

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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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. 20-UGB-001910

CA A173406

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ANSWERING BRIEF OF RESPONDENT LAND CONSERVATION  
AND DEVELOPMENT COMMISSION

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Petition for Judicial Review of the Final Order of the  
Land Conservation and Development Commission

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# **ANSWERING BRIEF OF RESPONDENT LAND CONSERVATION AND DEVELOPMENT COMMISSION**

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## **STATEMENT OF THE CASE**

Respondent, the Land Conservation and Development Commission (LCDC), generally accepts petitioner's statement of the case as adequate for review but restates the question presented and supplements the facts in the argument below. Where noted, LCDC also relies on the answering brief provided by respondent Metro.

### **Question Presented**

Did LCDC correctly determine that Metro complied with Goal 14's directive to demonstrate that all of its need for single-family housing could not "reasonably be accommodated" within the existing urban growth boundary?

### **Summary of Argument**

Petitioner seeks judicial review of an LCDC order approving Metro's expansion of its urban growth boundary (UGB). Petitioner contends that Metro misinterpreted and misapplied Goal 14's requirement that a local government first determine whether the identified need for single-family housing could "reasonably be accommodated" within the existing UGB, and thus that LCDC erred by approving Metro's submittal. But LCDC determined that Metro—in conducting a comprehensive analysis in which it determined that all but a small portion of the need for single-family housing need could be met within the

existing UGB—complied with that directive. In so ruling, LCDC neither misapplied the substantial evidence standard nor unreasonably interpreted the governing rules. Therefore, this court should affirm.

### **Procedural History**

This case concerns the expansion of the UGB for the Portland metropolitan area. In 2018, Metro enacted Ordinance 18-1427, expanding the UGB to provide capacity for housing in the region until 2038. (SER 3). Under ORS 197.626(1), in January 2019, Metro submitted that ordinance to the Department of Land Conservation and Development (DLCD) for review. (SER 1). Seven parties filed objections to the ordinance. (SER 1). In response, DLCD issued a staff report recommending that LCDC reject those objections and approve Metro’s submittal. (SER 4). Six parties filed written objections to the staff report. (SER 2). In July 2019, LCDC held a public hearing on the matter, reviewed the staff report and the written objections, and heard oral argument from Metro, the objectors, and certain affected local governments. (SER 2). In January 2020, LCDC issued an order rejecting all the objections and approving Metro’s submittal. (*See* SER 1-56 (LCDC Approval Order 20-UGB-001910)). Housing Land Advocates (HLA), one of the objecting parties, now seeks judicial review of LCDC’s order.

## **ANSWER TO ASSIGNMENT OF ERROR**

LCDC correctly interpreted applicable provisions of law, correctly determined, understood, and applied the substantial evidence standard, and plausibly interpreted its own rules in its approval of Metro Ordinance 18-1427; in particular, LCDC correctly interpreted Goal 14 when it approved Metro's conclusion that not all of the region's needed single-family housing for the next 20 years could be "reasonably accommodated" inside the existing UGB.

### **Preservation**

LCDC agrees that petitioner filed objections sufficient to preserve its assignment of error for judicial review.

### **Standard of Review**

LCDC's final order is subject to judicial review under ORS 197.651. Under that statute, this court may reverse or remand LCDC's order only if the order is unlawful in substance or procedure, unconstitutional, or is "[n]ot supported by substantial evidence in the whole record as to facts found by the commission." ORS 197.651(10). "The 'unlawful in substance review standard \* \* \* is for 'a mistaken interpretation of the applicable law.'" *Zimmerman v. LCDC*, 274 Or App 512, 519, 361 P3d 619 (2015) (quoting *Mountain West Investment Corp. v. City of Silverton*, 175 Or App 556, 559, 30 P3d 420 (2001)). In applying that standard, this court will "defer to LCDC's plausible

interpretation of its own rule[s].” *Barkers Five v. LCDC*, 261 Or App 259, 302, 323 P3d 368 (2014).

To understand this court’s role on judicial review, it is helpful to understand LCDC’s own role in reviewing Metro’s proposed UGB amendment. LCDC reviews certain UGB amendments “in the manner provided by periodic review for a work task under ORS 197.633.” ORS 197.626(1). Under ORS 197.633, LCDC reviews purported evidentiary issues for “substantial evidence in the record as a whole to support the local government’s decision.” ORS 197.633(3)(a).<sup>1</sup> Substantial evidence exists to support a finding of fact

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<sup>1</sup> ORS 197.633(3) sets out LCDC’s own 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) 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.”

when the record, viewed as a whole, would permit a reasonable person to make that finding. *City of West Linn v. LCDC*, 201 Or App 419, 431, 119 P3d 285 (2005); *see also Armstrong v. Asten-Hill Company*, 90 Or App 200, 206, 752 P2d 312 (1988) (“[I]f an agency’s finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence.”).

Under ORS 197.633(3)(c), LCDC reviews for “compliance with applicable laws” by assessing “whether the local government’s decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, \* \* \* and land use regulations.” Regarding a local government’s compliance with the land use planning goals, specifically, LCDC’s review for “‘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.” *Former ORS 197.747, renumbered as ORS 197.627* (2020).

Importantly, the substantial-evidence standard set out in ORS 197.633(3)(a)—and this court’s articulation of that standard in *City of West Linn*, 201 Or App at 431—applies to LCDC’s review of Metro’s UGB amendment. This court’s task, however, is not the same. Indeed, in conducting the substantial-evidence review set out in ORS 197.651(10)(c), this court does not “review the record on [its] own to determine whether [the local

government's] decisions, in fact, satisfied the substantial evidence standard."

*City of West Linn*, 201 Or App at 428-29. Rather, this court's role "is to determine whether [LCDC] *applied the correct legal test* in deciding whether [the local government's] decision is supported by substantial evidence." *Id.* at 429 (emphasis added) (quoting *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 21, 38 P3d 956 (2002)).

### **ARGUMENT**

Petitioner challenges LCDC's approval of the process by which Metro conducted an inventory of available land for single-family homes within the existing UGB. According to petitioner, Metro ran afoul of Goal 14's requirement that local governments consider whether an identified land need can be accommodated within an existing UGB before considering expansion of the UGB to meet that need. It follows, petitioner argues, that the portion of the LCDC order that overruled petitioner's objection on that basis is unlawful in substance and unsupported by substantial evidence. Not so.

First, although petitioner asserts that LCDC's order was unsupported by substantial evidence, petitioner fails to explain how LCDC applied an incorrect legal test in conducting its own substantial evidence review of Metro's submittal. For that reason alone, petitioner's substantial evidence argument must fail. Second, as explained in more detail below, LCDC did not mistakenly interpret any applicable law in approving Metro's UGB submittal. To the

contrary, LCDC correctly determined that Metro’s submittal conformed with the requirements set out in ORS 197.296 and Goal 14.

**A. Legal framework**

In Oregon, local governments must conduct land use planning in accordance with a host of state statutes as well statewide land use planning goals—and their implementing rules—adopted by LCDC. The operative goal in this case is Goal 14, which requires local governments to establish and maintain UGBs “to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land.” OAR 660-015-0000(14). A local government may only expand its UGB after considering several factors, including a “[d]emonstrated need for housing.” *Id.* To make that showing, “[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.” *Id.*

The operative statute in this case is ORS 197.296, which requires a metropolitan service district (*i.e.*, Metro) or a city with a population of at least 25,000 to maintain adequate buildable land for housing within its UGB. To that end, a local government must “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.” ORS 197.296(2). To

satisfy that requirement, a local government must periodically conduct an inventory of buildable lands within its existing UGB (the “Buildable Lands Inventory”), and conduct an analysis of housing needs by housing type for the next 20-year period (the “Housing Needs Analysis”). ORS 197.296(3).

In the course of conducting a Buildable Lands Inventory and Housing Needs Analysis, a local government must “demonstrate consideration of” several factors, including any relevant, existing land use regulations:

(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.

ORS 197.296(4)(b).

Finally, if the results of the Buildable Lands Inventory and Housing Needs Analysis demonstrate that the local government’s 20-year need for housing is greater than the housing capacity within the existing UGB, the local government must either: (a) “[a]mend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years”;

(b) amend its plan and implementing 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”; or (c) adopt a combination of actions under (a) and (b). ORS 197.296(6).

**B. LCDC correctly determined that Metro’s reconciliation of its Buildable Lands Inventory and Housing Needs Analysis complied with ORS 197.296.**

Following the dictates of ORS 197.296, Metro conducted a thorough inventory of its buildable lands and an analysis of the region’s housing needs for the next 20 years. Based on its Housing Needs Analysis and Buildable Lands Inventory, Metro concluded that the existing metro-area UGB included sufficient land to satisfy the 20-year need for multifamily housing, but a deficit of land to satisfy the 20-year need for single-family housing. (SER 16 (summarizing Metro’s findings)). Specifically, Metro identified a 20-year need for 98,400 single-family dwelling units and determined that the existing UGB had capacity for 92,300 of those units, leaving a leftover anticipated need of 6,100 single-family units. (SER 16-17). Metro concluded that the areas it selected for expansion of the UGB would provide land sufficient to accommodate those remaining single-family units. (SER 18).

Before LCDC and this court, petitioner disputes whether Metro complied with ORS 197.296. Before LCDC, petitioner argued that Metro’s submittal did

not comply with ORS 197.296(6), which requires Metro to accommodate a projected shortfall of residential lands by implementing measures to make more efficient use of land within the existing UGB to meet that need (under ORS 197.296(6)(b)), by expanding the UGB (under ORS 197.296(6)(a)), or by meeting the need for additional residential lands by through a combination of those two options (under ORS 197.296(6)(c)). Petitioner asserted that Metro ignored the option of making more efficient use of existing land within the UGB, under ORS 197.296(6)(b), and instead simply chose to expand the metro-area UGB to accommodate its member cities’ “insatiable appetite for more land for single-family homes.” (HLA objection at 12; SER 45). HLA attempts to revive that argument on judicial review, contending that LCDC’s final order was unlawful in substance because LCDC erroneously interpreted and applied the provisions of ORS 197.296(6) in approving Metro’s submittal. (*See* Pet Br at 21, 35). This court should reject petitioner’s statutory argument.

As LCDC observed in its order, the legislature did not mandate that a local government accommodate all or a portion of a projected shortfall in residential housing need through more efficient use of land within a UGB. (SER 45). Rather, ORS 197.296(6) sets out three options for a local government to meet an anticipated shortfall in housing—expanding the UGB, accommodating housing needs through more efficient use of land within the existing UGB, or a combination of those two options. But that does not mean

that local governments are free to expand their UGB whenever projected housing needs outpaces projected capacity, wholly unrestrained.

