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*441 REVIEWING THE REVIEWER: THE IMPACT OF THE LAND USE BOARD OF APPEALS ON THE OREGON LAND USE PROGRAM, 1979-1999

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I. Introduction

Twenty years have now passed since the Oregon legislature adopted an entirely new approach for reviewing most local and some state land use determinations through a statewide administrative panel, subject only to review by the appellate courts. [FN1] No other state has an entity similar to this panel, the Oregon Land Use Board of Appeals (LUBA or the Board). The reasons for establishing such a panel, rather than using the judicial branch, are examined and tested in this Article. Further, this Article examines the significance of LUBA's role in three important areas of the Oregon planning program. These areas include (1) the direction of the planning process, (2) conservation of certain natural resources, and (3) the urbanization process. After concluding that LUBA's role in these areas is of great significance, this Article provides some overall conclusions over the utility of such an institution in a policy-laden planning process.

This Article does not attempt to describe the Oregon planning program in full; such descriptions may be found elsewhere. [FN2] However, to evaluate the significance of LUBA's role in that planning ***442** program, one must be aware of both the role of LUBA, as well as other alternatives for making and applying state policy. [FN3] LUBA's role is to adjudicate most “land use decisions” [FN4] of local governments and some such decisions of state agencies for conformity to the statewide planning “goals” or to acknowledged comprehensive plans. To understand these concepts, a brief discussion of the statewide planning process is necessary.

Since 1973, Oregon has required that most land use decisions of state agencies [FN5] and local governments [FN6] be consistent with state policy, as embodied in a series of statewide planning goals adopted by the Land Conservation and Development Commission (“LCDC” or the “Commission”) [FN7] in the form of administrative rules. [FN8] Since its creation, the LCDC has promulgated 19 policy goals. [FN9] Generally, the goals address specific concerns within the field, such as the following: (1) the creation of a land use planning process and policy framework as the basis for all decisions related to use of land; [FN10] (2) the preservation of agricultural lands; [FN11] (3) the conservation of forest lands; [FN12] (4) the advancement of the recreational needs of citizens and visitors; [FN13] and (5) the transition from rural to urban land use in an ***443** orderly and efficient manner. [FN14]

Each state agency and special district maintains the duty to carry out these goals. [FN15] More importantly, these goals apply to individual parcels of land that later may become the subject of local government planning and regulatory jurisdiction. [FN16] At that time, the goals apply directly to the proposal until LCDC determines that the local jurisdiction's comprehensive plan and implementing regulations, taken together, meet the statewide planning goal requirements. [FN17] This determination is known as “acknowledgment.” [FN18]

Although LUBA has no role in the acknowledgment process, it must interpret the goals in the first instance after a locality amends its acknowledged plan and regulations. [FN19] LUBA also adjudicates the vast majority of cases wherein disputes arise over the application of the goals or the local comprehensive plans or regulations as applied to individual cases.

LUBA's role in shaping state policy is thus significant. However, it is not the only entity that adjudicates certain land use policies. Although other entities may have numerically fewer cases, many of them play a more decisive role in shaping policy and impacting individual cases. To place LUBA into context, these other entities, as well as their powers, should be examined.

A. State Legislature

The legislature is of primary importance in shaping state policy. Without its original delegation of power creating such an independent agency, LUBA could not exist. Second, the legislature makes, or adjusts, state land use policy in enacting, amending, or repealing statutes. The legislature has made major policy changes that are decisive***444** in the land use forum [FN20] and has, on occasion, trivialized policy by making particularized amendments that often appear to follow the needs of constituents, rather than state policy. [FN21] Through its policy-making actions in making and responding to particular needs, the legislature is the pre-eminent authority.

B. Appellate Courts

The decisions of LUBA and LCDC are subject to direct review by the Oregon Court of Appeals and, by petition, to the Oregon Supreme Court. [FN22] Appellate review is limited to LUBA determinations of both fact and law. [FN23] These limitations are an important factor in the Oregon system, as shown by the courts' frequent practice of upholding LUBA's decisions.

C. LCDC

This agency, created in 1973, is the heart of the state's planning program. Its membership, appointed by the governor and confirmed by the state senate, [FN24] formulates the statewide planning goals and the administrative rules that bind local governments and others in carrying out those goals. [FN25] These two rulemaking-type functions allow the Commission to establish state land use policy, subject only to constitutional and statutory limitations. [FN26]

In addition, the Commission has other adjudicatory-type powers in which it may apply state policy to particular areas or situations. For example, the Commission has the power to grant and deny acknowledgment to local government plans and regulations. [FN27] If a local government plan and implementing regulations have been "acknowledged"***445** as complying with a particular goal, that goal generally "drops out" as a review criterion for local land use decisions in that area. On the other hand, if the Commission has not acknowledged a plan or land use regulation, the goals remain directly applicable to land use decisions. [FN28] Second, following Commission acknowledgment, a local plan or land use regulation must be reviewed through a detailed statutory process every five to fifteen years to ensure continued compliance with the goals and any new or amended statutory criteria. [FN29] The Commission has an elaborate statutory- and rule-based process for this purpose. [FN30] In addition, the Commission has authority to bring an enforcement action against the local government that refuses to apply the goals or the local government's acknowledged comprehensive plan correctly. [FN31]

D. Oregon Trial Court System

One of the major effects of the creation of LUBA and its "exclusive jurisdiction" over "land use decisions" is the

general demise of the state trial courts as a forum for land use policy application. It is true that circuit courts [FN32] retain their power over enforcement or relief by mandamus, declaratory judgment, or injunction; [FN33] however, review of local land use decisions, once the province of the trial court, [FN34] now rests with LUBA.

E. Department of Land Conservation and Development

Although the Department of Land Conservation and Development ("DLCD" or the "Department") makes few decisions on its own, it is a workhorse for the policy formulation of the Commission and thus shapes land use policy in Oregon. [FN35] The Department determines whether to participate in local proceedings regarding adoption of plan amendments and new or amended land use regulations, [FN36] ***446** and whether to deal with initial periodic review work programs [FN37] and work tasks thereunder. [FN38] These functions are significant, but normally do not require the Department to become involved in individual land use cases.

Yet why did LUBA evolve? Adjudicatory models exist in every administrative procedures act throughout the United States. However, only Oregon has created an agency to address adjudication in the land use arena. In every other state, these decisions are made within the trial court system. [FN39] Oregon decided to supplant this system 20 years ago for some important policy reasons that typically justify any system of administrative adjudication and that are illustrated by Kenneth Culp Davis through his studies on administrative law. [FN40] These policies include:

1. Expertise

Having an agency develop and apply expertise to decisions in a particular area is an important justification for supplanting the general trial courts from adjudicating the same issues. [FN41] Thus, an organization of specialists exercising exclusive jurisdiction over all land use decisions allows for a level of expertise in land use matters that would not be available at the trial court level, where issues may be misunderstood. Such specialized tribunals often handle cases of a specific nature involving policy and its application.

2. Accuracy and Consistency

A single body of experts versed in the land use system results in an accurate and consistent body of precedent. [FN42] This makes state-of-the-law determinations much easier for lawyer and layman alike, in comparison with the usual disparate set of trial court decisions.

3. Efficiency

Similarly, routine cases of a specialized nature are handled ***447** much better by an efficient system of administrative adjudication. [FN43] Strict sets of procedural rules require LUBA to render final land use decisions within seventy-seven days after the record is settled. [FN44] Timely and accurate decisions in cases were, and are, a legislative priority that motivated many legislators to replace a system utilizing the trial courts with a system that utilized set timelines.

4. Cost

The trial court system is costly and burdensome. Saving the costs to the public by efficient administrative adjudication is also a major consideration for replacing the trial courts with an administrative agency. [FN45]

LUBA's role in the Oregon planning program is central, if only because that agency makes more decisions involving that program than any other participant. On average, LUBA considers about 250 case filings per year, [FN46] of which approximately two-thirds reach the opinion stage; other cases are either settled or involuntarily dismissed.

Moreover, LUBA's enabling legislation requires that the Board, where possible, decide all the issues presented to it on the merits. [FN47] Finally, LUBA is the most frequent forum for contesting amendments to comprehensive plans and land use regulations, and the agency decides these cases as well. Beyond the numbers, most often LUBA decides constitutional issues and the precise manner in which state policy is applied to concrete cases. Although LUBA's initial decisions are subject to review by the Oregon appellate courts, those courts accord LUBA's original determinations respect. More importantly, LUBA serves as the body that most frequently harmonizes, reconciles, and even overrules its own decisions in previous cases. It is the body that reacts to appellate court decisions, reviewing its cases, and LCDC rules, codifying, modifying, or overruling ***448** its previous decisions. In a very real sense, then, LUBA is the focus of the Oregon land use system.

In the next three parts of this Article, LUBA's role in these highly visible and important areas of Oregon land use law is examined over the first twenty years of the Board's existence. In each case, LUBA has made a number of important rulings to shape each area, has reacted to actions taken by other system participants, and has reconciled the law that controls the Oregon planning process.

II. The Planning Process

A. Introduction

In no other area of the Oregon planning program is the role of LUBA more crucial than that of the land use planning process. LUBA determines the adequacy of amendments to, or implementation of, comprehensive plans and the manner in which those plans are carried out. This part of the Article examines the five aspects of that process. In only one of these aspects is another program participant more important than LUBA.

The five areas of the planning process examined herein are: (1) the identification of a “land use decision” (over which LUBA has exclusive jurisdiction); (2) the initial acknowledgment of local government comprehensive plans and implementing land use regulations; (3) amendments to acknowledged plans and land use regulations; (4) local government administrative procedures for the adoption, amendment, and implementation of comprehensive plans and land use regulations; and (5) the nature and extent of deference to local interpretation.

Because the Commission decides during the acknowledgment process the sufficiency of plans and their implementing regulations in determining compliance with the statewide planning goals, the Commission's role is greater than that of LUBA in the second area of the planning process mentioned above. In all other cases, LUBA makes the initial, and often dispositive, determination of compliance.

B. Identity of a Land Use Decision and LUBA's Jurisdiction

LUBA has “exclusive jurisdiction” [FN48] over “land use decisions.”***449** [FN49] The legislative scheme was devised to prevent a multiplicity of litigation with possibly inconsistent results and to relieve the trial courts from having to decide most land use cases. [FN50] The nature of a “land use decision” is sufficiently broad to cover a multitude of situations, and it should be noted that almost as much ink has been spent on the exclusions from the definitions as the inclusions.

