The Commission concludes that the findings and record establish that Metro considered MC 3.07.1425(d)(5) in the manner required by law. Therefore, the Commission rejects this objection.

3. Housing Land Advocates

Housing Land Advocates (HLA) objects to the Metro UGB expansion decision for a number of reasons, described below:

a. Federal Fair Housing Act

Metro's six desired outcomes set forth in Chapter One of the Regional Framework Plan.

The Metro Regional Framework Plan, Chapter 1, provides, in part:

> "It is the policy of the Metro Council to exercise its powers to achieve the following six outcomes, characteristics of a successful region:
>
> "1. People live, work and play in vibrant communities where their everyday needs are easily accessible.
> "2. Current and future residents benefit from the region's sustained economic competitiveness and prosperity.
> "3. People have safe and reliable transportation choices that enhance their quality of life.
> "4. The region is a leader in minimizing contributions to global warming.
> "5. Current and future generations enjoy clean air, clean water and healthy ecosystems.
> "6. The benefits and burdens of growth and change are distributed equitably."

HLA objects that Metro has failed to comply with obligations of the federal Fair Housing Act, as Amended (FHA), along with related state statutes, specifically ORS 659A.001(9)(b), ORS 659A.421, and 659A.425. The Commission concludes that these laws are not applicable to this review of Metro's submittal; therefore, not within its scope of review.

The FHA became effective in 1989, amending provisions in the Civil Rights Act of 1968. The FHA provides in material part:

> "[I]t shall be unlawful—
> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
> "(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 USC § 3604.

HLA's objection asserts that Metro had obligations to affirmatively further fair housing and otherwise to meet the obligations of the FHA. In Metro's findings, HLA observes that Metro denied any legal responsibility for its actions in this area. HLA Objection at 2. HLA argues that the federal Department of Housing and Urban Development and federal courts have interpreted the FHA as prohibiting not only intentional discriminatory actions towards persons in a protected class, but also facially-neutral actions that have a "disparate impact" on persons in a protected class. HLA offers that local government land use decisions are an example of facially-neutral actions that can have a disparate impact on a protected class by excluding needed housing types and supply. HLA Objection at 5.

Noting that it is not a local government with zoning authority, Metro disagreed, finding that: "HLA does not identify any basis on which Metro would have the type of authority that could result in a violation of the FHA by Metro; nor does HLA identify any basis for its assertion that Metro has the authority to enforce FHA requirements against local governments in the region." Record at 1062. Metro states, "Metro is not a housing provider, does not zone property for housing, and does not receive Community Development Block Grants or any other federal funds for housing." Metro March 12, 2019 Response to Objections at 6. Having determined that the FHA was not applicable, Metro made no findings of compliance with the FHA in its submittal.

HLA argues that, when reviewing Metro's submittal, the Commission has obligations to ensure all of its activities that affect housing affirmatively further fair housing because such obligations apply to the State of Oregon as a recipient of federal housing and community development funds. HLA notes that the State of Oregon has acknowledged that it is obligated to comply with the FHA in the *State of Oregon Analysis of Impediments to Fair Housing 2016-2020*, prepared jointly by Oregon Infrastructure Finance Authority, Oregon Housing and Community Services, and Oregon Health Authority.

complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations." ORS 197.633(3)(c). The only item in this list that could plausibly include the FHA is the term "applicable statutes." Neither the Commission nor any court has construed the term "applicable statutes" in ORS 197.633(3)(c) to include anything other than state statutes. There is also no precedential case law that would include compliance with the FHA as being a standard for a decision by the Commission on a local government comprehensive plan amendment or periodic review submittal that is required by state law. Assuming for purposes of discussion only that the FHA or ORS chapter 659A applied to Metro, HLA has not established why or how it would be an applicable law to the Commission's review of the UGB submittal. Under its statutory standard of review, the Commission is not authorized to sustain an objection that seeks to make new provisions of law applicable to its review. The Commission concludes that as a matter of law, compliance with the FHA is not a basis for an objection under OAR 660-025-0140(2)(b) or subject to review as an applicable law under ORS 197.633(3)(c) and OAR 660-025-0160(2).

HLA is correct that ORS chapter 659A includes statutes that have similar provisions to the FHA. In its objection, HLA provides a great deal of information regarding the FHA and associated case law, but the objection does not establish that the submittal has resulted in discrimination against a protected class that might implicate any state statute, particularly ORS chapter 659A. HLA alleges that the submittal creates a greater adverse impact on members of a protected class than on persons generally, but the objection provides no specificity as to what that effect is.[48] On its face, ORS 659A.425 pertains to "a real property transaction." The submittal does not include any housing policies pertaining to real property transactions. The Commission finds nothing in the text of the provisions of ORS chapter 659A cited to by HLA that indicate a legislative intention to apply to a Metro legislative UGB amendment. The Commission concludes that this objection provides no basis to determine the submittal does not comply with applicable law and rejects this objection.

b. Compliance with Goal 10[49]

[48] The Commission notes that the submittal includes a robust record of the decision process, including documentation of Metro's process for making population projections and determining future housing needs for all future residents, regardless of race, color, religion, sex, familial status, or national origin. The HNA identifies a need for 196,900 new dwelling units in the region to accommodate population anticipated through 2038. Record at 1070-1072. Metro determined that adequate capacity exists through infill and redevelopment within the existing UGB to accommodate projected multifamily housing needs (98,400 dwelling units). The HNA identified capacity for additional attached and detached single-family dwellings from infill and redevelopment within the existing UGB as 92,300 units, leaving an unmet need for 6,100 attached or detached single-family dwellings that cannot be accommodated within the existing UGB. Based on this analysis, Metro projects that 97 percent of the new dwellings anticipated within the planning period will be accommodated within the existing UGB, at locations that will be dependent upon private and public housing market decisions that have yet to be made. HLA presents no evidence that either these units or the remaining three percent of dwelling units to be accommodated within the expansion areas would not be made available to protected classes, in conflict with the FHA or state statutes in ORS chapter 659A.

[49] In addition to objecting on the basis of Goal 10, HLA also objected on the basis of OAR chapter 660, division 7. HLA's division 7 objection is similar to that filed by 1000 Friends that this order rejects in Objection 2.a., above.

HLA objects that Metro has not adequately considered implementing measures, affordability, and locational diversity in terms of potential yield over the planning period. HLA Objection at 2. HLA asserts that Metro has failed to consider affordability impacts as a part of the UGB expansion decision.

Metro's submittal includes several pertinent documents, including UGR Appendix 5: Residential Development Trends, Record at 245, and the Housing Needs Analysis, Record at 287, which provides the justification for the UGB expansion. The Residential Development Trends document provides information on cost burdened renters and owners within the Metro area; persons of color within the region; income, race, and ethnicity data; and single and multifamily housing production trends; high growth areas in the region; median home values; median rents; median household, family, and non-family income; and other information. Pertinent to this discussion is the data regarding single and multifamily housing production trends between 2007 and 2016. Record at 253. Figure 4 shows that the proportion of housing types constructed over the time span was 40 percent single-family residential, 40 percent multifamily residential, and 20 percent mixed-use residential. Record at 253. The Commission understands the question posed by HLA, in part, to be whether the contemplated housing mix for the planning period will be aligned with the buying power of new residents in the region, for rental or ownership.

This question is discussed in detail in Metro's Housing Needs Analysis and includes a rather bleak assessment of the future for both new homeowners and new renters within the region during the planning period. Record at 290. For example, for homeowners, the housing cost burden, as a percentage of income, is projected to increase between 11 and 16 percentage points between 2018 and 2038, despite rising income levels over the same period. Currently, new homeowners in the region spend an aggregate of 41 percent of household income on housing costs. Any household that spends more than 30 percent of its income on housing costs is considered cost burdened. New homeowners in 2038 are projected to spend on average 56 percent of their income on housing costs.

On the rental side, the HNA notes that "[t]he share of cost burdened renters by income level increases between 2 to 7 percentage points from 2018 to 2038." Record at 294. This is less extreme than project increases for homeowners, but still significant. The study notes that "Median renters in 2018 spend about 53% of income and by 2038, they spend up to 58%." Record at 295. In other words, a current renter in the region who is currently making median income, is significantly cost burdened and will become more so over the planning period. It should be noted that this analysis projects costs for new residents in the region. For "non-movers," homeowners and renters who are currently in the region and do not move within the region over the planning period, housing prices will be lower, particularly for homeowners with fixed rate mortgages, but also to some degree for long-term renters. Record at 295.

Given this analysis, it is somewhat surprising to find the conclusion that, "The analytical findings in particular point to the need for additional production of single family units (attached and detached) over the 20-year forecast period." Record at 295. In the context of a recent housing market that has produced a mix of only 40 percent single family units over the last ten years, and in which affordability will continue to decline, the need for 50 percent of the new

housing produced to be single-family units seems to run counter to the facts. It is in this context that the information in Appendix 3 – Growth Forecast Findings is particularly germane.

The Growth Forecast Findings describe the MetroScope model results for fourteen future scenarios for the Metro region. Record 202. Independent variables for the model include rate of population and employment growth, capacity of existing land within the UGB to accommodate housing needs, and UGB expansion options. As reported by Metro, four of the scenarios define a tenable range of decision options for the Metro Council. In addition, Scenario Zero was also modeled, in which historical trends are carried forward into the future and no UGB expansion occurs. The results of the five scenarios in terms of housing land capacity, costs, and relative affordability are provided in Table 12. Record at 214.

It is important to understand that the five scenarios are not intended to provide a menu of alternative futures from which the Metro Council has been asked to choose, but rather as a means with which to gauge the resilience of the Metro housing market to factors, other than the UGB expansion question, that are largely out of Metro's control. For example, Scenario 4 provides a model for housing land supply and cost outcomes that are predicted to result if the Metro region sees a medium growth rate, realizes a medium housing yield from land within the current UGB, and decides to include the four expansion areas in the UGB. Record at 214. Alternatively, Scenario 2 shows the results if the Metro region sees a low growth rate, realizes a low housing yield from land within the current UGB, and decides not to include the expansion areas within the UGB. Record at 214. Based in part on this analysis, Metro determined that it would be most prudent to include the four expansion areas in the UGB, concluding that this policy approach will provide the most resilience to the regional housing market. It is important to note that by the end of the planning period Scenario 0 would leave no remaining single-family land and only six percent of the multi-family land supply. Conversely, in Scenario 4, which Metro determined to be the future scenario most likely to occur, eight percent of single family capacity and 29 percent of the multifamily capacity would remain at the end of the planning period in 2038.

Metro's Housing Needs Analysis finds an ample supply of multifamily capacity within the existing UGB. Metro's estimates of this housing capacity range between 136,000 and 271,100 multifamily units, which is well in excess of the anticipated need for 98,400 such units over the 20-year planning period. Record at 296. The estimate of single-family capacity within the existing UGB is much lower (92,300 units), with an estimated need for an additional 6,100 units that Metro determined cannot be accommodated within the current UGB. Record at 297. In the context of this complex analysis, it is important to keep in mind the provisions of OAR 660-032-0030(5), which provides in part, "The population forecast developed under the provisions of (1) through (4) of this rule is a prediction which, although based on the best available information and methodology, should not be held to an unreasonably high level of precision[.]" Given the variety of factors, including population and employment growth and infill and redevelopment decisions that will be dependent upon market conditions and individual investment decisions over the planning period, the Commission finds Metro's decision to include additional residential land within the UGB to be in compliance with the requirement to address the region's anticipated housing needs over the planning period.

Goal 10 requires the inventory of buildable lands and an analysis of the numbers of needed housing units. The Commission, in its findings, concluded that Metro had completed its BLI and HNA in conformance with ORS 197.296. The Commission has also concluded that this submittal is not made pursuant to "periodic review" and thus, most of the provisions of division 7 that HLA cites are not applicable to this review. HLA requests that the Commission direct Metro to "Prepare a region-wide assessment of the existing UGB's ability to meet housing needs before considering a proposed UGB expansion under the requirements of state law, and Goal 10." The Commission finds that Metro has done so and has complied with Goal 10. Consequently, the Commission rejects this objection.

c. Compliance with ORS 197.296(6)

HLA objects that the submittal does not comply with ORS 197.296(6), which requires the local government to accommodate a projected shortfall of residential lands by putting in place measures to make more efficient use of land within the UGB to meet the need (ORS 197.296(6)(b)), expanding the UGB to meet the need (ORS 197.296(6)(a)), or meeting the need through some combination of the first two options (ORS 197.296(6)(c)).[50] HLA asserts that Metro ignored ORS 197.296(6)(b) and merely accommodated its "member jurisdictions' insatiable appetite for more land for single-family homes." HLA objection at 12.

ORS 197.296(6) does not, by itself mandate that a local government accommodate all or even a portion of a projected shortfall through more efficient use of land within an existing UGB. However, Goal 14 and OAR 660-024-0050(4) require that, "prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB," and thus Metro must consider "reasonably accommodating" the identified need through increasing residential capacity within the existing UGB, the alternative set forth in ORS 197.296(6)(b). Although there is some discretion in the determination of what can be reasonably accommodated, Metro anticipates accommodating approximately 97 percent of the anticipated 196,900 new dwelling units that will be needed in the region over the planning period within the existing UGB, including 100 percent of the anticipated demand for multifamily housing.

Additionally, it is important to remember that Metro's HNA found that the Metro UGB contains more than a 20-year supply of multifamily units, and a deficit of single-family units. Record at 296. Thus, the question of compliance with ORS 197.296(6) rests on whether Metro has taken sufficient measures within the existing Metro UGB to meet the single-family housing deficit identified in the HNA, measures that show Metro has attempted to "reasonably accommodate" the single-family housing need within the existing UGB as is required by Goal 14 and OAR 660-024-0050(4). Metro's submittal analyzes this issue, and includes a fairly "aggressive" calculation of new single-family infill residential development within the existing UGB, assuming that, unless an existing lot contained a very high-value home, all lots at least 2.5 times the minimum lot size of existing zoning (2.2 in the City of Portland) would be divided into

[50] The HLA objection also raises issues regarding MC Chapter 3.07, Urban Growth Management Functional Plan which HLA correctly characterizes as "meant to implement ORS 197.296." HLA Objection, p. 8. This order has separately discussed Metro's compliance with the applicable provisions of MC Chapter 3.07, Titles 11 and 14, and determined that Title 7 does not provide applicable review standards to this submittal.

additional single-family residential building lots. Record at 150. Metro has also found that the median single-family lot size in the region has taken a major long-term decrease from 8,300 square feet in 1980 to 4,400 square feet in 2016. Record at 271. Metro provides a description of its thorough methodology for making these assumptions, including peer review with the department's participation. Record at 143. The Commission determines that Metro's own assumptions and evidence, as well as the fact that the preponderance of new single-family residential development within the Metro area is expected to occur within the existing Metro UGB (92,300 of 98,400 units, or 93 percent of the 20-year need for such units), shows Metro compliance with the provisions of Goal 14 and ORS 197.296(6). Record at 298. Therefore, the Commission rejects this objection.

d. Accessory Dwelling Unit capacity

HLA asserts that Metro failed to account for accessory dwelling unit capacity in light of the passage of SB 1051 in 2017. This law requires most cities within Metro and unincorporated areas within the UGB to allow accessory dwelling units in conjunction with a single-family dwelling. This requirement from SB 1051 was incorporated into statute at ORS 197.312(5). HLA Objection at 13.

Metro notes that the effective date of this portion of SB 1051 was July 1, 2018, and the Buildable Lands Inventory was completed in June of 2018. Metro's Urban Growth Report was published on July 3, 2018. Consequently, it was not possible to factor in the potential for additional accessory dwelling unit development that may result from passage of SB 1051 because anticipation of the impact of the measure on accessory dwelling unit production would have been speculative, at best.

The Commission finds that, although not a forecast of ORS 197.312(5) impact, Metro considered and included accessory dwelling unit production as part of the Housing Needs Analysis. Specifically, Metro provides data concerning such production in the larger Metro cities between 1995 and mid-2017, along with analysis and projections for future accessory dwelling unit development. Record at 184. Notably, the City of Portland significantly increased accessory dwelling units construction following its decision to waive their systems development charges (SDCs). Based on this analysis, Metro projects that an additional 4,400 new accessory dwelling units (considered multifamily long-term rental housing units) will be produced within the Metro area over the planning period. Record at 186. This constitutes 2.2 percent of the anticipated housing need. Record at 152, 186. Another factor cited in Metro's analysis is that some accessory dwelling units will be used as short-term rentals, meaning they would not be available to meet long-term housing needs in the region. Given the changing market and regulatory landscape, the Commission finds the assumptions regarding anticipated accessory dwelling unit production in the region to be reasonable, based on past trends. It is unclear at this time what impacts the passage of SB 1051 in 2017 (which required most cities to allow for accessory dwelling units where single family homes are allowed) will have on unit production numbers in the region. However, the Commission finds that Metro considered accessory dwelling units in assessing whether the identified need can be met within the existing UGB.

Moreover, Metro's unmet identified housing need is for single-family dwelling units, either attached or detached. Metro classified accessory dwelling units as multi-family units in its analysis, a determination the Commission determines is justified because of their general size and tenure (rental unit) status. Record at 152. Even assuming that ORS 197.312(5) will result in more accessory dwelling units than Metro forecasts, Metro would still need to accommodate its identified need. Therefore, the Commission rejects this objection.

e. Misapplication of Metro Charter Section 5(b)

Metro Charter Section 5(b) prohibits Metro from requiring an increase in density in single-family neighborhoods identified in the Regional Framework Plan solely as Inner or Outer Neighborhoods. HLA argues "Metro determined it must expand the boundary because it couldn't require additional efficiencies in single-family areas within the plans and land use regulations of cities and counties in the region and, consequently, didn't look for these efficiencies." HLA Objection at 15. HLA also notes, "as explicit *de jure* housing segregation by race or ethnicity is no longer allowed, local charters and land use regulations have been used to preserve and perpetuate segregated residential patterns by keeping existing single family neighborhoods intact against the threats of government-imposed densification." HLA Objection at 15, note 22.

At issue is the requirement, found in Goal 14 and OAR 660-024-0050(4) that, "Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB." This brings into consideration the question of whether requiring additional densities in the specified single-family residential neighborhoods is a "reasonable accommodation" that Metro should have required, per OAR 660-024-0050(4). The Commission concludes that it is not, because Metro's identified need is for 6,100 single-family dwelling units.

Local governments within the Metro area utilize a variety of measures to make efficient use of the land and all are required to meet minimum density standards and housing mix requirements of the Metropolitan Housing Rule. Beyond these minimum density requirements, additional measures utilized by at least some of the local governments within Metro include reduced parking requirements, allowance for accessory dwelling units (now mandatory, under ORS 197.312(5)), SDC waivers for some types of development, and reduced street sizing standards. The fact that Metro anticipates meeting 97 percent of the projected housing need over the next 20 years within the existing UGB, as discussed previously, (and 93 percent of the projected single-family housing need) demonstrates that Metro continues to make efficient use of land within its UGB, consistent with OAR 660-024-0050(4).

The Commission concludes that HLA has not established that Metro Charter Section 5(b) has impacted Metro's accommodation of its identified need within the existing UGB. The Commission finds that the record demonstrates that Metro is accommodating nearly all of its housing needs within the existing UGB. Therefore, the Commission rejects this objection.

f. Comparative Analysis of Social Consequences

The Commission rejects this objection. Metro analyzed transportation issues as a public facility under Goal 14, Boundary Location Factor 2. Record at 2108, 2116. The analysis notes impacts to roads and various modes of transportation, and includes estimated costs for providing sufficient transportation infrastructure. More detailed analysis of transportation impacts and solutions is appropriate at subsequent planning stages for the Cooper Mountain study area.

V. CONCLUSION

Based on the Commission's review and its consideration of the objections and exceptions, the Commission has rejected all objections, regardless of whether they are discussed herein, and approves the submittal from the Metro.

THEREFORE, IT IS ORDERED THAT:

Metro Ordinance No. 18-0427, expanding the Metro Urban Growth Boundary by approximately 2,100 acres, is approved.

DATED THIS 27 DAY OF JANUARY, 2020.

FOR THE COMMISSION

Jim Rue, Director
Department of Land Conservation and Development

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained pursuant to ORS 197.651(3) by filing a petition for review within 21 days from the service of this final order. Judicial review is pursuant to the provision of ORS 197.650 and 197.651(2), OAR 660-025-0040(3).

Copies of all exhibits are available for review at the department's office in Salem.

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF EXPANDING THE) URBAN GROWTH BOUNDARY TO) PROVIDE CAPACITY FOR HOUSING TO) THE YEAR 2038 AND AMENDING THE) METRO CODE TO CONFORM)
)

ORDINANCE NO. 18-1427

Introduced by Martha J. Bennett, Chief Operating Officer, with the concurrence of Tom Hughes, Council President

WHEREAS, state law requires Metro to assess the capacity of the urban growth boundary (UGB) on a periodic basis and, if necessary, to increase the region's capacity for housing and employment for the next 20 years; and

WHEREAS, Metro's previous growth management decision was made in 2015 when Metro adopted the 2014 Urban Growth Report (UGR) via Ordinance No. 15-1361, which forecasted population and employment growth in the region to the year 2035, inventoried the supply of buildable land inside the UGB, and concluded there was sufficient land capacity for the next 20 years; and

WHEREAS, in adopting Ordinance No. 15-1361 the Metro Council included a directive to Metro staff to produce a new urban growth rep01i within three years, rather than waiting six years as provided in state law; and

WHEREAS, in adopting Ordinance No. 15-1361 the Metro Council also made a commitment that Metro would work with its regional paiiners to explore possible improvements to the regional growth management process; and

WHEREAS, in furtherance of that commitment, in May 2016 Metro convened an Urban Growth Readiness Task Force consisting of 17 public and private sector representatives to develop recommendations for improving the growth management process; and

WHEREAS, the Task Force met five times between May 2016 and February 2017, and ultimately presented a set of recommendations to the Metro Council for improvements that were accepted by the Metro Council via Resolution No. 17-4764 on February 2, 2017; and

WHEREAS, the Task Force recommendations included three core concepts: (1) clarify expectations for cities proposing modest residential UGB expansions into concept-planned urban reserves; (2) seek greater flexibility for addressing regional housing needs; and (3) seek greater flexibility when choosing among concept-planned urban reserves for UGB expansions; and

WHEREAS, the Task Force recommended that Metro adopt changes in its decision-making processes to implement the three core concepts by taking an outcomes-based approach to growth management focused on specific UGB expansion proposals made by cities; and

WHEREAS, to implement the Task Force recommendations, Metro and its regional partners sought and obtained changes to state law via House Bill 2095 (2017), which allows Metro to make mid- cycle residential UGB expansions by amending its most recent inventory and analysis of the regional buildable land supply based on specific residential growth proposals brought forward by cities; and

WHEREAS, to further implement the Task Force recommendations, the Metro Council directed staff to work with the Metro Technical Advisory Committee (MTAC) on proposed amendments to the

METRO-0013

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WHEREAS, as part of this growth management decision the Metro Council is also adopting an administrative amendment to bring a 4.48 acre parcel of land in Washington County into the UGB to alleviate a significant public health hazard from a failing septic system, in order to allow existing commercial businesses on that property to connect to a City of Hillsboro sewer line; and

WHEREAS, the Metro Council held public hearings on this ordinance on December 6, 2018 and December 13, 2018; now therefore

THE METRO COUNCIL ORDAINS AS FOLLOWS:

1. The UGB is amended to add the four areas shown on Exhibit A, attached and incorporated into this ordinance, to provide capacity for housing.

