

Urbanization in Oregon: Goal 14 and the Urban Growth Boundary

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The urbanization process, with its attendant concerns over the cost and provision of infrastructure, resolving conflict among land uses, allocation of land uses and provision for housing and employment, is a principal reason for planning and land use regulation in the United States. For all the talk about the superiority of the free market, Americans have often resorted to planning and land use regulation as a check on the marketplace. This article examines the planning and land use regulatory experience in Oregon under Statewide Planning Goal 14, the state's principal method of controlling urban growth,¹ and its use of the Urban Growth Boundary (UGB) as a means of controlling urbanization.

I. Introduction and History of Urbanization in Oregon

A. *The Urbanization Process in General and Oregon in Particular*

Public control of urbanization requires balancing the negative impacts of growth, including the possibility of urban sprawl² against the requirement

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1. See DEP'T OF LAND CONSERVATION AND DEV., OR.'S STATEWIDE PLANNING GOALS AND GUIDELINES, 1 (2006) [hereinafter "DLCD Goals"] available at <http://www.oregon.gov/LCD/docs/goals/goal14.pdf> (stating the purpose of Goal 14 is "to provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities").

2. "Urban Sprawl" is generally characterized as scattered, low-density development that contributes to spatial and job mismatch, disconnected street networks that are dominated by automobiles contributing to lack of walk-able spaces, lack of well-defined downtowns or thriving activity centers, and general lack of efficient, alternative modes of transportation. See Don Chen, Reid Ewing, & Rolf Pendall, *Measuring Sprawl and its Impact*, 3, 9-12, SMART GROWTH AMERICA available at <http://www.smartgrowthamerica.org/documents/MeasuringSprawl.pdf>.

to provide sufficient and suitable lands to accommodate urban land needs. The negative effects of sprawl are well documented.³ To combat these undesirable consequences, various land use planning systems around the country have emerged and evolved in the past 50 years to provide for managing growth.⁴ Oregon's land use planning system and its use of the urban growth boundary stands as one of the most innovative and unique land use programs in the country.⁵

By the 1960s, Oregon had begun to experience some of the adverse effects of uncontrolled growth. That decade saw rapid and uncoordinated suburban growth, particularly in the fertile Willamette Valley, on the Pacific Coast, and in Central Oregon,⁶ and the state population grew by 18%, with 86% of that growth taking place in the Willamette Valley, and 54% in the Portland metropolitan area.⁷ The possible loss of farmland due to a population increase in the Willamette Valley, the most productive agricultural area of the state, threatened the entire Oregon economy.⁸ In response to the problems associated with urban sprawl and uncontrolled growth during the 1960s and 1970s, there was a growing realization that additional planning and a land use regulatory framework was needed to mitigate these undesirable effects. In 1973, then-Governor Tom McCall made his famous speech to the Oregon legislature denouncing disorderly

growth as a threat to the state.⁹ In that same year, the Oregon legislature provided a remedy by establishing a novel, centralized land use system in which a state agency set land use policy and standards to which local government comprehensive plans must adhere, while local governments retained the authority and responsibility for the methods by which to do so.¹⁰ Thus, a creative, innovative, and complex land use planning system emerged.

B. Background and History of the Oregon Planning System

1. HISTORICAL ANTECEDENTS¹¹

The passage of Senate Bill 100 in 1973 established the current land use system; however, Oregon's planning and land use control began about a half century prior in 1919 when Oregon enabled cities to adopt zoning regulations.¹² This legislation was challenged and upheld in *Kroner v. Portland*,¹³ confirming the power of cities to zone. Prior to 1947, planning was solely a city function, until enabling legislation was passed that year authorizing counties to plan, zone, and form planning commissions that would recommend "development patterns."¹⁴ However, unlike cities, counties were statutorily required to "carry out" these "development patterns,"¹⁵ which were later changed to "comprehensive plans" in 1963,¹⁶ thereby establishing the primacy of the plan, at least for counties.

The next significant development in the Oregon planning system to distinguish that system was the use of "Exclusive Farm Use Zones" (EFUs) in 1961, authorizing preferential tax assessments for land in "farm use" areas.¹⁷ In time, that legislation provided for both tax advantages to farmers engaged in agriculture and preservation of farmland for farm uses.¹⁸

3. While the anti-sprawl position is widely accepted, those in support of sprawl argue that sprawl does not create higher government costs, does not threaten natural resources, and is not a contributor to social problems. See, e.g., Samuel R. Staley, *The Sprawling of America: In Defense of the Dynamic City*, 14-15 (1999) available at <http://reason.org/files/ed09db5e026808f5a16e1e56cf28aad3.pdf> (claiming that the "sprawl index" is declining and that the negative effects of urban sprawl are exaggerated). For an exposition on negative effects of sprawl, see Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 801, 802 (1999) (discussing the negative effects of sprawl and growth management techniques to manage growth in urban areas).

4. See Daniel R. Mandelker, *Managing Space to Manage Growth*, *supra* note 3; see also Edward J. Sullivan and Jessica Yeh, *Smart Growth: State Strategies in Managing Sprawl*, 45 Urb. Law. 349, 350-51 (2013) (discussing the problems resulting from sprawl and state strategies in managing sprawl).

5. See Edward J. Sullivan, *Remarks to the University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813-14 (1998) [hereinafter "Oregon Symposium"] (discussing the successes and failures of the Oregon land use planning system 25 years after the passage of S.B. 100).

6. Ethan Seltzer, *Land Use Planning in Oregon: The Quilt and Struggle for Scale 6* (Lincoln Inst. of Land Policy, Working Paper, 2013) (discussing Oregon population growth).

7. *Id.*

8. *Id.*

9. See H. Journal, 57th Leg., Reg. Sess., at 310-15 (Or. 1973) (Governor Tom McCall's Legislative Message to a Joint Session of the Oregon Legislature on January 8, 1973).

10. See 1973 Or. Laws 127 [hereinafter "S.B. 100"].

11. See generally Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357, 358-73 (2012) [hereinafter "Quiet Revolution"] (examining the history of the Oregon Planning Program in greater detail).

12. 1919 Or. Laws 539.

13. 240 P. 536, 540 (1925).

14. See 1947 Or. Laws 548.

15. OR. REV. STAT. §215.110.

16. 1963 Or. Laws 1299.

17. 1961 Or. Laws 1428.

18. Edward J. Sullivan & Alexia Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961-2009*, 18 San Joaquin L. Rev. 1, 4-8 (2009). In 1971,

2. THE SYSTEM EMERGES: SB 10 (1969)

In 1969, the passage of Senate Bill 10 (“SB 10”)¹⁹ marked the last significant development, prior to SB 100, to establish a centralized land use planning program in Oregon. The bill provided that any city or county not subject to a comprehensive plan and zoning regulations by December 31, 1971 would be subject to the Governor’s authority to prescribe, amend, and administer comprehensive plans and zoning regulations on such lands.²⁰ Despite its lack of clarity, funding, and overall mechanism for implementation—all of which led to its inevitable failure—SB 10 symbolized the legislature’s concern over unplanned development and its desire to find an appropriate solution.

In addition to the efforts that resulted in the passage of SB 10 and the will of the legislature to provide a comprehensive land use scheme for Oregon, two landmark cases were decided in the early 1970s that helped establish Oregon’s unique program. In 1973, the Oregon Supreme Court, in *Fasano v. Board of County Commissioners of Washington County*,²¹ (1) held that counties were required to develop zoning and regulations in accordance with the comprehensive plans and (2) distinguished between legislative and quasi-judicial matters.²² Two years later, in *Baker v. City of Milwaukie*,²³ the court came to the same conclusion in an interpretation of the 1919 City Enabling Legislation that required consistency with a “well considered” plan.²⁴

C. SB 100 (1973) and The Current Oregon Land Use System: A Brief Overview

Determined to abrogate uncontrolled growth, the Oregon legislature passed Senate Bill 100 (SB 100) in 1973, creating Oregon’s unique

Oregon became the first state to regulate forest practices on private and state lands through the Oregon Forest Practices Act, which regulated timber harvesting, replanting, and stream setbacks. Sullivan & Solomou, *Preserving Forest Lands for Forest Use—Land Use Policies for Oregon Forest Lands*, 26 J. ENVTL. L. & LITIG. 179 (2011) [hereinafter *Preserving Forest Lands for Forest Use*]. Thus, by the time of the passage of its landmark legislation in 1973, Oregon already had an ethic oriented toward the protection of resource lands.

19. 1969 Or. Laws 581 [hereinafter “SB 10”].

20. *Id.*

21. 507 P.2d 23 (1973).

22. In requiring the subordination of land use regulations to the plan, the Oregon Supreme Court cited the 1947 County Zoning Enabling Legislation (OR. REV. STAT. §215.110(1)) which required zoning and other land use regulations “carry out” the county comprehensive plan. 507 P.2d at 27. The legislative-quasi-judicial distinction was the product of case law and scholarly publications. *Id.* at 26-27.

23. 533 P.2d 772 (1975).

24. See 1919 Or. Laws 539 (former OR. REV. STAT. §227.240 (1) (1973)).

and controversial statewide, centralized land-use system.²⁵ Space does not permit a full discussion of the Oregon planning system;²⁶ however, suffice it to say that SB 100 created a new state agency, the Land Conservation and Development Commission (LCDC) as an administrative agency to formulate and implement land use policy,²⁷ LCDC oversees the Oregon land use program and adopts mandatory statewide planning standards, called “Goals,”²⁸ and administrative rules for goal implementation.²⁹ In addition, the legislation requires each city and county to prepare and adopt comprehensive plans consistent with the statewide goals adopted by LCDC, and enact zoning, subdivision, and other ordinances or regulations to implement their comprehensive plans.³⁰ The incorporation of the goals into local plans then serves as the basis for local government regulations and actions.³¹

To assure that local comprehensive plans are consistent with the statewide goals established by the LCDC, the Oregon land use system includes a process called “acknowledgement.”³² The acknowledgement process is when the LCDC formally recognizes that a comprehensive plan or land use regulation complies with the statewide goals.³³ Currently all 242 cities³⁴ and 36 counties have been acknowledged, making the initial acknowledgment process no longer relevant, unless a new city is created on rural land.³⁵

In 1981, the Oregon legislature provided yet another means to further assure that local plans and regulations are in compliance with statewide goals by establishing the “post-acknowledgement” review process.³⁶ Designed to safeguard against incremental modifications to a local plan or regulation that could result in falling out of

25. See Sullivan & Solomou, *Preserving Forest Lands for Forest Uses*, *supra* note 18, at 188 (discussing the passage of S.B. 100).

26. Sullivan, *Quiet Revolution*, *supra* note 11, at 367-69.

27. SB 100 at 129 (codified as amended at OR. REV. STAT. §§ 215.055, .510, .515, .535, 453.345 (1975)). Section 5 of that legislation created LCDC. *Id.*

28. *Id.* §§ 197.015(8), .040(1)(c)(A), (2)(c) (2014).

29. *Id.* § 197.040(1)(b), (c)(A) (2014).