LUBA, understanding its role as the land use expert within the established land use scheme, has seldom dismissed a case because the case does not involve a “land use decision.” For example, the decision to annex land that implicates urbanization policies of the comprehensive plan is a land use decision, [FN51] and any final official statement by a planning official that requires some exercise of factual and legal judgment is also a land use decision. [FN52] The Court of Appeals has frequently affirmed LUBA's jurisdictional determinations in this area. [FN53] More importantly, the Court of Appeals has favored LUBA's jurisdiction by being skeptical of trial court jurisdiction over decisions that are arguably land use decisions. [FN54] The result has been a consistent implementation, led most often by LUBA

opinions,***450** of the legislative desire that LUBA decide nearly all cases involving land use.

C. Requirements of Local Comprehensive Plan and Land Use Implementing Regulations

As mentioned above, the Commission has set the tone for these requirements through the acknowledgment and periodic review processes. These processes are partially statutorily based [FN55] and partly based on Goal Two (land use planning). [FN56] Taken together, they require that an adequate factual basis be the predicate for planning and that there be a conscious and articulate choice among competing alternatives for the locally adopted land use program. With respect to local land use regulations, they require that the local government adequately carry out and act consistently with the comprehensive plan.

LUBA's interface with Goal Two consistency and plan adequacy requirements in post-acknowledgment review cases is relatively infrequent. [FN57] However, LCDC interpretations in acknowledgment cases are usually not used. The reason is that, following the initial round of acknowledgments, the goal interpretations in those proceedings are largely forgotten because acknowledgment orders are not readily available to the public. Moreover, these "precedents" are of uncertain status in any event. [FN58] Periodic review records are similarly remote from public review and similarly uncertain as to precedental value. [FN59] Thus, the relatively few cases in this area require LUBA to provide the primary interpretation of this goal.

The results in these cases are not encouraging. Perhaps because***451** of the lack of funds available to the local planning process or the long delay in getting plans acknowledged, [FN60] LUBA has followed the Commission's lead and has not been very demanding of local governments in carrying out the requirements of this goal. [FN61] The one exception appears to be in population projections, where counties have statutory authority to coordinate this activity for both incorporated and unincorporated areas, and county decisions would normally be final. [FN62] However, a series of cases brought by the Department and other state agencies under various theories have "raised the bar" somewhat. [FN63] As to the adequacy of implementation measures, LUBA's case law is similarly uninspiring. [FN64]

D. Amendments to Acknowledged Plans and Land Use Regulations

With the exception of the periodic review process, which is largely unavailable and of uncertain authority, the post-acknowl-edgment process provides the best insight into current interpretations of the goals and applicable state statutes and rules. The post-acknowledgment process is objections-based, i.e., LUBA responds only to objections raised by the petitioners. [FN65] Often, this means that petitioners are required to raise issues at the local government level or waive that issue. [FN66]

LUBA frequently reviews post-acknowledgment cases and occasionally has the advice of the Department or other state agencies in the form of briefs in cases before it as to how the goals or state statutes***452** and rules should be applied. Because it often acts first in time, LUBA often finds itself setting the authoritative precedent in such cases.

E. Local Procedures for Actions Implementing Plans

The Oregon legislature has imposed two major sets of constants on local governments in implementation of plans. The first is the restriction on quasi-judicial actions set by ORS 197.763, which requires a form of notice and hearings process. [FN67] The other set of constants***453** relates to the local government permit process. [FN68] Other procedural requirements are applicable in certain areas but have not been extensively litigated. [FN69]

LUBA is the only system participant that regularly treats assignments of error regarding local government conduct as a matter of first impression in land use proceedings. The Oregon Court of Appeals generally upholds the Board's decisions in these areas. [FN70] Many of these notice and hearing objections are deemed procedural (and therefore of lesser weight), although by no means all are so characterized. [FN71] LUBA has evolved a two-step test to

deal with procedural objections. First, an objection to a procedure must be raised, if possible, before the local hearing body. [FN72] Second, the error must prejudice the party's substantial rights. [FN73] In this area, LUBA has met expectations for administrative adjudications. It has authority, expertise, and an expedited means of review.

F. Nature and Extent of Deference to Local Interpretations of Plans and Regulations

For years, LUBA required that local government interpretation of its own plans and regulations be reasonable and correct. [FN74] Since the Oregon Supreme Court decision in Clark v. Jackson County [FN75] ***454** and the passage of ORS 197.829, [FN76] LUBA's review function is generally much more deferential of local interpretations of plans and regulations. However, if the plan or regulatory ordinance under consideration implements state law, LUBA does not owe any deference to a local interpretation. [FN77] Nor does LUBA owe interpretations of comprehensive plans or land use regulations made by persons or bodies other than the governing body. Such decisions (e.g., those of planning commissions or hearings officers) must still be both reasonable and correct. [FN78] However, even governing body decisions are not immune from challenge, as a number of LUBA cases have shown. [FN79]

In deBardelaben v. Tillamook County, [FN80] the county approved a variance to increase the height of a residence beyond that permitted ***455** under the ordinances. [FN81] Notwithstanding Clark's local government reasonable-interpretation-deference requirement, LUBA remanded the county's interpretation that “reasonable economic use” meant the highest and best use. [FN82] That decision was reversed by the Court of Appeals for insufficient deference to the interpretation given by the county. [FN83]

Similarly, no deference is given to local government interpretation of legal standards adopted by other bodies, e.g., statutes, goals, or administrative rules. [FN84] Finally, there is no invasion of the local interpretive function if the local government fails to apply a local plan [FN85] or ordinance [FN86] provision; in that case, LUBA will remand the matter for application and interpretation in the first instance. LUBA has weathered the Clark storm well and has a fairly respected and articulated process for review of local government interpretations. Here again, the LUBA experiment may be deemed a success.

G. Conclusion

In the planning process, LUBA has made most of the decisions dealing with plans and land use regulations. While the Department has the right to appeal land use decisions to LUBA or to file a state agency brief, and the appellate courts have the right to affirm, reverse, modify, or remand its decisions, LUBA decides the greatest number of cases involving the planning process. LUBA has responded well to the challenge of this responsibility.

III. Resource Lands Protection

A. Introduction

LUBA has played a significant role in Oregon policymakers' efforts to preserve resource lands, particularly those lands that provide the basis for two of the most important economic engines of the ***456** state, agriculture and forestry. [FN87]

The twists and turns of state policy in the preservation of agricultural and forest lands are reflected in the numerous LUBA decisions interpreting those changes. In general, those policies have steadily tightened restrictions on these lands, mixed with occasional relaxation of those standards in particular cases.

B. Agricultural Legislative Land Use History

To elaborate, Oregon's policy toward agricultural lands historically has been aligned with farmland protection and opposed to nonfarm uses and urban encroachment. After S.B. 100 was passed in 1973, the state policy was galvanized toward placing the maximum amount of farmland capable of agricultural production [FN88] and not already developed into exclusive farm-use (EFU) zones, in which the number of nonfarm uses is limited. [FN89] Land in an EFU zone, if farmed, is given a preferential tax assessment so that, notwithstanding the market value, the farmland would be assessed at its (invariably much lower) farm-use value. [FN90] As a companion to S.B. 100 in 1973, S.B. 101 placed other limitations on land divisions in EFU zones [FN91] and adopted an articulated (albeit broadly stated) state policy on farmland preservation. [FN92]

***457** In the late 1970s and throughout the 1980s, the agricultural battleground shifted. The most frequent focus of litigation became the administration of EFU zones by counties, particularly in allowing “farm” or “nonfarm” dwellings either for persons who had no intention of engaging in a commercial capacity, and where the dwelling would have an adverse impact on surrounding commercial agriculture. The legislature responded by increasing the restrictions on nonfarm dwellings by imposing statewide tests. [FN93] The battle over the interpretation of those tests is discussed below. Another battleground was over what constituted a dwelling “in conjunction with farm use.” LUBA was heavily involved in both battles.

In 1989, the legislature also changed the standards for the approval of most other nonfarm uses through the adoption of ORS 215.296(1) and (2), [FN94] which require such uses to be compatible with ***458** commercial agricultural and forestry practices on surrounding lands. It was left to LUBA to interpret and apply these broadly worded statutes. [FN95]

In 1993, the last of the “BLUBs” [FN96] brought a great number of changes to the resource lands policies of the state. [FN97] In exchange for a number of (previously prohibited) dwellings on resource lands, the legislature created statutory minimum lot sizes for various categories of farm and forest lands. [FN98] The legislation became effective immediately, [FN99] and LUBA soon began receiving appeals over the meaning of the legislation.

LUBA's decisions on farmland reflect this increased legislative concern about protection of the agriculture industry in a state in which suburbanization, particularly in the Willamette Valley, threatened the viability of that industry. Yet at the same time, the Supreme Court handed down the Clark decision, [FN100] in which LUBA's own review process was transformed. From a point at which LUBA affirmed local government decisions if it found the legal interpretation “reasonable and correct,” [FN101] Clark forced LUBA to give deference to local interpretations of plans and regulatory ordinances made by local governing bodies. [FN102] However, LUBA determined that such deference was not appropriate with regard to local interpretations of state agricultural or forest lands policy, where state law was paramount.***459** [FN103] In such cases, state interests must predominate. LUBA then has more influence over the ultimate outcome. [FN104] More importantly, the legislature has affirmed this result, as well as the ultimate power of LUBA to make interpretations of state law. [FN105]

C. LUBA Interprets Goal Three

Goal Three (agricultural land) [FN106] requires that all lands within certain soil classifications outside urban growth boundaries (UGB) be protected through the creation and application of exclusive farm-use zones. [FN107] All uses in these zones are limited to those items necessary to facilitate “farm use” or one of the enumerated nonfarm uses allowable in an EFU zone. Farm use requires “the current employment of land for the primary purpose of obtaining a profit in money” through certain agricultural activities. [FN108] Therefore, dwellings are only permitted in such zones if: (1) the structure is “customarily provided in conjunction with farm use,” [FN109] (2) the land is unsuitable for farming and the dwelling will not interfere with the neighboring farms, [FN110] or (3) the structures are nonfarm dwellings that were “grandfathered” in before the legislation was enacted in 1993. These latter structures are known as lot-of-record dwellings. [FN111]

LUBA interprets statutes under which farm dwellings are permitted if customary to farming practice and determines the level of agricultural activity necessary to permit the construction of such dwellings. [FN112] These were necessarily controversial decisions as many people built homes in the EFU zones, claiming to be farmers. The new "farmers" claimed their homes were thus "customarily provided in conjunction with farm use." Moreover, the so-called "martini farmers" [FN113] could take advantage of the significant property ***460** tax differential available if the land were assessed as being in "farm use" as opposed to being assessed at market value.