2. The UGB is also amended to add 4.88 acres of land shown on Exhibit B, attached and incorporated into this ordinance, to alleviate a health hazard from a failing septic system.

3. The conditions set forth in Exhibit C, attached and incorporated into this ordinance, are applied to the UGB expansion areas as indicated on that Exhibit.

4. The Urban Growth Boundary and Urban and Rural Reserves Map in Title 14 of the Urban Growth Management Functional Plan, attached and incorporated into this ordinance as Exhibit D, is amended to reflect the UGB amendments shown on Exhibits A and B.

5. The 2018 Urban Growth Report attached as Exhibit E to this ordinance is hereby adopted as support for the Metro Council's decision to amend the Metro UGB to provide capacity for housing.

6. The Findings of Fact and Conclusions of Law attached as Exhibit F to this ordinance are hereby adopted to explain how this ordinance is consistent with state law and applicable Metro policies, and to provide evidentiary support for this decision.

7. The areas being added into the Metro UGB by this ordinance are also annexed into the Metro jurisdictional boundary as provided by ORS 268.390(3)(b).

ADOPTED by the Metro Council this 13th day of December 2018.

Tom Hughes, Council President

Attest:

Sam Farrokhzadian, Recording Secretary

Approved as to Form:

Nathan Sykes, Acting Metro Attorney

Exhibit F, Metro Ordinance 18-1427

"* * * * *

"Prior to expanding the UGB, Goal 14 requires Metro to determine that the identified housing need "cannot reasonably be accommodated on land already inside the UGB." As described above and in Appendix 5A, Metro's analysis indicates that there is sufficient capacity inside the UGB for the projected multifamily need over the next 20 years. However, the analysis also identifies a need for additional single family homes that cannot be met on land already inside the UGB. As described above and in Appendix 2, Metro's buildable land inventory determines that the existing UGB has the capacity to provide 92,300 single family units. That single family capacity relies heavily on efficient use of land inside the UGB. Approximately 61 percent of the single family capacity already inside the UGB comes from infill. When that capacity is compared to growth projections, and under the needs analysis described above, even assuming the low end of the capture rate range there is an insufficient supply of land inside the UGB to meet the identified single family need. Metro's charter prohibits Metro from requiring any increased density in existing single family neighborhoods, which significantly limits its ability to achieve any further efficiency to address single family housing demand. Metro also notes that the methodology it employs for creating the buildable land inventory accounts for locally adopted measures that would increase local capacity."

"Further, while there is not an objective standard for what could "reasonably be accommodated on land already inside the UGB" under Goal 14, the state Metropolitan Housing Rule provides some guidance. All cities and counties in the region have comprehensive plans that have been acknowledged by the DLCD, indicating that they are in compliance with that rule. This compliance indicates that cities and counties in the region have taken reasonable actions to accommodate housing growth on land already inside the UGB." Metro Rec. 1055-56, LCDC Rec 1085-86.

"*****

DLCD Comment Letter to Metro, August 18, 2018

"* * * *

"Metro's Urban Growth Report shall provide the calculation of identified need for housing in the region. Goal 14 requires a local government to find, prior to an expansion of a UGB, that the housing need identified "cannot reasonably be accommodated on land already inside the urban growth boundary." Metro will be relying on concept plans and housing needs analyses (HNA) prepared by the four cities that have submitted proposed expansions of the Metro UGB to make this determination. In addition, Metro will need to determine that the identified need cannot be reasonably accommodated by other cities within Metro that have not submitted concept plans for UGB expansions.

"While it is appropriate for Metro to concentrate its attention on the cities that have submitted a concept plan for a UGB expansion when looking at this provision of Goal 14, Metro will need to provide findings that demonstrate that all the cities within Metro have adopted measures within the UGB which will reasonably accommodate as much of the demonstrated housing need as is feasible." Metro Rec 1461, LCDC Rec 1490

Housing Land Advocates

January 30, 2019

BY EMAIL: DLCD.PR-UGB@state.or.us

Jim Rue, Director
c/o Periodic Review Specialist
Oregon Department of Land Conservation and Development
635 Capitol Street NE Suite 150
Salem, OR 97301

Re: Metro Urban Growth Boundary Expansion Submission

Dear Director Rue:

This letter is submitted on behalf of Housing Land Advocates (HLA), a nonprofit organization that advocates for land use policies and practices that ensure an adequate and appropriate supply of affordable housing for all Oregonians. The Department and Commission have jurisdiction over these proceedings under ORS 197.626(1)(a).

HLA objects to the acknowledgment of the expansion of the Portland Metro Urban Growth Boundary (UGB), following proceedings before Metro in which HLA participated by letter of December 4, 2018, for the reasons that follow.

I. INTRODUCTION

Oregon's Needed Housing Statute (ORS 197.296), Housing Goal (Goal 10), and Goal 10 Interpretive Rules (OAR 660-007 and 660-008) require local governments to develop Buildable Lands Inventories and adopt comprehensive plan and zoning regulations that designate lands for Needed Housing using standards and procedures sufficient to assure compliance with the statewide Housing statutes, goals, and rules. If these measures, including so-called "efficiency measures," are insufficient to meet the entire identified need, then[1] cities must expand their urban growth boundaries to accommodate that excess need.

Unfortunately, experience has shown that Oregon's land use program has been far more successful in meeting demand for well-served, well-located, and efficiently-entitled high-end residential housing of all types, whether owned or rented, single or multi-family, than it has in meeting demand for affordable housing of any type in any but the least-desirable, least accessible, least healthy settings.

[1] And only then, to comply with Goal 14, Oregon's statewide Urbanization Goal.

Since up-market demand is so strong and supplies are so constrained here, housing type alone has proven to be a failure, both as a proxy for affordability and as an assurance of flexibility of housing location.

As a result, low income housing has been effectively excluded from safer neighborhoods with access to better schools, convenient groceries, and either reasonable proximity or good transit access to jobs, services, health care, and other vital services.

The connection between implementing measures, affordability, and locational diversity must be made, and it must be realistic in terms of potential yield during the relevant planning period. As the LCDC has recognized, in rejecting one city's attempt to demonstrate compliance with Goal 10 and the Needed Housing Statute:

> "Goal 10, the Goal 10 implementing rule, and the needed housing statutes also require that the City analyze needed housing types at particular price ranges and rent levels commensurate with the financial capabilities of present and future residents of area residents. The city's record contains much information on projected population and income levels, but neither its adopted plan policies nor its findings clearly tie together how the types and amounts of housing that it is planning for will be affordable for future residents of the area." 2010 LCDC Bend UGB Remand Order, p 31

> "The department found that the city failed to comply with the requirement in ORS 197.307 and Goal 10 to permit needed housing in one or more zoning districts with sufficient buildable lands to satisfy housing needs at particular price ranges and rent levels. The city's findings, studies and the Housing Element of its General Plan show a significant need for housing for low and moderate income households, along with a need for workforce housing. R. at 1072-1079(findings); R. at 1305-13 (Housing Element of the city's General Plan)." 2010 LCDC Bend UGB Remand Order p 33

From that base, HLA presents its objections to the Metro UGB expansion:

II. OBJECTIONS

A. OBJECTION NO. 1 – Metro's Federal Fair Housing Obligations

Metro is a recipient of substantial federal funding and is subject to oversight by DLCD. In its objections to Metro, attached, HLA asserted that Metro had obligations to affirmatively further fair housing and otherwise to meet the Fair Housing Act, as amended, 42 U.S.C. §§ 3601-3619 (FHAA). These obligations are also found in state law. ORS 459A.001(9)(b) and .421-.425. In its findings, Metro denied any legal responsibility for its actions in this area.[2]

[2] For example, Metro states:

> "* * * HLA then asserts that, as part of a UGB expansion, "Metro must use its authority to require cities and counties to change their plans and regulations to comply with the FHA." HLA cites no authority under which Metro is tasked with applying the FHA as part of a UGB expansion, and Metro is aware of no such

The Federal Fair Housing Act, 42 U.S.C. 3604 provides in material part:

"[I]t shall be unlawful—

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.*
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or *in the provision of services or facilities in connection therewith*, because of race, color, religion, sex, familial status, or national origin." (Emphasis added).

The obligation to affirmatively further fair housing applies to recipients of federal housing and community development funds. The State of Oregon receives such funds and is, therefore, obligated to ensure all of its activities that affect housing affirmatively further fair housing.[3] Thus, DLCD must also ensure its policies and actions affirmatively further fair housing. At a minimum, this means informing local jurisdictions of the factors it will consider and the information it requires when reviewing planning decisions for compliance with their fair housing obligation. With or without this guidance Metro's decision and its analysis on an expansion of the urban growth boundary must comply with the obligation to affirmatively further fair housing if DLCD is to review and affirm Metro's decision.

As shown below, the FHA applies to land use plans and regulations which, although enacted and implemented by local governments, are subject to state supervision under ORS Chapter 197.

The State of Oregon in its *2016-2020 Analysis of Impediments to Fair Housing Choice*,[4] at § VII, p. 2 identified the following impediment to fair housing in the state:

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authority.

There are at least two grounds for Metro's FHA obligations. As indicated elsewhere in these objections, Metro receives and distributes federal grant funds for transportation and other uses and Metro functionally acts as a local government that controls the use of land. *See inter alia* ORS 268.380-.390 and Metro Code (MC) 3.07.730 to .740, 3.07.810; 3.07.850; 3.07.1110(d); 3.07.1120(c) and 3.07.1425.

[3] Oregon acknowledges its obligation to implement planning and zoning regulations in a way that affirmatively further fair housing. "For all of these reasons, it is important that state governments review their zoning, subdivision and land development authorizing legislation to ensure that they do not create unnecessary barriers to private production of affordable housing. It is also important that states take reasonable steps to ensure that state grants of power to regulate housing or to address affordable housing needs do not unintentionally create barriers to fair housing choice. Attachment 1 *State of Oregon Analysis of Impediments to Fair Housing 2016-2020*, Appendix A. p. 5, and Section II, p.1.

[4] The State describes this report as a "HUD-required assessment of barriers to fair housing choice" and noted the

> Impediment 1-1. Lack of affordable, accessible housing, including housing available for persons with disabilities who wish to leave nursing homes or other institutional settings.[5]

The Fair Housing Act prohibits a broad range of housing and land use practices that discriminate against individuals on the basis of seven protected characteristics: race, color, national origin, sex, disability, family status (families with children), and religion.[6] The Supremacy Clause of the U.S. Constitution gives federal laws, such as the FHAA, precedence over conflicting state and local laws. Consequently, the Act prohibits state, local and regional governments from enacting land use and zoning laws, policies, and practices that discriminate based on a characteristic protected under the FHAA.[7] As defined in the Act, prohibited practices include making unavailable or denying housing (including vacant land that may be developed into residences)

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state is to conduct this analysis every five years "as a condition of receiving federal block grants funds for housing and community development." That analysis is attached here as Attachment 1.

[5] Indeed, the research used to justify the State's conclusion includes the following:

> Research Finding #6. Oregon's state laws may limit the ability of cities and counties to employ programs that are known to create a significant amount of affordable units in many other jurisdictions.
>
> Barrier 6.1. The state's ban on the use of inclusionary zoning limits municipalities' ability to employ flexible tools and incentives to increase the number of affordable units built. Lack of affordable units limits housing choice for persons of color and low income persons.
> Impediment 6-2. The lack of affordable units significantly limits housing choice for persons of color and low income persons.

One of the remedies for identified impediments expressly called attention to the post-acknowledgment planning process as a remedy to housing discrimination:

> Fund pilot program to review Post Acknowledgement Plan Amendments submitted to DLCD to identify land use proposals with a potentially discriminatory impact. Moderate priority, Short term effort.

The state itself recognizes its role in using its unitary land use system as a means of combating housing discrimination. In these objections, HLA requests that the Department and Commission acknowledge their respective roles in meeting that existing discrimination and not perpetuating the same by requiring Metro to analyze the proposed amendments under state and federal fair housing laws and regulations and submitting any UGB amendments consistent with the same.

[6] The Fair Housing Amendments Act (FHAA) 42 U.S.C. 3601 et seq., was signed into law on September 13, 1988, and became effective on March 12, 1989. The Act amends Title VIII of the Civil Rights Act of 1968, which prohibits discrimination on the basis of race, color, religion, sex or national origin in housing sales, rentals, advertising, financing and land use and zoning.

[7] Joint Statement of The Department of Housing and Urban Development and The Department Of Justice. State and Local Land Use Laws and Practices and the Fair Housing Act. Available at https://www.fairhousingnc.org/wp-content/uploads/2016/11/HUD-DOJ-Joint-Statement-re-Land-Use-11-10-2016.pdf. See also HUD and DOJ Update Fair Housing Act Guidance about Land Use Laws (2018) at *https://nlihc.org/article/hud-and-doj-update-fair-housing-act-guidance-about-land-use-laws and the statement itself at* http://bit.ly/2emU4kE

because of a protected characteristic. The Act has been broadly interpreted by the Courts to prohibit virtually all forms of differences in treatment based on any of the protected characteristics, and has been interpreted to apply to differences in the impact of otherwise neutral policies and practices.[8]

Liability under the Act may be established by showing intentional discrimination or by showing that a defendant's acts have a significant discriminatory effect. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys.* Project, Inc., 135 S. Ct. 2507 (2015). Discriminatory effect may be proven by showing either (1) adverse impact on a particular minority group or (2) harm to the community generally by the perpetuation of segregation. *Huntington Branch NAACP v. Town of Huntington,* 844 F 2d 926, 937 (2nd Cir.), *aff'd,* 488 US 15, 109 SCt 276, 102 LEd2d 180 (1988); *see also, Summerchase Ltd. Partnership I v. City of Gonzales,* 970 FSupp 522, 527-28 (M.D.La. 1997).

State, local and regional forms of government are required to comply with the various requirements of the Act. HUD's guidance, issued in connection with the publication of its final rule on disparate impact, explains that a discriminatory housing practice is broadly construed to include "any facially neutral actions, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria."[9]

The Metro Charter requires that Metro address growth management and land use planning matters of metropolitan concern. To do so it has adopted policies that guide Metro's actions and decisions in areas involving development of centers, corridors, station communities, and main streets, housing choices, employment choices and opportunities, economic vitality, urban and rural reserves, management of the Urban Growth Boundary (UGB), urban design and local plan and policy coordination as well as affordable housing.[10] Metro's actions and decisions in regional land use planning impacts the density and distribution of housing, including affordable housing, and housing patterns of protected class households within the metropolitan area. As a result, Metro's actions and decisions have the same effect as local zoning decisions and must also comply with the Fair Housing Act Amendments.

Metro does not directly engage in conventional local zoning of land in that it does not adopt zoning ordinances that allocate and regulate development or redevelopment, or

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[8] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,* 135 S Ct 2507 (2015).

[9] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013), available at https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF and attached here, as Attachment 2. HLA also attaches its December 4, 2018 letter of objection and refers the Department and Commission to that document, with particular reference to the federal issues raised in these objections, as Attachment 3.

[10] The Regional Framework Plan provides overall guidance for detailed policies with regard to, among other things, housing densities, urban design and settlement patterns. Available at: https://www.oregonmetro.gov/sites/default/files/2015/06/19/Regional-Framework-Plan-Chapter1-LandUse-20150318-final%20%28MD-15-8552%29.pdf

redevelopment of specific properties or groups of property. That local planning and zoning responsibility is assigned to cities and counties within Metro's regional planning area.[11] However, in Oregon's top-down hierarchical regime of local, regional, and state land use planning and zoning authority and responsibility, Metro retains and exercises significant regional land use regulatory authority. Metro is authorized and required by Oregon's statewide land use statutes, goals, and rules to regulate the local land use regulatory authorities within its territory in meeting their local and regional responsibilities under the statewide housing goal, the needed housing statutes, and LCDC's administrative rules.

Zoning and planning both involve the use of property. In Oregon, as elsewhere, planning is the broader concept. Planning generally concerns the overall development of a community. This includes the establishment of binding standards for orderly growth and development, including methods for implementation and achievement of those standards and specification of standards for implementing zoning codes and classifications. Zoning in Oregon is almost exclusively concerned with use regulation whereas planning involves both the aspirational planning of a community and the establishment of prescriptive planning maps and a range of enforceable plan map designations, services, schedules, standards, prohibitions, and other legally-enforceable requirements for implementing local plans, zoning codes, and zoning maps. Here, as elsewhere, planning contemplates the evolution of an overall program or design of the present and future physical development of the total area and services of an existing or contemplated municipality. Thus, zoning is part of the result or product of planning. See *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co*. 444 Md 490 (2015). *Baltimore Cnty. v. Wesley Chapel Bluemount Ass'n* 678 A2d 100 (1995) *rev'd on other grounds* 699 A2d 434, (1996), *Mueller v. People's Counsel for Balt. Cnty,* 177 Md App 43 (2007). In Oregon, however, plans are laws, not advice. *Baker v. Milwaukie*, 271 Or 500, 533 P2d 772 (1975). *See generally*, Knaap and Nelson, *The Regulated Landscape: Lessons on State Land Use Planning from Oregon*, Lincoln Inst. Of Land Use Policy (1992)

In the final analysis, Metro's obligation to affirmatively further fair housing may be considered derivative of DLCD's obligation as DLCD's compliance is derivative of the State's. DLCD, as an agency of the State of Oregon, is bound, especially in light of its own *2016-2020 Analysis of Impediments to Fair Housing Choice* in its actions on the Metro UGB change.[12] The Department must undertake this analysis at this time.

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[11] Metro responds to HLA's objections by saying in material part:

> Metro recognizes that courts have held that the FHA prohibits local zoning that has the effect of discriminating against individuals based on protected characteristics such as race, sex, and disability. However, Metro is not a local government with zoning authority, and Metro does not zone property.

[12] A fairly good collection of those obligations is found in two sections of the website of the Texas Department of Housing and Community Affairs, *The Fair Housing Act and Related Laws* at *https://www.tdhca.state.tx.us/fair-housing/policy-guidance.htm* and that state's treatment of its own Analysis of Impediments at https://www.tdhca.state.tx.us/fair-housing/analysis-impediments htm.

Moreover, distribution patterns of housing by type, tenure and cost determine the degree to which a municipality is either integrated or segregated. *LeBlanc-Sternberg v. Fletcher*, 67 F3d 412, 424 (2d Cir. 1995) (zoning restrictions

Also relevant is HUD's Affirmatively Favoring Fair Housing (AFFH) Rule, the current application of which is under litigation but which HLA believes to be applicable to this proceeding. As described by the Congressional Research Service:

> Another provision of the Fair Housing Act requires that HUD affirmatively further fair housing (AFFH). As part of this requirement, recipients of certain HUD funding—jurisdictions that receive Community Planning and Development grants and Public Housing Authorities—go through a process to certify that they are affirmatively furthering fair housing. In July 2015, HUD issued a new rule governing the process, called the Assessment of Fair Housing (AFH). The rule provided that *funding recipients are to assess their jurisdictions and regions for fair housing issues* (including areas of segregation, racially and ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs), identify factors that contribute to these fair housing issues, and set priorities and goals for overcoming them. HUD is to provide data for program participants to use in preparing their AFHs, as well as a tool that helps program participants through the AFH process. However, as of May 2018, HUD has indefinitely delayed implementation of the AFFH rule. In response, a group of advocacy organizations has filed a lawsuit challenging HUD's failure to implement and enforce the rule.[13] (Emphasis added).

If the rule is found to be in place, Metro would also be obliged to undertake this process in administering its land use related activities, including UGB changes.

Necessary Work Tasks:

Metro must review the application of the FHA to this UGB expansion decision, utilizing the data that is available from HUD and census information. Metro must use its GIS mapping capability in conjunction with data from member cities and counties to prepare an assessment of fair housing on a regional basis so that it can make an informed UGB expansion decision that accommodates affordable housing in all its jurisdictions and does not lead to the perpetuation of segregation.

Metro must analyze the housing data for the four cities that seek expansion here to determine whether housing policies do in fact affirmatively further fair housing rather than cater

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may constitute discriminatory housing practice); *Huntington Branch NAACP v. Town of Huntington,* 844 F2d at 936-38 (zoning that restricted multi-family housing to certain geographical areas adversely affected minorities and perpetuated segregation). Affordable housing is a critical issue in the metropolitan region not only in terms of supply but also in terms of cost and an equitable distribution across the region. Disparities in wealth, home ownership, income, employment and education are all factors that impact minority households' ability to access housing based on cost alone. Piecemeal decisions regarding the expansion of the UGB will not address the need and legal obligation for integrated residential housing patterns in the region.

[13] *See* Congressional Research Service, *The Fair Housing Act: HUD Oversight, Programs, and Activities July 6, 2016 – June 15, 2018* at https://www.everycrsreport.com/reports/R44557 html.

to additional high-end single family development, and revise the meaningless conditions that Metro imposed in this decision in accordance with these work tasks.