First, if a local government wishes to accommodate its 20-year housing needs by expanding its UGB under ORS 197.296(6)(a), the legislature specified that the local government must nevertheless “consider the effects of measures taken pursuant to paragraph (b) of this subsection.” ORS 197.296(6)(a). In other words, even when a local government chooses to expand its UGB to accommodate housing needs, it must consider the effects of enacting measures that would “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.” ORS 197.296(6)(b) (emphasis added).

Here, LCDC correctly concluded that Metro complied with that statutory directive. (SER 45-46). In conducting its Housing Needs Analysis, Metro determined that the existing metro-area UGB could accommodate a 20-year supply of multifamily housing units. (Record at 296). Metro also determined that the existing UGB could accommodate 92,300 additional single-family housing units—representing 93.8% of the projected 98,400 single-family housing units needed in the next 20 years. (Record at 296; SER 17). Metro reached that determination, in part, by employing an aggressive calculation for single-family residential infill within the existing UGB. Specifically, Metro

assumed that all lots at least 2.5 times the minimum lot size under existing zoning rules (and at least 2.2 times the minimum lot size in the City of Portland, specifically), would be divided into additional building lots for single-family residential development. (Record at 150). Metro also observed that the median lot size for a single-family unit in the region has decreased from 8,300 square feet in 1980 to 4,400 square feet in 2016. (Record at 271). Based on that historical trend and Metro's own peer-reviewed methodologies for predicting the amount of single-family residential infill within the existing UGB (Record at 143), Metro determined that it could accommodate 93.8% of the projected need for additional single-family housing within the existing UGB. (Record at 298). LCDC thus correctly determined that Metro complied with the statutory directive to "consider the effects of measures taken pursuant to [ORS 197.296(6)(b)]" before turning to a UGB expansion to accommodate the remaining need for housing.

Second, as LCDC explained in its final order, Statewide Land Use Planning Goal 14 and OAR 660-024-0050(4) separately 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 was required to consider whether it could "reasonably accommodate" the identified shortfall in single-family housing through increasing capacity within the existing UGB—the alternative identified in

ORS 197.296(6)(b). (SER 45). As explained below, LCDC correctly determined that Metro complied with that directive.

**C. LCDC correctly determined that Metro complied with Goal 14 and OAR 660-024-0050(4).**

Aside from its statutory argument, petitioner contends that LCDC’s order was unlawful in substance because LCDC misinterpreted and misapplied the mandates set out in Goal 14 and OAR 660-024-0050(4). Specifically, petitioner urges that the “Commission misinterpreted and misapplied the Statewide Urbanization Goal’s [(i.e., Goal 14)] requirement that Metro must, as a prerequisite to expanding its regional UGB, ‘demonstrate’ that the identified need ‘cannot reasonably be accommodated’ within the existing UGB.” (Pet Br at 11). Petitioner is incorrect.

As noted above, in determining whether LCDC’s final order was “unlawful in substance” under ORS 197.651(10)(a), this court must decide whether LCDC employed “a mistaken interpretation of the applicable law[.]” *Zimmerman*, 274 Or App at 519 (quotation marks omitted). In other words, petitioner’s argument reduces to whether LCDC mistakenly interpreted Goal 14 and OAR 660-024-0050(4). And, again, this court will “defer to LCDC’s plausible interpretation of its own rule[s].” *Barkers Five*, 261 Or App at 302. Finally, because petitioner’s argument hinges on LCDC’s review of Metro’s compliance with Goal 14, it bears emphasis that review for “compliance with

the goals” means that “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.” ORS 197.627.

Goal 14, the “urbanization” goal, provides, in pertinent part, 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.”<sup>2</sup> LCDC has adopted numerous administrative rules to clarify and implement the requirements of Goal 14. Chapter 660, division 24 of the Oregon Administrative Rules sets out the procedures by which local governments must adopt and amend their urban growth boundaries. OAR 660-024-0050 governs the process by which a local government inventories the land inside its UGB to determine whether the existing UGB contains adequate development capacity to accommodate the 20-year need for housing. OAR 660-024-0050(4), specifically, specifies how a local government must address a deficiency of land inside its existing UGB to satisfy the projected 20-year need. That rule provides, in part, that

[i]f the inventory demonstrates that the development capacity of land inside the UGB is inadequate to accommodate the estimated 20-year needs determined under [the housing needs analysis], the local government must amend the plan to satisfy the need deficiency, either by increasing the development

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<sup>2</sup> The full text of Goal 14 is attached to petitioner’s brief at App-3.

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.

In other words, OAR 660-024-0050(4) makes clear that, in deciding whether to expand its UGB to meet a need for additional buildable land, a local government must comply with the requirements of ORS 197.296, when applicable, and must determine that its need for additional buildable land “cannot reasonably be accommodated” within the existing UGB, as required under Goal 14 itself.

Contrary to petitioner’s argument on judicial review, LCDC correctly determined that Metro satisfied those requirements. First, as explained in the preceding section, LCDC correctly determined that Metro complied with ORS 197.296 in deciding to expand its UGB to accommodate the single-family housing deficit that could not be accommodated within the existing UGB. Further, LCDC determined that Metro complied with both Goal 14 and OAR 660-024-0050(4) because Metro took specific steps to ensure that it could accommodate as much of its projected housing 20-years housing needs within the existing UGB as possible. Specifically, in its final order, LCDC explained that local governments within the Metro area can and do utilize a variety of measures to make efficient use of their land. For example, all local governments must meet minimum density standards and housing mix

requirements, as set out in LCDC's Metropolitan Housing Rule. *See* OAR 660-007-0000 to 660-007-0060. (SER 47).

Further, LCDC explained that the fact that Metro determined that it would be able to accommodate all of its projected multi-family housing needs and 93 percent of its projected single-family housing needs within the existing UGB demonstrated that Metro will continue to make efficient use of the land within the existing UGB. Specifically, LCDC explained that the measures taken by Metro "show Metro has attempted to 'reasonably accommodate' the single-family housing need within the existing UGB as required by Goal 14 and OAR 660-024-0050(4)." (SER 45). LCDC went on to explain that

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 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 [DLCD'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).

(SER 45-46).

In making those findings, LCDC determined that Metro reasonably accommodated all of its projected need for multi-family housing and 93 percent of its projected need for single-family housing and that, in light of that accommodation, Metro's decision to expand the UGB in order to accommodate the remaining projected need for single-family housing complied with Goal 14 and OAR 660-024-0050(4). Or, in other words, LCDC determined that it was reasonable for Metro to accommodate all its multi-family housing needs and 93 percent of its single-family housing needs within the existing UGB before expanding the UGB to accommodate the remaining need for single-family housing. Petitioner has failed to demonstrate how LCDC's interpretation and application of Goal 14 and OAR 660-024-0050(4) are not "plausible." Thus, this court should defer to LCDC's interpretation and application of those rules.

**D. LCDC correctly concluded that Metro's reliance on Metro Charter Section 5(4)(b) did not violate Goal 14.**

Finally, petitioner argues that LCDC erred in approving Metro's UGB submittal because, in determining whether it could accommodate projected housing needs inside the existing UGB, Metro considered a provision of the Metro Charter that "prohibits Metro from requiring an increase in density in single-family neighborhoods identified in the Regional Framework Plan solely as Inner or Outer Neighborhoods." (SER 47). Petitioner argues, in effect, that the requirements of Goal 14 and OAR 660-024-0050(4) prevent Metro from

relying on that charter provision in assessing whether Metro could accommodate all of the anticipated 20-year need for housing within the existing UGB. Petitioner further argues that LCDC's order was unlawful in substance, insofar as it approved Metro's consideration of its charter provision, because LCDC misunderstood and misapplied Goal 14 and OAR 660-024-0050(4).

LCDC expressly addressed—and rejected—petitioner's challenge to Metro's consideration of its charter:

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.

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(4)(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.

(SER 47). In other words, LCDC concluded that it was reasonable for Metro to accommodate 97 percent of its total anticipated need for housing and 93 percent of its anticipated need for single-family housing within the existing UGB and expand the UGB boundary to accommodate the remaining need for single-family units. Or, put another way, LCDC concluded that the “reasonable accommodation” directive in Goal 14 and OAR 660-024-0050(4) did not require Metro to require local governments to rezone land inside the existing Metro UGB in order to accommodate *all* of the anticipated 20-year need for housing, notwithstanding Metro’s charter provision to the contrary.<sup>3</sup>

Petitioner has failed to demonstrate—through citation to caselaw, textual analysis, or otherwise—that LCDC’s interpretation of Goal 14 and OAR 660-024-0050(4) is implausible. To the contrary, LCDC’s interpretation of the “reasonably accommodate” directive in both Goal 14 and OAR 660-024-0050(4) is plausible and is thus entitled to deference in this court. *Barkers Five*, 261 Or App at 302. This court should therefore conclude that LCDC’s order approving Metro’s UGB submittal was not unlawful in substance in that LCDC

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<sup>3</sup> As Metro explains in its respondent’s brief, under ORS 197.296(4)(b), it was obligated to consider existing development restrictions imposed by local regulations and ordinances, including Section 5(b) of its charter, when preparing the inventory of buildable lands within the existing UGB. (Metro Resp Br at 9-11).

permitted Metro to consider its own charter provisions in determining how it would accommodate its anticipated need for housing.

### **CONCLUSION**

LCDC did not err in approving Metro's amendment to its urban growth boundary. This court should therefore affirm LCDC's approval order.

Respectfully submitted,

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Commission

**SUPPLEMENTAL  
EXCERPT OF RECORD**

## **SUPPLEMENTAL EXCERPT OF RECORD**

Pursuant to ORAP 5.50, respondent submits the following, as indexed below.

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

<b>IN THE MATTER OF REVIEW</b>	)	
<b>OF THE METRO URBAN</b>	)	<b>APPROVAL ORDER</b>
<b>GROWTH BOUNDARY IN THE</b>	)	<b>20-UGB-001910</b>
<b>MANNER OF PERIODIC REVIEW</b>	)	

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.<sup>1</sup>
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.<sup>2</sup> 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.<sup>3</sup> Metro now requires that concept plans in an urban reserve area be adopted by local

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> The urban and rural reserves adoption has had a complicated subsequent history. After remand by the Court of

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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).<sup>4</sup>

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.<sup>5</sup> 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.

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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).

<sup>4</sup> 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.

<sup>5</sup> The task force consisted of mayors, county commissioners, the department, 1000 Friends, and the Home Builders Association of Metropolitan Portland.

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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<sup>6</sup> 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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<sup>6</sup> 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.<sup>7</sup>

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<sup>7</sup> 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

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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.<sup>8</sup>

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

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<sup>8</sup> 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;<sup>9</sup> and 2) provide for minimum densities of six, eight, or ten units per net buildable acre, depending upon the size of the city.<sup>10</sup> Division 7 assigns Metro responsibility for regional coordination and determining

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<sup>9</sup> 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[.]”