Questions also arise as to the extent local governments may pass ordinances implementing the provisions of Goal Three. In 1000 Friends of Oregon v. Coos County, [FN114] the county had adopted a new land use ordinance regulating when a farm-help dwelling used to accommodate relatives of the farm owner may be added to EFU-zoned land. [FN115] One criterion permitting such use was the farm owner's or farm operator's written statement that the relative was needed to assist on the farm. [FN116] The petitioner argued, and LUBA agreed this was an improper delegation of authority to the farm owner or farm operator. The relevant statute [FN117] required that the county collect evidence and make findings of fact regarding this issue. [FN118]

Before dealing with these substantive issues, however, LUBA was first required to determine whether decisions approving dwellings in EFU zones were within its jurisdiction as "land use decisions." [FN119] In Doughton v. Douglas County (Doughton I), [FN120] the Court of Appeals reversed and remanded a LUBA decision dismissing an appeal on jurisdictional grounds, i.e., that the issuance of a building permit for a "dwelling customarily provided in conjunction with farm use" was not a land use decision. The Court of Appeals held that the determination of "farm use" was not ministerial in nature and may require the county to give notice and an opportunity to be heard. [FN121]

On remand in Doughton v. Douglas County (Doughton II), [FN122] LUBA determined which permit applications in EFU zones that required consideration of whether the dwelling is the kind that is "customarily provided in conjunction with farm use" involved the exercise of judgment and discretion. [FN123] As such, the local government must provide participants with both notice and the opportunity to be ***461** heard before deciding whether to issue the permit. The county's failure to provide such notice prejudiced petitioner's procedural due process rights. On remand, LUBA required that when making farm-dwelling determinations the local government findings must illustrate: (1) "that the dwelling proposed is of a kind customarily provided in conjunction with such farm use," and (2) "the property was in farm use." [FN124]

Exactly how and to what extent the various Goal Three agricultural statutes should be read together has been another challenge for LUBA. For five years, LUBA went back and forth with the Court of Appeals, trying to reconcile two statutory farm-dwelling requirements: (1) that dwellings be those that are "customarily provided in conjunction with farm use," [FN125] and (2) that the definition of "farm use" meaning "current employment of land for the primary purpose of obtaining a profit in money [in certain agricultural activities]." [FN126] First, LUBA read these provisions together in Matteo v. Polk County (Matteo I), [FN127] stating, "before a farm dwelling may be established on agricultural land, the farm use to which the dwelling relates must be existing." [FN128] On rehearing, LUBA remanded again, finding that although many farm improvements were planned the improvements failed to meet the "wholly devoted to farm use" standard. [FN129] The Matteo decisions [FN130] were the central foundation underlying the more significant analysis in the Newcomer cases that followed.

***462** In Newcomer I, [FN131] the petitioner appealed the county's approval of improvement to a farm dwelling where the applicant had only planned to install an irrigation well, a drain tile system, and plant nursery stock in annual increments, beginning with an initial two-acre planting. [FN132] In Newcomer I, relying on the holdings from the Matteo cases, LUBA remanded the county's decision. The Court of Appeals summarily reversed LUBA in Newcomer II, [FN133] stating that there was "nothing in the language or history of the statutes to support the engrafting of the 'current employment' requirement" onto the test for a farm dwelling, much less a requirement that the parcel be entirely devoted to farm use. [FN134] From here, DLCD, the agency charged with enforcing LCDC rules that implement the goals, sought and received reconsideration in Newcomer III. [FN135] In light of an administrative rule providing that the "day to day activities on the subject land are principally directed to farm use of the land," [FN136]

the Court of Appeals recanted in Newcomer II, withdrawing any suggestion that a farm dwelling may be constructed before the farm use is instigated and affirming LUBA's original remand. [FN137]

Substantively, LUBA has been required to interpret the LCDC rules [FN138] discussed in Newcomer II (now superseded), [FN139] setting a high standard for the amount of farm use that must exist before a farm dwelling can be authorized within an EFU zone. Ultimately, LUBA determined that a county may approve a dwelling in conjunction with a proposed farm use that incorporates a farm management plan,

> so long as the county (1) determines the level of farm use proposed by the farm management plan satisfies [the Goal Three rule], and (2) ensures through conditions that the farm dwelling cannot actually be built until after the county determines that the farm management plan has been carried out. [FN140]

This standard was tested earlier in a series of cases entitled ***463** Forster v. Polk County. In Forster v. Polk County (Forster I), [FN141] LUBA remanded the county approval of a farm dwelling because a 13-acre parcel that contained only 3.25 acres of planted seedlings with a plan to plant 3.5 acres in the two subsequent years was not an existing farm use. [FN142] Upon remand, the county included conditions of approval requiring the permit not be granted until 3.5 acres are planted and, after the permit is granted, that an additional 3.5 acres be planted within a year. This decision was appealed, and once again LUBA, in Forster v. Polk County, [FN143] responded with a remand. Although the conditions did ensure that the land was being placed in farm use, the permit may not be granted, permitting construction, when only 3.5 acres were actually in farm use. On appeal, in Forster v. Polk County (Forster III), [FN144] the Court of Appeals reversed and remanded, finding that LUBA erred in stating that all proposed farm uses must be established before issuing the permit because the rule does not establish the necessary amount of actual farm use. LUBA did not back down. In Forster IV, [FN145] LUBA reasoned that the minimum farm use permitted under the local zoning code required an annual agricultural productivity level of at least $10,000. [FN146] In this case, the 3.25 acres of trees that were already planted only rose to a productivity level of $5,734. [FN147]

LUBA has also been involved in reviewing decisions regarding when land must be designated agricultural and thus protected by Goal Three rules. In Kaye/DLCD v. Marion County, [FN148] LUBA reviewed a county decision to rezone land from "special agricultural" to "rural and acreage residential" in order to permit a planned development with residences and an 18-hole golf course. [FN149] LUBA held that although the property was not composed of soil types which required agricultural land designation, under the Goal Three definition of "agricultural land," agricultural land may also exist if ***464** (1) it is "intermingled with" or "adjacent to" Class I-IV soils within a "farm unit," [FN150] (2) it is "other land" suitable for farm use, [FN151] or (3) it is required to be designated as agricultural land in order to permit farming on nearby lands. [FN152] Although historic grazing of a few cattle was not sufficient to constitute a farm unit, LUBA remanded the approval because the findings failed to reveal which nearby lands the county considered and whether the land would be suitable for farming use. [FN153]

The order in which the various land use requests are considered may also affect the preservation of natural resources. If an applicant requests a partition and a nonfarm dwelling, the analysis will turn on whether one considers the existing farm use on the entire parcel, which may already contain a farm, or the partitioned portion only. [FN154] LUBA has decided that statutorily the first order of consideration is the nonfarm dwelling approval and, therefore, consideration of the entire parcel is necessary. [FN155] Further, LUBA has also stated that "where language in the EFU statutes is not precise, and therefore susceptible of more than one interpretation, we adopt the interpretation favoring farm use and discouraging nonfarm use." [FN156]

In Thede v. Polk Co., [FN157] petitioners appealed the county's approval to partition thirty-five acres of land within an EFU zone. [FN158] The county's justification for approval was that the land was not suitable for farming because it could not be used to raise cattle or sheep at a "worthwhile" profit. [FN159] Adhering to the criteria set out by statute, LUBA remanded the county's decision, stating that any county determination of unsuitability must contain detailed findings explaining how each factor was considered where the county failed to make detailed findings explaining how each factor contributed to the conclusion of unsuitability. The decision would be remanded. In support of its ruling, LUBA opined that the statute did not attach a dollar figure to the definition of "farmland." In addition, there

***465** was no evidence that the parcel was not suitable for growing grapes, and no evidence supported the conclusion that such soils would prevent economical use of the whole parcel for vine crops. [FN160]

In Goracke v. Benton County, [FN161] the applicant requested a land partition, intending to discontinue growing wheat and changing to managing a filbert orchard instead. [FN162] The county determined that an EFU-zoned land partition upon eighty acres was appropriate because commercial farming activities still would occur on the smaller 40-acre parcels, causing no harm to nearby farms. The petitioners challenged that conclusion, providing evidence that smaller farms were not as valuable and that it is more difficult to farm smaller-divided areas, rather than a single parcel, and citing an LCDC administrative rule. [FN163] LUBA agreed with the petitioner that the county failed to show that the proposal would not harm surrounding farm uses. [FN164]

***466** LUBA was also called upon to decide the parameters of another set of statutes and Goal Three administrative rules [FN165] that permitted the construction of nonfarm dwellings on land "unsuitable for the production of farm crops and livestock." [FN166] In Sweeten v. Clackamas County, [FN167] LUBA remanded the county's approval for the construction of a nonfarm dwelling on property that had been used for cattle grazing. [FN168] LUBA rejected the county's findings because they failed to explain why the parcel's size, shape, and topography led to the conclusion that the parcel was unsuitable for commercial agriculture. [FN169] The significance of this case lies in the "cumulative impact" test LUBA adopted for determining whether the proposed nonfarm dwelling will be compatible with the nearby existing farm uses and will not materially affect the stability of the area's overall land use pattern. [FN170]

The cumulative impact test required that the county "(1) identify the EFU zoned area for evaluation, (2) determine the land use ***467** pattern in that area, and (3) analyze whether the proposed nonfarm dwelling will materially alter that land use pattern." [FN171] This test has been refined through its subsequent application and combined with an articulated administrative rule. [FN172] For example, in Still v. Marion County, [FN173] LUBA stated that (1) the area for evaluation must be large enough to represent accurately the "commercial agricultural enterprise" that is not to be limited by a particular type of agriculture; [FN174] (2) the county must distinguish between commercial and non-commercial operations based on an analysis of yield; [FN175] and (3) the county must determine whether the partitioned parcels will be of sufficient size to "maintain or continue" the existing commercial enterprises in the area. [FN176] Notwithstanding administrative rule ambiguity, [FN177] LUBA has continued adding nuances to this test that give no deference to local government interpretation. For example, LUBA has held that local governments must include findings that illustrate that they considered both EFU and non-EFU uses within the analyzed area. [FN178]