B. <u>OBJECTION NO. 2 – Metro's proposed order fails to demonstrate that the UGB expansion complies with Goal 10, the Needed Housing Statutes, and Planning Obligations under Metro Code Chapter 3</u>

Metro's Regional Functional Plan Requirements, Title 1: Housing Capacity demonstrates that Metro is obligated to plan for compact urban form that ensures the provision of all housing types and needs. In light of the ongoing housing crisis and the requirements of Statewide Planning Goal 10, Metro has an imperative planning obligation to review existing shortcomings throughout the Metro region relating to the provision of housing for the most vulnerable community members. Metro's code demonstrates its gatekeeper function, where, for example, it places obligations on local governments to only negligibly reduce minimum residential zoning density. Metro Code 3.07.120(E) provides:

> A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a *negligible effect* on the city's or county's overall minimum zoned residential capacity. (Emphasis added).

The context of this provision is Metro's Code chapter 3.07 as a whole, the purpose of which is set out at §3.07.110:

> The Regional Framework Plan calls for a compact urban form and a "fair-share" approach to meeting regional housing needs. It is the purpose of Title 1 to accomplish these policies by requiring each city and county to maintain or increase its housing capacity except as provided in section 3.07.120.

Metro Code Chapter 3.07 is meant to implement ORS 197.296, especially subsection 6, which requires Metro to either require greater density on existing lands within the UGB or expand that boundary.

The issue raised under this code section is rooted in LUBA's decision in *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017) in which Petitioner challenged a change in designation of a parcel of 4.78 acres from Mixed Use Residential – Medium (which allows single and multifamily residential uses to Mixed Use Residential – Single Family to eliminate the possibility of multifamily uses and accommodate a 31-lot single family subdivision. The reduced density provided for by the redesignation was assailed on a number of grounds, beginning with the statutes relating to needed housing (ORS 197.307(3) and (4)). This statute requires Metro to take the lead on reviewing urban communities' compliance with the needed housing obligations.

Petitioners also raised compliance with Goal 10 and OAR 660, Division 007. LUBA did not directly address Petitioners' Goal 10 arguments, but framed Goal compliance in terms of Division 007. In these objections, HLA now raises *both* compliance with the Goal and Division

007 because Metro's UGB expansion is the time for demonstrating compliance with both, as well as the needed housing statutes.

Goal 10 provides:

"To provide for the housing needs of citizens of the state.

Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

The Goal must also be interpreted under Oregon's Needed Housing Statutes, ORS 197.295 to .314, *of which ORS 197.296 and .299-.302 are material parts*. LUBA's *Happy Valley* opinion seems to carve out an exemption to Goal 10 compliance by suggesting the more specific provisions of ORS 197.296 somehow overcome, *inter alia*, the needed housing provisions of ORS 197.307 and Goal 10. As HLA argued before LUBA and reasserts here, LUBA's conclusion is incorrect even in an individual-member city zone change context where Metro has put on its blinder. In any event, LUBA's decision is not binding on Metro, DLCD, or LCDC. Even if it were correct on its facts, it would only apply to individual local amendments. There is no justification for such a reading of ORS 197.307(3)[14] in these proceedings. HLA contends that ORS 197.296, 197.299 to .302 and 197.307 must be harmonized with each other and with Goals 10 and 14. See e.g. *1000 Friends v. Yamhill County and LCDC*, 244 Or App 239, 259 P33d 1021 (2011).[15]

So how is this amalgam to be applied here? We begin with ORS 197.296(6), which provides that if housing need is greater than housing capacity, Metro must either amend its UGB, as proposed here, *or*:

Amend its comprehensive plan, regional framework plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary. A local government or metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures;

When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

[15] "We are constrained to construe ORS 197.298 in a way that gives effect to all of its terms. 'As a general rule, we assume that the legislature did not intend any portions of its enactments to be meaningless surplusage.'" *State v. Stamper*, 197 Or App 413, 417, 106 P3d 172, *rev den*, 339 Or 230, 119 P3d 790 (2005); *see also* ORS 174.010 ("In the construction of a statute, * * * where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.")."

or undertake a combination of the two. Assuming that Metro has made the case on need and capacity, it could entertain expansion of the UGB.[16] LUBA rejected the objection in *Happy Valley* that a redesignation to a lower density violated ORS 197.307(3) and (4) because of the more particular provisions of ORS 197.296, and concluding that the Metro Housing Rule did not require reassessment of housing types and densities except at periodic review (which is before the Department and Commission now) under OAR 660-007-0060:

> (1) The new construction mix and minimum residential density standards of OAR 660-007-0030 through 660-007-0037 shall be applicable at each periodic review. During each periodic review local government shall prepare findings regarding the cumulative effects of all plan and zone changes affecting residential use. The jurisdiction's buildable lands inventory (updated pursuant to 660-007-0045) shall be a supporting document to the local jurisdiction's periodic review order.
>
> (2) For plan and land use regulation amendments which are subject to OAR 660, Division 18, the local jurisdiction shall either:
>
> (a) Demonstrate through findings that the mix and density standards in this Division are met by the amendment; or
>
> (b) Make a commitment through the findings associated with the amendment that the jurisdiction will comply with provisions of this Division for mix or density through subsequent plan amendments.

Metro is a "local government" under ORS 197.015(13) and the needed housing statutes and thus must prepare findings of all plan and zone changes affecting residential use under subsection (1). On this record, Metro has failed to do so. Instead, it has focused on four specific areas where it has projected growth, using its existing plan and zoning designations as an unexamined baseline.[17] Moreover, not only has Metro failed to examine past density–downward

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[16] HLA only assumes these things for purposes of discussion and has challenged elsewhere in these objections the choice of expansion of the UGB over the choice to increase its efficiency without a UGB expansion, as Goal 14 provides, *inter alia*:

> Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary

As advised by DLCD in its letter to Metro of December 5, 2018, Metro must *also* show that other portions of the region cannot reasonably accommodate identified needs and that all cities have adopted measures to accommodate housing needs as much as feasible. We do not believe either of these showings has been made.

[17] Metro is required to review all the plans and land use regulations for the urban lands of its constituent cities and counties at this periodic review and assure that needed housing is provided for on a regional basis under "coordinated comprehensive planning," under OAR 660-007-0050:

> (1) At each periodic review of the Metro UGB, Metro shall review the findings for the UGB. They shall determine whether the buildable land within the UGB satisfies housing needs by type and density for the region's long-range population and housing projections.

redesignations, it has refused to assure that the UGB will function to provide adequate types and densities even as attrition occurs as a result of Metro's failure to examine future redesignations for that purpose.

This objective may be achieved by adopting adequate ordinance provisions to assure in the implementation of subsection (2) that ORS 197.296(6)(a)'s provisions for including "sufficient buildable lands for the next 20 years" are met. Those provisions are also set out in ORS 197.307(3) and (4) and Goal 10, which are neither superseded by ORS 197.296, nor inconsistent with the same. And if it is asserted that no such boundary-assurance obligations are required under Division 007, HLA asserts that such interpretations, or the rules themselves, are inconsistent with Goals 10 and 14, as well as the needed housing statutes.

Metro is obliged to assure that required housing types and densities will not slip away between periodic reviews by adopting adequate measures to that end under ORS 197.296(7):

> Using the analysis conducted under subsection (3)(b) of this section, the local government shall determine the overall average density and overall mix of housing types at which residential development of needed housing types must occur in order to meet housing needs over the next 20 years. *If that density is greater than the actual density of development determined under subsection (5)(a)(A) of this section, or if that mix is different from the actual mix of housing types determined under subsection (5)(a)(A) of this section, the local government, as part of its periodic review, shall adopt measures that demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years.* (Emphasis added).

The only provision Metro has made to accommodate the "measures that demonstrably increase" the likelihood that the UGB will not be undermined is Metro Code 3.07.120(E), which provides:

> A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city's or county's overall minimum zoned residential capacity.

Combined with conditions imposed on granting of UGB expansions and other Metro ordinances to review and safeguard the integrity of the boundary, ORS 197.296(7) could be met. The statute is not met in this case, however, as no such safeguards are provided.

> (2) Metro shall ensure that needed housing is provided for on a regional basis through coordinated comprehensive plans.

Moreover, Metro has submitted these amendments to its Framework Plan with the apparent consent of the Department and Commission under ORS 197.274(2), so that the entire Metro planning structure, i.e., its Framework Plan and Land Use Code provisions, including Chapter 3.07 of the Metro Code, are before the Department and Commission in these proceedings. *See also* ORS 197.296(2).

Other portions of the Metro Housing Rule apply here as indicated by the Department's December 5, 2018 letter to Metro, i.e., the "50-50 rule" that requires at least half of new construction to be attached single-family or multifamily construction *across the region* and the 6-8-10 rule that requires minimum densities in each city in the region. Neither Metro, nor the State, can "cherry pick" as to review only the expansion areas. Unless Metro can show that *all* parts of the region meet these rules, it cannot justify the expansions (largely for detached single-family housing) it approved in this case. We do not believe Metro has made this case.

Metro, as a planning agency, must lead the charge, rather than react to member-jurisdiction's insatiable appetite for more land for single-family homes. In order to comply with applicable statutes, goals and rules, Metro must reconsider both the need to amend its UGB and its compliance with the standards raised above to accommodate housing, especially needed housing.

Necessary Work Tasks:

Prepare a region-wide assessment of the existing UGB's ability to meet housing needs before considering a proposed UGB expansion under the requirements of state law, and Goal 10.

C. <u>OBJECTION NO. 3 – Metro Has Failed to Justify the Need to Expand the UGB</u>

Substantial evidence or adequate statements of reasons in violation of Goal 2 and of applicable statutes, goals, and rules requiring Metro to demonstrate compliance therewith must be included in the proposed order before authorizing the subject UGB expansion.

As LCDC explained in its 2010 order remanding the proposed Bend Urban Growth Boundary expansion:

> "In determining compliance with Goal 2, the Commission considers whether the submittal is supported by an adequate factual base. The city's and county's decisions on the UGB and related plan and code amendments are legislative decisions. The Goal 2 requirement for an adequate factual base requires that a legislative land use decision be supported by substantial evidence. *1000 Friends of Oregon v. City of North Plains,* 27 Or LUBA 372, 376-378, *aff'd* 130 Or App 406, 882 P2d 1130 (1994), *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999)."
>
> "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c) and *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Where the evidence in the record is conflicting, if a reasonable person could reach the decision the city made in view of all the evidence in the record, the choice between the conflicting evidence belongs to the city. *Mazeski v. Wasco County,* 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995)."

> "Because the UGB amendment and related submittals embody both basic findings of fact and inferences drawn from those facts, substantial evidence review involves two related inquiries: "(1) whether the basic fact or facts are supported by substantial evidence, and (2) whether there is a basis in reason connecting the inference to the facts from which it is derived." *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271, 639 P2d 90 (1981). Where substantial evidence in the record supports the adopted findings concerning compliance with the goals and the Commission's administrative rules, the Commission nevertheless must determine whether the findings lead to a correct conclusion under the goals and rules. *Oregonians in Action v. LCDC*, 121 Or App 497, 504, 854 P2d 1010 (1993)." LCDC Order No. 10-REMAND-PARTIAL ACKNOW-001795 (Nov. 2, 2010), at Pages 8-9. (See also, DLCD Order No. 001775, as partially incorporated therein.)

The requirements of substantial evidence and adequate findings for review extend to evidence and findings concerning future capacity. See *Barkers Five, LLC v. Land Conservation*, 261 Or App 259, 323 P3d 368, 419-420 (2014).[18]

Even assuming that Metro's population projections are correct, those numbers do not automatically translate into a justification to expand the UGB in and of themselves, because there is additional capacity overlooked in the Metro capacity calculations. Moreover, if in fact the area within the existing UGB can accommodate many more additional dwelling units, that miscalculation may also affect the quite separate Metro determination to grow "up or out" under ORS 197.296(6).[19] HLA contends that Metro incorrectly calculated existing capacity in several ways:

a. Effect of ORS 197.312(5) on capacity calculations. The 2017 legislature required all cities over 2,500 and all counties over 15,000 to require accessory dwelling units be allowed in single-family detached structures. This legislation dramatically changes the capacity of the boundary, does not appear to be reflected in Metro's findings on capacity (nor in the figures that deal with capacity) and thus undermines the case for a boundary expansion. The statute demonstrates the

[18] "Stated simply, Metro and the county's reasoning reduces to nothing more than the proposition that the transportation system will change—and presumably improve—by 2060. However, Metro and the county do not explain, by reference to the evidence in the record, why that is so. Bluntly: Metro and the county's reasoning—which LCDC essentially adopted in resolving the substantial evidence challenge—is impermissibly speculative." *Id. at* 380.

[19] HLA is aware of the portion of ORS 197.296(5) that provides that the determination of housing capacity and need "must be based on data relating to land within the urban growth boundary that has been collected since the last periodic review or five years, whichever is greater." However, these provisions do not require that Metro use a "straight-line" approach that continues the trends of the last 5 years if housing needs for multifamily use are greater than those indicated by the trends. The needed housing statutes and Goals 10 and 14 require planning and allocation of residentially designated lands to provide for the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density. The five-year data is the beginning of the exercise, not its end.

unclear whether all Metro jurisdictions have lifted restrictions or prohibitions on manufactured homes as a residential use under ORS 197.303(c) and (d), 197.307(8) and 197.314, which would also open up housing capacity.

b. Metro Charter Limitations – At pp. 10-11 of Metro's findings, there is a remarkable statement that appears to exempt from consideration any changes to existing single-family neighborhoods, based on an interpretation of Metro Charter, Section 5(b), which provides in relevant part:

> (b) Density Increase Prohibited. Neither the Regional Framework Plan nor any Metro ordinance adopted to implement the plan shall require an increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods.[22]

Thus, Metro determined it must expand the boundary because it couldn't require additional efficiencies in single-family areas within the plans and land use regulations of cities and counties in the region and, consequently, didn't look for these efficiencies. In fact, as shown below, Metro conducted no analysis of areas other than the four cities that requested additional urban lands through this inspection.

The subject decision is not supported by substantial evidence or adequate findings supporting Metro's determination of need for expansion of the current UGB because Metro unlawfully excluded any consideration of existing neighborhoods.

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[22] Metro's Functional Plan includes a provision that implements the charter restriction. Section 3.07.1220 provides that "Metro shall not require any city or county to authorize an increase in the residential density of a single-family neighborhood in an area mapped solely as Neighborhood." Like the underlying charter provision, this language is also preempted or, if not preempted, disables Metro from providing DLCD and LCDC with a legally and factually supportable urban growth boundary expansion submittal.

However, as explicit *de jure* housing segregation by race or ethnicity is no longer allowed, local charters and land use regulations have been used to preserve and perpetuate segregated residential patterns by keeping existing single family neighborhoods intact against the threats of government-imposed densification. *See* Parisa Ijadi-Maghsoodi, *Redlining in Our Era: Land-Use Voter Initiatives*, (2018) Sargent Shriver National Center for Poverty Law at http://povertylaw.org/clearinghouse/articles/Ijadi-Maghsoodi, which concludes:

> Just as white families used now-unlawful exclusionary zoning to prevent integration of suburbs, homeowners now employ land-use voter initiatives to achieve the same ends.

See also Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

It should be clear to all by now that ORS 197.013, Oregon's Needed Housing Statutes, and LCDC's Housing Goal do not allow a local government to accommodate white privilege by building a wall around these areas to avoid affordable housing. Metro's Charter provision must yield to Oregon's needed housing statutes, Goals and rules.

Metro made the following finding concerning the capacity of existing neighborhoods:

> ". . . there is an insufficient supply of land inside the [existing Metro] UGB to meet the identified single-family need. Metro's charter prohibits Metro from requiring any increased density in existing single-family neighborhoods, which significantly limits its ability to achieve any further efficiency to address single family [attached and detached] housing demand." Metro also notes that the methodology it employs for creating the buildable land inventory accounts for locally adopted measures that would increase local capacity."

Metro's findings do not set forth the referenced charter text. They do not identify, quantify, or assess the potential capacity of those lands to accommodate the identified need absent the referenced self-imposed restriction on Metro's ability to comply with the statutory requirements of ORS 197.296 and the Urbanization Goal to demonstrate a lack of capacity before expanding an Urban Growth Boundary. They do not reference or take into account the housing measures required of local governments under SB 1051 (ch. 745, Or. Laws 2017). They do not identify or assess the likely effects of any efficiency measures in increasing that capacity as required by ORS 197.296 prior to expansion of an Urban Growth Boundary. Nor do they deal with the alternatives presented by home and room sharing to end homelessness by limiting or prohibiting short-term rentals. *See* Attachment 5, *An Analysis of Homelessness & Affordable Housing Multnomah County, 2018* at p. 24.

The finding also do not explain why such a self-imposed charter restriction overrides state standards and procedures for establishing and enhancing existing capacity before expanding an Urban Growth Boundary. They do not explain why Metro and its constituent jurisdictions are exempt from requirements imposed on Oregon's other urban areas.

HLA contends, in the alternative that:

1. the subject charter provision is preempted by the requirements of ORS 197.296, Goal 14, Goal 10, and LCDC's rules interpreting those goals and statutes; or

2. Until it repeals the subject charter language, Metro has disabled itself from meeting the requirements of state statutes and goals for a sufficient demonstration of an existing capacity shortage and of a need to expand the Metro UGB to meet that need.

Metro does not remedy the deficiency with its notation concerning locally adopted measures. It does not identify those measures. It does not say how and

whether those measures qualify as "efficiency measures" within the meaning of ORS 197.296. It does not say where and whether those measures currently apply or where and whether they are going to apply. It does not even say whether they are in force. It provides neither quantitative nor qualitative analysis or evidence of any kind. Both are essential to a sustainable existing capacity determination.

Local or regional charters may not excuse local and regional governments from following state law. See, e.g., *Stadelman v. City of Bandon*, 173 Or App 106, 20 P 3d 857 (2001) *rev den* 333 Or 73, 36 P3d 974 (2001)("The statutes [regulating landfill permitting] are preemptive to the extent of their inconsistency with the charter provisions, regardless of whether they have any broader preemptive effect. See *La Grande/Astoria v. PERB,* 281 Or 137, 148-49, 576 P2d 1204, *on rehearing* 284 Or 173, 586 P2d 765 (1978).").

In *Stadelman*, LUBA ruled that state statutes preempted the City of Bandon's charter provisions capping its refuse disposal rates, thereby preventing the city from meeting statutory obligations and standards for landfill bonding.

Similarly, Metro's charter limitation, as applied in the subject decision, purportedly enables Metro to evade its statutory obligation to refrain from expanding its urban growth boundary unless it has first established the 20-year capacity of its existing urban growth area including added capacity gained by the use of "efficiency measures" to enhance the capacity of underutilized residential lands. For this reason, the charter provision is invalid as applied. At the very least, it renders the current submittal legally and factually insufficient to support the proposed UGB expansions.

At the same time, the charter limitation prevents Metro from meeting its statutory obligation to maintain a rolling 20-year residential land supply by reevaluating that supply and projected needs every six years and expanding that boundary based upon a statutorily-prescribed analysis, which is fatally-compromised by Metro's exclusion from that analysis of measures to enhance capacity of existing neighborhoods. For this reason, the charter provision is facially invalid because it conflicts with Metro's long-term obligations to correctly update and maintain its HNA, BLI, and UGB and to ensure that all of its constituent cities can and do carry out their local obligations to plan, zone, and inventory in accordance with Goal 10 and the Needed Housing statutes.

Contrary to the Metro charter restriction, Oregon's Needed Housing Statutes, goals, and rules require Metro to assure that it and its constituent jurisdictions can "reasonably accommodate" as much of its future growth as possible within its existing UGB. As part of that demonstration, ORS 197.296, Goal 14 and OAR 660-024-0050(4) require Metro to establish that its projected needs for future land uses cannot reasonably be accommodated on land within its existing UGB, including through the use of "efficiency measures." 197.296(6)(b).

Goal 14 applies in addition to this statutory provision, to require Metro, as well as cities and counties outside of Metro, to consider additional, reasonable, efficiency measures without regard to self-imposed constraints such as a charter provision exempting "existing neighborhoods" and thereby creating vast single-family zoning "sanctuaries."

Goal 10 and ORS 197.296(9) also require Metro, unencumbered by self-imposed plan, ordinance, or charter restrictions, to "ensure that land zoned for needed housing is [planned] in locations appropriate for [needed] housing types * * *." Excluding the vast bulk of the region's residential areas from consideration is both unlawful and unconscionable, considering the regional scale and scope of Metro, the diversity of its housing needs, and the potential for dilution of state housing policy throughout Oregon's largest and most populous urban area. Because the state has entrusted Metro with responsibilities assigned to individual cities and counties elsewhere in Oregon, these locational requirements are especially important as Metro is the gatekeeper to assure that its cities and neighborhoods meet their Goal 10 obligations to provide their "fair share," of "least cost" housing at prices and rents throughout the Metro region in locations and at rents and prices that are affordable by and accessible to all Oregonians. Goal 10; *1000 Friends v. Lake Oswego*, 2 LCDC 138, 143-153 (1981); *1000 Friends v. Milwaukie,* 3 LCDC 1, 5-6 (1979); *Seaman v. Durham,* 1 LCDC 283, 288-293 (1978); *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998).

In summary, Metro may not, if it wants to expand its urban growth boundary, use its charter restriction to exclude existing neighborhoods from efficiency measures, reduced maximum lot sizes, increased density minimums, multifamily housing, accessory dwelling units, vacation rental restrictions, or other measures that implement Goal 10, the Needed Housing Statutes, and the accessibility requirements of state and federal fair housing laws.

c. Metro has failed to do a comparative analysis of social consequences for housing affordability, suitability, and location required by the ESEE factors of Goal 14.[23] By not considering whether the existing boundary could accommodate projected

[23] Although the Metro findings at pp. 10-11 concede the applicability of the locational factor:

> Factor 3 - Comparative environmental, energy, economic and social consequences;

The social consequences are never evaluated in the findings. *Compare* the extensive justification provided by the City of Bend in its 2016 successful UGB expansion by explicit consideration of these and other factors required by Goal 14. Because there are *factors* involved and were insufficiently formulated, remand is necessary for Metro to consider factors insufficiently stated or weighed, rather than for the Department or Commission to undertake that analysis in the first instance. Nor is there any discussion of Goal 10 or needed housing statutes regarding the need-supply fit or housing affordability and access for all Oregonians in the Goal 14 factor-balancing findings on social and economic consequences. One consideration militating towards a more compact UGB is the reallocation of space-wasting single-family lots to more efficient and more affordable attached and multifamily units.

growth and by not considering whether wealthier persons in-migrating to the Portland region would push less wealthy persons from their existing neighborhoods to the periphery of the region where land prices and rents are lower, Metro did not fully assess the social consequences of an expansion that more easily accommodates white residents of the region over their racial and ethnic minority counterparts.

d. In its findings defending its process against HLA's objections, Metro states that each of the four cities that wish to expand their UGBs have met the law:

HLA also correctly notes that local governments are required by state law to conduct a housing needs analysis (HNA). All four cities where the UGB is being expanded have HNAs that are acknowledged by DLCD as being in compliance with state law.