<sup>10</sup> 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.<sup>11</sup> Further, the rule specifies when the local jurisdictions within Metro are to evaluate or reevaluate the new housing construction mix and minimum density standards.<sup>12</sup>

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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<sup>11</sup> 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.”

<sup>12</sup> 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."<sup>13</sup> 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.<sup>14</sup>

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

<sup>14</sup> 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.

Included within Exhibit E to Metro Ordinance No. 18-1427 is Metro's 2018 Regional Economic Forecast, which includes forecast estimates of the future total population, employment, and employment by sector for the seven-county Metropolitan Statistical Area (MSA). Record at 70-72, 86-90. Metro decided to utilize the mid-point values of the projected range for population and employment over the planning period, settling on anticipated population growth of about 524,000 people and 209,000 additional jobs in the MSA by 2038. The forecast work is also summarized in the 2018 UGR as well as in Metro's adopted findings. Record at 23 and 1053. The Commission finds that these materials demonstrate that Metro has completed a coordinated population forecast for the entire area within its boundary using commonly accepted practices and standards for population forecasting, consistent with the requirements of OAR 660-032-0030.

## Residential Buildable Land Inventory

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“\* \* \* \* \*

“(4) The Metro forecast must be developed using commonly accepted practices and standards for population forecasting used by professional practitioners in the field of demography or economics. The forecast must be based on current, reliable and objective sources and verifiable factual information, and must take into account documented long-term demographic trends as well as recent events that have a reasonable likelihood of changing historical trends. Metro must coordinate with the [Portland State University Population Research Center] in the development and allocation of its forecast.

“(5) 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. For a forecast used as a basis for a decision adopting or amending the Metro regional urban growth boundary submitted to the Department of Land Conservation and Development (DLCD) under ORS 197.626, the director of DLCD or the Land Conservation and Development Commission may approve the forecast provided it finds that any failure to meet a particular requirement of this rule is insignificant and is unlikely to have a significant effect on the determination of long term needs for the Metro urban area under OAR 660-024-0040.”

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ORS 197.296(3) and (4) govern Metro's preparation of its residential buildable lands inventory.<sup>15</sup> The buildable lands inventory is also required by OAR 660-024-0050(1).<sup>16</sup>

Exhibit E to Metro Ordinance No. 18-1427 also includes Metro's 2018 Buildable Lands Inventory (BLI). Record at 122-201. The BLI provides an explanation of the methodology used to determine lands likely to be redeveloped, as well as development and land data from the 24 cities and portions of three counties that are located within the Metro UGB. Record at 143-155. The BLI also includes a summary and maps of vacant and redevelopable land within the Metro UGB. Record 125-127, 131-134, 262. Appendix 3: Growth Forecast Findings includes results from Metro's land use and transportation computer model, MetroScope. Record at 202. The model analyzed 14 future scenarios with a combination of three key inputs: growth rate, capacity within existing UGB, and inclusion or non-inclusion of UGB expansion areas. Record at 204. As summarized in Metro's findings, the analysis concludes that the existing UGB contains the capacity for 92,300 additional single-family dwelling units, while vacant lands and land likely to be redeveloped to accommodate multifamily dwelling units are sufficient to accommodate between 136,000 and 271,000 additional multifamily units. Record at 1053. The

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<sup>15</sup> ORS 197.296 provides, in part:

“(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;

“\* \* \* \* \*

“(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.

“\* \* \* \* \*

“(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.”

<sup>16</sup> OAR 660-024-0050(1) provides, in part:

“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[.]”

tables provided within the BLI show a comprehensive summary of vacant and redevelopable land remaining within the Metro UGB for all local governments within the Metro area consistent with the requirements of ORS 197.296(3) and (4). Record at 125.

## Metropolitan Housing Rule<sup>17</sup>

The Commission's Metropolitan Housing Rule (MHR) is provided in OAR chapter 660, division 7. Metro's determination of housing needs must be consistent with the requirements for doing so provided in division 7. OAR 660-024-0040(4). Otherwise, division 7 does not provide applicable review standards for this submittal.

Division 7 incorporates the statutory definition of "buildable lands" at ORS 197.295(1) and expounds upon it.<sup>18</sup> In accordance with the OAR 660-007-0005(3) assumption that publicly owned land is generally not considered available for residential uses, Metro removed tax exempt property coded as city, state, and federal, except property owned by housing authorities. Record at 146. For vacant buildable lands, Metro also determined the net unconstrained amount by removing land not considered 'suitable and available' because it is severely constrained by natural hazards, subject to natural resource protection measures, has steep slopes, is within the 100-year flood plain, or any combination thereof. Record at 140, 144, 146-148. Metro based that analysis on its environmental regulations found in Urban Growth Management Functional Plan Title 3 (Water Quality and Flood Management) and Title 13 (Nature in Neighborhoods), but also assumed one dwelling unit per residentially-zoned tax lot if environmental encumbrances would limit development such that no dwelling units would otherwise be permitted to "essentially avoid takings." Record at 148. In identifying buildable lands, Metro also considered areas that cannot be provided with public facilities by treating certain areas formerly known as the City of Damascus as a part of unincorporated Clackamas County. Record at 122-

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<sup>17</sup> Because a number of objections raise contentions about the applicability of and compliance with sections of the Metropolitan Housing Rule, additional discussion the Metropolitan Housing Rule is located in the objections section of this order.

<sup>18</sup> OAR 660-007-0005(3) provides:

"'Buildable Land' means residentially designated land within the Metro urban growth boundary, including both vacant and developed land likely to be redeveloped, that is suitable, available and necessary for residential uses. Publicly owned land is generally not considered available for residential uses. Land is generally considered 'suitable and available' unless it:

"(a) Is severely constrained by natural hazards as determined under Statewide Planning Goal 7;

"(b) Is subject to natural resource protection measures determined under Statewide Planning Goals 5, 6 or 15;

"(c) Has slopes of 25 percent or greater;

"(d) Is within the 100-year flood plain; or

"(e) Cannot be provided with public facilities."

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.<sup>19</sup> 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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<sup>19</sup> 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.<sup>20</sup> Statewide Planning Goal 14 and OAR 660-024-0050 describe requirements for Metro to consider for amendments to its UGB.<sup>21</sup>

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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<sup>20</sup> 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.”

<sup>21</sup> 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.<sup>22</sup>

## 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.<sup>23</sup>

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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<sup>22</sup> 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.

<sup>23</sup> 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. \* \* \* \* \*

need analysis in this submittal complies with OAR 660-024-0050(1), Goal 9, and OAR 660-009-0015.

Metro has included within the UGB a 4.88 acre parcel in North Hillsboro that is currently zoned and occupied by rural commercial uses, as part of the UGB expansion decision. The property is within an urban reserve area. Metro and Hillsboro are proposing this addition to resolve a public health issue with a failing septic system. Record at 1072. Per condition of approval G.1 from Metro Ordinance No. 18-1427, no additional employment development will be allowed on the property until urban reserve planning for the area north of Hillsboro is completed by the City of Hillsboro in the future. Record at 21.

## Metro Boundary Location Alternatives Analysis

ORS 197.298, Goal 14, and OAR 660-024-0060 provide direction to Metro when considering a Metro UGB amendment.<sup>24</sup> The Commission reviews Metro's Preliminary UGB

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<sup>24</sup> ORS 197.298(1) provides, in part:

"In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary of Metro except under the following priorities:

"(a) First priority is land that is designated urban reserve land under ORS 195.145, rule or metropolitan service district action plan."

Goal 14, Boundary Location, provides:

"The location of the urban growth boundary and changes to the boundary shall be determined by evaluating alternative boundary locations consistent with ORS 197A.320 or, for the Metropolitan Service District, ORS 197.298, and with consideration of the following factors:

"(1) Efficient accommodation of identified land needs;

"(2) Orderly and economic provision of public facilities and services;

"(3) Comparative environmental, energy, economic and social consequences; and

"(4) Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB."

OAR 660-024-0060 provides, in part:

"(1) When considering a Metro UGB amendment, Metro must determine which land to add by evaluating alternative urban growth boundary locations. For Metro, this determination must be consistent with the priority of land specified in ORS 197.298 and the boundary location factors of Goal 14, as follows:

"(a) Beginning with the highest priority of land available, Metro must determine which land in that priority is suitable to accommodate the need deficiency determined under OAR 660-024-0050.

"(b) If the amount of suitable land in the first priority category exceeds the amount necessary to satisfy the need deficiency, Metro must apply the location factors of Goal 14 to choose which land in that priority to include in the Metro UGB.

"\* \* \* \* \*

Alternatives Analysis, record at 334-991 and findings, record at 1057-1060, for compliance with the statutory and regulatory hierarchy of lands and consideration of the necessary factors in determining where to expand the UGB.

Metro's location alternatives analysis follows the prioritization required in OAR 660-024-0060 and ORS 197.298(1). Specifically, all areas considered for inclusion within the Metro UGB are urban reserve lands, which are identified as the top priority for inclusion within an UGB. Record at 352, 1057. The Preliminary UGB Alternatives Analysis includes consideration of the Goal 14 locational factors, as well as detailed summary reports for each of the 32 identified urban reserve areas. Record at 340-349, 350-991. It is important to reiterate the provisions of OAR 660-024-0060(3), which provides that "[t]he boundary location factors of Goal 14 are not independent criteria." *See also 1000 Friends of Oregon v. Metro*, 174 Or App 406, 409-410, 26 P3d 151 (2001) (requirement that each factor must be addressed does not make the factors independent approval criteria). Metro is charged with consideration of each factor and balancing of the factors in reaching a decision. As part of the detailed summary reports for

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"(3) The boundary location factors of Goal 14 are not independent criteria. When the factors are applied to compare alternative boundary locations and to determine the Metro UGB location, Metro must show that all the factors were considered and balanced.

"(4) In determining alternative land for evaluation under ORS 197.298, 'land adjacent to the UGB' is not limited to those lots or parcels that abut the UGB, but also includes land in the vicinity of the UGB that has a reasonable potential to satisfy the identified need deficiency.

"\* \* \* \* \*

"(6) The adopted findings for a Metro UGB adoption or amendment must describe or map all of the alternative areas evaluated in the boundary location alternatives analysis. If the analysis involves more than one parcel or area within a particular priority category in ORS 197.298 for which circumstances are the same, these parcels or areas may be considered and evaluated as a single group.

"(7) For purposes of Goal 14 Boundary Location Factor 2, 'public facilities and services' means water, sanitary sewer, storm water management, and transportation facilities.