30. 1973 Or. Laws 127, 129 (codified as amended at OR. REV. STAT. §§ 215.055, .510, .515, .535, 453.345 (1975))

31. See Sullivan, *Oregon Symposium*, *supra* note 5, at 817.

32. OR. REV. STAT. § 197.015(1) (2014).

33. OR. REV. STAT. §§ 197.015, .251 (2014).

34. Michael McCauley, *About City Government*, Oregon Blue Book (Mar. 12, 2015, 7:59 PM), <http://bluebook.state.or.us/local/cities/citiesgen.htm>.

35. See Edward J. Sullivan, *The Legal Evolution of the Oregon Planning System*, PLANNING THE OREGON WAY 49, 54 (Carl Abbot et al. 1994) <https://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/21980/PlanningtheOregonWay.pdf?sequence=1>

36. OR. REV. STAT. § 197.610-625 (2014).

compliance with the goals,³⁷ the post-acknowledgement review process requires local governments to submit notices of their proposed amendment to the LCDC for amendment review 20-35 days before the final hearing on the amendments.³⁸

Another notable feature of the Oregon land use planning program is the two-step “periodic review” process.³⁹ The Commission schedules periodic review to ensure that local comprehensive plans and regulations remain in compliance with statewide goals.⁴⁰ However, with less funding available for plan review, the incidence of periodic review is fairly rare.⁴¹

In 1979, the Oregon legislature completed the remainder of the structure of the current Oregon land use system by creating the Land Use Board of Appeals (LUBA), a unique tribunal⁴² where individuals, organizations, and corporations can appeal land use decisions⁴³ made by local governments.⁴⁴ The purpose of its creation is to “simplify the appeals process, speed resolution of land use disputes, and provide consistent interpretation of state and local land use laws.”⁴⁵ LUBA has exclusive jurisdiction over most land use related issues.⁴⁶ LUBA has a high degree of expertise regarding land use matters, thereby facilitating the purpose of its creation. LUBA decisions may then be appealed to the Oregon Court of Appeals.⁴⁷

37. See Sullivan, *Oregon Symposium*, *supra* note 5, at 818.

38. OR. REV. STAT. § 197.610(1) (2014).

39. It is interesting to note that when the legislature enacted § 197.646 in 2011, requiring that new statutes, goals, and rules become effective immediately, even if the local government had not incorporated those requirements in their plans and regulations, it effectively eliminated periodic review for many local governments. For a greater discussion on the failure of periodic review see Sullivan, *Quiet Revolution*, *supra* note 11, at 392.

40. OR. ADMIN. R. §§660-025-0010, -0030.

41. See OR. REV. STAT. §197.628(3).

42. LUBA was the first tribunal of its kind in the United States.

43. A “land use decision” is defined as “[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) [t]he goals; (ii) [a] comprehensive plan provision; (iii) [a] land use regulation; or (iv) [a] new land use regulation.” OR. REV. STAT. §197.015(10) (2014).

44. Interestingly, the standing requirements for LUBA are much more relaxed compared to traditional, judicial standing requirements. Prior to OR. REV. STAT. §197.830, a petitioner needed to have been adversely affected by a land use decision to meet the standing requirements.

45. Land Use Board of Appeals, OREGON.GOV, http://www.oregon.gov/LUBA/Pages/about_us.aspx (last visited Mar.12, 2015). See also OR. REV. STAT. §197.805-855 (2014) (statutes governing LUBA).

46. OR. REV. STAT. §197.825(1) (2014).

47. OR. REV. STAT. §197.850(1) (2014); see also OR. REV. STAT. §197.850(3) (2014) (conferring judicial review upon the Oregon Court of Appeals).

The creation of LUBA marked the last significant, structural change to the Oregon system as it stands today. With the state planning system in place, the difficult task of applying and interpreting the program was underway.⁴⁸

II. Adoption of Goal 14: Urbanization

Once SB 100 had passed, the next step was the adoption of the statewide goals called for in the legislation. A series of public workshops held around the state in April and May of 1974 revealed that preserving agriculture and containing urban sprawl were at the forefront of public opinion.⁴⁹ The first evidence of the concern over sprawl is found on a Department of Land Conservation and Development (“DLCD”) checklist in July of 1974, which called for an “orderly and efficient transition of land uses.”⁵⁰ By August 30, 1974 the Goal 14 draft had further evolved by detailing that “comprehensive plans shall be used to identify land suitable and necessary for urban development and identify the methods for directing development to these areas.”⁵¹ Despite this impression of progress during the goal development stage, the “statutorily imposed deadline for statewide goal adoption” of December 31, 1974 was looming, and the statewide planning goals needed considerable work yet to reach completion.⁵²

To assist in the development of the goal-adoption process, the Commission established an eleven-member Technical Advisory Committee (TAC) to ease the process by providing specificity to each goal topic and reporting on the issue of urbanization.⁵³ Although an “urban growth boundary” was not specifically mentioned in the October 8, 1974 report by the Urbanization TAC, the team did identify the need to limit urban development “to those areas zoned in comprehensive plans as necessary and suitable for future urban expansion. Urban and suburban uses would not be allowed outside these areas.”⁵⁴ The follow up report

48. Sullivan, *Quiet Revolution*, *supra* note 11, at 372-73.

49. Margaret Mary Hanna Collins, *Oregon’s Emerging Land Use Program: The Role of the Statewide Urbanization Goal in the 1970s: A Thesis 40-41* (1977) (unpublished thesis, University of Oregon) (on file with author) [hereinafter “Collins Thesis”].

50. *Id.* at 41. Interestingly enough, urban sprawl was not among the priority considerations for planning found in section 34(2) of SB 100. The language “orderly and efficient transition of land uses” would ultimately find its way into what would become Goal 14.

51. *Id.* at 42.

52. *Id.* at 47-51.

53. See *id.* at 52.

54. *Id.* at 42.

on October 23, 1974 did explicitly discuss the need for boundaries to be “established around urban areas to separate those lands along the urban fringe necessary and suitable for expansion from those areas which should remain in rural use.”⁵⁵ This report effectively established the birth of the UGB that would ultimately become a central component of Goal 14—one of the first goals adopted by LCDC.⁵⁶

The original 1974 Goal 14 (hereinafter “Original Goal 14”)⁵⁷ contained several notable requirements. First, it required that UGBs would be “established to identify and separate urbanizable land from rural land” in order to serve the goal’s purpose to provide for an orderly and efficient transition from rural to urban land use.⁵⁸ Secondly, the establishment or amendment of the boundary had to be a cooperative process between the cities and counties that surround it, must be based on seven factors for “consideration,”⁵⁹ and must follow the procedures outlined in the Goal 2 exception process (these factors and the Goal 2 exception process will be discussed in greater detail in the next section). The first two factors are considered “need” factors while the remaining factors are considered to be “locational” factors.⁶⁰ The goal also provided factors to consider when converting urbanizable land to urban land within a UGB.⁶¹ While the original version of Goal

55. *Id.* at 56.

56. Goal 14 in its original form became effective January 25, 1975. OR. ADMIN. R. 660-015-0000(14), LCD 1 (filed and effective December 31, 1974) [hereinafter “Original Goal 14”].

57. Goal 14 would later undergo significant changes in 2005. For purposes of this paper, the 2005 amendments effectively created a “New Goal 14.” See OR. ADMIN. R. 660, Division 14, as amended by LCDD 5-2006, filed July 13, 2006, and effective July 14, 2006 [hereinafter “New Goal 14”].

58. Original Goal 14, *supra* note 56.

59. See *id.* Those factors were:

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

60. See *Residents of Rosemont v. Metro*, 21 P.3d 1108, 1112 (Or. 2001) (Rosemont II).

61. See Original Goal 14, *supra* note 56. The four factors for consideration for urbanizable lands included:

- (1) Orderly, economic provision for public facilities and services;
- (2) Availability of sufficient land for the various uses to insure choices in the marketplace;
- (3) LCDC goals or the acknowledged comprehensive plan; and,

14 did attempt to focus urban development inside a boundary to prevent urban sprawl and preserve farm and forest land, the original goal was fraught with vague requirements and procedures, lack of clear definitions, and conflicting terms—all of which would lead to litigation, varying interpretations of Goal 14, and its eventual revision.

In the years following the adoption of Original Goal 14, the goal’s complications and ambiguities became more pronounced. One significant issue was the initial acknowledgement process. The process of acknowledging multiple urban growth boundaries around Oregon’s 240 cities at the time, took until 1986—much longer than expected.⁶² Second, Goal 14 was riddled with vague or undefined words, such as “urban” and “rural,” and uncertainty existed whether Goal 14 applied to land *only* within a UGB or outside as well.⁶³

The urban and rural issue was addressed in the *1000 Friends of Oregon v. LCDC* (“Curry County”).⁶⁴ In *Curry County* the issue to be decided was what Goal 14 “requires a county to do before the county allows ‘urban uses’ of lands located” outside of the UGB.⁶⁵ The court held that any “county whose comprehensive plan converts ‘rural land’ outside of the UGB to ‘urban uses’ must either (1) show that it complies with Goal 14, or (2) take an exception to Goal 14,” outlined in Goal 2.⁶⁶ The court also helped to clear up some Goal 14 ambiguity by labeling the seven factors as “establishment” factors to distinguish them from the four conversion factors.⁶⁷ However, the question still remained: must these factors all be satisfied to be in compliance with Goal 14? *Halvorson v. Lincoln County* resolved this question when the court held that the seven factors are to be considered together, and failing to meet the first two need factors is not dispositive to satisfying the Goal 14; rather, all the factors must be weighed

(4) Encouragement of development within urban areas before conversion of urbanizable areas. *Id.*

62. This acknowledgment process includes the acknowledgement of the Metro UGB, which includes 25 cities and 3 counties. See Edward J. Sullivan, *Urban Growth Management in Portland, Oregon*, for a detailed exposition of Metro UGB.

63. See Bob Rindy, Jim Hinman, and Gloria Gardiner, “Public Hearing on Proposed Amendments to Goal 14 and New Rules to Clarify and Streamline the UGB Amendment Process.” November 29, 2004.

64. *1000 Friends of Oregon v. Land Conservation & Dev. Comm’n*, 724 P.2d 268, 273 (1986) (Curry County).

65. *Id.* at 272.

66. *Id.* at 285.

67. See *id.* at 276.

together in balance to form a well-reasoned decision.⁶⁸ The complications latent in Original Goal 14 were rapidly becoming unveiled.