That was not the point HLA raised. Because Metro is expanding the *regional* boundary, needs contained in a HNA must be region-wide (as opposed to some portions of the region growing faster than others), for if housing needs can be accommodated within the current UGB, there is no need to expand it. Additionally, it appears that Metro limited its consideration to housing and employment land designations and did not consider whether other lands in the region outside these designations could accommodate its growth needs. Also, there is not indication in the findings that the rest of the region, outside the four cities that are candidates for accommodating the UGB expansion, meets the Metro Housing Rules, in particular whether there is a need for *any* UGB expansion if current residential designations *in the region as a whole* do not meet OAR 660-007-0035 (the 6-8-10 rule) *and* 660-007-0030 (the 50-50 rule for new construction).

Moreover, in addition to limiting its view so as to consider only UGB expansion, Metro has willfully blinded itself on the status of affordable housing provided under local government codes as required by its code:

> 3.07.740 Inventory and Progress Reports on Housing Supply
>
> (1)(a) Local governments shall assist Metro in the preparation of a biennial affordable housing inventory by fulfilling the reporting requirements in subsection (b) of this section.
>
> (b) Local governments shall report their progress on increasing the supply of affordable housing to Metro on a form provided by Metro, to be included as part of the biennial housing inventory described in subsection (a). Local governments shall submit their first progress reports on July 31, 2007, and by April 15 every two years following that date. Progress reports shall include, at least, the following information:

> (1) The number and types of units of affordable housing preserved and income groups served during the reporting period, as defined in Metro's form;
>
> (2) The number and types of units of affordable housing built and income groups served during the reporting period;
>
> (3) Affordable housing built and preserved in Centers and Corridors; and
>
> (4) City or county resources committed to the development of affordable housing, such as fee waivers and property tax exemptions.

Notwithstanding that this ordinance is effective, Metro's administrators decided that compliance with its reporting requirements caused conflicts and unilaterally decided not to enforce its provisions.[24]

e. Metro also touts the use of the conditions imposed on this UGB change as evidence of its commitment to Goal 10 and affordable housing:

> The conditions of approval attached to the ordinance approving the expansion areas are set forth in Exhibit C, and they include numerous conditions that are directly aimed at requiring the four cities to encourage the development of more affordable housing, both in the new expansion areas and within existing city limits. The relevant conditions are A.2, A.3, B.l, B.2, B.3, and B.6.

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[24] As HLA noted in its December 4, 2018 letter to Metro:

> Metro has created its own problem to figure out how to make Goal 10 findings in this case. On November 28, 2007, Metro's Chief Operating Officer ("COO") issued a letter to member local jurisdictions suspending reporting requirements related to housing and employment accommodation (then 3.07.120(D)), and housing choice for the affordable housing supply under Metro Code 3.07.740(B). See November 28, 2007 COO Letter attached as Exhibit 3. HLA has no knowledge that the suspension described in the November 28, 2007 letter has been lifted, despite years of advocating for a lift of the suspension. So far as we are able to ascertain, there was no Metro Council action to undertake this suspension. Unfortunately for Metro and the cities seeking the expansion here, a 10-year "temporary suspension" may mean that making Goal 10 findings are more difficult.[24] If the member jurisdictions had submitted reports on meeting their fair share of affordable housing, then the public would be able to analyze whether expanding the UGB to include the proposals here makes sense in the context of the Statewide Planning Goals and regional compliance with Goal 10. (Internal footnotes omitted)

Metro never responded to this objection.

The conditions, as drafted, are largely aspirational and unenforceable and without more will neither require nor accomplish additional affordable housing in these four cities or anywhere else. Nor are they tied into a system whereby the requirements for providing needed and affordable housing are met.

f. As to King City, there is no Transportation Systems Plan, which is necessary to evaluate the locational and public facilities factors. In *Barkers Five*, the Stafford area was found not to be a viable urban reserve candidate because the transportation plans were inadequate. While the criteria for a UGB amendment are different, lack of a TSP is certainly a relevant, if not the decisive, factor in choosing among candidate lands.

HLA joins with the objections filed to Metro's conditions by 1000 Friends of Oregon.

Necessary Work Tasks:

Draft precise and enforceable conditions with findings that explain how the conditions will achieve the region's housing goals. These conditions are necessary so that years from now, when HLA seeks enforcement for the failure of the conditions, everyone will know what Metro's decision meant to achieve.

III. CONCLUSION

For these reasons, HLA objects to acknowledgment of the Metro UGB expansion now before the Department and Commission and requests that these objections be entered into the record of these proceedings and that a copy of any order be sent to HLA at 121 SW Morrison St, Suite 1850, Portland, OR 97204.

Sincerely,

Jennifer Bragar
President, Housing Land Advocates

cc: (by email)
Gordon Howard
Kevin Young
House Speaker Kotek
Taylor Smile-Wolfe
Allan Lazo
Louise Dix
Ed Johnson
Roger Alfred

Housing Land Advocates

BY EMAIL

December 4, 2018

President Tom Hughes and Metro Councilors
600 NE Grand Avenue
Portland, OR 97232

Re: UGB Expansion Proposals

Dear President Hughes and Metro Councilors,

As Metro considers proposals to expand the urban growth boundary, Housing Land Advocates ("HLA") believes that it is imperative that Metro recommit to providing present and future urban Clackamas, Washington, and Multnomah County residents with greater access to affordable housing. By Metro's authority within Oregon's statewide land use system, and pursuant to state and federal requirements as set forth below, HLA believes the time for Metro to integrate these obligations into any plans to expand the urban growth boundary is now. Please include this letter in the record.

I. Federal Case Law

As the elected body to represent and govern regional planning for more than 1.5 million Oregonians, Metro sets policies that profoundly affect local governments that are federal funding recipients. To support local entities in efforts to obtain funding for affordable housing endeavors and sustain grants, Metro must undertake all necessary measures to ensure that zoning ordinances and policies do not impede access to affordable housing.

Under the federal Fair Housing Act ("FHA"), it is unlawful to "otherwise make unavailable … a dwelling to any person because of race, color, religion, sex familial status, or national origin."[1] Pursuant to the decision in *Metropolitan Housing Development Corp. v. Arlington Heights* (*"Arlington Heights"*)[2] effect, rather than motivation, has long been the

[1] 42 USC §3601.

[2] 616 F.2d 1006 (7th Cir. 1980). The procedural background in *Arlington Heights* included the Supreme Court' consideration of whether the zoning decision at issue could be construed as violating the Equal Protection Clause. *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). The Supreme Court ruled that no federal constitutional violation occurred because under its then-recent decision in *Washington v. Davis,* 426 U.S. 229, 240-242 (1976), as no intent to discriminate was shown. The Supreme Court remanded the case to the 7th Circuit to consider whether discriminatory effect violates the FHA. The case was subsequently settled; however, the Seventh Circuit set out four factors to analyze the effects of housing discrimination that could not be shown to be intentional. These factors were effectively adopted by the Supreme Court in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. ___ , 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015).

touchstone in determining whether a government entity has denied individuals housing on the basis of race or interfered with the right to equal housing opportunities under the FHA.[3]

In *Arlington Heights*, the defendant city's zoning ordinance prohibited the Metropolitan Housing Development Corp. from building new low-cost housing that would be available to racial minorities. On remand the 7th Circuit held that if the challenged zoning ordinance had the ultimate effect of keeping members of protected classes out of the predominantly white suburban city, the defendant city was obligated under the FHA to refrain from implementing the zoning ordinance. As the City of Portland similarly noted in its June 17, 2011, Fair Housing Plan Analysis of Impediments, zoning that excludes or deters multi-family housing might result in the concentration of protected classes in particular areas of a city,[4] and as *Arlington Heights* indicated, such zoning ordinances might result in an FHA violation. Therefore, Metro's obligation does not end with simple policy choices. Rather, Metro unquestionably has an affirmative duty to alleviate discriminatory effects of its member jurisdiction's historic zoning decisions as they move forward to create modern plans.

Further, under Executive Order No. 12892, recipients of federal funding for "all programs and activities related to fair housing and development" have an affirmative duty to further fair housing.[5] The U.S. Department of Housing and Urban Development ("HUD") has defined three elements that certify a recipient in affirmatively furthering fair housing ("AFFH") and therefore in compliance with criteria crucial for maintaining or receiving such funds. The three elements to obtain certification are: (i) an Analysis of Impediments ("AI") to Fair Housing Choice; (ii) actions to overcome the effects of any impediments identified through the analysis; and (iii) records reflecting the actions taken in response to the analysis. As a recipient of federal transportation dollars, Metro must ensure that these three elements are being met, at least to the extent that Metro is responsible for reviewing and approving transportation and land use plans of member jurisdictions, and allocation of federal transportation funding throughout the region.

More recently, in *United States Anti-Discrimination Center of Metro New York v. Westchester County* ("*Westchester County*"), the county was found liable because its AI failed to

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[3] *See also U.S. v City of Black Jack, Missouri*, 508 F2d 1179, 1181 (8th Cir. 1974) (holding that a local ordinance that was shown to have racially discriminatory effect, and was not justified by a compelling government interest, violated the FHA).

[4] "*Fair Housing Plan 2011: An Analysis of Implements to Fair Housing Choice and the Strategies to Address Them.*" City of Portland, Gresham, and Multnomah County. Available at https://www.portlandoregon.gov/phb/article/653184 (Accessed November 29, 2018).

[5] Executive Order 12892, LEADERSHIP AND COORDINATION FOR FAIR HOUSING IN FEDERAL PROGRAMS: AFFIRMATIVELY FURTHERING FAIR HOUSING.

> "...[A]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the [Fair Housing Act] … the phrase programs and activities shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions)."

See also 24 CFR Parts 5, 91, 92, 570, 575, 576, and 903.

include any mention or analysis of impediments to fair housing by race and ethnicity.[6] In December 2010, HUD rejected the county's revised AI for failure to "make any material link between those impediments [to fair housing choice] and the actions the County will take to overcome them."[7] As a result, in addition to identifying impediments to fair housing choice in their AIs, counties must show a "material link" between the impediments and their proposed recommendations to ameliorate the impediments. Although the second and third AFFH requirements were not at issue in the *Westchester County* case, Metro must take affirmative and concrete steps to overcome impediments, and to keep records reflecting the actions taken. Metro should remember this instruction when undertaking its planning and coordination functions.[8]

II. Metro Authority – Oregon Statutory Obligations

Metro has an affirmative duty to ensure that the comprehensive plans of cities and counties within its jurisdiction address their respective affordable housing needs.[9] Existing law gives Metro the authority to conduct reviews of local jurisdictions' comprehensive plans and to propose changes to bring these plans into compliance with Statewide Planning Goals, including Goal 10,[10] which requires a local jurisdiction to conduct a housing needs analysis ("HNA") and adopt a plan to accommodate current and future housing needs.[11]

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[6] *United States Anti-Discrimination Center of Metro New York v. Westchester County,* 668 F.Supp.2d 548, 562–65 (S.D.N.Y.2009).

[7] HUD Priv. Lrt. Rule (Dec. 21, 2010) Available at https://prrac.org/pdf/12-21-2010_HUD_Response_to_Westchester_AI.pdf (Accessed November 29, 2018).

[8] HUD's Fair Housing Planning Guide defines an AI as "a comprehensive review of a jurisdiction's laws, regulations, and administrative policies, procedures, and practices affecting the location, availability, and accessibility of housing, as well as an assessment of conditions, both public and private, affecting fair housing choice." "Impediments to fair housing choice are any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin that restrict housing choices or the availability of housing choices, or any actions, omissions, or decisions that have [such an] effect." Fair Housing Planning Guide at 4-4. Available at https://prrac.org/pdf/12-21-2010_HUD_Response_to_Westchester_AI.pdf (Accessed December 4, 2018).

[9] Metro Code (Or.) §3.07.730. Cities and counties within the Metro region shall ensure that their comprehensive plans and implementing ordinances:

A. Include strategies to ensure a diverse range of housing types within their jurisdictional boundaries.
B. Include in their plans actions and implementation *measures designed to maintain the existing supply of affordable housing as well as increase the opportunities for new dispersed affordable housing within their boundaries.*
C. Include in their plans actions and implementation measures aimed at increasing opportunities for households of all income levels within individual jurisdictions in *affordable housing*. (emphasis added).

[10] Goal 10 provides for "[b]uildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

[11] In 2010, Ordinance No. 10-1233B and Ordinance No. 11-1252A demonstrated Metro's acknowledgement of its responsibilities and prescribed Metro's compliance procedures and Regional framework plan.

For the greater Portland metropolitan area, Metro manages the shared urban growth boundary for the 24 cities in the area, which includes Beaverton, Hillsboro, King City, and Wilsonville. Prior to any Urban Growth Boundary ("UGB") expansion, a local jurisdiction needs to demonstrate its current compliance with that HNA and how it will continue to comply with that HNA and with the proposed UGB expansion. Metro must use its authority to require cities and counties to change their comprehensive plans and land use regulations to comply with the FHA.[12]

Goal 14 also requires Metro to demonstrate how the region's housing needs under Goal 10 are being met within the current UGB and how they will continue to be met if the UGB is expanded.[13] This includes housing "at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type, and density."[14]

Metro's own studies in preparation for its January 2010 urban growth report confirmed that these affordable housing needs were not being met. To meet demand, Metro's Regional Framework Plan called for the establishment of affordable housing production goals to be adopted by local governments.[15] Metro and local governments are required to issue a biennial affordable housing inventory to demonstrate their continued dedication to reaching affordable housing goals. This report must include not only the number and types of affordable housing units preserved during the reporting time, but also the number of new units built and the county resources committed to the development of these affordable housing units.

Metro also has the power to create and enforce Functional Plans[16] and direct changes in city or county plans and land use regulations as needed to bring them into compliance with such

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[12] Metro's authority under ORS 268.390 is greater than the authority of individual counties under ORS 195, allowing them to recommend them to "recommend or *require cities and counties, as it considers necessary, to make changes in any plan and any actions taken under the plan substantially comply with the district's functional plans* adopted under subsection (2) of this section and its urban growth boundary adopted under subsection (3) of this section …" (emphasis added).

[13] Goal 14 requires that "[p]rior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary."

[14] In addition, the "Statement of Purpose" for OAR 660-007-0000 states, "OAR 660- 007-0030 through 660-007-0037 are intended to establish by rule regional residential density and mix standards to measure Goal 10 Housing compliance for cities and counties within the Metro urban growth boundary, and to ensure the efficient use of residential land within the regional UGB consistent with Goal 14 Urbanization."

[15] Metro Code (Or.) §3.07.740 (2011).

[16] Metro Code (Or.) §3.07.850.

A. The Metro Council may initiate enforcement if a city or county has failed to meet a deadline for compliance with a functional plan requirement of if the Council has good cause to believe that a city or county is engaged in a pattern or a practice of decision-making that is inconsistent with the functional plan.

Functional Plans.[17] In addition to the existing Regional Solid Waste Management Plan and Urban Growth Management Functional Plan, of which voluntary affordable housing production goals are a subsection, Metro should implement, compel and enforce a separate affordable housing functional plan on a uniform level. HLA continues to believe that a distinct Functional Plan addressing regional shortfalls in needed housing would establish clear expectations and elicit more robust compliance with needed housing goals.

Further, the Metro Code sets out Metro's responsibility to oversee local compliance with statewide planning goals and Metro's power to enforce compliance by issuing orders in accordance with its own Functional Plan.[18] If the Land Conservation and Development Commission ("LCDC"), charged with overseeing statewide compliance with planning goals, so determines that compliance with planning goals is lacking, it may order a local government – a term that expressly includes Metro as well as the cities and counties within Metro's boundaries – to bring its plans and land use regulations in compliance.[19] Taken together, HLA believes that Metro's state-delegated authority and statutory obligations demonstrate that Metro has a duty to implement affordable housing initiatives, and that Metro's duty should not be taken lightly

III. Metro Authority – UGB Expansion

In addition to Metro's duty to oversee the compliance of cities and counties in conjunction with its regional framework plan, Metro itself must address local affordable housing concerns when it decides to expand the Urban Growth Boundary ("UGB"). Metro is subject to the mandates of ORS 197.296.[20] Consequently, Metro must take into account the region's housing needs when establishing buildable lands within the UGB.[21]

In 2010, Metro adopted two ordinances that each reflected Metro's responsibility to account for affordable housing during UGB expansion: Ordinance 10-1252A and Ordinance 10-1244B.[22] The Staff report for Ordinance 10-1252A stated that its purpose was to "[h]elp ensure opportunities for low-income housing types throughout the region so that families for modest means are not obligated to live concentrated in a few neighborhoods," because concentrating poverty is not desirable for the residents or the region.[23] Furthermore, Ordinance 10-1244B reinforced that goal and stated that "particular attention" will be given to affordable housing when expanding the UGB, and that Metro would seek agreement with local governments to

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[17] *Id.*
[18] ORS 268.390.
[19] ORS 197.320. The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe.
[20] *GMK Developments, LLC v. City of Madras*, 225 Or. App. 1 (2008).
[21] ORS 197.296
[22] *See* MC 3.07.1120 Planning for Areas Added to the UGB.
[23] Metro, Or., Staff Report for Ordin. 10-1252A (Dec. 29, 2010).

improve affordable housing.[24] Together, these ordinances plainly announced Metro's intention to implement affordable housing initiatives throughout Clackamas, Washington, and Multnomah counties.

A. *Housing Land Advocates v. City of Happy Valley*

In *Housing Land Advocates v. City of Happy Valley*,[25] the City of Happy Valley approved an application for the zoning reduction of a previously zoned Mixed Use Residential property to a 31-lot subdivision allowing development of detached single-family residential dwellings on individual lots.[26] HLA appealed the city's decision, arguing that the city failed to show how the 31 single-family homes would meet the housing needs of current and future Happy Valley and Portland-area residents of all income levels.[27] HLA specifically cited the city's responsibility under Title 1 of Metro's Urban Growth Management Functional Plan, specifically Metro Code Section 3.07.120(e), which requires a local government to "maintain or increase its housing capacity" in line with "a compact urban form and a 'fair share' approach to meeting housing needs."[28] Without an adequate housing analysis, the city, HLA claimed, failed to comply with statewide planning goals, namely Goal 10 and the Needed Housing Statutes at ORS 197.295 to .314.[29] In response to HLA's claims, the city argued that the zone change produced a reduction of "a mere .004 percent."[30] The city concluded that this reduction was "negligible," which the city argued conformed to the standard established under Metro Code Section 3.07.120(e).

While the Land Use Board of Appeals ("LUBA") agreed that this zone reduction "qualifies as negligible," LUBA determined that the comparison used by the city to calculate this reduction was not the comparison required under MC 3.07.120(e). The reason being the city's findings "neither identifies what the minimum zoned residential capacity of the subject property is nor how much that minimum zoned residential density is reduced by the challenged amendment."[31] LUBA concluded that the city would instead need to compare the reduction of the minimum zoned capacity of the property to the city's overall minimum zoned residential capacity.[32] Ultimately, LUBA upheld the standard under the acknowledged MC 3.07.120(e) that only "negligible" reductions were permitted when a city reduced the minimum zoned capacity of

[24] Metro, Or., Exhibit A to Ordin. 10-1244B Section 1.3.10 (Dec. 16, 2010).
[25] *Housing Land Advocates v. City of Happy Valley*, LUBA No. 2016-031-105 (Mar. 24, 2017).
[26] *Id.*, at 3.
[27] *Housing Land Advocates v. City of Happy Valley*, LUBA No. 2016-031-105 at 3, 6.
[28] MC §3.07.120 ("Housing Capacity").
[29] ORS 197.307(3) provides, "When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need." ORS 197.307(4) provides, "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."
[30] *Housing Land Advocates v. City of Happy Valley*, LUBA No. 2016-031-105 at fn.10.
[31] *Id.*, at 23-24.
[32] *Id.*, at 23.

a single lot or parcel.[33] As a result, LUBA remanded the case and ordered the city to include in its findings the "methodology and math" used to calculate the percent reduction in minimum zoned residential capacity.

Under the *Happy Valley* case, Metro needs to give the "negligible" loss standard means on a region-wide basis. Otherwise, we face the same battle and die the death of a thousand cuts. A 1% cumulative reduction could qualify as "negligible," as could 100 units (depending on the capacity of the jurisdiction). This should be a prerequisite Metro-wide prior to considering any boundary expansion, including the one proposed for the four cities involved in this round. Further, at this time, none of the four city proposals include findings that demonstrate that they meet the standard under the acknowledged MC 3.07.120(e) that only "negligible" reductions are permitted. That code section must be interpreted consistently with the Goals it implements, specifically Goals 10 and 14, under 197.829(1)(c) and (d). A new expansion of the UGB must show compliance and, particularly, demonstrate compliance with the "orderly and efficient" accommodation of land uses within a UGB under Goal 14. The mechanisms to assure compliance must be within the Metro Actions allowing for the boundary expansion. Moreover, we assert that the evaluation of the UGB amendments cannot be limited to the four candidate areas for the boundary expansion, but must include the entire UGB as amended in order to demonstrate compliance with the statewide planning goals. In addition, Goal 2 requires that the plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans.

While HLA can point to the specific shortcomings of these proposals, these cities, not HLA, have a legal duty to show that they are in compliance with MC 3.07.120(e). Moreover, Metro also has a legal duty to hold these cities to the standard upheld by LUBA and the very codes that Metro adopted in its Functional Plan. Until then, Metro will continue to be in violation of its own code and state laws.