"(8) The Goal 14 boundary location determination requires evaluation and comparison of the relative costs, advantages and disadvantages of alternative Metro UGB expansion areas with respect to the provision of public facilities and services needed to urbanize alternative boundary locations. This evaluation and comparison must be conducted in coordination with service providers, including the Oregon Department of Transportation (ODOT) with regard to impacts on the state transportation system. 'Coordination' includes timely notice to service providers and the consideration of evaluation methodologies recommended by service providers. The evaluation and comparison must include:

"(a) The impacts to existing water, sanitary sewer, storm water and transportation facilities that serve nearby areas already inside the Metro UGB;

"(b) The capacity of existing public facilities and services to serve areas already inside the UGB as well as areas proposed for addition to the Metro UGB; and

"(c) The need for new transportation facilities, such as highways and other roadways, interchanges, arterials and collectors, additional travel lanes, other major improvements on existing roadways and, for urban areas of 25,000 or more, the provision of public transit service."

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).<sup>25</sup> 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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<sup>25</sup> 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."

Title 11 provides both a guide for long-range planning for areas Metro adds to its UGB and interim protection for areas added to the UGB prior to urbanization. MC 3.07.1105. In furtherance of those purposes, Title 11 requires concept plans for new urban areas with housing prior to inclusion into the UGB.<sup>26</sup>

Each of the four cities with proposed areas for expansion in the Metro UGB have adopted concept plans under Title 11. Beaverton at Record 2824, Hillsboro at Record 2842, King City at Record 2859, and Wilsonville at Record 2876. Metro staff, various policy and technical advisory committees, and the Metro Council reviewed the cities' concept plans. Metro determined that all four proposed concept plans complied with Title 11. Based on the comments, Metro revised conditions of approval for each concept plan. Record at 18-21. Each concept plan specifically addresses Title 11. Beaverton at Record 2830, Hillsboro at Record 2844, King City at Record 2865, and Wilsonville at Record 2876. The Commission concludes that the submittal complies with the provisions of Title 11.

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<sup>26</sup> Title 11, MC 3.07.1110(b) provides:

"A local government, in creating a concept plan to comply with this section, shall consider actions necessary to achieve the following outcomes:

"(1) If the plan proposes a mix of residential and employment uses:

"(A) A mix and intensity of uses that will make efficient use of the public systems and facilities described in subsection (c);

"(B) A development pattern that supports pedestrian and bicycle travel to retail, professional and civic services;

"(C) A range of housing of different types, tenure and prices addressing the housing needs in the prospective UGB expansion area in the context of the housing needs of the governing city, the county, and the region if data on regional housing needs are available, in order to help create economically and socially vital and complete neighborhoods and cities and avoiding the concentration of poverty and the isolation of families and people of modest means;

"(D) Sufficient employment opportunities to support a healthy economy, including, for proposed employment areas, lands with characteristics, such as proximity to transportation facilities, needed by employers;

"(E) Well-connected systems of streets, bikeways, parks, recreational trails and public transit that link to needed housing so as to reduce the combined cost of housing and transportation;

"(F) A well-connected system of parks, natural areas and other public open spaces;

"(G) Protection of natural ecological systems and important natural landscape features; and

"(H) Avoidance or minimization of adverse effects on farm and forest practices and important natural landscape features on nearby rural lands."

## Urban Growth Management Functional Plan, Title 14: Urban Growth Boundary

Title 14 prescribes criteria and procedures for amendments to the Metro UGB. MC 3.07.1405. Like Goal 14, the purpose of Title 14 is to create a clear transition from rural to urban development, an adequate supply of urban land to accommodate long-term population and employment, and a compact urban form. Title 14 describes criteria and procedures for amendments to the UGB to achieve these objectives. MC 3.07.1420 provides the procedures for legislative amendment to the UGB, while MC 3.07.1425 provides the criteria. Metro establishes compliance with Goal 14 through compliance with those provisions. MC 3.07.1425(a).

Metro reviewed 25 urban reserves areas as a two-step process.<sup>27</sup> First, Metro performed a review of the Goal 14 locational factors. Record at 334-865. Metro has code provisions, MC 3.07.1425(c)(1)-(4), that are coextensive with the four boundary location factors of Goal 14. *See* note 24. Second, Metro performed a review of 25 urban reserve areas using additional locational factors in Title 14. Metro used the Title 14 factors in MC 3.07.1425(c) that are in addition to the Goal 14 factors, specifically:

“(5) Equitable and efficient distribution of housing and employment opportunities throughout the region;

“(6) Contribution to the purposes of Centers and Corridors;

“(7) Protection of farmland that is most important for the continuation of commercial agriculture in the region;

“(8) Avoidance of conflict with regionally significant fish and wildlife habitat; and

“(9) Clear transition between urban and rural lands, using natural and built features to mark the transition.”

Metro considered the 25 urban reserve areas for Title 14 and the Metro Council’s six desired outcomes. The methodology and the analysis of each of the 25 urban reserve areas are detailed in Exhibit E of the UGR attachment 7a UGB Alternative Analysis Metro Code Factors. Record at 875-990. Under the “equitable and efficient distribution of housing and employment opportunities throughout the region” factor, Metro found that the four selected areas for the Metro UGB have the highest ranking for distribution of housing. The four areas selected were found to be the most efficient because they were the most likely to be developed with housing in the 20-year time frame compared to the other reserve areas that were studied that lacked governance, development and urban services.

As required by MC 3.07.1445 for a legislative amendment of its UGB under MC 3.07.1420, Metro included conditions of approval on land added to the UGB. Record at 18-21.

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<sup>27</sup> Metro evaluated all 32 urban reserves areas in the Goal 14 locational factors analysis. Based on the results of the Goal 14 analysis, Metro used a smaller set of urban reserve areas, 25, in the second step for the Title 14 alternative locational factors analysis.

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.<sup>28</sup>

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.<sup>29</sup> The report recommended approval of the UGB expansion

<sup>28</sup> In its staff report, the department’s responses to objections used the numbering displayed for identification only; the numbers have no other significance.

<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

## 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."

<sup>30</sup> 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."

<sup>31</sup> 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.<sup>32</sup> 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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<sup>32</sup> 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;

**a. Metropolitan Housing Rule<sup>33</sup>**

1000 Friends first objects that Metro's decision fails to demonstrate compliance with the Metropolitan Housing Rule, specifically OAR 660-007-0030<sup>34</sup> and 660-007-0035.<sup>35</sup> 1000 Friends objects that Metro must demonstrate compliance with OAR 660-007-0030 and OAR 660-007-0035 concurrently with Metro's decision to expand the UGB and argues that Metro has failed to satisfactorily demonstrate that each of the four cities have met those rules citywide, or that the rules will be met within the subject expansion areas. 1000 Friends argues that the submitted concept plans are not sufficiently detailed to demonstrate compliance with the OAR 660-007-0030 and OAR 660-007-0035 requirements and the conditions of approval adopted by Metro are not sufficient to ensure compliance, "either in the expansion areas or citywide."

In its exception to the director's report to the Commission, 1000 Friends levels two additional arguments regarding OAR 660-007-0030 and OAR 660-007-0035. 1000 Friends asserts that the department has changed its position on the issue of whether Metro must ensure compliance with OAR 660-007-0030 and OAR 660-007-0035 in this submittal. Second, 1000 Friends comes to an alternative reading of OAR 660-007-0050, governing Metro's regional responsibilities under the Metropolitan Housing Rule. 1000 Friends argues that, because this is a

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<sup>33</sup> HLA also raises this matter in its objection. The response below addresses both objections.

<sup>34</sup> OAR 660-007-0030(1) provides, in part:

"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."

<sup>35</sup> 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."

Metro periodic review of its UGB, Metro has responsibility for assuring compliance with OAR 660-007-0035.

The Commission disagrees with 1000 Friends that Metro must demonstrate compliance with OAR 660-007-0030 and OAR 660-007-0035 concurrently with its decision to expand the UGB. The Commission does not construe either OAR 660-007-0030 or OAR 660-007-0035 to be an applicable law that Metro must demonstrate compliance with under ORS 197.633(3)(c) in this submittal.<sup>36</sup> The Commission recognizes that this perhaps varies from the department's December 5, 2018 comments to Metro with regard to *when* these provisions apply, nevertheless in reviewing a submittal, the Commission is only authorized to determining compliance with applicable law. As such, the Commission rejects this objection, for the reasons that follow.

As a matter of law, OAR 660-007-0030 (the "50-50 Rule") and OAR 660-007-0035 (the "6-8-10 Rule") apply specifically to jurisdictions within Metro, not Metro itself. The Metropolitan Housing Rule differentiates between the obligations of Metro and those of local governments within Metro regarding implementation of its requirements. Specifically, OAR 660-007-0050 requires Metro to engage in regional coordination to "ensure that needed housing is provided for on a regional basis through coordinated comprehensive plans." Conversely, OAR 660-007-0060 requires local governments to demonstrate compliance with the new construction mix and minimum density requirements of the Metropolitan Housing Rule at each periodic review.

1000 Friends and HLA, in their exceptions contend that Metro's action constitutes "periodic review" because the Commission review the submittal under ORS 197.626 which requires Metro UGB amendments of greater than 100 acres to be processed "in the manner of periodic review." "Periodic review," and "in the manner of periodic review," are not the same thing. Periodic review is a process by which a local jurisdiction works with the department to undertake a comprehensive review and update of its comprehensive plan and implement land use regulations, organized as "tasks" or "sub-tasks," to account for changed circumstances and updates to the statewide planning program affecting local jurisdictions. Metro last completed a periodic review in 2011, starting in 2000, with 11 sub-tasks.

In contrast, this Metro legislative UGB amendment is a post-acknowledgment plan amendment of Metro's existing UGB and is subject to the provisions of ORS 197.615 governing the submittal of such amendments to the department for review and dissemination. After the department receives a final notice of adoption for such amendments, it is obligated by ORS 197.626 to process it differently, requiring department or Commission review and acknowledgment. This is in contrast to a standard post-acknowledgment plan amendment, which is considered acknowledged unless appealed to the Land Use Board of Appeals. Because Metro is not engaged in periodic review, the Commission determines that OAR 660-007-0050(1), requiring Metro to take certain actions "at each periodic review" of the Metro UGB, does not apply to this decision. The Commission cannot construe OAR 660-007-0050(1) to apply outside periodic review without omitting the phrase "at each periodic review" and likewise cannot insert

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<sup>36</sup> The Commission considered in its review above Metro's compliance with the applicable provisions to this submittal of the MHR, concluding that Metro has complied.

the phrase “or at any other legislative review” consistent with the rules of interpretation.<sup>37</sup> ORS 174.010.