In addition to determining the extent of the farm use, LUBA must also decide which uses comprise "farm use," as it is a necessary component of Goal Three. In McKay Creek Valley Ass'n v. Washington County, [FN179] the county granted permits for two nonfarm dwellings set on land partially covered with strawberry plantings. [FN180] The acknowledged local comprehensive plan provision set the farm-use standard at "planted in perennials capable of producing $10,000 in gross income." [FN181] The county found that the property could generate that yield and granted the permit. LUBA remanded that decision, construing the ordinance to require that currently planted perennials***468** be capable of generating $10,000 in average gross annual income. Hence, the approval standard could not be satisfied by the abstract capability of the site or by the speculative capability of berries that might eventually be replanted on it. [FN182] The Court of Appeals affirmed this result and reasoning. [FN183]

LUBA also has found that the storage of chicken manure on land for use in a petitioner's business is not a farm use because (1) the definition is limited in its terms to production of farm products, and (2) an "operation for the preparation or storage of agricultural products where none of the products are produced on the land where the preparation or storage takes place does not constitute farm use." [FN184] Similarly, LUBA has found that the statutory definition of "farm use" is not met by a composting operation on the site where most of the compost inputs are produced offsite, even though some of the stock comes from the remnants of a small onsite Christmas tree operation. [FN185]

LUBA was also called on to interpret ORS 215.780(1) (the new statutory minimum lot-size requirement) and had

to decide how these statutory provisions affected partitions with nonfarm dwelling applications. [FN186] LUBA has clearly taken the narrowest reading of the statute in an effort to protect resources. In Dorvinen v. Crook County, [FN187] LUBA struck down the county's approval of an application to subdivide a 40-acre lot into three parcels and construct nonfarm dwellings on EFU-zoned land. [FN188] Although the local regulations did permit the creation of new parcels for nonfarm use, the issue turned on whether all parcels created, or at least the remainder parcel or parcels, met the 80-acre minimum size statutory requirement. [FN189] After exhaustive plain-language, context, and legislative-***469** intent analysis, LUBA determined that the statutes, read together, required that any partition must "leave a remainder parcel that meets the [[statutory] minimum parcel size." [FN190] Thus, a parcel not meeting the statutory minimum lot size may not be divided again.

The Court of Appeals affirmed LUBA's analysis, finding that all land within an EFU zone must retain an 80-acre minimum parcel size. [FN191] In so holding, the Court opined:

> The county is wrong in assuming that the allowance of nonfarm uses on EFU-zoned land divests the land of either its zoning or its character as agricultural land and that proposals to permit nonfarm uses are therefore outside the ambit of statutory and other regulations of uses on land in EFU zones. [FN192] Struggling within its limited role interpreting legislation, LUBA was able to preserve the purpose behind Goal Three: protecting farming resources.

This issue, however, is far from settled. In Alliance for Responsible Land Use v. Deschutes County, [FN193] the county based its partition approval on the original statutory discretionary standard of ORS 215.263(4), rather than the 80-acre minimum requirement of ORS 215.780(1)(a), thereby mounting a frontal attack on both LUBA's and the Court of Appeals' decisions in Dorvinen. [FN194] Before LUBA, the county argued that the across-the-board minimum restriction set out in Dorvinen is incompatible with other statutory requirements, such as division-of-land approval criteria requiring that minimum size be determined "in conjunction with the farm use" [FN195] or case-by-case determinations. [FN196] Further, respondent believed that Dorvinen should not apply to this case because the applicant's entire parcel was only forty acres, less than the minimum requirement, and because the land will be subdivided such that no large parcel will remain. [FN197] LUBA rejected all of these contentions and upheld the across-the-board requirement. [FN198] The Court of Appeals affirmed LUBA's decision. [FN199]

***470** Goal Three requirements also have forced LUBA to make many local government procedural decisions that, in hindsight, have been very pro-active in saving natural resources. [FN200] In Wilbur Residents v. Douglas County, [FN201] the neighboring petitioners argued, and LUBA agreed, that they were entitled to notice and the opportunity to be heard during the local hearing to decide if a sewer waste treatment plant fit the definition of "commercial activities that are in conjunction with farm use." [FN202]

Although local government codes may regulate some land within agricultural zones more restrictively than the state statute, they may not allow uses that are prohibited by state law. [FN203] Further, local government findings must articulate if and how the proposed use is or is not a valid "commercial activity that is in conjunction with farm use," as it is used within local codes. [FN204] Similarly, LUBA has indicated that it will take a fairly close view of just how "farm-related" various commercial operations must be before overturning a local decision denying the same. [FN205]

Sometimes LUBA has appeared to be the lone advocate, rejecting local government findings that land is not suitable for farming use. In Laudahl v. Polk County, [FN206] LUBA reversed the county's approval of a Goal Three exception allowing partition of property as ***471** not suitable for farm use because it had a tendency to flood. [FN207] The Court of Appeals reversed, finding that LUBA erred by sustaining a substantial-evidence challenge on testimony of one respondent who was interested in purchasing the property and was challenging the partition, rather than on the county's factual findings, which relied on the testimony of an expert witness. [FN208] Not satisfied with this result, LUBA appealed the Court of Appeals' conclusions to the Supreme Court. [FN209] Here, LUBA argued that it had standing because agencies should be able to seek review of reversals of their decisions in order to protect the "public interest" in the area of responsibility with which the agency is charged. [FN210] The Supreme Court disagreed, de-

nying LUBA's standing as an aggrieved party:

> The role delegated to the agency apart from its use of quasi-judicial procedures is the controlling consideration. We find no indication in the duties delegated to LUBA that the legislature contemplated that the tribunal would assume the role of advocate. Both enforcement and primary policy making responsibility reside in the Department and the Commission. [FN211]

Like "farm use" in the context of nonfarm dwellings, LUBA has been called on to define the substantive limits of "commercial activities that are in conjunction with farm use" for nonconforming uses within agricultural zones. For example, in City of Sandy v. Clackamas County, [FN212] the petitioner appealed the hearing officer's expansion of the parameters of respondent's conditional use permit for the sale of livestock and horse trailers, flatbeds, and trailers to include the rental of trucks and trailers, the sale of portable storage buildings, and the operation of a mailbox, UPS, and fax facility. [FN213] Agreeing with the petitioner that this use failed as an activity "in conjunction with farm use," LUBA reasoned that although sales may be primarily to farmers, that was not sufficient to satisfy the statutory definition: "the products and services provided must be essential to the practice of agriculture." [FN214] As such, products and services that both farmers and nonfarmers can use do not meet this definition.***472**

D. Forest Land Legislative History

Similar in many ways to farmland preservation, the purpose of Goal Four (forest lands) is to protect forest lands by requiring that counties "inventory, designate and zone forest lands." [FN215] The state requires that all local jurisdictions apply the inventory of resources within their comprehensive plans and zoning regulations or take an exception to Goal Four. [FN216] The term "forest lands" is not limited to only land suitable for commercial forest use, but includes adjacent or nearby lands that are necessary to permit forest operations or practices, and other forested lands that maintain soil, air, water, and fish and wildlife resources.

In 1987, the Oregon legislature adopted the Forest Practices Act, stating that the "public policy of the State of Oregon [was] to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species . . . ." [FN217] Emphasizing sustained-yield principles more strongly than conservation, this statute required that the Commission amend Goal Four and promulgate enforcement rules, making them consistent with this new legislation. Despite legislative direction toward harvesting more trees, the cases set forth below clearly show that LUBA attempts to meet the legislature's industrial forestry goals, while encouraging the preservation and protection of natural resources.

The administrative rules LCDC promulgated in response to the 1987 legislation set forth a list of permitted forest uses, [FN218] established review standards for new land divisions, [FN219] and established rules for when dwellings may be constructed on forest land. [FN220] In addition to commercial forestry uses, these standards permitted conservation uses that preserve the natural environment, as well as locationally dependent uses, such as communication towers, mineral operations,***473** and forest dwellings. [FN221] The term "dwellings" included (1) those that pre-existed the legislation (lot-of-record dwellings), (2) large-tract dwellings, or (3) template dwellings. [FN222]

One of the biggest changes emerging from these amendments came in the articulated limitations for permitting new dwellings. New dwelling construction was allowed based on substantial evidence that the dwelling was (1) "accessory to," meaning incidental and subordinate to the main forest use, and (2) "necessary for," meaning that the dwelling must contribute "substantially" to the effective and efficient management of the forest property. [FN223]

LCDC has not specifically set out a list of permitted nonforest dwellings; however, it does authorize other dwellings under prescribed conditions. [FN224] A few permitted nonforest dwellings are set out as permitted uses for forest lands, such as: caretaker residences for public parks and fish hatcheries or some types of destination resorts. [FN225] Although certain specified uses are allowed, LCDC has also established that the local government may only permit parcel sizes smaller than the 80-acre minimum upon a showing that the smaller parcels will not hamper the

continual growth and harvest of forest products. [FN226]

E. LUBA Interprets Goal Four

LUBA has determined that Goal Four provisions set the floor, rather than the ceiling, for local government regulation of natural resources. This precedent was established in Westfair Associates Partnership v. Lane County, [FN227] where the petitioners/applicants argued that the county could not deny their application to rezone "agricultural" land on findings that the parcel was "forest land" when the amended definition of that term in Goal Four does not require that the land be limited by Goal Four requirements. [FN228] LUBA disagreed:***474** "To the extent a local government does not run afoul of other goal requirements or other applicable legal requirements, a local government may regulate more restrictively than the goal requires." [FN229] As a result, LUBA ruled that the simple fact that property is zoned agricultural does not mean that it is not also forest land. [FN230]