B. *Deumling v. City of Salem*

In 2016, the City of Salem enacted Ordinance No. 14-16, which amended the Salem/ Keizer regional urban growth boundary (UGB) to add approximately 35 acres of land located in Polk County and zoned for exclusive farm use (EFU) to the city's UGB.[34] The ordinance also adopted an exception to Statewide Planning Goal 15 (Willamette River Greenway),[35] in connection with a new bridge over the Willamette River.[36] The petitioners argued that the city's proposal violated OAR 660-004-0018(4)(a). Under OAR 660-004-0018(4)(a), when a local government adopts a reasons exception to a goal, "plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception." The land subject to the Goal 15 exception was entirely within the city's UGB as it

[33] *Id.*
[34] *Deumling v. City of Salem*, LUBA No. 2016-126, 5-6 (August 9, 2017).
[35] Goal 15 is "to protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River as the Willamette River Greenway."
[36] *Deumling v. City of Salem*, LUBA No. 2016-126, at 3.

existed prior to the ordinance adoption.[37] In response, the city claimed that the existing plan and zoning designations would be maintained for the land subject to the Goal 15 exception.[38]

LUBA determined that the city failed to explain why the existing plan and zoning designations limit the uses "public facilities and services, and activities" to only those justified in the exception.[39] For this reason, LUBA remanded the case and required the city to "more clearly explain" why the existing plan and zoning designations for the land subject to the Goal 15 exception satisfied those requirements in OAR 660-004-0018(4)(a).[40]

In addition to the reporting requirements under MC 3.07.120(e), the four cities proposing expansion to the UGB must also clearly explain how they will be in compliance with statewide planning goals, as discussed above. Should one of these local governments adopt a reasons exception to a statewide planning goal to expand the UGB, that city's plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in that exception. For this reason, Metro must be remain cognizant of this case as it considers the four UGB expansion proposals.

IV. HLA Questions Whether Metro Will be able to Make Adequate Goal 10 Findings

The local government, Metro in this case, must demonstrate that its actions do not leave it with less than adequate residential land supplies in the types, locations, and affordability ranges affected. See *Burk v. Umatilla County*, 20 Or LUBA 54 (1990). The regional housing crisis is well-known. Yet, Metro has done little to proactively contribute to solving the problem. Instead, it attempts to make the decision here without any explanation of its compliance with Goal 10.

Goal 10 findings are not only required by the goal, but are necessary as a practical matter so a record of the ability to provide needed housing throughout the region is made under Goal 2, Land Use Planning. Already one of the most expensive suburbs in the region, Happy Valley, was let off the hook in complying with Goal 10 in the downzone case described above, and the need for affordable housing across the region grows. For example, see Exhibit 1, a letter submitted in the Happy Valley record showing that needed housing for all income levels was not provided within that city or urban Clackamas County. which are both within Metro's jurisdiction.

In Washington County, and the City of Sherwood, the story is very similar to the Clackamas County/Happy Valley situation where Sherwood is a less economically integrated suburb of Washington County. According to the Washington County Consolidated Plan, Sherwood residents make the highest income of all cities within the county limits, and has the highest median income levels. See Exhibit 2, page 1. Failure to analyze the impacts of this proposed urban growth expansion across the region calls into question Goal 10 compliance of a

[37] *Id.*, 30.
[38] *Id.*
[39] *Id.*
[40] *Id.*, at 31.

narrow UGB expansion that does not address the exclusive zoning in member cities like the cities of Happy Valley and Sherwood.

Metro has created its own problem to figure out how to make Goal 10 findings in this case. On November 28, 2007, Metro's Chief Operating Officer ("COO") issued a letter to member local jurisdictions suspending reporting requirements related to housing and employment accommodation (then 3.07.120(D)), and housing choice for the affordable housing supply under Metro Code 3.07.740(B). See November 28, 2007 COO Letter attached as Exhibit 3. HLA has no knowledge that the suspension described in the November 28, 2007 letter has been lifted, despite years of advocating for a lift of the suspension. So far as we are able to ascertain, there was no Metro Council action to undertake this suspension. Unfortunately for Metro and the cities seeking the expansion here, a 10-year "temporary suspension" may mean that making Goal 10 findings are more difficult.[41] If the member jurisdictions had submitted reports on meeting their fair share of affordable housing, then the public would be able to analyze whether expanding the UGB to include the proposals here makes sense in the context of the Statewide Planning Goals and regional compliance with Goal 10.

Metro must ensure that a decision to expand the boundaries in Beaverton, King City, Hillsboro, and Wilsonville does not, in effect, push off onto other cities within the region a housing responsibility it is required to assume. *Gresham v. Fairview*, 3 Or LUBA 219 (1981). Nowhere in the record is there any evidence concerning a reasoned analysis of Goal 10, Metro's regional buildable lands inventories, housing need projections, fair share allocations, housing and coordination policies, or of their application to this proposed UGB amendment. This is particularly concerning given that Sherwood had initially considered participating in the current expansion, but as soon as affordable housing was mentioned as part of the expansion goals, the city abandoned its plan to apply. Metro did not even take a step to insist that Sherwood needs to take steps to address affordability, thus, exclusionary zoning in Sherwood continues.

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[41] While Metro may try to avoid the direct application of the legislative UGB amendment criteria, by claiming its adoption of criteria in MC 3.07.1428 is the exclusive process for reviewing this expansion, nothing in the code states that the criteria under its own legislative decision making under 3.07.1525 do not apply (rather only direct compliance with Goal 14 is directly resolved). In any event, Metro's own code should provide context for the necessary evaluation that needs to take place in any UGB expansion, particularly MC 3.07.1425(c)(5) that requires Metro to consider, "**Equitable** and efficient distribution of housing and employment opportunities throughout the region." (emphasis added).

Above are the results of our research and show Metro's legal duty to require the cities of Beaverton, King City, Hillsboro, and Wilsonville to incorporate changes to their housing plans prior to the proposed land coming inside the UGB. We look forward to working with Metro to assure that it meets its obligations under the statewide planning goals. Please add Housing Land Advocates to the notice list, Housing Land Advocates, c/o Jennifer Bragar, 121 SW Morrison Street, Suite 1850, Portland, OR 97204.

Sincerely,

Jennifer Bragar
President, Housing Land Advocates

cc: (by e-mail)
Taylor Smiley-Wolfe
Anna Braun
Gordon Howard
Roger Alfred
Paulette Copperstone

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objections

[8] OAR 660-025-0140(6) provides:
If valid objections are received or the department conducts its own review, the department must issue a report.The report shall address the issues raised in valid objections. The report shall identify specific work tasks or measures to resolve valid objections or department concerns. A valid objection shall either be sustained or rejected by the department or commission based on the statewide planning goals, or applicable statutes or administrative rules. LCDC Rec. 4359

"****

C. Validity of Objections

OAR 660-025-0140(2) quoted in footnote 6 above, governs determination of the validity of objections.

All of the letters of objection received were filed within the required 21-day period. All of the letters of objection were timely and demonstrated that the objectors participated during the Metro's hearings process. Therefore, OAR 660-025-0140(2)(a) and (d) have been met. The department found that portions of Objection 6 (Fran Warren) did not satisfy OAR 660-025-0140(2)(b) because it did not clearly identify an alleged deficiency in the submittal either by providing adequate detail regarding the portion of submittal alleged to be deficient or identifying what relevant law, goal, or rule was violated. LCDC Rec 4377

D. Objections and Department Responses

1. Objection – Marion County Board of Commissioners

Marion County Board of Commissioners submitted an objection letter with two primary issues of concern: Goal 2 and Goal 11. The county's objection regarding Goal 2: Land Use Planning is that there is not enough information in the record for a decision, particularly with regard to a United States Army Corps of Engineers' proposal to reallocate water storage and free-flow river water resources in the Willamette River system. The Goal 11: Public Facilities issue relates specifically to water and the water rights for the Willamette River. The county has concerns that, since all of the Metro expansion areas would be supplied water from the Willamette River watershed, Marion County may lose some of its existing water rights, which will have a negative effect on agriculture and food processing aspects of its local economy. The county's letter also references Goal 3, 10, 12 and 14; however, only Goal 2 and Goal 11 have sufficient explanations and suggested remedies in

the objection. The letter concludes with a suggestion that Marion County is amenable to alternative resolution of this dispute.11

Department Response:

The department recommends rejection of this objection. The county did not submit evidence into the record, beyond its letter to the Council in December 2018, regarding water rights for the Willamette River. Without such evidence, it is unclear whether water rights for Marion County, which is upstream from the Portland Metro Area, would be compromised or diminished by increased use of water in the Willamette River watershed for Portland Metro area jurisdictions.

The department does recommend alternative dispute resolution between Marion County and Metro on this issue, and is willing to work with both parties to facilitate such a dispute resolution process. However, that process should occur independent of this urban growth boundary action.

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3. Objection – Housing Land Advocates

Housing Land Advocates (HLA) objects to the Metro UGB expansion decision for a number of reasons. First, HLA's objection asserts that Metro had obligations to affirmatively further fair housing and otherwise to meet the obligations of the federal Fair Housing Act, as Amended (FHAA). In its findings, HLA alleges that Metro denied any legal responsibility for its actions in this area. HLA Objection at 2. HLA notes that the FHAA has been interpreted, both by the federal Department of Housing and Urban Development and federal courts, as prohibiting not only intentional discriminatory actions based upon persons in a protected class, but also facially neutral actions that have a "disparate impact" on persons in a protected class. HLA offers that local government land use decisions are an example of such actions that can have a disparate impact on a protected class by excluding needed housing types and supply. HLA Objection at 5.

HLA argues that, when reviewing Metro's submittal, the State of Oregon also has obligations to ensure all of its activities that affect housing affirmatively further fair housing because such obligations apply to recipients of federal housing and community development funds. HLA notes that the State of Oregon receives such funds and has acknowledged that it is obligated to comply with the FHAA in its State of Oregon Analysis of
Impediments to Fair Housing 2016-2020, prepared jointly by three state agencies.

"*****

HLA's second objection to the submittal is that Metro has failed to demonstrate that the UGB expansion complies with Goal 10, the needed housing statutes, and planning obligations under Metro Code Chapter 3. HLA cites LCDC's Bend UGB Remand Order, and argues that Metro has similarly failed to tie together how the types and amounts that it is planning for will be affordable for future residents of the area. Concerns addressed by HLA as part of this objection include lack of compliance with Metro Code 3.07.120(E), the new construction mix and minimum residential density standards of OAR 660-007-0030 through 660-007-0037, and the applicability provisions of OAR 660-007-0060.

HLA's third objection is that Metro has failed to justify the need to expand the Metro UGB. Issues cited include:

I. Failure to account for accessory dwelling unit (ADU) capacity.

II. Misinterpretation of Metro Charter Section 5(b).
III. Failure to adopt a comparative analysis of social consequences for housing affordability, suitability, and location required by the environmental, energy, social and economic (ESEE) factors of Goal 14.
IV. Failure to implement Metro Code Section 3.07.740 regarding Inventory and Progress Reports on Housing Supply. That information is needed to determine adequacy of local government efforts to promote affordable housing.
V. Reliance on conditions of approval, which are "largely aspirational and unenforceable."
VI. Approval of the "Beef Bend" expansion area near King City despite the fact that King City has no Transportation System Plan (TSP), which is necessary to evaluate the locational and public facilities factors for UGB expansion.

HLA Objection at 12.

Needed Housing Statutes – HLA objects that the submittal does not comply with ORS 197.296(6), which requires the local government to accommodate a projected shortfall of residential lands by either putting in place measures to make more efficient use of land within the UGB to meet the need, expanding the UGB to meet the need, or meeting the need through some combination of the first two options.[17] It should be noted that ORS 197.296(6) does not, by itself mandate that a local government accommodate all or even a portion of a projected shortfall through more efficient use of land within an existing UGB; a local government could solve a housing deficit entirely with a UGB expansion if it chose to do so. However, Goal 14 and OAR 660-024-0050(4) require that, "prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB," and thus Metro and other local governments must give serious consideration to "reasonably accommodating" the need through increasing residential capacity within the existing UGB (the alternative set forth in ORS 197.296(6)(b)). Although there is some discretion in the determination of what can be reasonably accommodated, as stated earlier, Metro anticipates accommodating approximately 97 percent of the anticipated 196,900 new dwelling units that will be needed in the region over the planning period within the existing UGB, including 100 percent of the anticipated demand for multifamily housing.

Additionally, it is important to remember that Metro's HNA found that the Metro UGB contains more than a 20-year supply of multifamily units, and a deficit of single-family units. Record at 296. Thus, the question of compliance with ORS 197.296(6) rests on whether Metro has taken sufficient measures to provide new lands within the existing Metro UGB to meet the single-family housing deficit identified in the HNA, measures that show Metro has attempted to "reasonably accommodate" the single-family housing need

[17] The HLA objection also raises issues regarding Metro Code Chapter 3.07, which HLA correctly 197.296." HLA Objection, p. 8. Thus, this report will not separately address compliance with Metro Code Chapter 3.07.

within the existing UGB as is required by Goal 14 and OAR 660-024-0050(4). Metro's submittal analyzes this issue, and includes a fairly "aggressive" calculation of new single- family infill residential development within the existing UGB, assuming that, unless an existing lot contained a very high-value home, all lots at least 2.5 times the minimum lot size of existing zoning (2.2 in the City of Portland) would be divided into additional single- family residential building lots (Record at 150). Metro has also found that the median single-family lot size in the Portland region has taken a major long-term decrease from 8,300 square feet in 1980 to 4,400

square feet in 2016. Record at 271. Metro's thorough methodology for making these assumptions, including peer review with department participation, described briefly at Record 143. HLA seems to argue that Metro has not taken sufficient measures to force local governments to accommodate additional single- family residential capacity, perhaps because of Metro Charter Section (5)(b) (prohibiting mandated density increases in existing low-density residential neighborhoods within Metro's boundaries). However, the department determines that Metro's own assumptions and evidence, as well as the fact that the preponderance of new single-family residential development within the Metro area is expected to occur within the existing Metro UGB (92,300 of 98,400 units, or 93 percent of the 20-year need for such units), shows Metro compliance with the provisions of Goal 14 and ORS 197.296(6). Record at 29 . Therefore,

the department recommends that the commission reject this sub-objection. LCDC Rec 4393-95

2. Misapplication of Metro Charter Section 5(b), which prohibits Metro from requiring an increase in density in single family neighborhoods identified in the RFP solely as Inner or Outer Neighborhoods. HLA argues that "…Metro determined it must expand the boundary because it couldn't require additional efficiencies in single-family areas within the plans and land use regulations of cities and counties in the region and, consequently, didn't look for these efficiencies." HLA also notes that, "… as explicit de jure housing segregation by race or ethnicity is no longer allowed, local charters and land use regulations have been used to preserve and perpetuate segregated residential patterns by keeping existing single family neighborhoods intact against the threats of government-imposed densification." HLA Objection, Footnote 22.

Department Response: At issue is the requirement, found in Goal 14 and OAR section 660-024-0050(4) that, "Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB." This brings into consideration the question of whether requiring additional densities in the specified single family residential neighborhoods is a "reasonable accommodation" that should have been required, per OAR 660-024-0050(4). Without clear guidance as to what types of actions qualify as "reasonable accommodation" it is evident that making this determination is highly discretionary. In this context, citing current Metro Charter provisions that prohibit certain actions by Metro is a reasonable consideration of the Metro Council. The charge that abiding by this limitation constitutes a violation of the FFHA is addressed below.

Although the local governments within the Metro area utilize a variety of measures to make efficient use of the land within their UGBs, all are required to meet minimum density standards and housing mix requirements per the Metropolitan Housing Rule discussed previously in this report. Beyond these minimum density requirements, additional measures utilized by at least some of the local governments within Metro include reduced parking requirements, allowance for ADUs (now mandatory, per passage of SB 1051 by the Oregon Legislature in 2017), SDC waivers for some types of development, and reduced street sizing standards. The fact that Metro anticipates meeting 97 percent of the projected housing need over the next 20 years within the existing UGB, as discussed previously, (and 93 percent of the projected single-family housing need) demonstrates that Metro continues to make efficient use of land within its UGB, consistent with OAR 660-024- 0050(4).

As to the charge that the failure to require an increase in densities within Inner or Outer Neighborhoods results in de facto or de jure discrimination, HLA has not provided sufficient

information to demonstrate such an impact to a protected class. Whether Metro choose not to require increases in density within Inner or Outer Neighborhoods due to Charter Section 5(b) is immaterial to this question, as Metro has satisfactorily demonstrated that they have made efficient use of the land within the UGB without need for additional measures.

Therefore, the department recommends that the commission reject this sub-objection.

LCDC Rec 4396-97

Housing Land Advocates

July 11, 2019

BY EMAIL AND HAND DELIVERY

Jim Rue, Director
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301

via e-mail to: jim.rue@state.or.us

Re: Exceptions to Department Report, Metro UGB Amendment

Dear Mr. Rue:

Housing Land Advocates (HLA) filed Objections to Metro's urban growth boundary amendment on January 30, 2019. On July 1, 2019, the Department distributed a Director's Report recommending that the Commission reject all of HLA's Objections. Please include these exceptions in the record. Notices related to this file can be sent to Housing Land Advocates, c/o Jennifer Bragar, 121 SW Morrison Street, Suite 1850, Portland, OR 97204; e-mail jbragar@tomasilegal.com.

While these Exceptions pertain to just some of the issues raised in HLA's Objections, HLA preserves all of its Objections moving forward. For ease of reference, HLA attaches its December 4, 2018 comment letter to Metro as Attachment 1, and its January 30, 2019 Objections as Attachment 2.

I. Summary of Exceptions

Exception One: The Department rejected HLA's Objection that Metro was required to review the application of the federal Fair Housing Act, as amended ("FHA"), to this UGB expansion decision. The Department concluded that, while ORS 197.633(3)(c) requires an analysis of whether a local government's decision complies with "applicable statutes," neither the Department, the Commission, nor the courts have ever interpreted that term to include federal law. Because the absence of precedent does not prove the inapplicability of the FHA, the Department should reevaluate its response and the Commission should sustain this Objection. In addition, the state analogue to the FHA (i.e. ORS 659A.001(9)(b) and ORS 659A.421-.425) applies to this decision.

Exception Two: The Department rejected HLA's Objection that Metro failed to conduct the analyses necessary to comply with Goal 10, the Metro Housing Rule, and the Needed Housing Statutes. The Department concluded that, because Metro submitted "a number of pertinent documents," and because of Metro's "own assumptions and evidence," including its "aggressive" calculations and "thorough," "peer review[ed]" methodology, Metro's decision complies with "the requirement to address the region's anticipated housing needs over the planning period" and gave

serious consideration to "reasonably accommodating" needed housing within the existing UGB, and therefore complies with Goal 10, Goal 14, and ORS 197.296. Because none of these assertions, if true, would demonstrate that Metro undertook the analyses and remedial measures required by the Metro Housing Rule and the Needed Housing Statutes, the Commission should remand the submittal with directions to Metro to conduct those analyses and adopt any necessary remedial measures.

Exception Three: The Department rejected HLA's Objection that Metro failed to justify the need to expand the UGB with substantial evidence in the whole record. Even if Metro's population projections are correct, those numbers do not automatically translate into justification to expand the UGB because there is additional capacity overlooked by Metro in its calculations. The Department incorrectly deferred to Metro's findings when, among other things, Metro interpreted its Charter to restrict any "increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods." Thus, Metro failed to examine whether the existing urban growth boundary can accommodate the need for additional single-family housing and it failed to address the social outcomes of the proposed UGB expansion. The Commission should sustain HLA's Objection and remand this decision for a UGB that accounts for maximum efficiency within the existing boundary.

II. Burden of Proof

Much of the Department's Report charges that HLA must make particular findings or carry the burden of proof. However, the burden of proof lies first with Metro and now with the Commission to support its decision. As a reminder, the Commission should consider the following.

Since the adoption of the goals, the Oregon Supreme Court, the Oregon Court of Appeals, and the Land Use Board of Appeals have consistently placed on local governments the burden of making the factual, legal, and analytical case to demonstrate that their legislative planning and zoning ordinances comply with state land use goals, rules, and statutes.[1] The Commission has recognized and honored this principle from the beginning as it applies to Goal 10 and the needed housing statutes. In 1977, the LCDC applied Goal 10 to set aside a City of Ashland ordinance downzoning a residential area. In so doing, LCDC articulated quite clearly the scope of review that is applicable in cases like the one before it today:

> "Planning decisions must meet the standards set by the goals. Insofar as compliance depends upon specific, ascertainable fact, compliance must be shown by substantial evidence in the record. Insofar as compliance depends upon value judgments and policy, compliance must be shown by a coherent and defensible statement of reasons relating the policies stated or implied in the goals to the policies of the planning jurisdiction.'"[2]

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[1] *See generally, 1,000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384, 752 P2d 271 (1988) (Forest Lands Goal).

[2] *See Kneebone v. Ashland*, 3 LCDC 131, 134 (1979), quoting from *Cook v. Clackamas County*, 1 LCDC 244, 261 (1977).

Because the LCDC's rules implement the goals, a violation of an applicable provision of a rule is a violation of the goal or goals that it implements, and review follows the same principles.[3]

III. Exception One: The federal Fair Housing Act, as amended and its Oregon analogue apply to this decision. Metro's failure to apply fair housing requirements and to make findings relative to the act and state statute mean HLA's Objection should be upheld.

A. Brief Summary

The Department rejected HLA's Objection that Metro was required to review the application of the FHA to this UGB expansion decision. The Department concluded that, while ORS 197.633(3)(c) requires an analysis of whether a local government's decision complies with "applicable statutes," neither the Department, the Commission, nor the courts have ever interpreted that term to include these federal or state laws. Because the absence of precedent does not mean that the FHA or its Oregon analogue is not applicable, the Department should reevaluate its response and the Commission should sustain this Objection. See 42 U.S. Code §3615 ("…any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.)