The lack of clarity in Goal 14 also resulted in confusion for local governments in regards to coordination and consistency requirements. Original Goal 14 expressly stated that “the establishment and change of the boundaries shall be a cooperative process between a city and the county or counties that surround it.”⁶⁹ However, despite the express language, the mechanics of satisfying the requirement were still unclear. And while there may have been an express requirement for coordination, the ambiguity inherent in Goal 14 caused confusion for local governments. These issues were illuminated during the City of Medford⁷⁰ and the City of Boardman⁷¹ acknowledgement proceedings. Initially, the City of Medford failed to receive acknowledgement because the UGB was not “site specific” and there lacked complete agreement between the city, county, and some special districts on the UGB and the plan’s urbanization policies.⁷² The text of Goal 14 did not specify any “site specific” UGB requirements nor did it require the city and county to mutually adopt a UGB and comprehensive plan for the unincorporated area within the boundary, yet Medford did not receive acknowledgement until both of these actions were completed.⁷³ Similarly, the City of Boardman⁷⁴ failed to receive acknowledgment because “joint adoption [between the city and the county] of *only* a UGB did not satisfy Goal 14; and that a county had to either: (a) adopt the city’s plan for the UGB area, (b) formally agree to abide by it, or, (c) resolve through a management agreement, which comprehensive

68. *Halvorson v. Lincoln Cnty.*, 728 P.2d 77, 77 (1986). It should be noted that this case was overruled by *Milne v. City of Canby*, 96 P.3d 1267, 1271 (2004), which held that the two need factors must be met. The “New Goal 14” amendments followed the latter holding by making the first two need factors requirements to establish or amend a UGB.

69. Original Goal 14, *supra* note 56.

70. Memorandum from James F. Ross, Director, Or. Dep’t. of Land and Dev., on Urbanization Issues to the Land Conservation & Dev. Comm’n. 2 (November 1, 1983) (on file with author) [hereinafter “Ross Memo”].

71. *Id.* at 3.

72. *Id.* at 2.

73. *Id.* at 3.

74. *Id.* at 3. The June 3, 1977 staff report recommended that the City and Morrow County, which surrounded that city, “submit a growth management plan” for the area between the city limits and the urban growth boundary, resolve which entity’s plans and land use regulations would apply to that area, determine the conditions under which urban services would be provided to that area, and provide an exception to the agricultural lands goal that would otherwise apply. As shown in the subsequent staff report and acknowledgment order, the city and county successfully completed those tasks.

plan, zoning, and subdivision ordinances applied to the urbanizable area.”⁷⁵ These detailed requirements were absent from the text of Goal 14.

A. Amendments to Goal 14

In response to some of the aforementioned issues related to Goal 14, the goal underwent some early amendments prior to the dramatic changes in 2005 that ushered in New Goal 14. Furthermore, the non-binding “policy papers” issued by LCDC for goal interpretation were eventually replaced by binding administrative rules to ease the goal interpretation and implementation process; those rules are discussed in detail below. The following general outline of the amendments assists the reader in understanding the general evolution and direction of Goal 14.

1. THE 1988 GOAL AMENDMENTS

In 1988, Goal 14 criteria for the conversion of urbanizable land to urban uses inside the UGB were modified.⁷⁶ In addition to the original four criteria outlined in the goal, local governments could now base implementing legislation on their acknowledged comprehensive plans.⁷⁷ The planning guideline for the goal was also amended to include the needs of the population forecast in the conversion process.⁷⁸ The 1988 amendments were significant for cities because an acknowledged comprehensive plan could now be used for consideration when converting urbanizable lands to urban uses within the UGB, with perhaps less costly goal analysis measures. However, the lack of consistency and coherency, clear definitions, and guidance regarding coordination requirements for population projections or what constitutes an accurate population projection, were all still present in the goal and continued to result in inconsistent local government interpretations of Goal 14 during the establishment and amendment, as well as the administration, of the UGB.

75. *Id.* (emphasis added).

76. See OR. ADMIN. R., 660-015-0000(14) (2015) accessible at <http://www.oregon.gov/LCD/docs/history/goal14circa033188.pdf>. The amendment added “acknowledged comprehensive plan” in addition to “LCDC goals” in the first factor for adoption or amendment of an urban growth boundary.

77. See *id.*

78. See *id.* This amendment also eliminated the words “population needs by the year of 2000” language for the end point of the urban growth boundary analysis and replaced it with “needs of the population forecast.”

2. THE 1997 COGAN OWENS REPORT⁷⁹

The major gaps and ambiguities still inherent in Original Goal 14 prompted DLCD to contract with the Portland planning firm of Cogan Owens Cogan to review Goal 14 and identify its issues.⁸⁰ The detailed report that followed highlighted a number of key issues pertaining to Goal 14 and its implementation. Some of the central issues included lack of clear definitions of “urban” and “urbanizable,”⁸¹ a lack of clear standard for long range population growth in establishment Factor 1, the absence of any guidance to local jurisdictions regarding coordination of population projections or what satisfies an accurate factual basis for projections, and an overall lack of standards for the application of the seven factors for the establishment or amendment of an urban growth boundary.⁸²

3. THE 2000 GOAL AMENDMENTS

The next round of amendments followed three years after the Cogan Owens report.⁸³ Several issues related to Goal 14 were discussed and possible solutions were recommended.⁸⁴ Unfortunately, the

79. There was a minor housekeeping amendment to Goal 14 in 1994. This amendment was deliberately omitted from this paper because of its insignificance.

80. See Cogan Owens Cogan, *Goal 14 Analysis* (1997) [hereinafter “Cogan Owens Report”]. While this report did not result in substantial amendments to the goal, it is appropriate to include it here because Arnold Cogan, one of the principals in the firm, was the first Director of DLCD, so this report is an important part of the history of Goal 14.

81. *Id.* at 62-63. Although the terms “urban land,” “urbanizable land,” and “rural land” were defined in the goal, the report highlighted that the lack of clear definitions is problematic in distinguishing urban from urbanizable or urbanizable from rural land, while “Urban use” and “urban development” are not defined at all. See Cogan Owens Report for a greater explanation on the vague definitions in the goal.

82. *Id.* at vi-vii.

83. OR. ADMIN. R. 660-015-0000(14) (2000) amended by LCDD8-2000 (filed October 3, 2000 and effective October 04, 2000) accessible at <http://www.oregon.gov/LCD/docs/history/goal14circa100400.pdf>.

84. Richard P. Benner, Director, Memorandum from Dep’t of Land Conservation & Dev., (Aug. 11, 2000) (on file with author). The five issues identified for resolution included:

- (1) Should a city be able to include more than a 20-year supply of land within its urban growth boundary? Less than a 20 year supply?
- (2) When considering expansion of an urban growth boundary, how should need for land be calculated and alternative sites analyzed?
- (3) How should the state foster removal of regulatory obstacles to compact pedestrian-friendly, mixed use development?
- (4) Should a rule limit plan amendments that allow new commercial development outside downtowns or other designated centers?
- (5) For the purposes of establishing and amending UGBs, how should city, county and state population forecasts be developed and coordinated? To what extent should population forecasts be factually driven and to what extent should they be policy driven? *Id.*

2000 amendments would not reflect the issues highlighted in the 1997 Cogan Report nor the issues addressed at the work session, but instead addressed the application of Goal 14 to lands zoned for rural residential use.⁸⁵ The year 2000 amendments to Factor 4 were intended to reflect administrative rules developed for planning and zoning of unincorporated communities.⁸⁶ However, it would be another five years before any significant amendments to Goal 14 would occur.

4. THE 2005 GOAL AMENDMENTS: NEW GOAL 14

Amending Goal 14 to clarify its ambiguities and streamline the UGB amendment process began in 1998-2000. The efforts to draft amendments and rules for Goal 14 during those two years, however, were thwarted due to the passage of Measure 7 in 2000,⁸⁷ and thus, not many substantive changes were made in the 2000 Goal 14 amendment. LCDC proceeded to establish a new goal amendment and rule making project⁸⁸ in 2004 to continue where the previous workgroup left off in 2000.⁸⁹

In 2004 and 2005, there were a series of public hearings and work sessions held around the state to consider draft Goal 14 amendments and administrative rule proposals. The public hearings and meetings focused on amending the goal so as to eliminate ambiguities and vague language inherent within goal to establish a clearly articulated UGB policy.⁹⁰ For example, considerable discussion at the work

85. Cogan Owens Report, *supra* note 80. The amendments did serve the purpose of responding in part to the *Curry County* case by advancing the general prohibition on urban uses outside an urban growth boundary.

86. See OR. ADMIN. R. 660-022-0000 (2015). Created with the intent of expediting the planning process concerning unincorporated communities, i.e. lawfully urbanized areas outside cities, which thus lacked urban growth boundaries. The purpose of the new division was to recognize the existence of those areas without imposing nonconforming use disabilities on those uses and, in some instances, to allow for their growth.

87. Measure 7, an Oregon constitutional amendment passed in 2000, required local governments to compensate land owners when a state regulation reduced the value of their property. In 2002, the Oregon Supreme Court struck down Measure 7 as unconstitutional in *League of Or. Cities v. State*, 56 P.3d 892, 896 (Or. 2002). For a greater discussion of Measure 7, see Ellie Fiore, *Property Rights: Contested Compensation*. Oregon’s Land Use Planning Program. American Planning Association White Paper (2004).

88. LCDC appointed a new advisory workgroup consisting of 24 members representing various local governments, state agencies, and citizens interested in the UGB process. Bob Rindy, Director DLCD. Public Hearing and Adoption of Proposed Amendments to Goal 14 and Related Rules (January 19, 2005)

89. *Id.*

90. See *id.* LCDC’s orders regarding urbanization had been reversed and remanded in several high profile cases, including *Curry County*, *D. S. Parklane*, and *Residents of Rosemont*. LCDC saw rule revision as a means of responding to these losses.

sessions focused on whether the term “livability,” a component of land need factor 2, should be replaced with broader wording, relocated to the locational factors, or remain as is.⁹¹ Because the “livability” term in Original Goal 14 was not defined, local governments had varied interpretations of its meaning,⁹² necessitating some clarity in the proposed amendments. The deliberations also included consideration of new administrative rules specific to Goal 14 in order to provide clarity for the UGB amendment process.⁹³ In particular, the concept of creating a new administrative rule, Division 24, to help streamline the UGB amendment process by way of “safe harbors”⁹⁴ was proposed.⁹⁵ Another major point of discussion centered on the Goal 2 exception requirement when amending a UGB. In essence, because the working draft included an amendment proposal to Goal 14 that would eliminate the Goal 2 exception requirement from Goal 14 itself, Chapter 660, Division 4 should also be amended to eliminate the “exception requirement” when amending a UGB under Goal 14.⁹⁶ Eventually, at the conclusion of the public hearings and work sessions, LCDC adopted the final draft amendment on April 28, 2005, ushering the most significant Goal 14 amendments to date.⁹⁷

The 2005 amendments to Goal 14 were sufficiently substantial as to effectively create a “New Goal 14.”⁹⁸ While the 2005 amendments did not substantively change the overall purpose of the goal, the amendments were intended to streamline the amendment process, provide greater clarity, and codify interpretations from past LCDC decisions and court cases.⁹⁹

91. See Jim Hinman and Bob Rindy, DLCD, Work Session on Proposed Amendments to Goal 14 and Related Admin. Rules Regarding Urban Growth Boundaries, 2-7 (March 3, 2005) available at <https://lawschool.westlaw.com/DocForums/ViewSingleDocument.aspx?postingID=11125957&courseID=192033&forumDBID=886575>.

92. Rindy, Hinman & Gardiner, *supra* note 63, at 3.

93. See Rindy, *supra* note 88, at 2.

94. “Safe harbors” are essentially a form of “short cut” that usually provides a cheaper, more effective means of satisfying the requirements.