The Commission construes the Metropolitan Housing Rule provision that tasks Metro to ensure needed housing on a regional basis to apply at a later point in the process of urbanizing the UGB expansion areas. OAR 660-007-0050(2) requires Metro to achieve regional provision of needed housing “through coordinated comprehensive plans.” At this point in the process, the four cities have not submitted the comprehensive plan amendment process to urbanize the expansion areas. The submittal before the Commission does not include any comprehensive plan amendments. They come later. Sequentially, Metro makes a legislative UGB amendment. At that time, Title 11 requires both interim protection and planning for the areas added to the UGB. MC 3.07.1105, MC 3.07.1120, MC 3.07.1130. The four cities are required to adopt comprehensive plans and land use regulations for the areas that address certain requirements, including “provisions that ensure zoned capacity for the specified number and types of housing units.” MC 3.07.1120(c)(3). OAR 660-007-0060(2) applies to comprehensive plan and land use regulation amendments and the four cities will then have to demonstrate that the mix and density of OAR 660-007-0030 or OAR 660-007-0035 are met.<sup>38</sup>

The Commission finds that the submittal sets the requirements for these subsequent steps. Pursuant to Title 14, as required for lands added to the UGB pursuant to MC 3.07.1420, Metro conditioned the UGB amendment as required by MC 3.07.1455. The Metro submittal specifies in Condition A.5 that the four cities consult with Metro and the department during comprehensive planning for the expansion areas regarding compliance with the Metropolitan Housing Rule. Record at 6. Additionally, Condition A.2 requires allowance for single-family attached housing, including townhomes, duplexes, triplexes, and fourplexes, on all zones on which single-family housing will be allowed in the expansion areas.<sup>39</sup> To be clear, the Commission finds that Metro included these conditions to meet the requirements of the Metro Code, not for the purpose of demonstrating compliance with a currently applicable law state statute, goal or administrative rule.

1000 Friends argues that the submitted concept plans are not sufficiently detailed to demonstrate compliance with the Metropolitan Housing Rule requirements, and the conditions of approval adopted by Metro are not sufficient to ensure compliance, “either in the expansion areas or citywide.”<sup>40</sup> The Commission concurs that the concept plans are conceptual and not sufficient

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<sup>37</sup> For example, in ORS 197.296(2), the legislature required local governments to provide sufficient buildable lands “[a]t 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 application of a statewide planning goal relating to buildable lands for residential use[.]”

<sup>38</sup> Prior to adopting such amendments, the cities must submit proposed amendments to the department as comprehensive plan and land use regulation amendments through the post-acknowledgment plan amendment process required by ORS 197.610 to ORS 197.625 and elaborated upon in OAR chapter 660, division 18. The department will review and provide comments on those submittals, analyzing compliance with OAR 660-007-0035, the remainder of the Metropolitan Housing Rule, and other statewide planning goals.

<sup>39</sup> Assuming for purposes of discussion only that OAR 660-007-0030 applied at this point, this condition alone would ensure compliance with the new construction mix opportunity requirement of the Metropolitan Housing Rule.

<sup>40</sup> The Commission notes that Metro has authority to impose and enforce the conditions of approval on the UGB

to ensure compliance with the applicable Metropolitan Housing Rule requirements. However, the Commission, as decided above, concludes that the Metropolitan Housing Rule requirements that are the basis for 1000 Friends objection are not applicable administrative rules for review of this submittal.

1000 Friends made similarly structured arguments in a previous judicial review of a Metro UGB amendment. In *Citizens Against Irresponsible Growth*, 1000 Friends challenged *inter alia* Metro conditions on the conversion of land added to the UGB from urbanizable to urban land for development on the City of Hillsboro amending its comprehensive plan to address certain transportation concerns for impacts to TV Highway. 179 Or App at 15. Metro had prepared a draft urban reserve concept plan to show that urbanization of the area complied with its code, Goals 2 and 14. *Id.* The court found it significant that the Metro UGB amendment did not convert rural or urbanizable land to urban use. *Id.* at 17. The court stated:

“Additional action will need to be taken to accomplish that result. At that time, a number of the considerations that petitioners believe are pertinent here will apply. Petitioners’ concern that adequate public facilities should be established before land is removed from rural status and placed within an urban growth boundary may well be valid from a policy standpoint. However, the approach necessarily elevates one of the Goal 14 factors to prominence over the others. As LUBA concluded, there is no support for that approach in the text or context of Goal 14, or the authorities construing it.” *Id.* at 17-18 (footnote omitted).

The court summarized, “[i]n short, petitioners ask for too much too soon.” *Id.* at 19. The court reiterated that the matter was an UGB amendment that sets the “stage for later, more specific planning decisions.” *Id.* Turning to the petitioners challenge that Metro’s conditions calling for additional transportation planning and improved transportation facilities “do not address the problems and further, that the conditions do not ensure that the improvements will actually be built”, the court simply concluded that it was not “persuaded that the conditions imposed by Metro are improper or inadequate.” *Id.* at 20-21. The court stated that the petitioners acknowledged that the city must address the Transportation Planning Rule requirements when converting land from urbanizable to urban, but the petitioners argued “that ‘that is a poor way to conduct land planning.’” *Id.* at 22. The court held:

“Petitioners want the rule requirements to be addressed now rather than to wait and risk the possibility that the rule will not permit the densities that Metro believes necessary. Petitioners argument is essentially that OAR chapter 660, division 012 should be revised. We agree with LUBA that the rule does not apply to this UGB amendment.”

The court affirmed the LUBA final opinion and order affirming Metro’s UGB amendment.

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expansion decision, per MC 3.07.1455 and 3.07.850 of Titles 8 and 14 of the Urban Growth Management Functional Plan. Two available avenues for enforcement are: 1) a LUBA appeal challenging a city’s adoption of comprehensive plan and land use regulations that are inconsistent with Metro conditions, and 2) utilization of Title 8 to conduct a hearing of the Metro Council to determine if a city is in violation of a condition of approval, and to establish an appropriate remedy if found in violation. Appropriate remedies include adopting an order directing the city to change its decision, withholding discretionary funds, or seeking an enforcement order from the Commission.

The Commission finds that this objection again asserts that Metro must satisfy now rule provisions that apply to the future planning and comprehensive plan amendments necessary for each of the four cities. That is not the case. This is distinct from the circumstances in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007). In that case, the county development code required a conceptual master plan to describe wildlife resources on the site and, as an approval criterion, that the applicant submit a proposed wildlife mitigation and resource protection plan. The county approved a conceptual master plan conditionally, requiring future adoption of the wildlife mitigation plan. The court determined that by the condition, the county substituted “an uncertain plan, a plan yet to be composed” and that was not based on substantial evidence in the record in violation of the county code requirements. *Id.* at 163. Here, the four cities are not required to amend their comprehensive plans in order to submit a concept plan required by MC 3.07.1110. The necessary comprehensive plan amendments are required to be completed within four years. Record at 6. The four cities will need to comply with the Metropolitan Housing Rule for the comprehensive plan and land use regulations necessary to urbanize the areas added to the UGB. OAR 660-007-0060(2). The Commission concludes that the objection presents no basis to conclude that the submittal does not comply with applicable law.

Finally, in its exception, 1000 Friends suggests that the Commission should require a condition that the four cities comply with HB 2001 (2019). Section 2(2) of that act requires cities in Metro to allow middle housing types in areas zoned for residential use. The legislation became effective on August 8, 2019 and requires the four cities to amend their comprehensive plans to implement section 2 no later than June 30, 2022. Section 3(1)(b). The Commission does not see the need to require the four cities to act in accordance to statutory requirements which apply directly.

**b. Metropolitan Housing Rule – King City**

1000 Friends asserts that Metro’s conditions for King City “are such that it is not apparent that Metro or DLCD could determine what number or type of dwellings will ultimately be planned for; that conclusion depends on the results of other studies, including a town center market analysis and transportation and infrastructure planning.” 1000 Friends Objection at 3. As a result, 1000 Friends contends that Metro could not reasonably find that King City’s concept plan submittal would satisfy the Metropolitan Housing Rule.

Assuming that 1000 Friends is correct in its assessment, this objection provides no basis for the Commission to sustain, because it is premised on the position that compliance with the Metropolitan Housing Rule is determined at the concept planning phase. As discussed above, the Commission does not construe division 7 in that way.

Nevertheless, regarding the proposed UGB expansion in the vicinity of King City, the Commission notes that although Condition E.3 requires planning for at least 3,300 homes within the Beef Bend South area “pending the results of the market analysis of a new town center”, the condition recognizes that King City and Metro will determine the actual number of units to be provided before amending the King City comprehensive plan as required by Condition E.2. Record at 8. Again, it is at the time that King City amends its comprehensive plan that it will

demonstrate compliance with the mix and density requirements of division 7. Additionally, Condition E.3 notes that, “If the market analysis indicates that this housing target is infeasible, King City shall work with Metro to determine the appropriate housing target for the expansion area.” However, given that the number of dwelling units to be produced in this expansion area, in addition to housing required in the other expansion areas by Conditions C.1, D.1, and F.1 must only be 165 dwelling units to meet Metro’s overall identified need ( $6,100 - 5,935 = 165$ ), the Commission concludes that the record supports the determination that the 528-acre site will be capable of accommodating at least 165 dwelling units. Therefore, the Commission rejects this sub-objection from 1000 Friends.

**c. Compliance with Title 7<sup>41</sup>**

1000 Friends objects that Metro must demonstrate compliance with Urban Growth Management Functional Plan, Title 7, Housing Choice.<sup>42</sup> In its exception, 1000 Friends states

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<sup>41</sup> HLA also raises this matter in its objection. The Commission’s response addresses both objections.

<sup>42</sup> Title 7: Housing Choice provides, in part:

“3.07.710 Intent

“The Regional Framework Plan calls for establishment of voluntary affordable housing production goals to be adopted by local governments and assistance from local governments on reports on progress towards increasing the supply of affordable housing. It is the intent of Title 7 to implement these policies of the Regional Framework Plan.

“3.07.720 Voluntary Affordable Housing Production Goals

“Each city and county within the Metro region should adopt the Affordable Housing Production Goal indicated in Table 3.07-7, as amended over time, as a guide to measure progress toward increasing housing choices and meeting the affordable housing needs of households with incomes between 0 percent and 50 percent of the regional median family income.

“3.07.730 Requirements for Comprehensive Plan and Implementing Ordinance Changes

“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 plan policies, actions, and implementation measures aimed at increasing opportunities for households of all income levels to live within their individual jurisdictions in affordable housing.

“3.07.740 Inventory and Progress Reports on Housing Supply

“(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

that MC 3.07.740 requires mandatory local government reporting that addresses regulated affordable rental housing and notes that local governments have not done the required reporting for many years. 1000 Friends also contends that MC 3.07.730 provides requirements that apply when Metro cities change a comprehensive plan.

The Commission rejects this objection. 1000 Friends does not establish its premise, that “compliance with Title 7 is a necessary element in justifying a UGB expansion under Goals 10 and 14.” Title 7: Housing Choice is a generally voluntary program which sets affordable housing targets for local governments within Metro. Compliance with this voluntary program is not a applicable law to the Commissions review under ORS 197.633(3)(c). The submittal does not include changes to any city’s comprehensive plan; therefore, MC 3.07.730 is not applicable.