B. Background

The FHA,[4] provides in material part that it is unlawful to either "make unavailable or deny[] a dwelling to any person" or "discriminate against any person in the provision of services or facilities in connection" with the sale or rental of a dwelling "because of race, color, religion, sex, familial status, or national origin."[5] For those entities receiving federal housing funds, such as the State of Oregon, there is an additional obligation to affirmatively further fair housing; to address historical impacts of segregation and to promote inclusive housing communities that are free from discrimination.[6] Additionally, there is no question that the federal fair housing laws apply to state agencies regulating local or regional land use policies and practices.[7]

The FHA has been broadly interpreted by the courts to apply to land use regulatory powers and prohibits virtually all differences in treatment based on any of the protected characteristics, and has been interpreted to apply to differences in the impact of otherwise neutral policies and practices.[8] Citizens may bring civil rights claims against state actors "when the objective is to obtain a declaration that a rule of federal law supersedes the rules that the state actors are

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[3] *See Melton/DLCD v. City of Cottage Grove*, 28 Or LUBA 1, (1995).
[4] 42 U.S.C. §§ 3601-3619.
[5] 42 U.S.C. § 3604.
[6] 24 C.F.R. § 5.150
[7] Silverstein, Thomas (2015) "Overcoming Land Use Localism: How HUD's New Fair Housing Regulation Can Push States to Eradicate Exclusionary Zoning," University of Baltimore Journal of Land and Development: Vol. 5: Iss. 1, Article 3. Available at: http://scholarworks.law.ubalt.edu/ubjld/vol5/iss1/3 AFFH Rule Guidebook, Version 1, December 31, 2015, The US. Department of Housing and Urban Development, Preface available at https://files.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf.
[8] *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015).

implementing."[9] The Supreme Court has held that citizens have standing to bring such claims simply by "alleg[ing] a reduction in their enjoyment as a result of having fewer black neighbors."[10]

The Supremacy Clause of the U.S. Constitution[11] gives federal laws, such as the FHA, precedence over conflicting state and local laws.[12] Consequently, the FHA prohibits state, local, and regional governments from enacting discriminatory land use and zoning laws, policies, and practices that make unavailable or deny housing—including vacant land that could be developed into residences—because of a characteristic protected under the FHA.[13]

Liability under the FHA may be established by showing intentional discrimination or by showing that a defendant's acts have a significant discriminatory effect.[14] Discriminatory effect may be proven by showing either (1) adverse impact on a particular minority group or (2) harm to the community generally by the perpetuation of segregation.[15] The U.S. Department of Housing and Urban Development's (HUD) final rule on disparate impact explains that a discriminatory housing practice is broadly construed to include "any facially neutral actions, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria."[16]

State law also prohibits discrimination in land use policies and practices selling, renting, or leasing property and provides that a "facially neutral housing policy" may be a violation if it is found to have a greater adverse impact on members of a protected class than on persons generally.[17]

In addition, under HUD's Affirmatively Furthering Fair Housing (AFFH) rule,[18] recipients of Community Planning and Development grants are obligated to *affirmatively further* fair

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[9] *New West, L.P. v. City of Joliet*, 491 F.3d 717, 719 (2007); *see also* 42 U.S.C. § 1983.
[10] *See New West, L.P.*, 491 F.3d at 721 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S. Ct. 1601 (1979)).
[11] *See* U.S. Const. art. VI, cl. 2.
[12] *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1383 (2015) ("It is apparent that this Clause creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws."); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–374, 120 S. Ct. 2288, 2293–2294 (2000).
[13] *See id.* ("[The Court] will find preemption where . . . 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67, 61 S. Ct. 399 (1941). *See also* Dep't of Hous. & Urban Dev. & Dep't of Justice, *State and Local Land Use Laws and Practices and the Fair Housing Act* (2018), http://bit.ly/2emU4kE (last visited July 8, 2019).
[14] *See Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. 2507.
[15] Distribution patterns of housing by type, tenure, and cost determine the degree to which a municipality is either integrated or segregated. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995) (zoning restrictions may constitute discriminatory housing practice); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 936–938 (2d Cir. 1988) (zoning that restricts multi-family housing to certain geographical areas adversely affects minorities and perpetuates segregation), *aff'd*, 488 U.S. 15, 109 S. Ct. 276 (1988) (per curium); *see also Summerchase Ltd. Partnership I v. City of Gonzales*, 970 F. Supp. 522, 527–28 (M.D.La. 1997).
[16] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).
[17] *See* Or. Rev. Stat. § 659A.001(9)(b), .421–.425.
[18] *See* 24 C.F.R. § 5.150–.168.

local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the RFP, the functional plan and land use regulations."[21] HLA agrees with the Department that the item in this list, which includes the FHA is the term "applicable statutes."

The Department's position is that, because there is "no history of the department or commission interpreting the term 'applicable statutes' to include anything other than [state] statutes[,]" and because there is "no precedential case law that would include compliance with the FHA as being a standard for a decision . . . on a local government plan amendment or periodic review[,]" the FHA applies to neither Metro in making its decision nor the Department in reviewing it. And while the Department recognizes that Oregon law imposes substantially the same requirements as the FHA, it concludes we have not established that this UGB expansion decision violates state law by either discriminating against or having disproportionate adverse impacts on a protected class.

E. HLA's Exception

1. Applicability

The absence of precedent applying the FHA and the state statutory analogue to UGB expansion decisions is not a bar to their consideration by the Commission for the first time now given the uniqueness of Oregon's system of land use laws and regulations. The Department claims that, because there is no case law interpreting "applicable statutes" in ORS 197.633(3)(c) to include federal law, the FHA does not apply. ORS Chapter 197 includes numerous references to "applicable" laws. In various sections, it singles out "federal law,"[22] "state law,"[23] "federal statute,"[24] and "state statute."[25] The Legislature knows how to distinguish between laws adopted by the Oregon State Legislature and those adopted by Congress. The fact that there is no qualifying phrase preceding "statutes" in ORS 197.633(3)(c) means that the Legislature did not intend to limit the Department and Commission's scope of review in a such a fashion. Although HLA believes the Department was obligated to review this UGB expansion decision for compliance with the FHA regardless of express legislative authorization to do so, that authorization did in fact already exist by virtue of ORS 197.633(3)(c).

This question was raised below and in HLA's Objections to Metro's decision, and it is properly before both the Department and the Commission. The Department's decision to read out both their and Metro's requirement to ensure compliance with the FHA – indeed, its failure to even respond to HLA's assertions – should not be deferred to in this instance because to do so would be to avoid addressing the tough reality that Metro, like so many other jurisdictions around the country, has perpetuated exclusionary practices. In other words, LCDC cannot make a decision with a basis for understanding whether the UGB expansion will perpetuate historic patterns of

[21] Or. Rev. Stat. § 197.633(3)(c)
[22] *See* Or. Rev. Stat. § 197.012; 197.180(2)(a), (3).
[23] *See* Or. Rev. Stat. § 197.012; 197.180(3); 197.296(4)(b)(A).
[24] *See* Or. Rev. Stat. § 197.296(4)(b)(A).
[25] *See* Or. Rev. Stat. § 197.180(2)(a); 197.829(1)(d).

power to review and revise plans and regulations of its member jurisdictions. In order to expand the UGB, Metro, as a statutory "local government," must be able to ensure compliance with Goal 10, the Metro Housing Rule, and the Needed Housing Statutes. Because it lacks that ability right now, the Commission must remand this UGB expansion decision until such a mechanism is in place. Until then, Metro's Urban Growth Management Functional Plan, which both Metro and the Department correctly characterize as "meant to implement ORS 197.296," cannot be deemed satisfied because it provides no mechanism to correct the loss of housing capacity by individual local actions.[46]

V. Exception Three: Metro and the Department failed to justify the UGB expansion for failure to consider other lands and requirements that might have obviated the need to expand (HLA Objections 3(b) and 3(c) – Metro Charter and Comparative Analysis)

A. Brief Summary of Metro Charter

The Department rejected HLA's Objection that Metro has correctly construed applicable law and that Metro has justified the proposed UGB expansions with substantial evidence in the whole record and an adequate statement of reasons despite Metro's categorical refusal to consider any "increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods." This "finding" occurred only at the end of the process and was not the subject of any other Metro analysis in this record.

HLA takes exception to the Department's recommendation that the Commission should allow such a massive categorical exclusion because it leaves a poorly-defined but definite hole in Metro's evidentiary record concerning whether the existing UGB can reasonably accommodate identified needs, including the needs for additional single-family housing used as the basis for the four expansions before the Commission in this proceeding.

The Director's Report also invites the Commission to misinterpret and misapply the statutes, goals, and rules governing urban growth boundary expansions for needed housing in ways that encourage exclusionary nullification strategies like the charter amendment in question.

HLA respectfully but urgently asks the Commission not to be a party in undermining the primacy of state land use laws affecting housing and that it not be a party to unlawfully limit the capacity of Oregon's existing urban growth boundaries.

B. HLA's Charter Amendment Objection

In HLA's Sub-Objection 3b, HLA explained that Metro's failure to analyze whether the existing UGB can reasonably accommodate identified needs, including the needs for additional single-family housing needs identified as the basis for the expansions before the Commission. At pp. 10-11 of Metro's findings, HLA points out that there is a remarkable statement that appears to exempt from consideration any changes to existing single-family neighborhoods, based on an interpretation of Metro Charter, Section 5(b).

[46] *See* Section V, *infra* for HLA's response to the Department regarding the Metro Charter limitations.

Metro determined it must expand the boundary because it couldn't consider or require additional efficiencies in single-family areas within the plans and land use regulations of cities and counties in the region and, consequently, didn't look for these efficiencies. HLA argues that Metro conducted no analysis of areas other than the four cities that requested additional urban lands through this inspection.

The issue for HLA is that the subject decision is not supported by substantial evidence or adequate findings supporting Metro's determination of need for expansion of the current UGB because Metro unlawfully excluded any consideration of existing neighborhoods.

Further, HLA mentions the findings also fail to explain why such a self-imposed charter restriction overrides state standards and procedures for establishing and enhancing existing capacity before expanding an Urban Growth Boundary. Those findings do not explain why Metro and its constituent jurisdictions are exempt from requirements imposed on Oregon's other urban areas.

Additionally and alternatively, HLA contends that: 1) The subject charter provision is preempted by the requirements of ORS 197.296, Goal 14, Goal 10, and LCDC's rules interpreting those goals and statutes; or 2) Until it repeals the subject charter language or otherwise follows state law, Metro has disabled itself from meeting the requirements of state statutes and goals for maximum efficiency of the existing UGB, a showing of an inability to accommodate estimated needs within the existing UGB and a sufficient demonstration of an existing capacity shortage and of a need to expand the Metro UGB to meet that need.

In summary, Metro may not, if it wants to expand its urban growth boundary, use its charter restriction to exclude existing neighborhoods from efficiency measures, reduced maximum lot sizes, increased density minimums, multifamily housing, accessory dwelling units, vacation rental restrictions, or other measures that implement Goal 10, the Needed Housing Statutes, and the accessibility requirements of state and federal fair housing laws.

C. Department's Response to HLA Charter Amendment Objection

The Department cites to Goal 14 and OAR section 660-024-0050(4) that, "[p]rior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB." The Department finds that because Goal 14 and OAR section 660-024-0050(4) is "…without clear guidance as to 'reasonable accommodation' it is evident that making this determination is highly discretionary." The Department concludes that for this proceeding, the Metro Charter provisions that prohibit certain actions by Metro is a reasonable consideration.

Further, the Department concludes that HLA has not provided sufficient information to demonstrate that Metro's inaction violated the FHA because "…to require increases in density within Inner or Outer Neighborhoods due to Charter Section 5(b) is immaterial to this question, as Metro has satisfactorily demonstrated that they have made efficient use of the land within the UGB without need for additional measures."

D. HLA's Exception

As the Department's Report says,

> "At issue is the requirement, found in Goal 14 and OAR section 660-024-0050(4) that, 'Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB.'"[47]

Where the Department runs off track is in failing to understand that this fundamental "requirement" underpinning the integrity of existing urban growth boundaries significantly constrains the discretion local and regional governments have under the Needed Housing Statute to choose and apply appropriate "efficiency measures" as well as whether to (a) eliminate an existing capacity deficit with efficiency measures, (b) expand an existing UGB, or (c) both.

Simply put, a proposed UGB expansion which categorically excludes the vast majority of existing lands planned and zoned for single-family residential use from any density increases to meet an identified need for more single-family housing does not "demonstrate" that those needs cannot be "reasonably accommodated" on lands "already inside the UGB."

Nothing in ORS 197.296(6)[48] says or suggests that it overrides or qualifies the requirement of Goal 14 and the urbanization rule that, before they expand their UGBs, regional and local governments must first "demonstrate" that they cannot "reasonably accommodate" identified residential land needs within their existing urban growth boundaries.

Metro's attempt to gate off its entire inventory of single-family neighborhoods is not *ipso facto* "reasonable" and its status as a charter amendment does nothing to make it so.[49] Could Eugene or Bend or Hood River do the same? Does ORS 197.296 offer a free pass on increasing

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[47] Department Report at p 48.

[48] Or. Rev. Stat. § 197.296(6) provides that

> "(6) If the housing need determined pursuant to subsection (3)(b) of this section is greater than the housing capacity determined pursuant to subsection (3)(a) of this section, the local government shall take one or more of the following actions to accommodate the additional housing need:
>
> "(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years. As part of this process, the local government shall consider the effects of measures taken pursuant to paragraph (b) of this subsection. . . ;
>
> "(b) Amend its comprehensive plan, regional framework plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary. A local government or metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures; or
>
> (c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection.

[49] See *1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 396 (1988) (The "talisman of a forest management plan" is "legally inadequate" to make construction of a dwelling "automatically comply with Goal 4.")

single-family home capacity simply because it is not completely prescriptive and identifies choices local governments may make, consistent with their continuing obligation to "demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB?" Or has that obligation now become a matter of "discretion" and "local option?" Does Metro's charter amendment excuse it from demonstrating compliance with all other applicable goals, statutes, and rules, including the Urbanization Goal, the Housing Goal, the requirement of an adequate factual base, and the requirement of a reasoned analysis?[50]

The answers must be "No." And those answers cannot be found because Metro saw no need to answer them. Here, despite the huge record, there is no factual base and no such reasoned analysis connecting the evidence with the conclusions reached, either by Metro or by the Department's Report, concerning whether Metro really needs to expand its urban growth boundary.

The Department's Report doesn't fill any gaps with this rather odd comments that there are other measures (minimum densities and housing mix provisions of the Metro Housing Rule, parking reductions, ADUs) so that 97 percent of the projected housing need over the next 20 years within the existing UGB, as discussed previously, (and 93 percent of the projected single-family housing need) is met.[51] That shows the boundary is "efficient."

This is not just a *non sequitur*. It is a reverse sequitur. It connects the facts in the record with the exact opposite of the Director's conclusion: If the existing boundary can accommodate 97 percent without the additional[52] efficiency measures mentioned in ORS 197.296, then it should be easy to boost capacity by another three percent. That makes excluding single-family zones, which currently occupy most of that land, from any role in increasing capacity for the identified needed housing type – single-family homes – patently unreasonable.

As far as HLA knows, Metro's charter amendment was not promulgated as a post-acknowledgment plan amendment or zoning regulation and has never been reviewed for compliance with statewide land use statutes, goals, and rules. Metro's charter amendment could never pass such a test. For as applied here, it undermines and contravenes the Urbanization Goal and Rule with its bypass of the obligation to demonstrate inability to reasonably accommodate projected needs with existing urban growth boundaries. It exempts the vast bulk of residentially-planned and zoned lands within Oregon's largest urban growth boundary and the current residents and owners of those lands from bearing their fair share of *their* communities' obligations under Oregon's State Housing Goal 10.

Its obvious purpose is to "entrench" an exemption from state housing laws. Its obvious effect to date is a classic case of "regulatory capture." The challenge for this Commission is to free Metro and the Department, not to join them in the cage.

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[50] In acknowledging a plan or plan amendment, LCDC must "[I]nclude a clear statement of findings in support of the determinations of compliance." Or. Rev. Stat. § 197.251(5)(b). For its part, Metro must present a record to LCDC that "viewed as a whole, would permit a reasonable person to make that finding." Or. Rev. Stat. § 183.483(8)(c) and parallel Goal 2 requirement of an "adequate factual basis."

[51] Department Report at pp 48-49.

[52] The efficiency measures contemplated in Or. Rev. Stat. § 197.296 are additional measures to those already in place, which are counted toward the baseline capacity and can't be recounted towards enhanced capacity.

This Commission has a great responsibility as stewards of Oregon lands, air, and water resource and as stewards of Oregon's entire land use constitution. Where Goal 10 is concerned, what that stewardship obligation entails has long been clear. From the very beginning, the Commission has rejected attempts to reduce or to avoid increasing housing density without demonstrating compliance with the Statewide Housing Goal. As the original Commissioners, including several founding fathers and mothers of Oregon's "land use constitution," said over 40 years ago, in *Seaman v. Durham*, 1 LCDC 283, 288-290 (1978), overturning a local government's attempt to use density to exclude affordable housing,

> "The Commission finds, for the reasons set forth in this opinion, that the density reduction should be declared void as in violation of the housing goal and that the matter should be returned to the city for such action, if any, as is consistent with the Commission' s determination and this opinion.
>
> This case turns on the meaning and intent of the LCDC Housing Goal. Goal 10 is short and to the point:
>
> > 'Goal: To provide for the housing needs of citizens of the state. Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.
> >
> > Buildable Lands - refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.
> >
> > Household - refers to one or more persons occupying a single housing unit.'
>
> ***
>
> [C]ities are not required to conform strictly to guidelines.
>
> ***
>
> Yet they are instructive and may validly be considered for the light they cast on the intent of the drafters of the goals. The housing guidelines reflect a great concern for variety in shelter costs, for dispersal of low-income housing throughout urban areas, and for affirmative incentives to achieve the goal, if necessary. See Guidelines A(1) and B(2) to B(5). The guidelines also contemplate the ultimate implementation of the goal to be on a regional level. Guideline B(6). Perhaps most important, the goal itself refers to the 'financial capability' not of residents of the municipality but of 'Oregon households,' strongly suggesting that towns must look beyond their borders

in assessing housing needs.

The housing goal clearly says that municipalities are not going to be able to do what they have done in metropolitan areas in the rest of the country. They are not going to be able to pass the housing buck to their neighbors on the assumption that some other community will open wide its doors and take in the teachers, police, firemen, clerks, secretaries and other ordinary folk who can't afford homes in the towns where they work.

The LCDC, in adopting Goal 10, was doing just what the courts in many urban states have been doing in recent years. The development is examined approvingly and at length in a leading planning law treatise, which introduces the topic with these observations:

> 'If anything is clear in American planning law, it is that the state courts (and some lower federal courts) have been moving rapidly towards a major reversal in the law on exclusionary zoning directed against lower-income groups. At least in several states, and probably in most states, there is a strong probability that in the near future municipal autonomy to use zoning for such purposes will be sharply reduced . . .'
>
> This change . . . is the result of several different factors. First, because of changes in the age structure of the population, this country is moving into a period when there will be heavy pressure for several types of housing, all of which are now prohibited on most of the available vacant land. Two groups in the population are now increasing rapidly - the aged ... and the young married couples.
>
> In the second place, the recent development of public policy in the other critical areas has cast considerable light on the implications of the exclusionary suburban pattern . . . (For) a decade or two now it has been apparent that, if current trends continue, there is considerable likelihood of a pattern of largely black (and poor) central cities surrounded by largely white (and middle class) suburbs - a pattern whose implications appeal to very few thoughtful people. 3 Williams, *American Land Planning,* Law Section 66.01 (1975).'

Goal 10 speaks of the housing needs of Oregon households, not the housing needs of Durham households. Its meaning is clear: planning for housing must not be parochial. Planning jurisdictions must consider the needs of the relevant region in arriving at a fair allocation of housing types. Goal 10 represents the broader interests of all Oregon households.

In this respect, Goal 10 is consistent with common sense and human nature.

> Local officials cannot be expected to concern themselves too deeply about the requirements of outsiders, especially when their constituencies have interests that conflict with those of the outsiders. It is only proper for these officials to consider their first responsibility to be their constituents.
>
> It becomes necessary, therefore, to assure that broader interests are represented in planning decisions such as housing, which have significance and impacts extending far beyond municipal borders." (Emphasis added).

The Commission's resolution of this issue has far-reaching implications. As the *Seaman* case illustrates, density restrictions can take many forms, some of which can render efficiency measures such as minimum lot sizes and added housing types ineffective. An ordinance setting a maximum density of five units per acre, for example, can limit development on a one-acre site to two duplexes and a single-family home. Strict floor-area ratios, oversized setbacks, and vaguely defined buffer areas can have the same effect.[53] Such restrictions, if tolerated because of charter amendments like Metro's, would seriously impair the effectiveness of state land use laws such as the newly-enacted House Bill 2001. The decision should be remanded so that Metro can analyze the full tool set of efficiency measures to utilize land within the existing boundary to meet housing needs.

E. Relatedly, Metro's consideration of social impacts in light of HLA's comments about exclusion and effects on low-income Oregonians is so flawed in its failure to respond that the environmental, social, energy and economics analysis ("ESEE") establishes another basis for remand.

1. Brief Summary Of Comparative Analysis

Metro must evaluate and apply the locational factors when there is a need to amend the UGB under MC 3.07.1440(b). This section's cross-reference to 3.07.1425(c)(3) requires ESEE findings:

> "(c) If the Council determines there is a need to amend the UGB, the Council shall evaluate areas designated urban reserve for possible addition to the UGB and shall determine which areas better meet the need considering the following factors:
>
> * * *
>
> (3) Comparative environmental, energy, economic and social consequences;"

2. HLA's Objection

HLA raised significant social concerns in its comments to Metro. HLA specifically pointed to the cities of Sherwood and Happy Valley, the cities with the highest median incomes in their

[53] See *Homebuilders et al. v. City of Eugene*, 41Or LUBA 370, 446 (2002), finding that petitioners had made a "facially plausible showing" that city code provisions establishing buffers around some 200,000 "significant trees" dispersed across the city "are likely to reduce the supply of buildable lands," and that the city had failed to "quantify how much land, if any, may be rendered unbuildable."

respective counties (Washington and Clackamas). Unsurprisingly, the Clackamas County Consolidated Plan shows that Happy Valley's population grew by 208% between 2000-2010, and in 2010, 76% of its population was white.[54] In addition, poverty has increased in the County by 10.4% between 2000 and 2010 and in nearly half of female householders with young children under five (a protected class) lived in poverty.[55] Yet, Metro's decision did not include an analysis of whether Happy Valley has exclusionary zoning practices and/or results. Similarly, while the City of Sherwood has the highest median income in Washington County, and an identified need to expand its UGB, it neither applied for an expansion nor was required to do so.[56] The City Council did not want to be tethered to affordable housing requirements that Metro identified as a linchpin to successful applications.[57]

These concern were raised under the Goal 10 heading, but HLA's footnote 41 in its December 4, 2018 letter tied the issue back to Metro Code 3.07.1425(c)(3). However, Metro's decision and the DLCD Report make no reference to this important criticism and omission. Instead, the Director's Report embraces Metro's self-fulfilling prophecy that the only boundary expansion necessary to consider were from those member cities who applied. This is contrary to *Seaman v. Durham,* which stands for the greater regional planning goal - the very reason Metro exists.[58]

3. Department Response

The Department claims that "HLA seems to misunderstand the purpose of the boundary location factors analysis required by Goal 14. HLA asserts that Metro must analyze the social consequences of UGB expansion upon residents of the existing UGB. As a matter of law, the social consequences required to be measured under Goal 14 as part of factor 3 cited above are a comparative analysis of different proposed UGB expansion areas – a local government completes this analysis after it has determined the amount or capacity of the land need to be satisfied with a UGB expansion, not before." The Department claims that "HLA's concerns regarding locational preferences and potential displacement are addressed by Metro's HNA and buildable lands inventory, completed in an earlier phase of the analysis."