95. See Rindy, *supra* note 88, at 2.

96. *Id.* at 7. The requirement to take an exception to applicable statewide planning goals (usually goals relating to natural resources, such as Goal 3, Agricultural Lands or Goal 4, Forest Lands) were fairly exacting and made urban growth boundaries fairly difficult. See OR. REV. STAT. §197.732. Cities in particular wished to rid themselves of this requirement so that they would grow more easily.

97. These administrative rules have not been adopted as of March 12, 2015.

98. OR. ADMIN. R. 660-015-0000(14) amended by LCDD 1-2006, filed and effective February 10, 2006. Accessible at <http://www.oregon.gov/LCD/docs/goals/goal14.pdf>.

99. See New Goal 14, *supra* note 57.

One substantial change was the separation of the seven factors in Original Goal into two distinct groups. The first two need factors are now contained in the first group, called “Land Need,” while the rest of the factors are now located in the second group, called “Boundary Locations.”¹⁰⁰ What is particularly significant about this change is that now the two factors in “Land Need” are requirements, rather than factors for consideration as in the Original Goal.

Another significant need factor change was that a UGB amendment must be based on a 20-year population forecast,¹⁰¹ rather than the vague “long-range urban population growth requirements” outlined in the Original Goal.¹⁰² So, in order to amend the UGB, the local government must first determine, based on the forecast,¹⁰³ the land need to accommodate for 20 years of their estimated population, and must determine whether the need can be met in the existing UGB. If the two requirements are met and the need cannot be satisfied in the existing

100. *Id.* These changes effectively codified the dichotomy of these two groups, which had already been recognized in practice by the LCDC and the courts. The new language reads:

Land Need:

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

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

Boundary Location:

The location of the urban growth boundary and changes to the boundary shall be determined by evaluating alternative boundary locations consistent with OR. REV. STAT. § 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. *Id.*

101. *Id.* This change codified what was already a long standing interpretation in practice which related to the 20-year horizon for consideration of urban growth boundaries.

102. *Id.*

103. *Id.* The issues related to the population forecast will be discussed at length in a later section.

UGB, only then may the local government proceed to the Boundary Location factors.¹⁰⁴ Interestingly, these new requirements effectively eliminated the previous Goal 2 exceptions process because the exceptions process is built into New Goal 14 itself, thus eliminating the confusion surrounding the UGB amendment and the previous exception requirement.¹⁰⁵

There were some other notable amendments to Goal 14 in 2005. One significant modification to New Goal 14 was the requirement that both the city or cities and the county adopt a UGB amendment, except in the case of Metro.¹⁰⁶ This amendment helps resolve the issues that arose in past acknowledgement proceedings. Another important alteration to Goal 14 was the modified wording throughout the goal. For example, Need Factor 2 now includes needed context by providing examples of “livability and uses.”¹⁰⁷ To address other problematic vague language in determining need, the amended New Goal 14 allows the local government to specify “characteristics” necessary for land to be suitable for an identified need.¹⁰⁸ Despite these overdue amendments to Goal 14, there was still a need to provide further clarity to achieve greater consistency and simplicity in the UGB amendment process.

B. Goal 14 Administrative Rules

LCDC adopted the Goal 14 amendments in 2005, but it would take another year for LCDC to adopt the administrative rules. The workgroup that had developed the 2005 goal amendments had also been simultaneously working on adopting specific Goal 14 administrative rules.¹⁰⁹

104. *See id.*

105. See Cogan Owens Report, *supra* note 80, at 59-62 for ambiguities and confusion surrounding the old Goal 2 exceptions requirement when amending a UGB.

106. New Goal 14, *supra* note 57. For a detailed explanation on the Metro UGB amendment process see Sullivan, *supra* note 62, at 473-74.

107. The New Goal 14 language reads: “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.” New Goal 14, *supra* note 57 at 1.

108. *See id.* This amendment was intended to assert an implicit principle of Goal 14 and central to LCDC’s approval of the City of North Plains UGB amendment, in which the Commission agreed with the city that “walkable” access to downtown should be a consideration in determining suitable land need. *See Rindy, supra* note 88. The new language of the goal reads: “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.” New Goal 14, *supra* note 57 at 1.

109. *See* Bob Rindy and Lane Shetterly, DLCD, Public Hearing and Possible Adoption of Proposed New Administrative Rules Regarding the Urban Growth Boundary Amendment Process 2 (September 25, 2006) available at <http://www.oregon.gov/LCD/docs/meetings/lcdc/lcdcmgmin113005.pdf>.

Due to a number of issues raised in public comment and lack of consensus regarding rule specifics, however, the workgroup decided at that time to suspend the administrative rules development for later refinement and focus on adopting the goal amendments.¹¹⁰ After a series of meetings throughout the months of February and March of 2006, a draft with the proposed administrative rules was developed.¹¹¹ By September, public hearings had been conducted and the draft had gone through several revisions before Division 24 was adopted in October of 2006.

Chapter 660, Division 24 was developed as Goal 14’s specific administrative rules¹¹² to help interpret and clarify Goal 14 to streamline the UGB amendment process.¹¹³ To achieve this, the new rules clearly establish which goals apply and do not apply during a UGB amendment, thereby resolving previous confusion.¹¹⁴ Another noteworthy component of Division 24 is the clarification of the population forecast used during the evaluation or amendment of the UGB. Due to the large number of counties that had not maintained a current population forecast for the entire area within its border, as required by law, the new rules established a method by which cities can request county approval of a city generated updated forecast, which becomes valid if the county fails to act on the city’s request.¹¹⁵ The new rules also provide guidance

110. *Id.*

111. *Id.*

112. OR. ADMIN. R. 660-024-0000 (2015) (indicating that those local governments that began a UGB evaluation process before the 2005 Goal 14 amendments can choose to apply Old Goal or New Goal). Those that do not fall in that category must apply New Goal 14 and its Division 24 administrative rules.

113. The general outline of the steps of the new administrative rule:

- (1) Forecast long range (20-year) population,
- (2) Determine 20-year land needs,
- (3) Inventory current buildable land supply in the UGB,
- (4) Determine whether the current UGB is adequate to accommodate the 20-year needs. If a UGB is not adequate,
- (5) Rezone land currently in the UGB to meet the needs, or, if that is not sufficient, add land to the UGB, as follows: Evaluate alternative areas around the UGB to decide which land to add, and plan and zone land added for the particular needs determined in #2, above.

Rindy and Shetterly, *supra* note 109, at 3.

114. OR. ADMIN. R. 660-024-0020(1)(d) (2015) also provides a method for local governments to avoid the often costly and difficult requirements of OR. ADMIN. R. 660-12 (Transportation Planning). This subsection was a considerable part of the work group discussions. *See* Rindy & Shetterly, *supra* note 109 at 4.

115. The obligation was imposed by OR. REV. STAT. § 195.036 (1995). *See* OR. ADMIN. R. 660-024-0030 (2015). It is important to note that in 2007 the legislature adopted OR. REV. STAT. § 195.034, which essentially codified this rule. The statute gives the county six months to “act” before the city-generated population forecast becomes effective for use in city’s UGB amendment. However, H.R. 2253, 77th Leg.,

on how to apply both Or. Rev. Stat. § 197.298 and locational factors when determining the location of the UGB.¹¹⁶ But perhaps the most important aspect of Division 24 is the addition of “safe harbors” that can help local governments save time and resources by providing an optional course of action to satisfy Goal 14 requirements.¹¹⁷ Although Division 24 helps to interpret Goal 14 and streamline the UGB amendment process, attention must also be focused in other directions to fully understand and appreciate Goal 14’s complex nature.

III. Other Influences on Urbanization

To properly understand how the UGB is established and amended under Goal 14, the interplay between Goal 14 and other factors influencing urbanization must be addressed. Goal 14 does not stand in isolation—there are statutes, goals, and administrative rules that must be considered and applied when establishing or amending a UGB under Goal 14.

A. Population Forecasting

One major issue with Goal 14, causing much confusion for local governments over the last several decades, is the population forecasting process. The basis of much of the UGB analysis depends upon the population forecast because the amount of land needed in a UGB amendment is derived from the results of the forecast.¹¹⁸ Despite the significance of the forecast in a Goal 14 analysis, the inherent and persistent problems associated with the forecasting process have prompted the creation of a series of remedial statutes over the years.

The problems associated with population forecasting trace back to the origins of the current state land use system. In 1974, SB 100 gave counties “coordination authority” over cities and special districts in their territories.¹¹⁹ In order to engage in a proper Goal 14 Factor 1 “need”

(Or. 2013) (effective July 1, 2013) repealed OR. REV. STAT. § 195.034 and amended OR. REV. STAT. § 195.036 (2013).

116. The statute imposing the priorities obligation is OR. REV. STAT. § 197.298 (2015). See OR. ADMIN. R. 660-024-0060 (2015).

117. OR. ADMIN. R. 660-024-0010 (2015) reads:

(7) “Safe harbor” means an optional course of action that a local government may use to satisfy a requirement of Goal 14. Use of a safe harbor prescribed in this division will satisfy the requirement for which it is prescribed. A safe harbor is not the only way or necessarily the preferred way to comply with a requirement and it is not intended to interpret the requirement for any purpose other than applying a safe harbor within this division.

118. New Goal 14, *supra* note 57.

119. S.B. 100, *supra* note 10.

analysis with either the Original or New Goal 14, there must be a determination of future population growth.¹²⁰ However, it was not until 1995 that a statute was created specifically requiring the “coordination authority”¹²¹ to prepare a population forecast.¹²² The statute generally required counties to coordinate¹²³ population forecasts with all the cities in the county boundary,¹²⁴ with the intent to avoid uncoordinated forecasts within the same jurisdiction. While the statute itself does not provide a means of ensuring an adequate factual base for the forecasts, Goal 2 requires land use planning decisions to have an adequate factual base.¹²⁵ Despite this requirement, the vague language provided little guidance for the proper forecast methodology.

Notwithstanding the lack of guidance for the population forecast methodology, but requiring the county to prepare a factually based coordinated forecast led to problems with counties skewing the projections in some places in favor of getting more land urbanized.¹²⁶ The lack of coordination and methodology were highlighted during the 1997 *Douglas County I* case, in which LUBA held that the county’s failure to postpone its plan amendment and wait for the state’s population forecast for the county prevented an “exchange of information,” and thus the county did not coordinate its forecast with the state, an affected governmental unit.¹²⁷ LUBA disagreed with the county’s

120. See Original Goal 14, *supra*, note 56, at 1; see also New Goal 14, *supra* note 57, at 2 (also requiring a demonstrated need to accommodate long-range urban population growth).

121. 1995 Or. Laws, Ch. 547, § 7. The codified statute, OR. REV. STAT. § 195.036 (1997) has since been repealed, but provided:

“The coordinating body under ORS 195.025(1) shall establish and maintain a population forecast for the entire area within its boundary for use in maintaining and updating comprehensive plans, and shall coordinate the forecast with the local governments within its boundary.”