Compliance with the inventory and progress reports, as discussed in Metro Code Section 3.07.740, while mandatory, is not a standard or approval criteria for a UGB expansion. Metro has not collected this information from local governments for many years, but now compiles the required information itself. While this report is not in the record, it is available on the Metro website. The Commission concludes that Title 7 does not provide standards applicable to this legislative UGB amendment.

## **d. Compliance with Title 11**

1000 Friends objects that Metro findings to demonstrate compliance with Urban Growth Management Functional Plan, Title 11: Planning for New Urban Areas are conclusory and insufficient to establish compliance.<sup>43</sup> 1000 Friends faults Metro’s findings, the Commission

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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.”

<sup>43</sup> Title 11, Planning for New Urban Areas, provides, in part:

### “3.07.1105 Purpose and Intent

“The Regional Framework Plan calls for long-range planning to ensure that areas brought into the UGB are urbanized efficiently and become or contribute to mixed-use, walkable, transit-friendly communities. It is the purpose of Title 11 to guide such long-range planning for urban reserves and areas added to the UGB. It is also the purpose of Title 11 to provide interim protection for areas added to the UGB until city or county amendments to land use regulations to allow urbanization become applicable to the areas.

### “3.07.1110 Planning for Areas Designated Urban Reserve

does not understand 1000 Friends to contend specifically that the concept plans themselves fall short of considering the elements of Title 11 and addressing them in the concept plans.

The Commission rejects this objection. MC 3.07.1105 and 3.07.1110 provide the purposes and the process for the development of concept plans for areas added to the UGB. The four cities each prepared a concept plans for the four urban reserve areas and Metro evaluated the concept plans in light of the considerations listed in MC 3.07.1110.

1000 Friends argues, “Metro must find that the proposing city has developed a concept plan that complies with MC 3.07.1110, Planning for Areas Designated Urban reserve.” 1000 Friends Objection at 5. 1000 Friends is correct that the Metro findings related to Title 11 concept plans is laconic: “All four areas have been concept planned.” Record at 1060. In light of the succinct findings, the Commission reviewed concept plan information included in the record. The Commission looks for “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*, 179 Or App at 16 n 6.

The Commission understands that Metro had already been through a process to determine that the concept plans address Title 11. Metro provided administrative guidance to cities for concept plans under Title 11 that specified requirements of MC 3.07.1110. Record 2907-2911. The November 28, 2018 Metro staff report stated:

“Four city expansion proposals

“Four cities – Beaverton, Hillsboro, King City and Wilsonville – submitted UGB expansion proposals by the May 31, 2018 deadline. Together, the four cities have proposed expansions totaling 2,181 acres. The proposed expansions are depicted on maps included as Attachments 1 through 4 to this staff report. The four cities have presented their proposals at Council work sessions, MPAC and MTAC. The four cities addressed Metro code requirements in their proposals, including the requirement – adopted in 2010 – that a concept plan be completed before the Council expands the UGB as well as newer factors – adopted in 2017 – that clarify expectations for cities.” Record at 1067-1068.

The record shows that Metro approved the concept plans. For example, the Hillsboro expansion area proposal states, “The Concept Plan has been developed to ensure that all Title 11-required

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“(4) If the area subject to the concept plan calls for designation of land for residential use, the concept plan will describe the goals for meeting the housing needs for the concept planning area in the context of the housing needs of the governing city, the county, and the region if data on regional housing needs are available. As part of this statement of objectives, the concept plan shall identify the general number, price and type of market and nonmarket-provided housing. The concept plan shall also identify preliminary strategies, including fee waivers, subsidies, zoning incentives and private and nonprofit partnerships, that will support the likelihood of achieving the outcomes described in subsection (b) of this section;”

elements are addressed (see Attachments D and E) and was deemed compliant by Metro Staff on April 19, 2018 (see Attachment F). Record at 2844. Likewise for Beaverton, “the South Cooper Mountain Concept Plan, adopted in December 2014 and found by Metro to be consistent with Title 11[.]” Record at 2830. That the “Concept Plan King City URA 6D includes the necessary plan elements and satisfies the provisions of section 3.07.1110” is included in the King City proposal. Record at 2865. The Wilsonville proposal for UGB expansion provides a thorough summary of the key findings and conclusions of the Title 11 findings in its concept plan. Record at 2876-2878.

1000 Friends’ exception highlights the MC 3.07.1104(c)(4) requirement to “describe the goals for meeting housing need for the concept planning area in the context of housing needs for the governing city[.]” 1000 Friends Exception at 7. The concept plan information in the record demonstrates that the housing needs met by each cities’ proposed concept plan is based on each cities’ adopted housing needs analysis:

- Beaverton describes how the city’s concept plan provides the needs and housing capacity for the city. Beaverton determined the needed through the city’s adopted housing needs analysis; while much of the needed housing is for single family residential, the city’s concept plan will provide for a wider range of housing in the concept plan area. The city has a comprehensive affordable housing strategy to address the city’s need throughout the city. Record at 2835
- Hillsboro addressed compliance with Title 11 in attachment D and E of their submittal to Metro. Record at 2842. Their concept plan address funding, transportation and needed housing capacity based on the city’s adopted housing needs analysis. The city describes their affordable housing program. Record 2848. The city council has appointed a Housing Affordability Team to help inform city staff on affordability programs and incentives throughout the entire city. Hillsboro describes in detail Title 11 compliance in its exception. *See Hillsboro Exception at 2.*
- King City is built out, without an expansion, there are no growth options during the 20-year planning period for the city. Record at 2859. The city’s proposed concept plan allows for housing expansion consistent with the city’s adopted housing needs analysis and Metro’s Title 11.
- Wilsonville describes the city’s best practices for affordable housing. Record at 2880. The city received an Equitable Housing Strategic Plan grant in 2016 from Metro to assess affordability of the housing market and city demographics to help determine the gaps between housing and needed supply. The outcomes from this grant will be folded into the adopted master plan for this area. Wilsonville filed an exception that describe the goals for meeting housing need for the concept planning area in the context of its housing needs. *Wilsonville Exception at 2-3.*

The Commission concludes that between the succinct finding, the conditions, and the record, the submittal establishes that the four cities concept plans on the whole, conform with the purposes of Title 11. The Commission understands Metro’s findings to imply that compliance with Title

11 is determined before a concept planned area is included in a legislative UGB amendment proposal and that Metro conditions address issues identified in concept plans. Particularly with regard to compliance with its functional plan, the Commission review is deferential to Metro's interpretation. ORS 197.633(3)(c); ORS 197.829.

**e. Compliance with Title 14 – Consideration of Affordable Housing Best Practices**

1000 Friends objects that the submittal does not demonstrate compliance with Metro Code Title 14: Urban Growth Boundary. The objection asserts that Metro's findings on this Title are conclusory and insufficient, particularly as regards Metro Code 3.07.1425(d)(4), regarding affordable housing.<sup>44</sup> 1000 Friends asserts that Metro has not set forth a factual basis by which to consider this factor, has no list of "best practices for preserving and increasing the supply and diversity of affordable housing in its existing urban areas," and acknowledges in its findings that the cities have not met this standard.

MC 3.07.1425(d) requires Metro to consider specified factors in determining with urban reserve areas better meet the housing need. The factors are in addition to the factors that Metro considers in evaluating urban reserve areas for addition to the UGB under the boundary location factors of Goal 14 and MC 3.07.1425(c). However, the provision uses language from Goal 14 – "consideration of the following factors" – that carries an established meaning in UGB amendment proceedings.<sup>45</sup> See *Citizens Against Irresponsible Growth*, 179 Or App at 17, *Barkers Five, LLC v. LCDC*, 261 Or App 259, 295-301, 323 P3d 368 (2014). In short, Metro must apply and evaluate each factor in MC 3.07.1425(d); weigh and balance the factors – which are not independent approval criteria – as a whole; and meaningfully explain why an urban reserve area better met the housing need. Metro's findings are:

"The fourth factor is whether the city that prepared the concept plan has implemented best practices for preserving and increasing the supply and diversity of affordable housing in its existing urban areas. This factor was considered by the City Readiness Advisory Group (CRAG) in its review of the city proposals, and comments from CRAG were forwarded to the Metro Council via a staff memorandum dated July 11, 2018, followed by a presentation to the Metro Council by CRAG on July 17, 2018. The Metro Council has reviewed those comments, as well as the information presented by the cities

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<sup>44</sup> MC 3.07.1425 provides, in part:

"(d) If the Council determines that there is a need to amend the UGB for housing, in addition to consideration of the factors listed in subsection (c) of this section, the Council shall also consider the following factors in determining which urban reserve areas better meet the housing need:

"\* \* \* \* \*

"(4) Whether the city responsible for preparing the concept plan has implemented best practices for preserving and increasing the supply and diversity of affordable housing in its existing urban areas;"

<sup>45</sup> Metro was cognizant that it was invoking the established meaning: "The Council also notes that in adopting these factors, the Council's expressly stated intent was not to create criteria that must be satisfied, but factors to be considered and weighed, in the manner of the Goal 14 locational factors." Record at 1060.

in their proposals regarding this factor, and the Council has considered whether each city has implemented best practices regarding affordable housing under this factor. The Metro Council finds that all four cities have taken at least some steps toward encouraging the development of affordable housing in their jurisdictions, as described in the CRAG comments and the cities' proposals. The City of Beaverton in particular has demonstrated a very firm commitment to providing affordable housing. While it cannot be said that all four cities have implemented 'best practices,' the cities have demonstrated progress toward providing more affordable housing. The Metro Council finds that one purpose of this factor is to encourage cities seeking UGB expansions to make preserving and increasing the supply of affordable housing more of a priority, and that purpose has been met. Also, the conditions of approval attached to the UGB expansions regarding housing mix, removing barriers to accessory dwelling units, and variable system development charges are all being imposed in order to increase the supply of affordable housing in the four cities." Record at 1061.

That finding demonstrates that Metro applied and evaluated MC 3.07.1425(d)(4). On balance, Metro concludes that each city could do more to preserve and increase the supply and diversity of affordable housing in their existing urban areas. The Commission understands that consideration of this factor does not weigh in favor of any proposal, except that Metro identifies Beaverton to have demonstrated the greatest commitment to providing affordable housing. Ultimately, 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 Metro considered MC 3.07.1425(d)(4) in the manner required by law.

1000 Friends objects that absent a "best practices" definition, Metro has no basis to consider this factor. Metro responds that the cities' proposals included the type of information regarding comprehensive plan and land use regulation provisions as are contemplated by Title 7, particularly MC 3.07.730. Metro March 12, 2019 Response to Objections at 4. The Commission defers to Metro's interpretation that it will look to Title 7 for "best practices" in considering MC 3.07. 1425(d)(4), because that interpretation is neither inconsistent with the Metro Code or Goal 14. ORS 197.829(1). The Commission finds no basis to sustain this objection and it is rejected.