As with the interpretation of "farm use" under ORS 215.203(2)(a), LUBA has been charged with defining the limits of the forest uses definition. In DLCD v. Coos County, [FN231] LUBA rejected the county's argument that the term "commercial," as used in the "suitable for commercial forest use" requirement, meant that the use be profitable. [FN232] Further, as to the impact on nearby forest operations, the county cannot limit its analysis by considering only those parcels that are contiguous or adjacent, rather than "near-by." [FN233] In Brown v. Coos County, [FN234] LUBA rejected the assertion that the land must be significantly forested in order for it to be protected as "other forest lands that maintain soil, air, water and fish and wildlife resources." [FN235] Although the percentage of the forested area is relevant to the Goal Four equation, the county may not simply rely on a finding that less than a majority of the site is forested and conclude that it does not fit the "other forest land" definition. [FN236]

LUBA has established that all findings must clearly explain how and why the application meets all Goal Four requirements. In Grden v. Umatilla County, [FN237] the county approved a conditional use permit to allow the construction of a church retreat on forest-zoned land. [FN238] Even though the structure would not harm any of the harvestable timber and the 20- to 25-person, weekend-only use would not harm the resource, LUBA remanded the findings for failure to consider the entire five-acre tract and its suitability to the forest use, rather than simply the structure. [FN239] LUBA required that the county must do more to understand and explain the nature of the proposed use. ***475** Without a description of the operational characteristics of the use and the associated land use impacts, there is no way of knowing the basis for the county's rather broad conclusion that "the proposed use will not interfere in any way with the existing and accepted forest practices on adjacent lands." [FN240] The county also did not identify the existing and accepted forest practices on those lands adjacent to the site that are in forest use. [FN241]

In Donnelly v. Curry County, [FN242] LUBA limited the definition of "campground" to prohibit the construction of fifty-one full-service recreational vehicle spaces on 1.5 acres of a 12-acre parcel. [FN243] Goal Four, as well as the local county forest/grazing zone that implements the goal, defined "campground." Focusing on "intensity or density of the proposed use" within the definition, LUBA found error in the county's findings determining density against the entire 12-acre site rather than the development portion. [FN244] LUBA stressed the importance of maintaining independent rigorous standards regarding resource lands: "The question under Goal Four is not whether a campground on forest lands is appropriately rural (i.e. nonurban) in intensity, but whether the campground's intensity of development is 'appropriate in a forest environment." ' [FN245] Thus, LUBA was able to foster natural resource protection through its interpretation of "campgrounds" within forest zones.

Like Goal Three with regard to farmland, Goal Four prohibits the construction of dwellings in forest lands that are not "necessary and accessory" for forest management. [FN246] LUBA has spent much ink reviewing and remanding those that fail to meet this standard. Realizing the potential for abuse, LUBA has narrowly interpreted items that are "necessary." For example, locating a dwelling on undeveloped forest land and arguing that such use does not harm forest resources does not make the dwelling necessary. [FN247] The Supreme Court affirmed LUBA's analysis on this issue:

> For a forest dwelling to be necessary and accessory to wood fiber production, it must, at least, be difficult to manage the land for ***476** forest production without the dwelling. The purpose of the dwelling must be to make possible the production of trees which it would not otherwise be physically possible to produce. [FN248] In accordance with the Court's ruling, LUBA has held that a dwelling may not be permitted based simply on the property owner's unwillingness to conduct watershed-enhancement activities on his property without the structure. [FN249]

Each zoning ordinance or change in amendment must comply with all of Goal Four's requirements. In Lamb v. Lane County, [FN250] the petitioner challenged the county's enactment of an interim zoning ordinance changing certain forest-use zones within the county as failing to comply with Goal Four. [FN251] LUBA disagreed with the county's response that the insufficient factual basis underlying the amendment was only temporary and necessary to allay fears. The goal requires that lands suitable for forest uses shall be inventoried and designated as forest lands. [FN252] Without the inventories mandated by the goal, the county could not know whether application of the ordinance would result in loss of forest land. [FN253] Further, the county erred by permitting airplanes, helipads, and balloon-bedding areas on forest land because such uses were neither specifically permitted by Goal Four nor were they necessary to facilitate a permitted forest use. [FN254]

LUBA also established the parameters of permitted auxiliary uses to forest practice. [FN255] In McKy v. Josephine County, [FN256] LUBA agreed with the petitioners, who argued that a driving range was not auxiliary to a forest use. [FN257] Even though irrigation would cause tree growth upon the proposed range, “incidental conservation benefits” do not make this an air, soil, or water-quality conservation use. [FN258]

Similar to the numeric minimum lot sizes established for agricultural***477** land, Goal Four establishes size limits for both land divisions and the creation of new parcels to more than eighty acres. [FN259] Exceptions to the eighty acres are only permitted where the local government can prove to LCDC that the parcels will be large enough to ensure accomplishment of the Goal Four requirements. The boundaries of the minimum lot-size requirements were tested and upheld in DLCD v. Douglas County. [FN260]

F. Conclusion

The strict requirements of Goals Three and Four make navigating amendments to comprehensive plans, ordinances, zone changes, or goal exceptions difficult. As mentioned earlier, any unacknowledged change to a local government's comprehensive plan means that the goals apply directly to the applications. Administrative rules permit nonresource-specific uses if every permitted use upon the parcel is “impracticable” or if the area is already physically developed. [FN261] However, before the local government can conclude that the allowed uses are impracticable, LUBA has determined that that local government must provide findings of fact that directly support the impracticability conclusion. [FN262] Similarly, findings that illustrate the existence of nonresource structures located in the area before the goals were in place should not necessarily lead to a conclusion that the area is physically developed. [FN263]

In Champion International Corp. v. Douglas County, [FN264] the petitioner challenged the county's approval to rezone sixty-seven acres from “timberlands resource” to “farm forest” to allow the construction of a nonforest dwelling upon the parcel. [FN265] Petitioner argued, and LUBA agreed, that rezoning was inconsistent and could not implement the timberland plan designation set out in the comprehensive plan. [FN266] Thus, the focus was on the farm-forest zone itself, which would permit the construction of a nonforest dwelling, rather than the proposed use, which could not carry out the dwelling limitations ***478** as they were articulated within the county's comprehensive plan. [FN267]

As the cases involving farm and forest lands tend to demonstrate, LUBA has been on the firing line in making the first, and often the last, interpretation of statutes, goals, and administrative rules designed to preserve these lands. In

most cases, LUBA's interpretations have withstood challenge on appeal and have shaped the law of Oregon.

IV. Urbanization

A. Introduction

Complementing the natural resources protection aspects of Oregon's land use program are goals that regulate development. One such development goal and probably the most renowned part of Oregon's land use system, Goal Fourteen (urbanization), regulates the creation and expansion of UGBs in an effort "to provide for an orderly and efficient transition from rural to urban land use." [FN268] The goal encourages the urbanization of land within the boundary, rather than beyond its borders, thereby effectively halting scattered urban development. The urbanization policy of the state was prefigured by the adoption of ORS 215.243(3) in 1973 by S.B. 101, a companion to S.B. 100. [FN269] This regulation establishes the rationale behind prohibiting urban growth in rural areas as (1) the increased cost of providing services, (2) the incompatibility between farm and urban uses, and (3) the loss of both open space and natural beauty. [FN270] The establishment of the UGB also clarifies which goals apply to each parcel of land. Inside the UGB, the development goals (i.e., Goals Nine through Fourteen) are the primary consideration. [FN271] Outside the boundary, natural resource preservation goals, such as Goals Three and Four, [FN272] are most important. In either case, Goal Eleven, requiring public facilities appropriate for the urban or rural ***479** area, [FN273] applies.

The creation or amendment of a UGB is based on seven factors, and its creation requires cooperation between the affected cities and surrounding counties. [FN274] As with all of the other levels of planning under Goal Two, the UGB must be consistent with the acknowledged comprehensive plan, as well as applicable zoning provisions. Initially, the line drawing was reviewed by LCDC within the acknowledgment process and was not subject to LUBA review. However, now that all cities have established UGBs, most UGB amendments not adopted as part of the periodic review process are subject to LUBA's review. [FN275]

Achieving consensus between distinct county and city entities is often difficult, but LUBA has not backed down and continues to enforce the Goal Two planning requirement. In City of Portland v. City of Beaverton, [FN276] the challenge came in response to the unilateral decision by Beaverton and surrounding Washington County to amend their comprehensive plans by adopting an urban service boundary (USB), including land between the two cities, which was allocated to Beaverton. LUBA remanded both decisions to Beaverton and Washington County because such unilateral action would make their plans inconsistent with Portland's acknowledged plan. Portland neither agreed to amend in this manner, nor did Metro (the agency charged with coordination of the planning efforts of its constituent local governments) [FN277] consent to the USB location, as required by an explicit statutory coordination requirement. [FN278] The following year, the City of Portland unilaterally adopted a similar USB; ***480** LUBA again responded with a remand. [FN279] LUBA declared that these entities "lack the authority to adopt the challenged decision, absent a decision by Metro that the USB chosen is the one that, in Metro's view, accommodates the needs of all affected local governments as much as possible." [FN280]

Goal Fourteen requires that all land be designated urban, urbanizable, or rural. [FN281] Originally, it was assumed that these definitions would be clear and that Goal Fourteen need only be considered with regard to land within a UGB. However, in the landmark case that interpreted many facets of Goal Fourteen, 1000 Friends of Oregon v. LCDC (Curry Co.), [FN282] the Supreme Court articulated that urban uses on rural lands were prohibited unless the local government's decision supported either an exception to Goal Fourteen provisions or provided an explanation of why the proposed use did not convert rural land to an urban use. [FN283] Subsequently, LUBA has held that these changes-in-use decisions require individual case-by-case analysis. [FN284]

Although LCDC has promulgated rules defining "urban lands" as those within the UGB, LUBA has fleshed out the nuances of the urbanization process. These types of issues typically come before LUBA in one of two forms: (1) challenges to findings explaining why the proposed change does or does not allow an urban use on rural land, or (2)

challenges to the sufficiency of findings in support of UGB amendments.