122. Before OR. REV. STAT. § 195.036, DLCD historically adopted population projections that were consistent with historical trends or current conditions. Cogan Owens Report, *supra* note 80, at 10.

123. The definition contains the following language: “A plan is ‘coordinated’ when 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.” OR. REV. STAT. § 197.015(5).

124. See OR. REV. STAT. § 195.036.

125. See OR. ADMIN. R. 660-015-0000(2) (2015); see also *1000 Friends of Oregon v. City of North Plains*, 27 Or. LUBA 372, 377-78, *aff’d*, 882 P2d 1130 (1994) (stating that an adequate factual basis base is required).

126. See Dep’t of Land Conservation and Dev. v. Douglas County, 33 Or. LUBA 216 (1997) (*Douglas County I*); see also DLCD v. Douglas County, 37 Or. LUBA 129 (1999) (*Douglas County II*) (where the county did not adopt DLCD coordination findings).

127. *Douglas County I*, 33 Or. LUBA at 222-23. The state economist was working on a population forecast for each county in the state and asked Douglas County to

argument that so long as there is an adequate factual basis, then the Goal 2 coordination requirement is no longer applicable.¹²⁸ The coordination requirement and the adequate factual base requirement are distinct requirements.¹²⁹ LUBA went further to hold that the county failed to provide an adequate factual basis for its population forecasts, required by Goal 2, by not including evidence to support the county's in-migration and out-migration projections, and thus its population forecast was insufficient.¹³⁰

On remand, in *Douglas County II*, DLCD argued that the county's amended projections were based on flawed assumptions that no reasonable decision maker would rely upon, especially because the findings were internally inconsistent, even if "coordinated" under the law.¹³¹ LUBA disagreed with DLCD and held that some of the county's population projections, which were based on the 1990 U.S. Census Bureau figures, could lead a reasonable person to rely on such figures, notwithstanding that the figures did not align with official state projections.¹³² The question after these cases becomes: what constitutes an adequate population forecast methodology. Essentially, while the *Douglas* cases are just two examples of the confusion resulting from the ambiguities surrounding the statutory population forecast requirements, it was becoming clear that additional guidance was needed.¹³³

Another prominent issue with the population forecasting process was the fact that not all counties had current and complete population forecasts.¹³⁴ This presented an issue for cities attempting to update their comprehensive plans. While the statute required a coordinated population projection, it did not provide an enforcement mechanism or deadlines for doing so, and the result was fewer than half of the counties in the state had completed and coordinated population forecasts in 2008.¹³⁵

delay the adoption its own population forecast into its comprehensive plan until the state was finished with its forecast. In addition, LUBA found the County's population projections lacked an adequate factual base. *Id.* at 224.

128. *Id.* at 222.

129. *Id.*

130. *Id.* at 224. The county had a forecast range of 14 to 53 percent growth. *Id.* at 217.

131. *Douglas County II*, 37 Or. LUBA 129 (counties are not necessarily required to adopt the OEA population projections).

132. *See id.* at 8 accessible at <http://www.oregon.gov/LUBA/docs/opinions/1999/11-99/98119.pdf>.

133. *See* Cogan Owens Report, *supra* note 80, at 11 (highlighting the ambiguities regarding coordination of population projections).

134. *See* Memorandum from Richard Whitman and Rob Hallyburton on Informal Briefing on Coordinated Population Forecasts to Land Conservation and Development Commission, 4 (May 30, 2008) (on file with author).

135. *See id.*

In an effort to address some of the issues with population forecasting process,¹³⁶ the Oregon Legislature enacted another statute in 2007.¹³⁷ This statute effectively allowed cities to do alternative forecasting if the county failed to provide a coordinated population forecast upon request of a city. Essentially, the statute provided a six-month window for county action upon city request of a coordinated forecast, after which point the city may adopt a safe harbor without concurring with the county.¹³⁸

However, issues began to surface with the new statute. Because the statute called for forecasts to be based on a continuation of existing trends, use of the statute by a city often resulted in a lower forecast, especially for fast growing cities.¹³⁹ Another potential issue with the use of safe harbors in the new statute was that it could result in counties coordinating with cities on an individual basis, rather than through the county-wide coordinated forecast envisioned by law.¹⁴⁰ Unfortunately, the use of the statute with its safe harbors, while designed to fix previous issues with population forecast, particularly when a county failed to provide coordinated projections, was beginning to have unforeseen consequences.

In 2013, the Oregon legislature decided to provide another round of solutions to the issues presented with the population forecasting process. House Bill 2253 (HB 2253) instituted a new population forecast system by repealing the statute that had assigned forecasting to counties, and instead, designating the responsibility for population

136. In 2005, Division 24 was established which also attempted to provide guidance for the population forecast process and provide safe harbors for cities when a county fails to provide a current coordinated forecast. For example, OR. ADMIN. R. 660-024-0030 (2015). provides examples and additional guidance pertaining to population forecast methodology:

(2) The forecast must be developed using commonly accepted practices and standards for population forecasting used by professional practitioners in the field of demography or economics, and must be based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA). The forecast must take into account documented long-term demographic trends as well as recent events that have a reasonable likelihood of changing historical trends. The population forecast is an estimate which, although based on the best available information and methodology, should not be held to an unreasonably high level of precision.

137. OR. REV. STAT. § 195.034. This statute provided for alternative forecasting methods for cities when the county has failed to maintain current and coordinated population forecasts with the city.

138. *Id.*; *see also* Whitman & Hallyburton *supra* note 134, at 3.

139. *See* Whitman & Hallyburton, *supra* note 134, at 5.

140. *See id.*; *see also* OR. REV. STAT. § 195.036.

forecasting to the Population Forecasting Center at Portland State University (PSU).¹⁴¹ HB 2253 also provides some guidance as to the methodology and data to be included in the forecast, as well as requiring PSU to issue forecasts for every city and county every four years.¹⁴² Another significant change is that HB 2253 establishes that population forecasts are not land use decisions, and thus not appealable to LUBA. The legislature was busy that year and also enacted a companion bill, House Bill 2254 (HB 2254), to help smooth the population forecast during the UGB amendment process. HB 2254 provides optional methods for cities to estimate population growth that can be accommodated in the existing UGB based on the experience of similar cities and clarifies the procedure of including land in the UGB.¹⁴³ LCDC is currently in the process of creating rules to implement this statute.

B. The Urban Reserves Process

In 1995, after a trial attempt to provide for lands presumed to be added first to the UGB,¹⁴⁴ the Oregon legislature attempted to clear up confusion and reduce speculation every two to five years over which particular areas of land might be added to the UGB by enacting a statute allowing local governments to establish “urban reserves.”¹⁴⁵ This so-called “priorities statute,” applicable to both legislative and quasi-

141. 2013 Or. Laws Ch. 574 [hereinafter “HB 2253”]. This new statute also repealed OR. REV. STAT. § 195.034, but does not apply to Metro.

142. *Id.*

143. *See* 2013 Or. Laws Ch. 575 [hereinafter “HB 2254”]. This new statute does not apply to Metro.

144. LCDC had first established an administrative rule designating urban reserves in 1992 without a specific statutory base. Former OR. ADMIN. R. 660-21 (finalized and effective Apr. 29, 1992). The Oregon legislature followed up in 1993 explicitly authorizing urban reserves. 1993 Or. Laws 2530-37. Section 19 of the 1993 statute defined “urban reserve areas” to be lands outside urban growth boundaries that will provide for: “(a) Future expansion over a long-term period; and (b) The cost-effective provision of public facilities and service within the areas when the lands are included with the urban growth boundary.” 1993 Or. Laws at 2536.

145. OR. REV. STAT. § 298 (2013). That statute now provides:

- (1) In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities:
 - (a) First priority is land that is designated urban reserve land under ORS 195.145, rule or metropolitan service district action plan.
 - (b) If land under paragraph (a) of this subsection is inadequate to accommodate the amount of land needed, second priority is land adjacent to an urban growth boundary that is identified in an acknowledged comprehensive plan as an exception area or nonresource land. Second priority may include resource land that is completely surrounded by exception areas unless such resource land is high-value farmland as described in ORS 215.710.

judicial amendments to the UGB,¹⁴⁶ not only identifies different types of land outside the UGB and prioritizes land for eventual inclusion within the UGB once the need for expansion is established, but also is a critical factor in the location of the UGB.¹⁴⁷ Cities and counties¹⁴⁸ act cooperatively to designate urban reserves, which must be based on the locational factors of Goal 14 and a demonstrated showing of no reasonable alternative available that require less, or have less effect upon, resource land.¹⁴⁹ However, satisfying the priorities statute is not in itself dispositive; rather, the requirements are in addition to, and do not supersede, the Goal 14 factors used to establish or amend the UGB.¹⁵⁰

In 2007, after Metro’s first unsuccessful attempt to designate urban reserves,¹⁵¹ the legislature enacted SB 1011—largely at Metro’s behest.¹⁵² SB 1011 allows for the designation of urban reserves for a 50 year period (i.e. an additional 30 years beyond the 20 year period previously used), authorizes the establishment of “rural reserves,”

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- (c) If land under paragraphs (a) and (b) of this subsection is inadequate to accommodate the amount of land needed, third priority is land designated as marginal land pursuant to ORS 197.247 (1991 Edition).
 - (d) If land under paragraphs (a) to (c) of this subsection is inadequate to accommodate the amount of land needed, fourth priority is land designated in an acknowledged comprehensive plan for agriculture or forestry, or both.
- (2) Higher priority shall be given to land of lower capability as measured by the capability classification system or by cubic foot site class, whichever is appropriate for the current use.
 - (3) Land of lower priority under subsection (1) of this section may be included in an urban growth boundary if land of higher priority is found to be inadequate to accommodate the amount of land estimated in subsection (1) of this section for one or more of the following reasons:
 - (a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands;
 - (b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints; or
 - (c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands. [1995 c.547 §5; 1999 c.59 §56]

Id.

146. *See* Malinowski Farms v. Metro, 38 Or. LUBA 633, 654-655 (2000). Division 21 also is used as guidance during the urban reserve process.

147. *See* 1000 Friends v. City of McMinnville, 259 P.3d 1021, 1031-33 (Or. Ct. App. 2011) for the discussion of that relationship.

148. Metro has a different process and analysis for urban reserve designation with the passage of SB 1011 in 2007. For a fuller discussion of Metro and its urban reserve process, see Sullivan, *supra* note 62, at 476-79.

149. OR. ADMIN. R. 660-021-0030 (2015).

150. *See* Residents of Rosemont v. Metro, 21 P.3d 1108, 1114 (Or. Ct. App. 2001).

151. *See* D.S. Parklane Dev., Inc. v. Metro, 994 P.2d 1205 (Or. Ct. App. 2000).