The Department further claims that, "[A]s part of the required consideration of Goal 14 Boundary Locational Factors (Goal 14, Boundary Location) Metro completed a comparative analysis of the ESEE Factors identified in Goal 14. The complete analysis of locational factors may be found on pages 1985–1994 of the Record. Metro completed detailed analyses of the Goal 14 Locational Factors for all 32 of the urban reserve areas under consideration for expansion. Record at 1998. The department finds that Metro has adequately considered the boundary locational factors of Goal 14, and recommends that the commission reject this sub-objection."

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[54] See HLA's December 4, 2018 letter to Metro attached here as Attachment 1.
[55] *See id.*
[56] *See id.*
[57] *See id.*
[58] This is true despite Metro's emphasis on the long-term planning for the zoo and now as a grant agency that will support housing in only those member cities that qualify for community development block grants, not those cities that are too small, and as the trajectory of this decision shows, will be insulated from consequences for their exclusionary practices.

4. HLA's Exception

The Director's Report cites to the ESEE analysis that was prepared by Metro at Record 1985-1994. But, that was done without reference to HLA's social concerns. An ESEE analysis requires a comparison of the social impacts for both the proposed expansion area and for the alternative sites.[59] Metro has an obligation to consider each of the locational factors and to articulate its thinking regarding the factor and the role that each factor played in its balancing of all the factors.[60] But, it cannot avoid uncomfortable social facts in its analysis, and it does so by completely avoiding the absence of the City of Sherwood in this expansion request.[61] Thus, the analysis of social consequences does not allow for a meaningful review.

Metro's findings fail to address the social consequences and the impact on housing opportunities. Rather, the ESEE's social consequences are limited to displacement of existing homes in the contemplated expansion areas. It is apparent that there is a statewide crisis with the lack of affordable housing across Oregon. HLA offered empirical data that Sherwood provides nearly the least amount of affordable housing in Washington County, while having the highest income, and the highest median rents.[62] Livability, which is a social consequence, is a more pressing social matter than the Director's Report credits. Instead, the Director's Report sanctions Metro's blinders to the problems throughout its region and allows Metro to limit the focus only on the four cities that applied for an expansion. This is the kind of reasoning that raises the specter of exclusion. The social impact may result in a reduction of housing equity, loss of a vibrant community, diminished quality of life, and less housing opportunities for current and future citizens. These points were echoed in HLA's Objection, at pp. 18-19.

Similarly, gentrification is not discussed at all in the ESEE as a social impact. If, as is true, persons of color are displaced by gentrification in Albina and North Portland or are required by economics to live in East Portland, how does expanding single-family housing in King City, where transportation is inadequate, not a consideration in a boundary expansion?[63] Without specifying key social impacts, the ESEE analysis is incomplete.

Taken together 1) the smokescreen of the Metro Charter, and the unexamined conclusion that the existing UGB cannot be used to meet the 3% need for additional single-family dwellings because increased density cannot be required, and 2) the failure to address the social outcomes, results in exclusion and allows patterns of segregation to continue throughout the region. Metro

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[59] *See 1000 Friends of Oregon v. Metro*, 38 Or LUBA 565, 595 (2000), *aff. in part* 174 Or App 406 (2001) (*Ryland Homes*).

[60] *See Ryland Homes*, 174 Or. App. 406.

[61] *See Eckis v. Linn County*, 22 Or LUBA 27, 47 (1991), *aff'd* 110 Or App 309 (1991) (livability is a social consequence and must be addressed).

[62] *See* Attachment 1, Exhibit 2.

[63] Moreover, Goal 14's need requirements also include consideration of similar factors when it provides: "Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary." Similarly, as noted in HLA's third objection, if persons of color are displaced by gentrification in Albina and North Portland or are required by economics to live in East Portland, how does expanding single-family housing in King City, where transportation is inadequate, not a consideration in a boundary expansion? The lower or middle-income Latino pushed out of North Portland is not likely to be accommodated by a $500,000 dwelling in the expansion area of King City.

cannot be let off the hook this easily, and on remand, in order to make adequate findings addressing this issue, it should reopen the record. At that time, Metro should start in the City of Happy Valley to determine whether there are buildable lands that could increase density to allow dwellings. Then, it should go down the line of member cities to Sherwood and other high-priced exclusive cities within the Metro region to determine where the need can be met. Only then, will Metro start to lead us out of exclusion to the equity goal it has set as an aspiration.

CONCLUSION

HLA has witnessed Metro's conversations around equity, but "conversations" do not replace the hard planning work necessary to end exclusionary zoning practices. The years between UGB expansions should be spent less on toolkits and more on identifying and leading member cities to expansion proposals that aim to end exclusion, gentrification, and to stanch the forces that push marginalized communities to the edge of the boundary. The equity-based issues that HLA's all volunteer-board argues in this UGB exception, provides LCDC the support it needs to make the right decision here – to send Metro back to the drawing board and turn its "conversations" about equity into practice in housing supply solutions.

Sincerely,

Jennifer Bragar
President, Housing Land Advocates

Attachments:

Attachment 1: Housing Land Advocates' December 14, 2018 Letter to Metro
Attachment 2: Housing Land Advocates' January 30, 2019 Objection to DLCD

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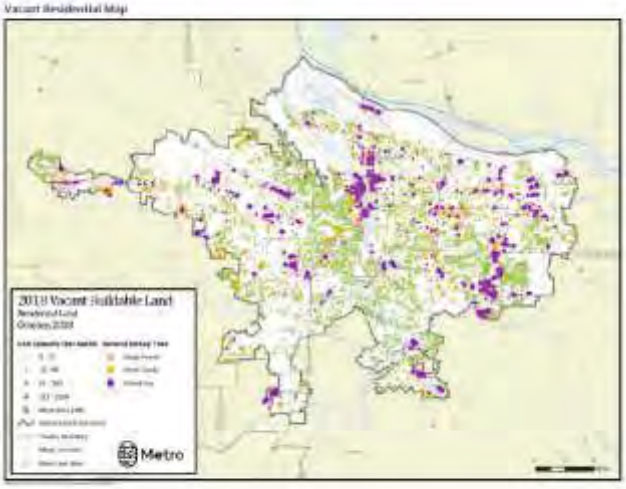
Graphics

Exhibit C to Ordinance No. 18-1427 Page 109 of 1034

Vacant Residential Map



Oregon's Statewide Planning Goals & Guidelines

GOAL 2: LAND USE PLANNING

OAR 660-015-0000(2)

PART I -- PLANNING

To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.

City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268.

All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents. The plans, supporting documents and implementation ordinances shall be filed in a public office or other place easily accessible to the public. The plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. Each plan and related implementation measure shall be coordinated with the plans of affected governmental units.

All land-use plans and implementation ordinances shall be adopted by the governing body after public hearing and shall be reviewed and, as needed, revised on a periodic cycle to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan. Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances.

Affected Governmental Units -- are those local governments, state and federal agencies and special districts which have programs, land ownerships, or responsibilities within the area included in the plan.

Comprehensive Plan -- as defined in ORS 197.015(5).

Coordinated -- as defined in ORS 197.015(5). Note: It is included in the definition of comprehensive plan.

Implementation Measures -- are the means used to carry out the plan. These are of two general types: (1) management implementation measures such as ordinances, regulations or project plans, and (2) site or area specific implementation measures such as permits and grants for construction, construction of public facilities or provision of services.

Plans -- as used here encompass all plans which guide land-use decisions, including both comprehensive and single-purpose plans of cities, counties, state and federal agencies and special districts.

GOAL 10: HOUSING

OAR 660-015-0000(10)

To provide for the housing needs of citizens of the state.

Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

Buildable Lands -- refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.

Government-Assisted Housing -- means housing that is financed in whole or part by either a federal or state housing agency or a local housing authority as defined in ORS 456.005 to 456.720, or housing that is occupied by a tenant or tenants who benefit from rent supplements or housing vouchers provided by either a federal or state housing agency or a local housing authority.

Household -- refers to one or more persons occupying a single housing unit.

Manufactured Homes -- means structures with a Department of Housing and Urban Development (HUD) label certifying that the structure is constructed in accordance with the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 USC 5401 et seq.), as amended on August 22, 1981.

Needed Housing Units -- means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, "needed housing units" also includes government-assisted housing. For cities having populations larger than 2,500 people and counties having populations larger than 15,000 people, "needed housing units" also includes (but is not limited to) attached and detached single-family housing, multiple-family housing, and manufactured homes, whether occupied by owners or renters.

GUIDELINES

A. PLANNING

1. In addition to inventories of buildable lands, housing elements of a comprehensive plan should, at a minimum, include: (1) a comparison of the distribution of the existing population by income with the distribution of available housing units by cost; (2) a determination of vacancy rates, both overall and at varying rent ranges and cost levels; (3) a determination of expected housing demand at varying rent ranges and cost levels; (4) allowance for a variety of densities and types of residences in each community; and (5) an inventory of sound housing in urban areas including units capable of being rehabilitated.

GOAL 14: URBANIZATION

OAR 660-015-0000(14)

(Effective January 1, 2016)

To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.

Urban Growth Boundaries

Urban growth boundaries shall be established and maintained by cities, counties and regional governments to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land. Establishment and change of urban growth boundaries shall be a cooperative process among cities, counties and, where applicable, regional governments.

An urban growth boundary and amendments to the boundary shall be adopted by all cities within the boundary and by the county or counties within which the boundary is located, consistent with intergovernmental agreements, except for the Metro regional urban growth boundary established pursuant to ORS chapter 268, which shall be adopted or amended by the Metropolitan Service District.

Land Need

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

(1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments, or for cities applying the simplified process under ORS chapter 197A, a 14-year forecast; and

(2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2). In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need. Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary.

OREGON ADMINISTRATIVE RULES

OAR Ch. 660, Division 24, Urban Growth Boundaries

OAR 660-024-0000 –

Purpose and Applicability
(1) The rules in this division clarify procedures and requirements of Goal 14 regarding a local government adoption or amendment of an urban growth boundary (UGB). The rules in this division do not apply to the simplified UGB process under OAR chapter 660, division 38.

660-024-0020
Adoption or Amendment of a UGB
(1) All statewide goals and related administrative rules are applicable when establishing or amending a UGB, except as follows:
(a) The exceptions process in Goal 2 and OAR chapter 660, division 4, is not applicable unless a local government chooses to take an exception to a particular goal requirement, for example, as provided in OAR 660-004-0010(1);
(b) Goals 3 and 4 are not applicable;
(c) Goal 5 and related rules under OAR chapter 660, division 23, apply only in areas added to the UGB, except as required under OAR 660-023-0070 and 660-023-0250;
(d) The transportation planning rule requirements under OAR 660-012-0060 need not be applied to a UGB amendment if the land added to the UGB is zoned as urbanizable land, either by retaining the zoning that was assigned prior to inclusion in the boundary or by assigning interim zoning that does not allow development that would generate more vehicle trips than development allowed by the zoning assigned prior to inclusion in the boundary;
(e) Goal 15 is not applicable to land added to the UGB unless the land is within the Willamette River Greenway Boundary;
(f) Goals 16 to 18 are not applicable to land added to the UGB unless the land is within a coastal shorelands boundary;
(g) Goal 19 is not applicable to a UGB amendment.

660-024-0050
Land Inventory and Response to Deficiency

(1) When evaluating or amending a UGB, a local government must inventory land inside the UGB to determine whether there is adequate development capacity to accommodate 20-year needs determined in OAR 660-024-0040. For residential land, the buildable land inventory must include vacant and redevelopable land, and be conducted in accordance with OAR 660-007-0045 or 660-008-0010, whichever is applicable, and ORS 197.296 for local governments subject to that statute. For employment land, the inventory must include suitable vacant and developed land designated for industrial or other employment use, and must be conducted in accordance with OAR 660-009-0015.

* * * * *

(4) 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 applicable rules at OAR 660-024-0060 or 660-024-0065 and 660-024-0067.

660-024-0080

LCDC Review Required for UGB Amendments
A metropolitan service district that amends its UGB to include more than 100 acres, or a city with a population of 2,500 or more within its UGB that amends the UGB to include more than 50 acres shall submit the amendment

to the Commission in the manner provided for periodic review under ORS 197.628 to 197.650 and OAR 660-025-0175.

OAR Ch 660, Division 25, Periodic Review

660-025-0020

Definitions

For the purposes of this division, the definitions contained in ORS 197.015, 197.303, and 197.747 shall apply unless the context requires otherwise. In addition, the following definitions apply:

(1) "Filed" or "Submitted" means that the required documents have been received by the Department of Land Conservation and Development at its Salem, Oregon, office.

(2) "Final Decision" means the completion by the local government of a work task on an approved work program, including the adoption of supporting findings and any amendments to the comprehensive plan or land use regulations. A decision is final when the local government's decision is transmitted to the department for review.

(3) "Metropolitan planning organization" means an organization located wholly within the State of Oregon and designated by the Governor to coordinate transportation planning in an urbanized area of the state pursuant to 49 USC § 5303(c).

(4) "Objection" means a written complaint concerning the adequacy of an evaluation, proposed work program, or completed work task.

(5) "Participated at the local level" means to have provided substantive comment, evidence, documents, correspondence, or testimony to the local government during the local proceedings regarding a decision on an evaluation, work program or work task.

660-025-0040

Exclusive Jurisdiction of LCDC

(2) Pursuant to ORS 197.626, the commission has exclusive jurisdiction for review of the following final decisions for compliance with the statewide planning goals:

(a) An amendment of an urban growth boundary by a metropolitan service district that adds more than 100 acres to the area within its urban growth boundary;

660-025-0175

Review of UGB Amendments and Urban Reserve Area Designations

(1) A local government must submit the following land use decisions to the department for review for compliance with the applicable statewide planning goals, statutes and rules in the manner provided for review of a work task under ORS 197.633:

(a) An amendment of an urban growth boundary by a metropolitan service district that adds more than 100 acres to the area within its urban growth boundary;

(b) An amendment of an urban growth boundary by a city with a population of 2,500 or more within its urban growth boundary that adds more than 50 acres to the area within the urban growth boundary, except as provided by ORS 197A.325 and OAR 660-038-0020(10);

(c) A designation of an area as an urban reserve under ORS 195.137 to 195.145 by a metropolitan service district or by a city with a population of 2,500 or more within its urban growth boundary;

(d) An amendment of the boundary of an urban reserve by a metropolitan service district;

(e) An amendment of the boundary of an urban reserve to add more than 50 acres to the urban reserve by a city with a population of 2,500 of more within its urban growth boundary; and

(f) A designation or an amendment to the designation of a rural reserve under ORS 195.137 to 195.145 by a county, in coordination with a metropolitan service district, including an amendment of the boundary of a rural reserve.

(2) A local government may submit a comprehensive plan amendment or land use regulation amendment to the department for review for compliance with the applicable statewide planning goals, statutes and rules in the manner provided for review of a work task under ORS 197.633 when it is a task on a work program for sequential submittal of an urban growth boundary as provided in ORS 197.626(3) and OAR 660-025-0185.

(3) The standards and procedures in this rule govern the local government process and submittal, and department and commission review.

(4) The local government must provide notice of the proposed amendment according to the procedures and requirements for post-acknowledgement plan amendments in ORS 197.610 and OAR 660-018-0020.

(5) The local government must submit its final decision amending its comprehensive plan or urban growth boundary, or designating urban reserve areas, to the department according to all the requirements for a work task submittal in OAR 660-025-0130 and 660-025-0140.
(6) Department and commission review and decision on the submittal from the local government must follow the procedures and requirements for review and decision of a work task submittal in OAR 660-025-0085, 660-025-0140 to 660-025-0160, and 660-025-0185.

660-025-0085

Commission Hearings Notice and Procedures
(1) Hearings before the commission on a referral of a local government submittal of a work program or hearings on referral or appeal of a work task must be noticed and conducted in accordance with this rule.
* * * * *
(4) The director may prepare a written report to the commission on an appeal or referral. If a report is prepared, the director must send a copy to the local government, objectors, the appellant, and individuals requesting the report in writing.
(5) Commission hearings will be conducted using the following procedures:
(a) The chair will open the hearing and explain the proceedings;
(b) The director or designee will present an oral report regarding the nature of the matter before the commission, an explanation of the director's decision, if any, and other information to assist the commission in reaching a decision * * * * *
(c) Participation in the hearing is limited to:
(A) The local government or governments whose decision is under review;
(B) Persons who filed a valid objection to the local decision in the case of commission hearing on a referral;
(C) Persons who filed a valid appeal of the director's decision in the case of a commission hearing on an appeal; and
(D) Other affected local governments.
(d) Standing to file an appeal of a work task is governed by OAR 660-025-0150.
(e) Persons or their authorized representative may present oral argument.
(f) The local government that submitted the task may provide general information from the record on the task submittal and address those issues raised in the department review, objections, or the appeal. A person who submitted objections or an appeal may address only those issues raised in the

objections or the appeal submitted by that person. Other affected local governments may address only those issues raised in objections or an appeal.
(g) As provided in ORS 197.633(3), the commission will confine its review of evidence to the local record.
(h) The director or commission may take official notice of law defined as:
(A) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.
(B) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.
(C) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.
(D) Rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.
(E) The law of an organization of nations and of foreign nations and public entities in foreign nations.
(F) An ordinance, comprehensive plan or enactment of any local government in this state, or a right derived therefrom.

660-025-0140

Notice and Filing of Objections (Work Task Phase)
(1) After the local government makes a final decision on a work task or comprehensive plan amendment listed in ORS 197.626(1) and OAR 660-025-0175, the local government must notify the department and persons who participated at the local level orally or in writing during the local process or who requested notice in writing. The local government notice must contain the following information:
(a) Where a person can review a copy of the local government's final decision, and how a person may obtain a copy of the final decision;
(b) The requirements listed in section (2) of this rule for filing a valid objection to the work task or comprehensive plan amendment listed in OAR 660-025-0175; and
(c) That objectors must give a copy of the objection to the local government.
(2) Persons who participated orally or in writing in the local process leading to the final decision may object to the local government's submittal. To be valid, objections must:

(a) Be in writing and filed with the department's Salem office no later than 21 days from the date the local government sent the notice;
(b) Clearly identify an alleged deficiency in the work task or adopted comprehensive plan amendment sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the submittal is alleged to have violated;
(c) Suggest specific revisions that would resolve the objection; and
(d) Demonstrate that the objecting party participated orally or in writing in the local process leading to the final decision.
(3) Objections that do not meet the requirements of section (2) of this rule will not be considered by the director or commission.

660-025-0150

Director Action and Appeal of Director Action (Work Task Phase)
(1) In response to a completed work task or other plan amendment submitted to the department for review in accordance with OAR 660-025-0140, the director may:
(a) Issue an order approving the completed work task or plan amendment;
(b) Issue an order remanding the work task or plan amendment to the local government including, for a work task only, a date for resubmittal;
(c) Refer the work task or plan amendment to the commission for review and action ; * * * * *

660-025-0160

Commission Review of Referrals and Appeals (Work Task Phase)
(1) The commission shall hear appeals and referrals of work tasks or other plan amendments according to the applicable procedures in OAR 660-025-0085 and 660-025-0150.
(2) The commission's standard of review, as provided in ORS 197.633(3), is:
(a) For evidentiary issues, whether there is substantial evidence in the record as a whole to support the local government's decision.
(b) For procedural issues, whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.
(c) For issues concerning compliance with applicable laws, whether the local government's decision on the whole complies with applicable statutes,

statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The commission shall defer to a local government's interpretation of its comprehensive plan or land use regulation in the manner provided in ORS 197.829 or to Metro's interpretation of its regional framework plan or functional plans. For purposes of this subsection, "complies" has the meaning given the term "compliance" in the phrase "compliance with the goals" in ORS 197.747.
(3) In response to a referral or appeal, the director may prepare and submit a report to the commission.
(4) The department must send a copy of the report to the local government, all persons who submitted objections, and other persons who appealed the director's decision. The department must send the report at least 21 days before the commission meeting to consider the referral or appeal.
(5) The persons specified in OAR 660-025-0085(5)(c) may file written exceptions to the director's report within 10 days of the date the report is sent. Objectors may refer to or append to their exceptions any document from the local record, whether or not the local government submitted it to the department under OAR 660-025-0130. The director may issue a response to exceptions and may make revisions to the director's report in response to exceptions. The department may provide the commission a response or revised report at or prior to its hearing on the referral or appeal. A revised director's report is not required to be sent at least 21 days prior to the commission hearing.
(6) The commission shall hear appeals based on the local record. The written record shall consist of the submittal, timely objections, the director's report, timely exceptions to the director's report including materials described in section (5) of this rule, the director's response to exceptions and revised report if any, and the appeal if one was filed.
(7) Following its hearing, the commission must issue an order that does one or more of the following:
(a) Approves the work task or plan amendment or a portion of the task or plan amendment;
(b) Remands the work task or plan amendment or a portion of the task or plan amendment to the local government, including, for a work task only, a date for resubmittal;
(c) Requires specific plan or land use regulation revisions to be completed by a specific date. Where specific revisions are required, the order shall specify that no further review is necessary. These changes are final when adopted by the local government. The failure to adopt the required revisions

by the date established in the order shall constitute failure to complete a work task or plan amendment by the specified deadline requiring the director to initiate a hearing before the commission according to the procedures in OAR 660-025-0170(3);
(d) Amends the work program to add a task authorized under OAR 660-025-0170(1)(b); or
(e) Modifies the schedule for the approved work program in order to accommodate additional work on a remanded work task.
(8) If the commission approves the work task or plan amendment or portion of a work task or plan amendment under subsection (7)(a) of this rule and no appeal to the Court of Appeals is filed within the time provided in ORS 197.651, the work task or plan amendment or portion of a work task or plan amendment shall be deemed acknowledged. If the commission decision on a work task or plan amendment is under subsection (7)(b) through (e) of this rule and no appeal to the Court of Appeals is filed within the time provided in ORS 197.651, the decision is final.