B. Urban Use in Rural Areas

One of the most basic principles established in 1000 Friends of Oregon v. LCDC (Curry Co.) [FN285] was that urban uses require an urban location; that is, they must be located inside the acknowledged UGB. "Goal 14 generally prohibits the urbanization of 'rural land."' ***481** As a result, the local jurisdiction must determine whether an urban use is being approved on rural land. If the use is urban in nature, the county must either (1) amend its UGB, triggering the comprehensive plan consistency and acknowledgment requirements in order to accommodate the proposed use, or (2) take an exception to Goal Fourteen. [FN286]

Once the Supreme Court had spoken, clearly requiring urban use on urban land and prohibiting urban use on rural land, LUBA became responsible for articulating the hair-splitting definitions of terms such as "rural," "urban," and "urban use." One of the earliest cases to arrive on LUBA's doorstep was Hammack & Associates, Inc. v. Washington County. [FN287] Here, petitioners challenged the county's board of commissioners' approval of the construction of a 15,000-person, outdoor amphitheater outside the UGB, with parking for 9,000 vehicles and sewer and water services supplied from within the UGB. [FN288] The county asserted that the existing EFU zone would permit the proposed 45-acre parcel size, and the most similarly analogous use would be a recreation use, which is allowed on EFU land and would serve both urban and rural residents. [FN289] Stating that honing a definition of "urban use" would be made on a case-by-case basis, LUBA disagreed with the county, reasoning that the simple fact that similar uses such as golf courses are allowed or conditionally permitted in rural EFU areas does not mean that the proposed use is not urban. Neither seasonal nor sporadic use makes the impact of 15,000 people a nonurban use. [FN290] The Court of Appeals affirmed LUBA's analysis, stating that since the legislature failed to include amphitheaters in its list of permitted recreational EFU uses, the proposed use, based exclusively on the facts presented, must be urban. [FN291]

LUBA has determined that the local government's first order of inquiry regarding Goal Fourteen is to characterize the use properly. In 1000 Friends of Oregon v. Marion County, [FN292] the county took an ***482** exception to Goal Fourteen, permitting the expansion of a recreational vehicle park. [FN293] The county argued that, like campgrounds, recreational vehicle parks are permitted by conditional use in EFU zones and that the application is for the expansion of such a permitted use. [FN294] On these grounds, the county took an exception to Goal Fourteen. LUBA disagreed and remanded the decision for the county's failure to provide findings that examine the nature of the use. [FN295] The fact that the proposed use might be compatible with the surrounding rural uses because it is continuing an established use is not determinative of rural use. [FN296] Although LUBA declined to determine whether this particular use was urban or rural, LUBA did set out a relevant list of urban characteristics. These include the type of facility, the number of people using it, the public facilities necessary to serve the people, and potential increased traffic. [FN297]

For the first few years, bright-line rules were difficult to determine due to the lack of statutory direction and a host of amorphous factors, coupled with case-by-case analysis. However, LUBA was up to the challenge. For example, in LCDC v. Douglas County, [FN298] LUBA remanded the county's approval of an amendment to the comprehensive plan map changing EFU-zoned land to a 5-acre rural residential zone. The county argued that the project would not require urban-type services because an onsite septic system was to be installed. [FN299] LUBA disagreed, stating that the simple fact that the development would maintain an onsite sewer system, rather than the city's system, does not necessarily constitute an urban use on rural land. [FN300]

In Cox v. Yamhill County, [FN301] the county commissioners approved the rezoning of an applicant's parcel from an EFU zone to a public-assembly, institutional zone to permit construction of a church. [FN302] The petitioners challenged this decision, arguing that the ***483** proposed church use was an urban use that could not be allowed without an exception to Goal Fourteen. [FN303] LUBA disagreed with the petitioner, notwithstanding the onsite sewage disposal, [FN304] finding that churches are not inherently urban in nature and that the proposed church would serve a primarily rural congregation. [FN305]

One major limitation to the applicability of Goal Fourteen's prohibition of urban uses on rural lands is that the goal applies only to proposals involving an amendment to an acknowledged plan or land use regulation. Because acknowledgment precludes the direct application of the goals, any application contemplated or permitted under the acknowledged comprehensive plan or ordinances is permitted without Goal Fourteen consideration. In Highway 213 Coalition v. Clackamas County, [FN306] the county approved an application for a conditional-use permit that would allow the existing structures on the parcel to be used as a Japanese business school, dormitory, and cultural exchange center. [FN307] LUBA denied petitioners' Goal Fourteen urban-use-on-rural-land challenge on the grounds that (1) schools were allowed as permitted uses in rural zones (as provided in ORS 215.283(1)(a) and (2)), and (2) the county's decision was governed by the statute and its acknowledged comprehensive plan and land use ordinances. [FN308]

In Churchill v. Tillamook County, [FN309] a petitioner challenged the county's decision to rezone three areas to permit residential development within an unincorporated community located outside the UGB. [FN310] According to petitioner, this decision permitted an urban use in a rural area. [FN311] The county argued that nearby unincorporated areas were zoned to permit even higher-density residential zones. [FN312] Therefore, the county believed that such "up-zoning" did not require compliance with Goal Fourteen. [FN313] LUBA disagreed. [FN314] By ***484** definition, all land outside an acknowledged UGB is rural land. [FN315] Therefore, the county may not rezone parcels to allow denser development in an area outside a UGB without explaining why this does not convert rural land to urban use. [FN316]

Another case, Donnelly v. Curry County, [FN317] also contained a Goal Fourteen challenge based on the prohibition of urban uses on rural land. [FN318] The county argued that the proposed 52-unit recreational vehicle park sited on twelve acres would not yield a more intense use than other recreation sites on the river. [FN319] The petitioner countered those claims, asserting that the development would cover only 1.5 acres of the 12-acre site. [FN320] Sustaining the petitioner's challenge, LUBA stated, "when assessing 'density' for purposes of determining whether a land use is 'urban' or 'rural' in character, we have held that the local government must assess density with regard to the lands actually being developed." [FN321]

C. Urban Growth Boundary Amendments

1. Introduction

Goal Fourteen requires that the establishing or altering of any UGB "be a cooperative process between a city and the county or counties that surround it." [FN322] This means that the city and county or counties must work together to adopt the same UGB regulations within their comprehensive plans. For example, in the Portland metropolitan area, Metro, the agency charged with providing cohesive land use planning for the urban area must adopt a boundary and address urbanization issues for twenty-four incorporated cities and three counties. [FN323]

The creation of UGBs, or their expansion, requires that local ***485** governments estimate the long-range land needs for anticipated population and economic growth and that they supply an amount of land sufficient to meet those needs. Thus, these factors have been labeled the "need" and "locational" factors. [FN324]

2. The "Need" Factors

The "need" factors require assessment of UGB creation or alteration based on long-range population projections and the estimated amount of land needed to provide employment, housing, and service accommodations required for future population. [FN325] Although this type of analysis is clearly necessary for UGB creation, it was not clear how the need factors applied in altering an existing UGB. LUBA addressed those issues in BenjFran Development v. Metro Serv. Dist. [FN326] In this case, petitioner challenged Metro's denial of a proposed amendment to add five-hundred acres to the existing UGB for the construction of an industrial park. [FN327] The petitioner argued that the project

would attract industry and jobs to the region and could not be located on any existing sites within the UGB; thus, it was "needed," as required by factors one and two. [FN328] LUBA disagreed. [FN329] Reconsideration of the existing boundaries may be "needed" by (1) showing that the population can and will increase, (2) showing that the original assumptions to meet population figures are in error, or (3) doing both. [FN330] The "need" factors must be read in conjunction with one another. [FN331] "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." [FN332] It must only provide findings that address***486** the needs of the projected population. [FN333]

Similarly, LUBA has held that the "need" factors are not met by expansions that are deemed necessary for reducing high property tax rates, school problems, or other isolated impacts upon livability. [FN334] Any examination of needs must be comprehensive and thorough and include an analysis of why the positive impacts outweigh the negative ones. [FN335]

In City of LaGrande v. Union County, [FN336] the petitioners challenged the actions of the encompassing county to expand the UGB and rezone the annexed property. [FN337] The petitioners argued that the county failed to revise its population projections to determine the size of the needed amendment. The petitioners further argued that the amendments were not needed because the population had decreased since the creation of the original assumptions. [FN338] Applying the BenjFran factors, LUBA agreed with petitioners, holding that, although the county believed that recent commercial development and more residential land would increase the historically decreasing population, the need assumptions must be revised and supported by substantial evidence before an amendment is appropriate. [FN339]

In Simnitt Nurseries v. City of Canby, [FN340] the city approved an amendment to its UGB based on a finding that it had insufficient residential land able to be developed within its UGB to meet the established population projection. [FN341] LUBA remanded the decision on the grounds that the city failed to explain why up-zoning through increased densities, as contemplated in the comprehensive plan, would not remedy the situation. [FN342] LUBA later expanded this analysis to include considerations of: (1) the possibility of rezoning to greater density, (2) redesignating lot lines, and (3) reconfiguring the proposed use. [FN343]

***487** In 1000 Friends v. City of North Plains, [FN344] the petitioners challenged the county's adoption of a UGB amendment nearly doubling the size of the existing urban growth area. [FN345] Although the city was not located within Metro boundaries, the city based its decision on current livability problems. The city further asserted the amendment would improve livability by attracting a portion of Metro's projected growth within its boundary. [FN346] LUBA remanded the decision because the condition that the amended land would be for "mixed use" was too vague to meet the "need" projection. LUBA further reasoned that it was impossible for the city to rely on Metro's growth without coordinating with Metro to achieve those ends. [FN347]

In Roth v. Yamhill County, [FN348] four property owners proposed expansion of the UGB, while the petitioners, two other owners within the proposed boundaries, challenged the county's decision. [FN349] The petitioners argued that, even though the county may need additional residential land, the petitioners had no intention of developing their land after it was included. [FN350] LUBA agreed with petitioners and stated that, "If this land is truly unavailable for development, the UGB should be redrawn to exclude it." [FN351]

Another question for LUBA is whose numbers are decisive as to population projections or determinations of sufficient housing and employment opportunities. In Concerned Citizens of the Upper Rogue v. Jackson County, [FN352] petitioners challenged the approval of an amendment to expand the UGB to accommodate a planned-unit development that would include an 18-hole golf course, residences, and a hotel-resort complex. [FN353] The petitioners provided their own expert studies, asserting that the county's findings relied on faulty population projections. [FN354] Embarking on an exhaustive comparison of the population proposals, LUBA quoted a Court of Appeals' observation: "The line between reweighing evidence and determining substantiality in the light of supporting and countervailing evidence ***488** is either razor thin or invisible to tribunals that must locate it." [FN355] LUBA even-

tually settled population need based on the county's numbers and sustained the petitioners' arguments that the subsequent use of the land after amendment was insufficient to meet the articulated housing and livability needs. [FN356]