152. 2007 Or. Laws 1885-89 (codified as OR. REV. STAT. §§ 195.137-.145) (SB 1011).

which protects particular areas from being included in the UGB for a similar 50 year period,¹⁵³ and provides for a special set of rules specifically for Metro.¹⁵⁴ Essentially, SB 1011 establishes a new process for designating urban reserves “based on a set of factors that consider how well land can be woven into the urban fabric of the region rather than the current approach of selecting urban reserves based on factors that are related to their quality as farm land.”¹⁵⁵

C. Statutes, Administrative Rules, and Goals: The Interplay with Goal 14

To fully understand the logistics of Goal 14, one must acknowledge the complex web of statutes, goals, and rules found in several locations that govern the legal application of Goal 14. The Cogan Owens Report on Goal 14 highlighted this ambiguity and addressed the resulting complexity and confusion of a UGB amendment.¹⁵⁶ Interestingly, the drafters of the goal at LCDC did not intend for this complexity; rather, the intent was that the satisfaction of the original seven factors “would in effect satisfy the other goals.”¹⁵⁷ Needless to say, the results did not reflect the intent.

1. THE INTERPLAY WITH GOAL 14: STATUTES

State statutes play a large role in the legal application of Goal 14. Many of the Goal 14 UGB procedural mechanisms are found in various statutes. For example, the process of amending the UGB is governed by a cooperative process among various governments pursuant to Or. Rev. Stat. § 195.020-195.030.¹⁵⁸ Furthermore, during the evaluation or change of the UGB process, various provisions found in Or. Rev. Stat. § 197.295-197.299 must be employed.¹⁵⁹ Lastly, Or. Rev.

153. OR. REV. STAT. § 197.137(1) (2014) provides: “‘Rural reserve’ means land reserved to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”

154. See §§ 195.137-.145. OR. ADMIN. R. 600-27 was designed specifically for Metro’s benefit. For a greater discussion of the Metro urban and rural reserves process refer to Sullivan, *supra* note 62.

155. *Barkers Five, LLC v. Land Conservation & Dev. Comm’n*, 323 P.3d 368, 379 (Or. Ct. App. 2014) (quoting a statement made by Representative Jackie Dingfelder on the House Floor Debate of SB 1011).

156. See Cogan Owens Report, *supra* note 80, at 66-67.

157. *Id.* at 65.

158. OR. REV. STAT. § 195.020-.030 (2014).

159. OR. REV. STAT. § 197.295-.299 (2014). These sections include provisions concerning the determination of land need, definitions, other factors required during a UGB evaluation or amendment analysis.

Stat. § 195.145 must also be considered because it includes the definition of “urban reserve,” while the process of designating urban reserves is found in administrative rule Chapter 660, Division 21.¹⁶⁰

2. THE INTERPLAY WITH GOAL 14: GOALS

Not only must state statutes be factored into the application of Goal 14, but other statewide planning goals must be examined as well. For example, in an effort to satisfy the Goal 14 “need” requirements to provide enough housing and employment for a 20-year period, Goal 9 (Economic Development)¹⁶¹ and Goal 10 (Housing)¹⁶² must be considered. In addition, once the land uses and shape of the boundary are determined, adequate facilities and transportation must be provided, necessitating the use of Goal 11 (Public Facilities and Services)¹⁶³ and Goal 12 (Transportation).¹⁶⁴

3. THE INTERPLAY WITH GOAL 14: ADMINISTRATIVE RULES

A series of administrative rules were initially developed in the early 1980s to help resolve confusion resulting from the non-binding policy papers issued as guidance for goal implementation. Several rules developed for goal implementation and interpretation must be used during UGB establishment or amendment procedures. For example, during the Goal 9 and Goal 10 need analysis, Divisions 7, 8, and 9 must be consulted for guidance.¹⁶⁵

Several other rules have particular influence on Goal 14. Division 21 sets out detailed guidelines for the urban reserves process. Division 14, developed to address Goal 14 and newly incorporated communities, helps to clarify the requirements of the goal and provide guidance to local governments regarding urban development on rural lands and the planning and zoning of newly incorporated

160. Metro has specific administrative rules that guide the urban reserves process within its jurisdiction. See OR. ADMIN. R. 660-027-0020 (2015).

161. OR. ADMIN. R. § 660-015-0000(9) (2015). The purpose of Goal 9: “[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon’s citizens.”

162. OR. ADMIN. R. § 660-015-0000(10). The purpose of Goal 10: “[t]o provide for the housing needs of the citizens of the state.”

163. OR. ADMIN. R. § 660-015-0000(11). The purpose of Goal 11: “[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.”

164. OR. ADMIN. R. § 660-015-0000(12) (2015): The purpose of Goal 12: “[t]o provide and encourage a safe, convenient and economic transportation system.”

165. See OR. ADMIN. R. §§ 660-015-0000(9) and 660-015-0000(10), *supra* notes 161-62.

cities.¹⁶⁶ Division 22 interprets Goal 14 concerning unincorporated communities.¹⁶⁷ Finally, if it is determined that a UGB amendment is appropriate, but an exception to Goal 14 is needed, then Division 4 must also be applied.¹⁶⁸

Goal 14, statutes, administrative rules, and other statewide planning goals are all part of the complex urbanization process in Oregon. However, despite the established infrastructure in place, litigation plays a very important role in the Oregon urbanization experience.

IV. Case Law: Challenging the Urban Growth Boundary

Goal 14 and the Oregon land use program have undergone trials since its inception over 40 years ago. The following seminal cases illustrate some of the conflicts that arise during the establishment and amendment of the UGB and the difficulties in interpreting Goal 14's requirements. The following cases are placed in particular categories but could arguably fit into one or more other categories. The intent behind categorization is to provide the reader with a general outline and sense of the larger issues presented in the following cases.

A. The "Need" Cases

The need factors are perhaps the most important consideration in a Goal 14 analysis. Even before these need factors were amended in 2005 to become requirements, the consideration of these factors was still an essential component of the Goal 14 analysis because satisfying these factors demonstrates a need to amend the UGB. As previously mentioned, the need factors analysis requires a long-range population forecast to determine how much land is needed for housing, employment opportunities, and livability purposes. LUBA and the state courts have tried to determine exactly what the analysis entails.

1. *BENJFRAN DEVELOPMENT, INC. v. METRO* (1989)¹⁶⁹

Benjfran, an important case in Oregon land use history, addressed how the need factors apply to the amendment of an existing UGB. In this case, petitioners unsuccessfully challenged Metro's denial of its

166. See OR. ADMIN. R. § 660-014-0000 (2015).

167. See *id.* at § 660-022-0000 (2015).

168. See *id.* at § 660-004-0000 (2015). Division 4 interprets the Goal 2 Exceptions requirements.

169. *Benjfran Dev., Inc. v. Metro*, 17 Or. LUBA 30 (1988), *aff'd*, 767 P.2d 467 (Or. Ct. App. 1989).

request to amend the UGB to include another approximately 500 acres for an industrial park.¹⁷⁰ Petitioners argued that the industrial park would attract jobs to the region and could not be located on any existing sites already within the UGB; thus, it was sufficient under the two need factors in the Goal 14 analysis.¹⁷¹ LUBA disagreed and held that a need consistent with factors one and two "could be demonstrated by (1) increasing population projections; (2) amending the economic, employment, and other assumptions applied to those population figures in originally justifying the UGB, or (3) doing both."¹⁷² Essentially, the "need" factors are to be read together,¹⁷³ and "Metro is not required to amend its UGB to provide appropriate land to accommodate every new industrial land-marketing technique enjoying success in other major urban real estate markets."¹⁷⁴ Metro is required, instead, to meet the needs of the population projection.¹⁷⁵

2. *1000 FRIENDS OF OREGON v. CITY OF NORTH PLAINS* (1994)¹⁷⁶

In this case, petitioners challenged the city's UGB amendment that nearly doubled the size of the existing North Plains UGB. This case centered around two need factors of the Goal 14 analysis. Petitioners successfully argued that it is an improper Goal 14 need analysis to base the UGB expansion on the theory that the additional land in the UGB would increase livability because industry and people would eventually move to the city.¹⁷⁷ Perhaps more importantly, however, was LUBA's holding that the city's need analysis was inherently flawed because it relied upon growth expected to "occur within the Metro UGB, of which the city is not a part."¹⁷⁸ Essentially, the city cannot unilaterally decide to capture growth projected in another jurisdiction without coordinating with that affected government unit.¹⁷⁹

170. See 767 P.2d at 470.

171. *Id.* at 467.

172. 17 Or. LUBA at 42.

173. The court rejected the idea that Goal 9 (Economic Development) preempts Goal 14 requirements. In other words, even if the local government demonstrates a 20-year industrial land need consistent with Goal 9 requirements, an amendment to Goal 14 cannot be accomplished without meeting Goal 14's requirements. See *1000 Friends of Oregon v. Land Conservation & Dev. Comm'n*, 239 P.3d 272, 275-76 (2010) (Woodburn I) (discussing *Benjfran*).

174. 767 P.2d at 469.

175. See *id.*

176. *1000 Friends of Oregon v. City of North Plains*, 27 Or. LUBA 372, 1994 WL 1726845 (1994), *rev'd*, 882 P.2d 1130 (Or. Ct. App. 1994).

177. 27 Or. LUBA 372, 1994 WL 1726845, at 6.

178. *Id.* at 8.

179. *Id.*

3. *WOODBURN I* (2010)¹⁸⁰

In *Woodburn I*, 1000 Friends of Oregon sought judicial review of LCDC's approval of the City of Woodburn's amendment of its UGB to include an additional 900 acres, 409 of which were for industrial uses.¹⁸¹ In the late 1990s, Woodburn began its "periodic review process to update its comprehensive plan" through 2020 (the end of the planning period).¹⁸² During the periodic review, Woodburn decided to amend its UGB to include an additional 409 acres as part of an economic development strategy to target high wage industries that would hopefully relocate to the city because of its geographical advantages.¹⁸³ The city believed that in order to carry out its economic development strategy and attract specific industries¹⁸⁴ it would need this new industrial land.¹⁸⁵ LCDC approved the amendment but "provided essentially no reasoning" as to how the amendment complied with the need factors Goal 14.¹⁸⁶ The court of appeals reversed and remanded the case, holding that LCDC must explain its reasons why the UGB amendment that included more industrial land than necessary to accommodate the needs over the 20-year planning period was consistent with Goal 14.¹⁸⁷ Despite the fact that Goal 9's requirements may have been satisfied,¹⁸⁸ any UGB amendment must also comply

180. 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n (*Woodburn I*), 239 P.3d 272 (Or. Ct. App. 2010).

181. *Id.* at 275.

182. *Id.*

183. *Id.* The city conducted various studies to determine that certain economic opportunities would correlate with specific site requirements for targeted industries. *Id.* at 275-76.

184. *Woodburn I*, 239 P.3d at 275. Traditionally, cities apply an "employee per acre" approach to calculate the number of acres needed, consistent with the employment growth forecast. The "target industries approach" considers the employment growth projections and employment goals and establishes a framework to attract the specific type of employers the city desires to attract. During this "target industries approach," the city identified 13 specific industries: (1) "Printing and Publishing;" (2) "Stone, Clay & Glass;" (3) "Fabricated Metal;" (4) "Industrial Machinery & Equipment;" (5) "Electronic and Electric Equipment;" (6) "Transportation Equipment;" (7) "Trucking & Warehousing;" (8) "Wholesale Trade: Durables;" (9) "Wholesale Trade: Nondurables;" (10) "Nondepository Institutions;" (11) "Business Services;" (12) "Health Services;" and (13) "Engineering & Management." *Id.* at 276 n.5.