**f. Compliance with Title 14 – Consideration of "Six Desired Outcomes"**

1000 Friends objects that Metro's findings on MC 3.07.1425(d)(5), are conclusory and insufficient to establish that each city has met the six desired outcomes resulting from any UGB expansion.<sup>46</sup> 1000 Friends Objection at 9-11. 1000 Friends identified "4. The region is a leader

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<sup>46</sup> MC 3.07.1425 provides, in part:

“(d) If the Council determines that there is a need to amend the UGB for housing, in addition to consideration of the factors listed in subsection (c) of this section, the Council shall also consider the following factors in determining which urban reserve areas better meet the housing need:

“\* \* \* \* \*

“(5) Whether the city responsible for preparing the concept plan has taken actions to advance

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**

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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.

HLA also cites ORS 659A.001(9)(b) and ORS 659A.421 to 659A.425 as directly applicable to this review.<sup>47</sup> ORS 659A.421 to 659A.425 prohibit discrimination in selling,

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<sup>47</sup> The Commission understands the HLA objection references to provisions of ORS chapter 459A to actually be to ORS 659A.001(9)(b) and 659A.421 to 659A.425. ORS 659A.001(9)(b) defines "Person" to include "A public body as defined in ORS 30.260."

ORS 659A.421 provides, in part:

"(2) A person may not, because of the race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income of any person:

"(a) Refuse to sell, lease or rent any real property to a purchaser. This paragraph does not prevent a person from refusing to lease or rent real property to a prospective renter or prospective lessee:

"(A) Based upon the past conduct of a prospective renter or prospective lessee provided the refusal to lease or rent based on past conduct is consistent with local, state and federal law, including but not limited to fair housing laws; or

"(B) Based upon the prospective renter's or prospective lessee's inability to pay rent, taking into account the value of the prospective renter's or prospective lessee's local, state and federal housing assistance, provided the refusal to lease or rent based on inability to pay rent is consistent with local, state and federal law, including but not limited to fair housing laws.

"(b) Expel a purchaser from any real property.

"(c) Make any distinction, discrimination or restriction against a purchaser in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or in the furnishing of any facilities or services in connection therewith.

"(d) Attempt to discourage the sale, rental or lease of any real property to a purchaser.

"(e) Publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind relating to the sale, rental or leasing of real property that indicates any preference, limitation, specification or unlawful discrimination based on race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income.

"(f) Assist, induce, incite or coerce another person to commit an act or engage in a practice that violates this section.

"(g) Coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of the person having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this section.

"(h) Deny access to, or membership or participation in, any multiple listing service, real estate brokers' organization or other service, organization or facility relating to the business of selling or renting dwellings, or discriminate against any person in the terms or conditions of the access, membership or participation.

"(i) Represent to a person that a dwelling is not available for inspection, sale or rental when the dwelling in fact is available for inspection, sale or rental.

"(j) Otherwise make unavailable or deny a dwelling to a person.

"(3)(a) A person whose business includes engaging in residential real estate related transactions may not

renting or leasing property, similar to the FHA. ORS 659A.425 provides that a “facially neutral housing policy” may violate these provisions if it is found to have a greater adverse impact on members of a protected class than on persons generally in a real property transaction.

The Commission standard of review for this submittal provides, “[f]or issues concerning compliance with applicable laws, is whether the local government’s decision on the whole

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discriminate against any person in making a transaction available, or in the terms or conditions of the transaction, because of race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income.

“\* \* \* \* \*

“(4) A real estate licensee may not accept or retain a listing of real property for sale, lease or rental with an understanding that a purchaser may be discriminated against with respect to the sale, rental or lease thereof because of race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income.

“(5) A person may not, for profit, induce or attempt to induce any other person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income.”

ORS 659A.425 provides, in part:

“(1) As used in this section:

“(a) ‘Facially neutral housing policy’ means a guideline, practice, rule or screening or admission criterion, regarding a real property transaction that applies equally to all persons.

“(b) ‘Protected class’ means a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, familial status, source of income or disability.

“(c) ‘Real property transaction’ means an act described in ORS 659A.145 or 659A.421 involving the renting or leasing of residential real property subject to ORS chapter 90.

“(2) A court or the Commissioner of the Bureau of Labor and Industries may find a person to have violated ORS 659A.145 or 659A.421 if:

“(a) The person applies a facially neutral housing policy to a member of a protected class in a real property transaction involving a residential tenancy subject to ORS chapter 90; and

“(b) Application of the policy adversely impacts members of the protected class to a greater extent than the policy impacts persons generally.

“(3) In determining under subsection (2) of this section whether a violation has occurred and, if a violation has occurred, what relief should be granted, a court or the commissioner shall consider:

“(a) The significance of the adverse impact on the protected class;

“(b) The importance and necessity of any business purpose for the facially neutral housing policy; and

“(c) The availability of less discriminatory alternatives for achieving the business purpose for the facially neutral housing policy.”

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.<sup>48</sup> 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<sup>49</sup>**

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<sup>48</sup> 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.

<sup>49</sup> 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)).<sup>50</sup> 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

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<sup>50</sup> 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**

HLA asserts that Metro has failed to do a comparative analysis of social consequences for housing affordability, suitability, and location required by the locational factors of Goal 14.<sup>51</sup> HLA argues that since Metro did not consider “whether the existing boundary could accommodate projected 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.” HLA Objection at 18-19.

HLA mischaracterizes the Commission’s purpose for 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 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. Metro addresses HLA’s concerns regarding locational preferences and potential displacement in its housing needs analysis and buildable lands inventory, completed in an earlier phase of the analysis.

As part of the required consideration of Goal 14, Boundary Locational Factors, Metro completed a comparative analysis of the social consequences factor identified in Goal 14. Record 1985–1994. 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 Commission finds that Metro has properly considered the boundary locational factors of Goal 14, and therefore rejects this objection.

## **g. Unenforceable conditions of approval**

HLA asserts that Metro’s proposed conditions of approval are “largely aspirational and unenforceable” and thus do not ensure compliance with state and Metro requirements. HLA Objection at 20. The specific conditions mentioned are:

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<sup>51</sup> Goal 14 provides, in part:

“The location of the urban growth boundary and changes to the boundary shall be determined by evaluating alternative boundary locations consistent with ORS 197A.320 or, for the Metropolitan Service District, ORS 197.298, and with consideration of the following factors:

“(1) Efficient accommodation of identified land needs;

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

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

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

“A.2. 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.

“A.3. The four cities shall explore ways to encourage the construction of ADUs in the expansion areas.

“B.1. Within one year after the date this ordinance is acknowledged by LCDC (excluding any subsequent appeals), the four cities shall demonstrate compliance with Metro code section 3.07.120(g) and ORS 197.312(5) regarding accessory dwelling units. In addition to the specific requirements cited in Metro code and state law, cities shall not require that accessory dwelling units be owner occupied and shall not require off street parking when street parking is available.

“B.2. Before amending their comprehensive plans to include the expansion areas, the four cities shall amend their codes to ensure that any future homeowners associations will not regulate housing types, including accessory dwelling units, or impose any standards that would have the effect of prohibiting or limiting the type or density of housing that would otherwise be allowable under city zoning.

“B.3. Before amending their comprehensive plans to include the expansion areas, the four cities shall amend their codes to ensure that any future homeowners associations will not require owner occupancy of homes that have accessory dwelling units.

“B.6. For at least six years after this UGB expansion, the four cities shall provide Metro with a written annual update on compliance with these conditions as well as planning and development progress in the expansion areas. These reports will be due to the Metro Chief Operating Officer by December 31 of each year, beginning December 31, 2019.” Record at 6-7.

First, the Commission concludes that Metro did not impose the conditions for the purpose of establishing compliance with currently applicable review standards. Instead, the conditions are required by the Urban Growth Management Framework Plan to guide the four cities in undertaking the comprehensive plan and land use regulations necessary to urbanize the expansion areas. Second, the Commission, in reviewing these conditions of approval, notes that three of the six conditions (A.2., B.1, and B.3.) are now required by state statute (HB 2001 (2019)); two of the conditions (A.3. and B.2.) are mostly required by HB 2001; and only condition B.6., a reporting requirement is now a completely independent condition.

Because HLA has not demonstrated how these particular conditions are required to ensure compliance with state law, rule, goal, or Metro code applicable to this review, the objection provides the Commission no basis to sustain. Therefore, the Commission rejects this objection.

## **h. King City Transportation System Plan**

HLA notes that King City has no transportation system plan. HLA asserts that such a plan is necessary to evaluate the locational and public facilities factors under Goal 14. HLA Objection at 21. HLA states “lack of a TSP is certainly a relevant, if not the decisive, factor in choosing among candidate lands.” *Id.*

HLA does not establish that Goal 14 requires a city proposing a UGB expansion area to have a transportation system plan. Goal 14, Boundary Location Factor 2, requires consideration of “[o]rderly and economic provision of public facilities and services.” That consideration must be supported by substantial evidence in the record. Goal 2. Metro has provided a full evaluation of the boundary location factors for the Beef Bend South urban reserve area, including discussion of transportation system needs. Record at 2021. As with other expansion areas, it is anticipated that King City will develop more specific infrastructure and area plans following inclusion of this area within the UGB. Metro has demonstrated the required consideration, weighing, and balancing of locational factors in selection of this area for inclusion in the UGB. Therefore, the Commission rejects this sub-objection.

#### **4. Ron Johnson**

Ron Johnson objects to specific areas being included in the proposed King City expansion of the Metro UGB. Mr. Johnson raises two objections: that the King City expansion area includes areas that do not meet the definition of “buildable lands” and that transportation proposals cross lands subject to a conservation easement.

##### **a. Buildable Lands**

Mr. Johnson objects that the proposed King City UGB expansion area is flawed and violates Goals 5, 6, 7, and 12 as the expansion area inappropriately includes land that does not meet the definition of “Buildable Land” as described in OAR 660-007-0050(3), specifically land that is constrained by natural hazards, is subject to natural resource protection measures, has steep slopes, or is within the 100-year floodplain. Johnson Objection at 1. The Commission concluded above that Metro had met the buildable land inventory requirement of division 7 for lands within the UGB.<sup>52</sup> This objection pertains to lands proposed to be added to the UGB.