3. The “Location” Factors

The “location” factors determine how and where to site appropriate expansions. [FN357] A decision to add land to the UGB requires proof that maximum efforts were made to encourage development within the UGB. Decisions should be made focusing on the most orderly and economic provision for public facilities and services, as well as the “environmental, energy, economic and social consequences (ESEE) of designating property for urban use.” [FN358]

Along with the “need” factors, Roth v. Yamhill County [FN359] contained challenges based on the “location” factors. [FN360] The petitioner argued, and LUBA agreed, that the findings are insufficient if they only show that the services will be extended to meet expansion. [FN361] Findings also must explain how the proposal will affect the existing water and sewer system. [FN362] In order to comply with factor four, the findings also must show that the county made attempts to accommodate the development within the UGB. [FN363] Finally, LUBA determined that the findings were inadequate in concluding that the proposed use is compatible with nearby agricultural activities because a road dividing the development from farmland will create an adequate ***489** buffer. [FN364]

Similarly, LUBA considered the county's application of the “location” factors in 1000 Friends of Oregon v. City of North Plains. [FN365] LUBA established that because of the vague provisions governing the types and intensity of uses permitted on the amended lands, the city could not determine adequately whether or not it met the location-factor requirements. [FN366] Further, the determination that this particular area was designated “of interest,” or was designated under the comprehensive plan to be first in priority for incorporation, does not remove the need to consider location factors three through seven. [FN367] Finally, the city failed to address whether other less-valuable agricultural land was available for development. [FN368]

In DLCD v. Douglas County, [FN369] LUBA remanded a county decision to amend the UGB to include land near the freeway to accommodate a restaurant, mini-mall, and professional offices. Factor four, which requires an exacting analytical consideration of alternative locations, was not met because the expansion would encompass Class I soils. By statute, Class I soils may be considered for inclusion only when (1) no land is available within the UGB to meet the required need, and (2) no nonresource land nor Class II through Class IV soil land located outside the UGB is available. [FN370] Similarly, the local government cannot consider upgrading public services outside the UGB if land already inside the boundary contains those services. [FN371]

In Halverson v. Lincoln County, [FN372] the petitioner challenged the approval of an amendment to the UGB in an area that was sufficiently developed to permit a “committed” exception to Goal Fourteen. [FN373] In a conclusory fashion, the county addressed the location factors under the assumption that after finding an exception those factors were not relevant. [FN374] LUBA disagreed, holding that “the ***490** amendment process may . . . be the last occasion for ‘meaningful scrutiny’ by planning officials of a significant intensification of land use.” [FN375] Therefore, the county must consider the ESEE impacts of the proposal in an adequate manner. Thus, LUBA has determined that a location-factor analysis must also be considered when approving UGB amendments based on “commitment.”

D. Exceptions to Goal Fourteen

LCDC has promulgated administrative rules that describe the type of findings required for the local government to grant a “built” or “committed” exception to Goal Fourteen, arising primarily when an existing urban use or development is already so extensive on rural land that requiring agricultural rural uses would be impracticable. [FN376] The regulations that permit this exception are not Goal Fourteen-specific, but come from the exception process provided in Goal Two and apply to all decisions that will allow urban uses on rural lands. [FN377] The four factors that must be considered for granting an exception are: (1) reasons for the exception; (2) alternative locations; (3) conse-

quences to existing resource use; and (4) compatibility with nearby uses. [FN378] Ultimately, this requires a determination that the proposal warrants overriding the state goal requirements.

One of the first cases to consider Goal Fourteen and its relationship to the Goal Two exception process was City of Medford v. Jackson County. [FN379] In that case, the county responded to the challenge of violating the Goal Fourteen regulation allowing urban uses outside rural areas by asserting that development already existed outside the UGB and that the county could not be required to make nonconforming uses out of every quasi-urban area of development. [FN380] LUBA held that the county must apply the Goal Two exception process to determine if urban uses should be permitted on resource lands. [FN381]

Mentioned earlier in the context of urban use on rural land, the ***491** case of Hammack and Associates, Inc. v. Washington County [FN382] responds to the exception process. The petitioner argued that the finding permitting the construction of the outdoor amphitheater and performing arts center failed to meet the four factors for granting an exception. [FN383] LUBA agreed with the petitioner. [FN384] Although consistent with Goal Eight, neither the uniqueness of the facility nor its expected success is sufficient to override the goals, even though the action may comply with many of the other statewide planning goals. [FN385]

Also mentioned earlier, in 1000 Friends v. Marion County, [FN386] the petitioner appealed the county's approval to expand an 84-space recreational vehicle park to accommodate an additional seventy-seven spaces. The county argued that it had sufficient documentation to establish a “need” under the administrative rules to justify an exception to the requirements of Goals Three and Fourteen. [FN387] Although LUBA agreed that the county demonstrated sufficient market demand to meet the “need” requirement, it found the county failed to show that the use of this site would meet other statewide planning goals, nor could the county show that other specific sites could not more reasonably accommodate the use. [FN388]

In Murray v. Marion County, [FN389] the county granted approval to rezone an EFU-zoned parcel to “public” and granted a nonconforming use permit to accommodate the expansion of an airport. [FN390] The petitioners argued that the county failed to take an exception to Goal Fourteen because both the area served and the level of service provided evidence that this airport was clearly an urban public facility use. [FN391] LUBA agreed and remanded, requiring that the county adopt an exception to Goal Fourteen before granting approval. [FN392]

In Caine v. Tillamook County, [FN393] the county amended its comprehensive***492** plan and zoning maps to expand its UGB and rezone property from “small farm woodlot” to “medium density urban residential” to accommodate 124 retirement dwellings. [FN394] LUBA rejected the county's argument that the amendment is necessary to support an economic activity that depends on a nearby natural resource because retired persons are neither an economic activity nor a natural resource. [FN395] Further, because the identified need extended countywide, the county's findings must show that the need could not reasonably be accommodated on lands that would not require a goal exception. [FN396]

In Leathers v. Marion County, [FN397] the petitioners sought review of the county's approval of an application to expand a truck stop on land that was previously zoned EFU and interchange district (ID). [FN398] The petitioners argued that the county failed to take an exception to Goal Three, regarding the conditional use on the ID land, and a further exception to Goal Fourteen, regarding the EFU land. [FN399] LUBA sustained both assignments of error. [FN400] The local comprehensive plan required that any amendment to the plan needs to consider the relevant exception process, and the county argued that granting conditional use did not amend the plan nor necessitate the exception process. [FN401] LUBA disagreed, stating that allowing additional uses requires an amendment and the taking of an exception. [FN402] Further, the county was not excused from Goal Fourteen requirements because the proposal was an expansion of an existing use, rather than a new use. [FN403]

Because the new proposal signifies a change in the type or intensity of the use in an exception area, the

county must (1) make findings showing either that Goal 14 does not apply or the proposal complies with an existing Goal 14 exception; or (2) take a new Goal 14 exception. [FN404] ***493** In James v. Josephine County, [FN405] the county approved an application to rezone property from rural residential to rural industrial and to take an "irrevocably committed" exception to Goal Fourteen for a parking lot near the applicant's existing gas station. The petitioner challenged the findings of "irrevocably committed" based on a determination that the residential uses permitted by the existing zone were impracticable. [FN406] The county responded that the residential lots were too close to the freeway and that no recent residential development has taken place in that area. [FN407] LUBA agreed with petitioner, stating that the local government cannot take a committed exception because the permitted uses were "not ideal"; and, therefore, the parcels would be better suited to alternative uses. [FN408]

E. Municipal Incorporation

The urban-use-on-rural-land and the need-and-location-factor requirements are difficult enough to apply to expand existing urban areas. However, review of a decision allowing incorporation of a city on rural land presents unique questions regarding the relationship of a political decision on governance and the significant land use effects flowing from that political decision. Such was the case in the matters involving the City of Rajneeshpuram, which presented several decisional challenges to LUBA. The Rajneeshees were a religious cult from India that bought several thousand acres of land in central Oregon in 1981 and attempted to incorporate a city there.

Without the benefit of the Supreme Court's clarification of Goal Fourteen in 1000 Friends of Oregon v. LCDC (Curry Co.), [FN409] discussed above, LUBA quickly became aware of the issues and rose to the challenge. In the 1000 Friends of Oregon v. Wasco County [FN410] ***494** series of cases, petitioners challenged a 2-to-1 decision of a county governing body approving incorporation of the city. The petitioners argued that the county improperly determined that (1) Goal Three did not apply to this case, (2) there were insufficient findings as to population projections, (3) the pecuniary interests of the county judge [FN411] prejudiced the outcome of the hearing, and (4) Goal Fourteen prohibited the incorporation.