185. *See id.* at 275. Factors the city included to promote its comparative advantage include: location, natural resources, buildable lands, labor force, housing, and transportation.

186. *Id.* at 277.

187. *See id.* at 279. It was possible that a particular reserved site(s) would not be selected by the targeted industry or that a particular site would be held for future development, both of which would result in the site not fully developing within the planning period.

188. The court noted that on remand LCDC must also explain how "market choice" is sufficient reason to expand the UGB under Goal 9. The court maintained that

with Goal 14, and LCDC did not demonstrate how or why amending the UGB to include more industrial land than what was needed for the 20-year period complied with Goal 14's need factors.¹⁸⁹

4. *WOODBURN II* (2014)¹⁹⁰

After the decision in *Woodburn I*, LCDC went back and issued a revised order again approving the city's amendment to its UGB. LCDC's analysis centered around two considerations. First, LCDC determined that there was a "close correlation" between the need for industrial land using the traditional "employees per acre" approach and the need for industrial land using the "targeted industries" approach.¹⁹¹ Second, LCDC concluded that Woodburn's "analysis of population, employment, target industries, and site requirements" was sufficient to establish an adequate and factual base to Goal 14's need requirements.¹⁹²

The court of appeals did not agree with LCDC and found that its analysis was not supported by substantial reason.¹⁹³ The court did not find LCDC's "close correlation" reasoning to be persuasive because LCDC failed to "explain why the relationship between the two numbers . . . should relieve it from reviewing—or local governments from explaining—why the amount of land proposed to be added to the UGB is consistent with the goals . . . just as carefully as it would if the correlation were not 'close.'"¹⁹⁴ Essentially, the court felt that LCDC did not provide content to the analysis and that LCDC failed to demonstrate at what point the numbers failed to be considered "close" and how a close correlation provides sufficient support for amending a UGB in compliance with Goal 14's need factors.¹⁹⁵

The court also was not persuaded with LCDC's second justification for approving the UGB amendment. Rather than providing a meaningful explanation of *why* the steps the city took to satisfy Goal 14 legal

"market choice" is an infinitely pliable and elastic term—and all forms and degrees of market choice are not necessarily consistent with Goal 9." *Id.*

189. *Id.*

190. 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 317 P.3d 927 (Or. Ct. App. 2014), *rev. denied*, 328 P.3d 696 (Or. 2014).

191. *Id.* at 931.

192. *Id.*

193. *Id.* at 931-32. The court noted that the standard of review had changed since *Woodburn I* with the amendment of OR. REV. STAT. § 197.650 in 2011. *Id.* at 932 n.3.

194. *Id.* at 933. The difference between the numbers was 311 buildable acres for the employee per acre method and 362 buildable acres for the targeted industries approach. *Id.* at 932.

195. *See id.* at 933.

standards, LCDC provided a bare, detailed enumeration of the steps taken by the city, followed by a conclusion that the steps taken provide a sufficient analytical and factual base consistent with Goal 14.¹⁹⁶ LCDC failed to explain how these steps satisfy Goal 14's need requirements.¹⁹⁷

B. *Circumstances of the Boundary: The Locational Factors*

The need factors are essential in determining that a UGB amendment is, in fact, necessary.¹⁹⁸ However, once this necessity is determined, the analysis turns to the locational factors to determine where exactly this boundary should occur.

1. *D.S. PARKLANE DEVELOPMENT v. METRO (2000)*¹⁹⁹

D.S. Parklane was the first of many difficult cases the courts would hear involving urbanization in the Portland metropolitan area.²⁰⁰ In 1997, in an effort to meet the urban land needs of 2040, Metro attempted to add 18,759 acres of urban reserves without amending the UGB. When there was to be only a 20-year supply of urban land remaining, those reserves were the presumptive first priority additions to the UGB.²⁰¹ Petitioners successfully challenged, before LUBA, the Metro ordinance that allowed for the inclusion of these lands into urban reserves.²⁰² The essential question facing the court of appeals was: what is the proper interpretation of the administrative rules when designating urban reserves.²⁰³ Both LUBA and the court of appeals did not take issue with the amount of land Metro allegedly needed²⁰⁴ but agreed that Metro erred in the subsequent locational

196. See *id.* at 933-34.

197. *Id.* at 934.

198. The importance of the two need factors was made especially clear in the 2005 Goal 14 amendments that created New Goal 14. See New Goal 14, *supra* note 57.

199. *D.S. Parklane Development, Inc. v. Metro*, 994 P.2d 1205 (Or. Ct. App. 2000).

200. For more information on cases testing the Metro UGB, see Sullivan, *Urban Management in Portland, Oregon*, *supra* note 62.

201. See OR. REV. STAT. §§ 195.137(2) & 197.298(1). In interpreting these statutes, LCDC characterized the definition in OR. ADMIN. R. 660-021-0030(1) (1999) as follows: "Urban reserves shall include an amount of land estimated to be at least a 10-year supply and no more than a 30-year supply of developable land beyond the 20-year time frame used to establish the urban growth boundary."

202. See *D.S. Parklane*, 994 P.2d 1205 at 1219.

203. See *id.* at 1214; see also OR. ADMIN. R. 660-021-0030 (these administrative rules deal with the urban reserves process).

204. See *D.S. Parklane Dev., Inc. v. Metro*, 994 P.2d 1205, 1211 (Or. Ct. App. 2000); see also New Goal 14, Factors 1 and 2 (establishment and change of urban growth boundary based on a demonstrated need).

steps under Division 21. To assist in determining suitability for inclusion of land within urban reserves, the administrative rules required Metro and local governments to first study lands adjacent to, or near, the UGB.²⁰⁵ The rules also require the land to be included within and urban reserve to be based upon the locational factors of Goal 14 and a demonstration that there are no reasonable alternatives that will require less, or have less effect upon, resource land.²⁰⁶ The next step is that local governments must then designate land to be included within the urban reserve, based on prioritized system outlined in the rules that emphasizes the use of less productive lands over quality resource lands.²⁰⁷ The rule also provided instances in which "lower priority" resource lands may be used to accommodate particular growth needs.²⁰⁸

205. OR. ADMIN. R. 660-021-0030(3)(a) (2015).

206. OR. ADMIN. R. 660-021-0030(2) (2015).

207. See OR. ADMIN. R. 660-021-0030(3) (1999):

Land found suitable for an urban reserve may be included within an urban reserve area only according to the following priorities:

- (a) First priority goes to lands adjacent to an urban growth boundary which are identified in an acknowledged comprehensive plan as exception areas or non-resource land. First priority may include resource land that is completely surrounded by exception areas unless these are high value crop areas as defined in Goal 8 or prime or unique agricultural lands as defined by the United States Department of Agriculture;
- (b) If land of higher priority is inadequate to accommodate the amount of land estimated in section (1) of this rule, second priority goes to land designated as marginal land pursuant to ORS 197.247;
- (c) If land of higher priority is inadequate to accommodate the amount of land estimated in section (1) of this rule, third priority goes to land designated as secondary if such category is defined by Land Conservation and Development Commission rule or by the legislature;
- (d) If land of higher priority is inadequate to accommodate the amount of land estimated in section (1) of this rule, fourth priority goes to land designated in an acknowledged comprehensive plan for agriculture or forestry, or both. Higher priority shall be given to land of lower capability as measured by the capability classification system or by cubic foot site class, whichever is appropriate for the current use. *Id.*

These criteria were revised by the enactment of OR. REV. STAT. §197.298(1). The Oregon Legislature has also since provided that when a district includes land designated as an urban reserve within an urban growth boundary pursuant to OR. REV. STAT. § 197.298(1), "the district is not required to consider the capability classification system or the cubic foot site class of the land as described in OR. REV. STAT. 197.298(2)." 2009 Or. Laws Ch. 497 § 1. Presumably, this action releases Metro from considering soils classifications as a "locational factor."

208. OR. ADMIN. R. 660-02100030(4) (1999) provides:

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

- (a) Specific types of identified land needs including the need to meet favorable ratios of jobs to housing for areas of at least 100,000 population served by one or more

Both LUBA and the court of appeals took issue with Metro's process of applying the locational factors in the urban reserves process. Metro erred by using a computer model, called "URSA-matic," to assign numeric scores in order to apply Goal 14 locational factors to lands for inclusion in urban reserves areas.²⁰⁹ The court agreed with LUBA that Metro is to apply each locational factor of Goal 14 equally and can only include lands in urban reserves when all of the factors justify the inclusion.²¹⁰ However, the court quoted with approval from the LUBA decision that:

'correct application of Subsection 4 requires the local government to categorize the inventory of suitable lands according to their Subsection 3 priorities and subpriorities, and then, in considering a specific site under one of the Subsection 4 exceptions, determine that no higher priority land is adequate to meet the particular subsection 4 need. As noted elsewhere, in the present case Metro designated fourth priority lands under Subsection 4(a) and (c) without determining whether higher priority lands, including first priority or lower capability fourth priority lands, are adequate to meet the Subsection 4 need.'

In addition to concluding that Metro's designation process was inconsistent with the substantive requirements of subsections (2), (3) and (4), LUBA also determined that Metro's findings were not sufficiently explanatory to satisfy subsection (5). Among the connections in which LUBA held that Metro's findings were deficient was its failure to sufficiently explain its suitability determinations by reference to the criteria in subsection (2), as distinct from the raw "URSA-matic" data.²¹¹

C. Need versus Location

The relationship between the need and locational factors has not always been fully understood. This issue was particularly present in the Original Goal 14 before the need factors were amended to become requirements. One case in particular recently tested this relationship.

In *1000 Friends of Oregon v. LCDC* (the "McMinnville Case"),²¹² petitioners challenged LCDC's approval of a large expansion of the

regional centers designated in the regional goals and objectives for the Portland Metropolitan Service district or in a comprehensive plan for areas outside the Portland area, cannot be reasonably accommodated on higher priority lands; or

- (b) Future urban services could not reasonably be provided to the higher priority area due to topographical or other physical constraints; or
- (c) Maximum efficiency of land uses within a proposed urban reserve area requires inclusion of lower priority lands in order to include or to provide services to higher priority lands

These criteria have since been revised as well by the enactment and amendment of Or. Rev. Stat. § 197.298(3).

209. See D.S. Parklane Dev., 994 P.2d at 1218.

210. *Id.*

211. *Id.* at 1212-13.

212. 259 P.3d 1021 (Or. Ct. App. 2011) [hereinafter "McMinnville Case"].