The division 7 definition of “Buildable Land” provides that buildable land means “residentially designated land within the Metro urban growth boundary[.]” OAR chapter 660, division 24, is the applicable rule that clarifies the procedures and requirements of Goal 14 regarding Metro’s amendment of its UGB. The division 7 definition of buildable land in the context of residentially designated lands is used to approximate the amount of land available for residential use within an urban growth boundary and to comply with other aspects of the Metropolitan Housing Rule such as the provision of specific housing types and densities. The

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<sup>52</sup> For vacant buildable lands within the UGB, Metro determined the net unconstrained amount by removing land not considered ‘suitable and available’ because it is severely constrained by natural hazards, subject to natural resource protection measures, has steep slopes, is within the 100-year flood plain, or any combination thereof. Record at 140, 144, 146-148. Metro based that analysis on its environmental regulations found in Urban Growth Management Functional Plan Title 3 (Water Quality and Flood Management) and Title 13 (Nature in Neighborhoods), but also assumed one dwelling unit per residentially-zoned tax lot if environmental encumbrances would limit development such that no dwelling units would otherwise be permitted to “essentially avoid takings.” Record at 148.

buildable land definition does not determine the location of an urban growth boundary, specific location or boundaries of natural resources and floodplains, or areas that will be developed as residential in the future. The proposed King City expansion area has not yet been zoned for residential use, nor any urban use as of yet, and this can only occur after the land is included in the Metro UGB and further land use planning in compliance with applicable Metro and state land use requirements is completed and adopted by the city. These requirements include provisions for complying with statewide planning goals relating to natural resource protection and hazards. In adopting comprehensive plan and land use regulations for this expansion area that are reviewed for compliance with the Goals, King City will consider steep slopes, floodplains, and perhaps potential failure of Scoggins Dam in determining lands suitable for residential use. The Commission rejects this objection.

## **b. Proposed Road in Conservation Easement**

The objector asserts that a road in the King City UGB expansion area is proposed to cross a conservation easement that protects critical drainages to the Tualatin River against the wishes of local residents in violation of Goal 1 and where it may be subject to the city using eminent domain and therefore violates the intent of Goals 5 and 6. In addition, the objection argues that Goal 12 specifies that a transportation plan shall minimize environmental impacts, which cannot be achieved by constructing a road through a conservation easement. Johnson Objection at 4.

While Goal 1, Citizen Involvement, calls for the opportunity for citizens to be involved in all phases of the planning process, the objector has not established that Metro may only adopt an urban growth boundary amendment that accords with all of the input received. The UGB expansion record documents the input provided by the objector. Establishing that there may have been support for a different submittal does not provide the Commission a basis for rejecting the submittal under review. Goal 1 requires a program for consideration of citizen input— it does not dictate a particular result.

In addition, Metro has identified the issue raised by Mr. Johnson, and has included a condition of approval to address it. Exhibit C to Metro Ordinance No. 18-1427, Conditions of Approval on Land Added to UGB, Section E, King City reads:

“The Columbia Land Trust holds a conservation easement over portions of the Bankston property, which King City’s concept plan identifies as the intended location for a key transportation facility serving the expansion area. King City shall work with the Columbia Land Trust to protect, to the maximum extent possible, the portion of the Bankston property covered by the conservation easement.” Record at 20.

Again, King City’s comprehensive plan and land use regulation amendments necessary to urbanize this expansion area will need to demonstrate compliance with the Goals. ORS 197.175(2)(a); *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583, 591 (1994). Therefore, the Commission rejects this objection.

## **5. Karl Swanson**

Mr. Swanson asserts that Metro failed to adequately assess and preserve natural resources with respect to the King City UGB proposal. Further, he states that Metro failed to consider Goal 5, particularly with respect to the city's proposed east-west road connection across what appear to be multiple water bodies in a "Title 13 Inventory of the Portland Metro Region" Map and described as: "Adopted by the Metro Council in September of 2005, the chief mapping data for the Metro Title 13 Resource Inventory combines Regionally Significant Riparian & Upland Wildlife habitat, Habitats of Concern, and impact areas into one integrated layer based on Metro's GIS models for mapping riparian functions and wildlife values." Mr. Swanson further asserts that north-south connections to Beef Bend Road are much less destructive to resources and more economical. Swanson Objection at 1.

The Commission rejects this objection. Metro analyzed environmental issues related to the Beef Bend South urban reserve area (the area proposed for expansion adjacent to King City). Record at 2021. Metro discussed environmental consequences under Goal 14, Boundary Location Factor 3, noting five streams in the area and the impacts of these streams and associated riparian areas upon future development. Record at 2026. Metro recognizes that these environmental resources will limit and shape future urban development of this area. Record at 2028.

## **6. Fran Warren**

Ms. Warren objected to five aspects of Metro's UGB expansion in the vicinity of Beaverton. Three of those objections were ruled to be invalid by the department and are not considered here. *See* OAR 660-025-0140(3) (Commission may only consider valid objections). The remaining two objections are discussed below.

### **a. Protection of Natural Resources**

Ms. Warren asserts that the Metro decision inadequately addressed protection of the natural resources providing upland habitat, including trees, water sources and wildlife corridors and connectivity. Warren Objection at 1. Ms. Warren notes that some of the local governments have not yet studied, documented, and identified all of the area's resources. *Id.*

The Commission concludes that the concerns do not provide a basis to remand the submittal and therefore rejects this objection. Metro's analysis of environmental impacts under Goal 14, Boundary Location Factor 3 is found in the record at 2111. The analysis notes the presence of streams, riparian areas, wetlands, and associated upland habitat in the Cooper Mountain study area and concludes that these resources will impact and shape future urban development in the area. More detailed analysis of environmental resources and impacts is appropriate at subsequent planning stages for the Cooper Mountain study area. Metro's Title 11, Planning for New Urban Areas, required King City to show water quality resource areas, flood management areas, and habitat conservation areas that will be subject to performance standards under Metro Title 3, Water Quality and Flood Management and Title 13, Nature in

Neighborhoods. MC 3.07.1110(c)(5). The planning for compliance under Titles 3 and 13 includes a methodology for evaluating, conserving and mitigating the impact of development on riparian corridors, wetlands and wildlife habitat resources.

## **b. Inadequate Transportation Infrastructure**

Ms. Warren asserts that the Beaverton Cooper Mountain area lacks adequate transportation infrastructure to support development. Warren Objection at 2.

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 identifies 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; however, the existence of such issues does not preclude the expansion authorized in the submittal.

## **7. Michael Donoghue**

Mr. Donoghue objects to the expansion of the Metro UGB to include Cooper Mountain and the proposed development of approximately 3,700 homes. Mr. Donoghue also provided written exceptions. He has focused on two major areas of concern including natural area protection and transportation challenges.

### **a. Protection of Significant Natural Areas**

Mr. Donoghue asserts that Metro Ordinance No. 18-1427 does not take into consideration specific Washington County Comprehensive Plan policies to protect and enhance designated significant natural areas. In addition, he takes exception to the Metro ordinance finding: "Goal 5 (Natural Resources): The Metro Council finds that adoption of Ordinance No. 18-1427 does not impact any inventoried Goal 5 resources and is therefore consistent with Goal 5 and its implementing rules." Record at 1065. He also asserts that Goal 5 resources were not inventoried as provided by the goal language, specifically resources related to riparian corridors, wetlands, wildlife habitat, groundwater resources, and natural areas. Donoghue Objection at 1. In Mr. Donoghue's exception, he clarifies that Washington County is tasked with defining and protecting Significant Natural Areas and Goal 5 resources in the expansion area, but does not appear to have been consulted to do so. Donoghue Exception at 1.

Mr. Donoghue has indicated a desire for better natural resource protection than currently exists in Washington County and essentially asserts that a Metro UGB expansion requires a new natural resource inventory of the Cooper Mountain area based on Washington County natural resource protection policies and Goal 5 inventory requirements. The relevant rules can be found in OAR chapter 660, division 24, Urban Growth Boundaries and OAR chapter 660, division 23, Procedures and Requirements for complying with Goal 5. Specifically OAR 660-024-0020(3)(c), Adoption of Amendment of a UGB, provides:

“(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;”

Further, OAR 660-023-0250(3)(c) provides:

“(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if: ...

“(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.”

The resource inventory described in the actual Goal 5 language does not apply directly to this UGB amendment as Washington County has an acknowledged comprehensive plan including natural resource protections. The Commission understand Mr. Donoghue to be concerned about resources that Washington County has not included on its Goal 5 inventory but should consider including. However, only inventoried resource sites, not those that perhaps should be inventoried, fall within the scope of OAR 660-023-0250. *Johnson v. Jefferson County*, 221 Or App 156, 163, 189 P3d 30 (2008), *rev dismissed* 347 Or 259 (2009).

Metro analyzed environmental impacts under Goal 14, Boundary Location Factor 3. Record at 2111. The analysis notes the presence of streams, riparian areas, wetlands, and associated upland habitat in the Cooper Mountain study area, and concludes that these resources will impact and shape future urban development in the area. More detailed analysis of environmental resources and impacts is appropriate at subsequent planning stages for the Cooper Mountain study area. Metro’s analysis of environmental impacts under Goal 14, Boundary Location Factor 3, concludes that identified resources will impact and shape future development of the Cooper Mountain Area. Record at 2111. Metro’s Title 11, Planning for New Urban Areas, required local jurisdictions to show water quality resource areas, flood management areas, and habitat conservation areas that will be subject to performance standards under Metro Title 3, Water Quality and Flood Management and Title 13, Nature in Neighborhoods. MC 3.07.1110(c)(5). The planning for compliance under Titles 3 and 13 includes a methodology for evaluating, conserving and mitigating the impact of development on riparian corridors, wetlands and wildlife habitat resources. The Commission has acknowledged Title 13 as sufficient for meeting Goal 5 for riparian areas and wildlife habitat. Metro Title 3 provides an approach to wetland that provides equal or greater protection for the resource category. Because this objection provides no basis for determining that the submittal does not comply with Goal 5, the Commission rejects this objection.

## **b. Transportation Impacts**

Mr. Donoghue indicates that recent current development in the Cooper Mountain area has already created a significant increase in traffic on the county’s transportation system and that Metro has hardly considered the impacts of additional new development or incorporated those impacts into regional transportation plans. Donoghue Objection at 3.

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 22 DAY OF JANUARY, 2020.

FOR THE COMMISSION

  
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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.

## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on August 10, 2020, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Micheal Reeder, attorney for petitioner, Caroline MacLaren, Christopher Crean, Roger Alfred, Peter Watts, Peter Livingston, and Barbara Jacobson, attorneys for respondents, by using the electronic filing system.

I further certify that on August 10, 2020, I directed the Respondent's Answering Brief to be served upon William Kirby, attorney for City of Beaverton, by mailing two copies, with postage prepaid, in an envelope addressed to:

William B. Kirby  
Beaverton City Attorney's Office  
12725 SW Millikan Way  
P.O. Box 4755  
Beaverton, OR 97076

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**CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)**

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 4,341 words. I further 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(2)(b).

/s/ Philip Thoennes

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