OREGON REVISED STATUTES

URBAN GROWTH BOUNDARIES AND NEEDED HOUSING WITHIN BOUNDARIES

197.295 Definitions for ORS 197.295 to 197.314 and 197.475 to 197.490. As used in ORS 197.295 to 197.314 and 197.475 to 197.490:

(1) "Buildable lands" means lands in urban and urbanizable areas that are suitable, available and necessary for residential uses. "Buildable lands" includes both vacant land and developed land likely to be redeveloped.

(2) "Manufactured dwelling park" has the meaning given that term in ORS 446.003.

(3) "Government assisted housing" means housing that is financed in whole or part by either a federal or state housing agency or a housing authority as defined in ORS 456.005, or housing that is occupied by a tenant or tenants who benefit from rent supplements or housing vouchers provided by either a federal or state housing agency or a local housing authority.

(4) "Manufactured homes" has the meaning given that term in ORS 446.003.

(5) "Mobile home park" has the meaning given that term in ORS 446.003.

(6) "Periodic review" means the process and procedures as set forth in ORS 197.628 to 197.651.

(7) "Urban growth boundary" means an urban growth boundary included or referenced in a comprehensive plan. [1981 c.884 §4; 1983 c.795 §1; 1987 c.785 §1; 1989 c.648 §51; 1991 c.226 §16; 1991 c.612 §12; 1995 c.79 §73; 1995 c.547 §2]

197.296 Factors to establish sufficiency of buildable lands within urban growth boundary; analysis and determination of residential housing patterns. (1)(a) The

provisions of subsections (2) to (9) of this section apply to metropolitan service district regional framework plans and local government comprehensive plans for lands within the urban growth boundary of a city that is located outside of a metropolitan service district and has a population of 25,000 or more.

* * * * *

(2) At periodic review pursuant to ORS 197.628 to 197.651 or at any other legislative review of the comprehensive plan or regional framework plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, a local government shall demonstrate that its comprehensive plan or regional framework plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years. The 20-year period shall commence on the date initially scheduled for completion of the periodic or legislative review.

(3) In performing the duties under subsection (2) of this section, a local government shall:

(a) Inventory the supply of buildable lands within the urban growth boundary and determine the housing capacity of the buildable lands; and

(b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years.

(4)(a) For the purpose of the inventory described in subsection (3)(a) of this section, "buildable lands" includes:

(A) Vacant lands planned or zoned for residential use;

(B) Partially vacant lands planned or zoned for residential use;

(C) Lands that may be used for a mix of residential and employment uses under the existing planning or zoning; and

(D) Lands that may be used for residential infill or redevelopment.

(b) For the purpose of the inventory and determination of housing capacity described in subsection (3)(a) of this section, the local government must demonstrate consideration of:

(A) The extent that residential development is prohibited or restricted by local regulation and ordinance, state law and rule or federal statute and regulation;

(B) A written long term contract or easement for radio, telecommunications or electrical facilities, if the written contract or easement is provided to the local government; and

(C) The presence of a single family dwelling or other structure on a lot or parcel.

(c) Except for land that may be used for residential infill or redevelopment, a local government shall create a map or document that may be used to verify and identify specific lots or parcels that have been determined to be buildable lands.

(5)(a) Except as provided in paragraphs (b) and (c) of this subsection, the determination of housing capacity and need pursuant to subsection (3) of this section must be based on data relating to land within the urban growth boundary that has been collected since the last periodic review or five years, whichever is greater. The data shall include:

(A) The number, density and average mix of housing types of urban residential development that have actually occurred;

(B) Trends in density and average mix of housing types of urban residential development;

(C) Demographic and population trends;

(D) Economic trends and cycles; and

(E) The number, density and average mix of housing types that have occurred on the buildable lands described in subsection (4)(a) of this section.

(b) A local government shall make the determination described in paragraph (a) of this subsection using a shorter time period than the time period described in paragraph (a) of this subsection if the local government finds that the shorter time period will provide more accurate and reliable data related to housing capacity and need. The shorter time period may not be less than three years.

(c) A local government shall use data from a wider geographic area or use a time period for economic cycles and trends longer than the time period described in paragraph (a) of this subsection if the analysis of a wider geographic area or the use of a longer time period will provide more accurate, complete and reliable data relating to trends affecting housing need than an analysis performed pursuant to paragraph (a) of this subsection. The local government must clearly describe the geographic area, time frame and source of data used in a determination performed under this paragraph.

(6) If the housing need determined pursuant to subsection (3)(b) of this section is greater than the housing capacity determined pursuant to subsection (3)(a) of this section, the local government shall take one or more of the following actions to accommodate the additional housing need:

(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years. As part of this process, the local government shall consider the effects of measures taken

pursuant to paragraph (b) of this subsection. The amendment shall include sufficient land reasonably necessary to accommodate the siting of new public school facilities. The need and inclusion of lands for new public school facilities shall be a coordinated process between the affected public school districts and the local government that has the authority to approve the urban growth boundary;

(b) Amend its comprehensive plan, regional framework plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary. A local government or metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures; or

(c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection.

(7) Using the analysis conducted under subsection (3)(b) of this section, the local government shall determine the overall average density and overall mix of housing types at which residential development of needed housing types must occur in order to meet housing needs over the next 20 years. If that density is greater than the actual density of development determined under subsection (5)(a)(A) of this section, or if that mix is different from the actual mix of housing types determined under subsection (5)(a)(A) of this section, the local government, as part of its periodic review, shall adopt measures that demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years.

(8)(a) A local government outside a metropolitan service district that takes any actions under subsection (6) or (7) of this section shall demonstrate that the comprehensive plan and land use regulations comply with goals and rules adopted by the commission and implement ORS 197.295 to 197.314.

(b) The local government shall determine the density and mix of housing types anticipated as a result of actions taken under subsections (6) and (7) of this section and monitor and record the actual density and mix of housing types achieved. The local government shall compare actual and anticipated density and mix. The local government shall submit its comparison to the commission at the next periodic review or at the next legislative review of its urban growth boundary, whichever comes first.

(9) In establishing that actions and measures adopted under subsections (6) and (7) of this section demonstrably increase the likelihood of higher density residential development, the local government shall at a minimum ensure that land zoned for needed housing is in locations appropriate for the housing types identified under subsection (3) of this section and is zoned at density ranges that are likely to be achieved by the housing market using the analysis in subsection (3) of this section. Actions or measures, or both, may include but are not limited to:

(a) Increases in the permitted density on existing residential land;

(b) Financial incentives for higher density housing;

(c) Provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer;

(d) Removal or easing of approval standards or procedures;

(e) Minimum density ranges;

(f) Redevelopment and infill strategies;

(g) Authorization of housing types not previously allowed by the plan or regulations;

(h) Adoption of an average residential density standard; and

(i) Rezoning or redesignation of nonresidential land.

(10)(a) The provisions of this subsection apply to local government comprehensive plans for lands within the urban growth boundary of a city that is located outside of a metropolitan service district and has a population of less than 25,000.

(b) At periodic review pursuant to ORS 197.628 to 197.651 or at any other legislative review of the comprehensive plan that requires the application of a statewide planning goal relating to buildable lands for residential use, a city shall, according to rules of the commission:

(A) Determine the estimated housing needs within the jurisdiction for the next 20 years;

(B) Inventory the supply of buildable lands available within the urban growth boundary to accommodate the estimated housing needs determined under this subsection; and

(C) Adopt measures necessary to accommodate the estimated housing needs determined under this subsection.

(c) For the purpose of the inventory described in this subsection, "buildable lands" includes those lands described in subsection (4)(a) of this section. [1995 c.547 §3; 2001 c.908 §1; 2003 c.177 §1; 2015 c.27 §19; 2017 c.102 §1]

197.015 Definitions for ORS chapters 195, 196, 197 and ORS 197A.300 to 197A.325. As used in ORS chapters 195, 196 and 197 and ORS 197A.300 to 197A.325, unless the context requires otherwise:

* * * * *

(8) "Goals" means the mandatory statewide land use planning standards adopted by the commission pursuant to ORS chapters 195, 196 and 197.

* * * * *

(13) "Local government" means any city, county or metropolitan service district formed under ORS chapter 268 or an association of local governments performing land use planning functions under ORS 195.025.

(14) "Metro" means a metropolitan service district organized under ORS chapter 268.

(15) "Metro planning goals and objectives" means the land use goals and objectives that a metropolitan service district may adopt under ORS 268.380 (1)(a). The goals and objectives do not constitute a comprehensive plan.

(16) "Metro regional framework plan" means the regional framework plan required by the 1992 Metro Charter or its separate components. Neither the regional framework plan nor its individual components constitute a comprehensive plan.

197.299 Metropolitan service district analysis of buildable land supply; schedule for accommodating needed housing; need for land for school; extension of schedule; revision of determination and analysis. (1) A metropolitan service district organized under ORS chapter 268 shall complete the inventory, determination and analysis required under ORS 197.296 (3) not later than six years after completion of the previous inventory, determination and analysis.

(2)(a) The metropolitan service district shall take such action as necessary under ORS 197.296 (6)(a) to accommodate one-half of a 20-year buildable land supply determined under ORS 197.296 (3) within one year of completing the analysis.

(b) The metropolitan service district shall take all final action under ORS 197.296 (6)(a) necessary to accommodate a 20-year buildable land supply determined under ORS 197.296 (3) within two years of completing the analysis.

(c) The metropolitan service district shall take action under ORS 197.296 (6)(b), within one year after the analysis required under ORS 197.296 (3)(b) is completed, to provide sufficient buildable land within the urban growth boundary to accommodate the estimated housing needs for 20 years from the

time the actions are completed. The metropolitan service district shall consider and adopt new measures that the governing body deems appropriate under ORS 197.296 (6)(b).

* * * * *

(5) Three years after completing its most recent demonstration of sufficient buildable lands under ORS 197.296, a metropolitan service district may, on a single occasion, revise the determination and analysis required as part of the demonstration for the purpose of considering an amendment to the metropolitan service district's urban growth boundary, provided:

(a) The metropolitan service district has entered into an intergovernmental agreement and has designated rural reserves and urban reserves under ORS 195.141 and 195.145 with each county located within the district;

(b) The commission has acknowledged the rural reserve and urban reserve designations described in paragraph (a) of this subsection;

(c) One or more cities within the metropolitan service district have proposed a development that would require expansion of the urban growth boundary;

(d) The city or cities proposing the development have provided evidence to the metropolitan service district that the proposed development would provide additional needed housing to the needed housing included in the most recent determination and analysis;

(e) The location chosen for the proposed development is adjacent to the city proposing the development; and

(f) The location chosen for the proposed development is located within an area designated and acknowledged as an urban reserve.

(6)(a) If a metropolitan service district, after revising its most recent determination and analysis pursuant to subsection (5) of this section, concludes that an expansion of its urban growth boundary is warranted, the metropolitan service district may take action to expand its urban growth boundary in one or more locations to accommodate the proposed development, provided the urban growth boundary expansion does not exceed a total of 1,000 acres.

(b) A metropolitan service district that expands its urban growth boundary under this subsection:

(A) Must adopt the urban growth boundary expansion not more than four years after completing its most recent demonstration of sufficient buildable lands under ORS 197.296; and

(B) Is exempt from the boundary location requirements described in the statewide land use planning goals relating to urbanization. [1997 c.763 §2; 2001 c.908 §2; 2005 c.590 §1; 2007 c.579 §2; 2014 c.92 §5; 2017 c.199 §1]

197.303 "Needed housing" defined. (1) As used in ORS 197.307, "needed housing" means all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a. "Needed housing" includes the following housing types:

(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

(b) Government assisted housing;

(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;

(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and

(e) Housing for farmworkers.

(2) Subsection (1)(a) and (d) of this section does not apply to:

(a) A city with a population of less than 2,500.

(b) A county with a population of less than 15,000.

(3) A local government may take an exception under ORS 197.732 to the definition of "needed housing" in subsection (1) of this section in the same manner that an exception may be taken under the goals. [1981 c.884 §6; 1983 c.795 §2; 1989 c.380 §1; 2011 c.354 §2; 2017 c.745 §4]

197.307 Effect of need for certain housing in urban growth areas; approval standards for residential development; placement standards for approval of manufactured dwellings. (1) The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern.

(2) Many persons of lower, middle and fixed income depend on government assisted housing as a source of affordable, decent, safe and sanitary housing.

(3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing.

197.626 Submission of land use decisions that expand urban growth boundary or designate urban or rural reserves. (1) A local government shall submit for review and the Land Conservation and Development Commission shall review the following final land use decisions in the manner provided for review of a work task under ORS 197.633 and subject to subsection (3) of this section:

(a) An amendment of an urban growth boundary by a metropolitan service district that adds more than 100 acres to the area within its urban growth boundary;

197.650 Appeal to Court of Appeals; standing. (1) A Land Conservation and Development Commission final order issued pursuant to ORS 197.180, 197.251, 197.626, 197.628 to 197.651, 197.652 to 197.658, 197.659, 215.780 or 215.788 to 215.794 may be appealed to the Court of Appeals by persons who participated in proceedings, if any, that led to issuance of the final order being appealed.

(2) Jurisdiction for judicial review of a final order of the commission issued pursuant to ORS 197.180, 197.251, 197.626, 197.628 to 197.651, 197.652 to 197.658, 197.659, 215.780 or 215.788 to 215.794 is conferred upon the Court of Appeals. [1981 c.748 §10; 1983 c.827 §52; 1989 c.761 §8; 1991 c.612 §16; 1997 c.247 §1; 1999 c.622 §7; 2009 c.606 §5; 2009 c.873 §13a; 2011 c.469 §5]

Note: See note under 197.646.

197.651 Appeal to Court of Appeals for judicial review of final order of Land Conservation and Development Commission. (1) Judicial review of a final order of the Land Conservation and Development Commission

under ORS 197.626 concerning the designation of urban reserves under ORS 195.145 (1)(b) or rural reserves under ORS 195.141 is as provided in subsections (3) to (12) of this section.

(2) Judicial review of any other final order of the commission under ORS 197.626 or of a final order of the commission under 197.180, 197.251, 197.628 to 197.651, 197.652 to 197.658, 197.659, 215.780 or 215.788 to 215.794 is as provided in subsections (3) to (7), (9), (10) and (12) of this section.

(3) A proceeding for judicial review under this section may be instituted by filing a petition in the Court of Appeals. The petition must be filed within 21 days after the date the commission delivered or mailed the order upon which the petition is based.

(4) The filing of the petition, as set forth in subsection (3) of this section, and service of a petition on the persons who submitted oral or written testimony in the proceeding before the commission are jurisdictional and may not be waived or extended.

(5) The petition must state the nature of the order the petitioner seeks to have reviewed. Copies of the petition must be served by registered or certified mail upon the commission and the persons who submitted oral or written testimony in the proceeding before the commission.

(6) Within 21 days after service of the petition, the commission shall transmit to the Court of Appeals the original or a certified copy of the entire record of the proceeding under review. However, by stipulation of the parties to the review proceeding, the record may be shortened. The Court of Appeals may tax a party that unreasonably refuses to stipulate to limit the record for the additional costs. The Court of Appeals may require or permit subsequent corrections or additions to the record. Except as specifically provided in this subsection, the Court of Appeals may not tax the cost of the record to the petitioner or an intervening party. However, the Court of Appeals may tax the costs to a party that files a frivolous petition for judicial review.

(7) Petitions and briefs must be filed within time periods and in a manner established by the Court of Appeals by rule.

(8) The Court of Appeals shall:

(a) Hear oral argument within 49 days of the date of transmittal of the record unless the Court of Appeals determines that the ends of justice served by holding oral argument on a later day outweigh the best interests of the public and the parties. However, the Court of Appeals may not hold oral argument more than 49 days after the date of transmittal of the record

because of general congestion of the court calendar or lack of diligent preparation or attention to the case by a member of the court or a party.

(b) Set forth in writing and provide to the parties a determination to hear oral argument more than 49 days from the date the record is transmitted, together with the reasons for the determination. The Court of Appeals shall schedule oral argument as soon as is practicable.

(c) Consider, in making a determination under paragraph (b) of this subsection:

(A) Whether the case is so unusual or complex, due to the number of parties or the existence of novel questions of law, that 49 days is an unreasonable amount of time for the parties to brief the case and for the Court of Appeals to prepare for oral argument; and

(B) Whether the failure to hold oral argument at a later date likely would result in a miscarriage of justice.

(9) The court:

(a) Shall limit judicial review of an order reviewed under this section to the record.

(b) May not substitute its judgment for that of the Land Conservation and Development Commission as to an issue of fact.

(10) The Court of Appeals may affirm, reverse or remand an order reviewed under this section. The Court of Appeals shall reverse or remand the order only if the court finds the order is:

(a) Unlawful in substance or procedure. However, error in procedure is not cause for reversal or remand unless the Court of Appeals determines that substantial rights of the petitioner were prejudiced.

(b) Unconstitutional.

(c) Not supported by substantial evidence in the whole record as to facts found by the commission.

(11) The Court of Appeals shall issue a final order on the petition for judicial review with the greatest possible expediency.

(12) If the order of the commission is remanded by the Court of Appeals or the Supreme Court, the commission shall respond to the court's appellate judgment within 30 days. [2007 c.723 §9; 2011 c.469 §6]

79th OREGON LEGISLATIVE ASSEMBLY--2017 Regular Session

Enrolled
House Bill 2095

Introduced and printed pursuant to House Rule 12.00. Presession filed (at the request of House Interim Committee on Rural Communities, Land Use and Water)

CHAPTER .....

AN ACT

Relating to amendment to an urban growth boundary by a metropolitan service district based on a one-time revision of the most recent demonstration of sufficient buildable lands; amending ORS 197.299.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 197.299 is amended to read:

197.299. (1) A metropolitan service district organized under ORS chapter 268 shall complete the inventory, determination and analysis required under ORS 197.296 (3) not later than six years after completion of the previous inventory, determination and analysis.

(2)(a) The metropolitan service district shall take such action as necessary under ORS 197.296 (6)(a) to accommodate one-half of a 20-year buildable land supply determined under ORS 197.296 (3) within one year of completing the analysis.

(b) The metropolitan service district shall take all final action under ORS 197.296 (6)(a) necessary to accommodate a 20-year buildable land supply determined under ORS 197.296 (3) within two years of completing the analysis.

(c) The metropolitan service district shall take action under ORS 197.296 (6)(b), within one year after the analysis required under ORS 197.296 (3)(b) is completed, to provide sufficient buildable land within the urban growth boundary to accommodate the estimated housing needs for 20 years from the time the actions are completed. The metropolitan service district shall consider and adopt new measures that the governing body deems appropriate under ORS 197.296 (6)(b).

(3) The Land Conservation and Development Commission may grant an extension to the time limits of subsection (2) of this section if the Director of the Department of Land Conservation and Development determines that the metropolitan service district has provided good cause for failing to meet the time limits.

(4)(a) The metropolitan service district shall establish a process to expand the urban growth boundary to accommodate a need for land for a public school that cannot reasonably be accommodated within the existing urban growth boundary. The metropolitan service district shall design the process to:

(A) Accommodate a need that must be accommodated between periodic analyses of urban growth boundary capacity required by subsection (1) of this section; and

(B) Provide for a final decision on a proposal to expand the urban growth boundary within four months after submission of a complete application by a large school district as defined in ORS 195.110.

(b) At the request of a large school district, the metropolitan service district shall assist the large school district to identify school sites required by the school facility planning process described in ORS 195.110. A need for a public school is a specific type of identified land need under ORS 197.298 (3).

(5) Three years after completing its most recent demonstration of sufficient buildable lands under ORS 197.296, a metropolitan service district may, on a single occasion, revise the determination and analysis required as part of the demonstration for the purpose of considering an amendment to the metropolitan service district's urban growth boundary, provided:

(a) The metropolitan service district has entered into an intergovernmental agreement and has designated rural reserves and urban reserves under ORS 195.141 and 195.145 with each county located within the district;

(b) The commission has acknowledged the rural reserve and urban reserve designations described in paragraph (a) of this subsection;

(c) One or more cities within the metropolitan service district have proposed a development that would require expansion of the urban growth boundary;

(d) The city or cities proposing the development have provided evidence to the metropolitan service district that the proposed development would provide additional needed housing to the needed housing included in the most recent determination and analysis;

(e) The location chosen for the proposed development is adjacent to the city proposing the development; and

(f) The location chosen for the proposed development is located within an area designated and acknowledged as an urban reserve.

(6)(a) If a metropolitan service district, after revising its most recent determination and analysis pursuant to subsection (5) of this section, concludes that an expansion of its urban growth boundary is warranted, the metropolitan service district may take action to expand its urban growth boundary in one or more locations to accommodate the proposed development, provided the urban growth boundary expansion does not exceed a total of 1,000 acres.

(b) A metropolitan service district that expands its urban growth boundary under this subsection:

(A) Must adopt the urban growth boundary expansion not more than four years after completing its most recent demonstration of sufficient buildable lands under ORS 197.296; and

(B) Is exempt from the boundary location requirements described in the statewide land use planning goals relating to urbanization.

Passed by House April 3, 2017

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate May 23, 2017

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Peter Courtney, President of Senate

Received by Governor:

.....M.,....., 2017

Approved:

.....M.,....., 2017

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2017

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Dennis Richardson, Secretary of State