City of McMinnville's UGB that was proposed during the city's periodic review.²¹³ The expansion designated previous rural lands to urban uses. The primary issue in the case was the relationship between Or. Rev. Stat. § 197.298, a statute that prioritizes the types of lands to be added to a UGB, and the Goal 14 factors.²¹⁴ Petitioners alleged that (1) the city did not apply the Goal 14 factors completely or consistently; and (2) the city ruled out some land for consideration by defining its land needs, particularly in using Or. Rev. Stat. § 197.298.²¹⁵

The court concluded that LCDC did err in approving the city's UGB expansion and reversed and remanded the case. Applying a statutory construction analysis, the court explains that Or. Rev. Stat. § 197.298 "provide[s] the first cut in the sorting process and that Goal 14 is then applied to justify the inclusion or exclusion of the sorted lands and any remaining choices about what land to include in the boundary."²¹⁶ The court went further to make clear that Goal 14 is used to identify the types of land that are subjected to Or. Rev. Stat. § 197.298 and is used in evaluating the adequacy of available land under the statute.²¹⁷

D. New Cities: The "Damascus Debacle"²¹⁸

In 2002, Metro expanded its UGB to include 18,600 new acres, with two-thirds of it in Damascus.²¹⁹ At the time, state population projections indicated that Metro would house about 1 million new residents by 2040, and in order to support this projected future growth, Metro needed to be able to provide enough land.²²⁰ This time around, Metro properly chose to add land that was of lesser resource value,

213. The 2005 amendments to Goal 14 allowed local governments "that initiated an evaluation of the [UGB] land supply prior to April 28, 2005, and consider[ed] an amendment of the UGB based on that evaluation" to apply the Original Goal 14, if they so chose. New Goal 14, *supra* note 57. McMinnville applied the Original Goal 14 in this case.

214. McMinnville Case, 259 P.3d at 1023.

215. *Id.* at 1029-30.

216. *Id.* at 1030.

217. *Id.*

218. While there has yet to be a LUBA or court case regarding Damascus' incorporation as a new city, its creation has caused much controversy and issues within the state land use system, and thus its importance warrants discussion in this section of the article.

219. At the time of the Metro UGB expansion, Damascus was an unincorporated community in Clackamas County.

220. PATRICK T. HURLEY & PETER A. WALKER, PLANNING PARADISE: POLITICS AND VI-SIONING OF LAND USE IN OREGON 165-67 (2011).

according to Or. Rev. Stat. § 197.298, and adjacent to the existing UGB. This ultimately meant that the poorer quality farmland in Damascus was most suitable for inclusion into the Metro UGB expansion. However, the political and ideological atmosphere in Damascus was thick with property rights advocates who not only planned to remain unchanged in their rural community, but who also had a strong distrust and disdain for outsiders planning their destinies.²²¹

Determined to have greater control over its own future, Damascus voted to incorporate in 2004.²²² By becoming a new city, Damascus would retain some degree of autonomy with its own mechanisms for planning and land use control.²²³ The new city adopted ordinances and charter provisions that effectively required a vote for just about every local regulatory action.²²⁴ The intended effect of such provisions was to essentially block or discourage Metro and local urbanization policies.²²⁵ These political tools have been somewhat effective, and as of 2014, Damascus still has yet to submit a comprehensive plan that complies with the statewide goals.²²⁶ In March of 2014, after LCDC provided several deadline extensions to adopt a comprehensive plan for acknowledgment, DLCD finally ordered an enforcement order pursuant to Or. Rev. Stat. § 197.324²²⁷ against Damascus that will withhold state-shared revenue the city is entitled to.²²⁸

221. See *id.* at 165-75.

222. The creation of the City of Damascus was the first new city in Oregon in 22 years.

223. See HURLEY & WALKER, *supra* note 220, at 167-70.

224. See *id.* at 171-79.

225. See *id.*

226. See *City of Damascus Acknowledgement*, OREGON DEP'T OF LAND CONSERVATION AND DEV. http://www.oregon.gov/LCD/pages/damascus_acknowledgement.aspx (last visited March 21, 2015).

227. See OR. REV. STAT. § 197.324 (2014).

228. *In the Matter of Enforcement Order for the City of Damascus Pursuant to ORS 197.324*, OREGON DEP'T OF LAND CONSERVATION AND DEV., http://www.oregon.gov/LCD/docs/general/damascus/Damascus_EnforcementOrder_Final.pdf. The enforcement order provided:

(1.) The department shall notify the officer responsible for disbursing state-shared revenue to withhold that portion of state-shared revenues to which the city is entitled under OR. REV. STAT. 221.770, 323.455, 366.762 & 366.800 and OR. REV. STAT. Ch. 471, which represents the amount of \$300,000, the state planning grant moneys previously provided to the local government by the commission. The withholding shall begin on April 1, 2014 or at the first practicable disbursement date thereafter. Such withholdings will be released on the earlier date of either when this Commission acknowledges the city's comprehensive plan and land use regulations or otherwise terminates this enforcement order.

E. *Urban Reserves*: Barkers Five, LLC v. LCDC (2014)²²⁹

The urban reserves process helps to establish areas outside of the UGB that will be first for inclusion into the UGB once it is expanded. While the purpose of the urban reserves process may be rather straightforward, the process of implementing urban reserves is a bit more convoluted.

Following the new urban reserves process established in 2007,²³⁰ Metro and the three counties within the Portland region designated urban and rural reserves in 2011. LCDC reviewed and approved of the process in August of 2012.²³¹ The order was then appealed to the court of appeals, which reversed and remanded the order on several grounds.

The court found that LCDC's interpretation of the relevant statutes²³² and administrative rules²³³ was entitled to deference but that some of the local governments, particularly Washington County, misapplied the rural reserve factors²³⁴—presumably to find more urbanizable land.²³⁵ While the court did take issue with the reserves process in parts of Multnomah²³⁶ and Clackamas²³⁷ Counties, Washington

(2.) The city shall adopt a comprehensive plan and land use regulations in compliance with the statewide planning goals.

Id.

229. 323 P.3d 368 (Or. Ct. App. 2014).

230. See SB 1011, *supra* note 152.

231. *Barkers*, 323 P.3d at 374.

232. OR. REV. STAT. §§ 195.137-.145 (2014).

233. OR. ADMIN. R. 660-027-0005-0080 (2015).

234. *Barkers*, 323 P.3d at 404-12.

235. Geography likely played an important role in Washington County's effort to find more candidate land for urbanization, considering the County's location is strategically located at the center of Oregon's "Silicon Forest" and its population expanded significantly from 61,269 in 1950 to 471,537 in 2010. See *Big name tech companies resume migration into silicon forest*, OREGON LIVE, http://www.oregonlive.com/silicon-forest/index.ssf/2011/07/big-name_tech_companies_resume_migration_into_the.html (last visited March 21, 2015); *Population Dynamics of the Portland-Vancouver USA*, METROPOLITAN KNOWLEDGE NETWORK, <http://mkn.research.pdx.edu/2010/05/population-dynamics/> (last visited March 21, 2015).

236. *Barkers*, 323 P.3d at 413-19. Multnomah County did not adequately consider the rural reserve factors with respect to one area of the county.

237. See *id.* at 423-28. Two cities challenged the inclusion of 7300 acres near the Stafford area in the urban reserve because the Regional Transportation Plan showed it would be failing in 2035 and did not comply with OR. ADMIN. R. 660-027-0050(1), (3). OR. ADMIN. R. 660-027-0050 provides, in part:

"When identifying and selecting lands for designation as urban reserves under this division, Metro shall base its decision on consideration of whether land proposed for designation as urban reserves, alone or in conjunction with land inside the UGB:

"(1) Can be developed at urban densities in a way that makes efficient use of existing and future public and private infrastructure investments;

County faced the greatest difficulty before the court. The problem with Washington County's methodology, which Metro accepted, was its addition of "inexact surrogates," which the court labeled as "pseudo factors,"²³⁸ rather than the statutorily prescribed rural reserve factors to evaluate lands for designation as urban reserves. Essentially, Washington County overreached by trying to create its own set of rural reserve factors to avoid designating prime farmland as rural reserves when the application of the required reserve rules and factors would likely result in the classification as rural reserves.²³⁹ The court noted that, "because the designation of urban and rural reserves are interrelated—particularly where Foundation Agricultural Land is involved²⁴⁰—on remand, LCDC must, in turn remand Washington County's reserves designation as a whole for reconsideration."²⁴¹

Interestingly, the Oregon Legislature was in session when the court of appeals rendered the *Barkers Five* decision. During this time, the legislature quickly enacted House Bill 4078 ("The Grand Bargain") in response to the growing concern that a remand would be too costly,

"(3) Can be efficiently and cost-effectively served with public schools and other urban-level public facilities and services by appropriate and financially capable service providers[.]"

OR. ADMIN. R. 660-027-0050. The court agreed with the two cities and found that LCDC failed to demonstrate that it adequately reviewed Stafford's urban reserve designation with substantial evidence because it "adopt[ed] Metro and the county's speculative reasoning that the transportation system will presumably improve by 2060." *Barkers*, 323 P.3d at 362.

238. *Barkers*, 323 P.3d at 405-06. Washington County relied on an outdated 1982 Hudleston soils report rather than a more recently updated 2007 Oregon Department of Agriculture ("ODA") report for Metro referred to in OR. ADMIN. R. 660-027-0040(11), providing:

(11) Because the January 2007 Oregon Department of Agriculture report entitled "Identification and Assessment of the Long-Term Commercial viability of Metro Region Agricultural Lands" indicates that Foundation Agricultural Land is the most important land for the viability and vitality of the agricultural industry, if Metro designates such land as urban reserves, the findings and statement of reasons shall explain, by reference to the factors in OR. ADMIN. R. 660-027-0050 and 660-027-0060(2), why Metro chose the Foundation Agricultural Land for designation as urban reserves rather than other land considered under this division.

239. See *Barkers*, 323 P.3d at 405.

240. See generally HURLEY & WALKER, *supra* note 220 (discussing that rural land may be treated as part of the city geographically and functionally).

241. *Barkers*, 323 P.3d at 333 (internal citation added). Because the issues relating to Multnomah and Clackamas Counties were specifically related to the application of reserves factors to specific areas, rather than an inherent methodological flaw, remand was not necessary. *Id.* at 319-33, 337-47.

contentious, and time consuming.²⁴² The Grand Bargain essentially provided an immediate solution to the potential problems associated with a remand by placing much of the Washington County proposed urban reserves into rural reserves and expanding the County's UGB.²⁴³ Despite the legislature's attempt to resolve the immediate problems, the precedent established by having the legislature step in and resolve future land use disputes is concerning.

242. See, e.g., Land Use "Grand Bargain" Gets New Name, Heads to Oregon Senate Floor, http://www.oregonlive.com/politics/index.ssf/2014/03/land_use_grand_bargain_gets_ne.html; Oregon House Passes Land Use "Grand Bargain" in Unanimous Vote, http://www.oregonlive.com/politics/index.ssf/2014/02/land_use_grand_bargain_could_m.html; Land Use Grand Bargain Could Move Quickly Through Oregon Legislature, http://www.oregonlive.com/politics/index.ssf/2014/02/oregon_house_passes_land_use_g.html

243. 2014 Or. Laws Ch. 92 (HB 4078) available at <https://olis.leg.state.or.us/liz/2014R1/Downloads/MeasureDocument/HB4078>.