LUBA first determined that it lacked jurisdiction to review the application of the county's final order and prevent the first city council election because enforcement decisions are within the domain of the trial courts. [FN412] The Court of Appeals reversed LUBA, finding that incorporation is a "land use decision" under the applicable statutes and because of the magnitude of the potential land use impacts. [FN413] As to the substance of petitioner's arguments, even before the Supreme Court had spoken in the Curry County [FN414] decision, LUBA initially determined that incorporation would allow urban uses on rural lands. Such action was a per se violation of Goal Fourteen, and the county must take a Goal Two exception to Goal Fourteen. [FN415] Further, LUBA determined that Goal Three required that the county look beyond the town's boundaries to the entire farm or ranch to determine whether the land is agricultural. [FN416]

The Court of Appeals reversed and remanded this second LUBA decision, finding that the determination of a per se violation of Goal Fourteen impermissibly amended that goal. [FN417] Upon reconsideration, the Court of Appeals withdrew its former opinion and affirmed LUBA as modified. [FN418] The Court determined that, "Although the [urban use on rural land] requirement is not expressly stated in Goal Fourteen, LCDC has determined that the intent and ***495** purpose of the goal requires invocation of the exception process in this context." [FN419] Like a tennis match that seemed to go on with no end, the Supreme Court overturned the Court of Appeals, stating that an exception requirement for incorporation did amend the language of Goal Fourteen and was prohibited. [FN420] Preliminary findings on the Goal Fourteen factors are required; however, the goal is appropriately addressed when the UGB is adopted. [FN421] As for Goal Three, the Supreme Court found LUBA had erred by requiring that the county consider the entire ranch property because the impacts on adjacent farms were not raised below. [FN422] Finally, the Supreme Court revived the bias issue and remanded for LUBA to determine whether the county judge (i.e., the chair of the board of county commissioners) acted improperly, thereby prejudicing substantial rights. [FN423]

Upon its third consideration of these issues, LUBA held fast, remanding the county's decision as to Goal Three because the county failed to explain why, even if the land is overgrazed or of marginal quality, the difficulty in reclaiming the land for agricultural use precludes the reclamation effort. [FN424] Relying on an actual-proof-standard-of-finding bias, LUBA rejected petitioner's argument on that issue. [FN425] Once again the Court of Appeals disagreed with LUBA, upholding the county's determination that Goal Three did not apply because the incorporation area was not suitable for farm use. However, that Court found that the judge's financial involvement with the applicants disqualified his participation in the vote. [FN426] Only the bias issue was appealed, and the Supreme Court again reversed. [FN427] Rejecting the "appearance of fairness" rule, the Court weighed the federal due process factors and determined that they were on the low interest of the scale. Local government officers often serve "part-time and without pay, making their livings from the ordinary pursuits and private transactions of their communities." [FN428]

***496** Regardless of the outcome, LUBA proved itself in the Raj-neeshpuram controversy by deciding the matters on a timely basis and providing the appellate courts with a factual and analytical framework for their decisions. [FN429]

F. Urban Reserves

As illustrated in the above examples, the development of potentially urbanizable land has led to contentious battles as to the order in which land is added to a UGB. LCDC has authorized planning for eventual inclusion of land in a UGB through the creation of urban reserves by administrative rule. [FN430] These rules provide protection against any "pattern of development which would impede urbanization." [FN431] Once mandated in the most urban metropolitan areas, the urban reserve rules required that "urban reserve areas shall include an amount of land estimated to be at least a 10-year supply and no more than a 30-year supply." [FN432] Once designated for the reserves, the land continues to be zoned for rural uses, but the orderly transition to urban uses may require clustering and the preplatting of future lots or parcels. [FN433]

The only case to date involving urban reserves that has required LUBA's expertise is D.S. Parklane Dev., Inc. v. Metro Serv. Dist. [FN434] This was an extremely complex case. Metro had approved the designation of 18,579 acres as urban reserves, and eight appeals filed by twenty-one parties were subsequently consolidated into a single case. [FN435] The petitioners challenged the ordinance that designated certain lands as urban reserves. [FN436] LUBA agreed with the petitioners, finding that although Metro need not study all lands adjacent to the existing UGB the amount of land studied needs to equal or exceed the amount of land needed. [FN437] LUBA determined that a jurisdiction***497** cannot study such a small set of lands so as to thwart the priority scheme of the rule. [FN438]

Further, Metro failed to designate higher-priority-land exception areas, and parcels with lower-resource soil classifications before it designated parcels with higher-resource soil classifications. [FN439] If resource lands are to be designated as urban reserves, there must be an alternative-site analysis to assure that higher-priority lands cannot "reasonably accommodate" regional land needs, not that the resource lands are more easily, economically, and efficiently developable. [FN440]

Next, LUBA considered how Metro had properly considered the Goal Fourteen "locational" factors, as required by administrative rule. [FN441] LUBA disagreed with Metro's assertion that the location factors were properly considered through Metro's computer model simulations, stating that the focus of the location inquiry should be on why an area is suitable for inclusion in the reserve, rather than why an area is unsuitable. [FN442] LUBA determined that Metro had misapplied those factors. [FN443] For example, Metro placed too much emphasis on the cost and serviceability factors to determine suitability and erred by limiting its compatibility-with-nearby-rural-uses analysis only to those areas where farming was the dominant activity. [FN444] As a result, LUBA remanded the decision, and the Court of Appeals affirmed.

As with the planning process and natural resource goal areas, LUBA has rolled up its "institutional sleeves" and brought order to a chaotic world filled with unfamiliar actors, vague criteria, and conflicting interests. Largely in Oregon now, there are definite distinctions between urban and rural areas and uses. None of the participants has done more than LUBA to settle that law.

***498** V. Conclusion

As noted above, LUBA is but one of many participants in the Oregon land use system. It began as an experiment, with a four-year "sunset" provision in 1979. [FN445] At the end of that four-year period, the legislature determined that the experiment had worked sufficiently well to keep the agency. [FN446] While there have been efforts to restrict the jurisdiction of LUBA or to require that jurisdiction be exercised in certain ways, there has been no credible effort over the last 20 years to abolish the agency and return review of local land use decisions to the trial courts.

LUBA possesses only a delegated authority, except in the adoption of its internal administrative rules. The agency has no legislative authority to influence state land use policy; rather, much like the courts, only the authority to decide those cases presented to it. And, just like the courts, LUBA engages in a continuing dialogue with the legislature over the meaning of legislation. Its decisions may cause the legislature to react by changing legislation. However, unlike the courts, that dialogue is with both the legislature and LCDC, as both these entities have policymaking authority. Similarly, LUBA conducts a dialogue with the appellate courts as its decisions are reviewed and acted upon. [FN447] Comparing the number of cases brought each year to LUBA to those that are appealed from that agency, [FN448] it is apparent that LUBA has, and deserves the confidence of the regulated community. Moreover, LUBA's "batting average" [FN449] is extraordinarily***499** high, reflecting trust in its work by the appellate courts. [FN450] LCDC has continued to adopt rules to interpret the goals with the full expectation that LUBA will respect those interpretations and point out anomalies in the rules. There is thus a level of trust by LUBA's principal agency partner. And, with some exceptions, the legislature has continued to fund the agency, as well as be generally responsive to gubernatorial appointments to that body. Finally, there is no indication that the trial courts of Oregon desire to return to the thicket of land use, except for cases relating to enforcement.

At the beginning of this Article, four justifications for the use of an administrative law system were given. In the main portions of this Article, three contentious areas of land use law were examined to test LUBA's performance. These three areas (i.e., the planning process, natural resource protection, and urbanization) are the heart of the state's planning program. They have been the subjects of legislation and litigation, as well as goal and rulemaking. The policies created by the legislature or LCDC have often been vague or have anticipated the numerous cases in which their meanings were critical. It is in this mixture of abdication and lack of anticipation that administrative adjudication is critical. It is in the filling-in of the interstices of broad policy that the mettle of such adjudication is tested.

LUBA certainly has acquired the institutional expertise to consider and dispose of cases that come before it, at least to the extent its adjudicative personnel stay with the Board. The very repetition by which cases come before the agency involving the same statutes, goals, or administrative regulations itself gives the agency an advantage in resolving disputes with an air of authority.

Similarly, the very fact of being the primary and principal agency to determine the meaning of policy, as well as the most frequent adjudicator of that policy, brings credibility to LUBA in the land use field. LUBA frequently acts as the "filter" for the Court of Appeals by reviewing the facts, framing the issues, and providing reasons for its determination. [FN451] Here again the institutional memory ***500** and repetition of analysis and decisionmaking serves both LUBA and the land use system well.

The third justification for LUBA is that of efficiency. Certainly, LUBA is more efficient than the trial court system it replaced. That former system involved judges who may not see a land use case for years and who are apt to

be impatient and unfamiliar with land use law. Moreover, the use of the trial courts for resolution of land use disputes often involves competition for judicial resources with criminal cases, which need quick resolution and frequently occupy first place on the judicial docket. [FN452] Further, the time periods given LUBA to decide cases [FN453] have operated as a remedy for the difficulties of the previous system.

Finally, although a LUBA appeal may be costly to some, [FN454] these costs actually are much less than one would expect to pay in a trial court, not to mention the delay in resolution. Moreover, it is also possible to act as a pro se litigant at LUBA. Unquestionably, litigants spend much less money under the LUBA process.

LUBA has not avoided its share of personnel difficulties, nor has it been entirely immune from efforts to influence the outcome of particular cases. As an agency, however, LUBA has done rather well in bringing case-by-case order out of policy chaos. As an investment by the state of Oregon, LUBA has paid rich dividends in terms of efficiency. As an institution, LUBA has done well in applying the expertise in deciding cases well and providing an initial analysis for those who wish to have appeals considered by the appellate courts. With LUBA, there is much to celebrate in these first 20 years and much for other states to emulate.

***501** APPENDIX

Limited to final opinions reviewed on appeal and including only those cases that the supreme court took review, this chart illustrates that LUBA adjudicates and concludes most of the land use controversies in Oregon.

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This chart shows LUBA's affirmed and reversed ratio by year. Notice that in the last ten years LUBA has maintained an almost 80% affirmed ratio.

[FNa1]. Partner, Preston Gates & Ellis LLP, Portland, Oregon; M.A. (Political Thought), University of Durham, 1999; Diploma in Law, University College, Oxford, 1984; LL.M., University College, London, 1978; Urban Studies Certificate, Portland State University, 1974; M.A. (History), Portland State University, 1973; J.D., Willamette University, 1969; B.A., St. John's University (N.Y.), 1966. The author gratefully acknowledges the invaluable contribution of Carrie Richter, J.D., Northwestern College of Law, Lewis and Clark College, 2000, in the preparation of this Article.

[FN1]. Or. Rev. Stat. §§ 197.805-.855 (1999).

[FN2]. See, e.g., Edward J. Sullivan, Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100, 77 Or. L. Rev. (1999); Edward J. Sullivan, The Legal Evolution of the Oregon Planning System, in Planning the Oregon Way (Carl Abbott et al. eds., 1994); Edward J. Sullivan, Oregon Blazes a Trail, in State and Regional Comprehensive Planning (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

[FN3]. Fasano v. Board of County Comm'rs, 507 P.2d 23, 27 (Or. 1973) (characterizing most decisions affecting only individual parcels of land as “quasi-judicial” so that the scope of judicial review increased and threatened to overwhelm the courts and cause the state legislature to examine nonjudicial alternatives).

[FN4]. Or. Rev. Stat. § 197.015(10) defines “land use decision” to include:

(A)A final decision of determination made by a local government or special district that concerns the adoption, amendment or application of:

(i) The goals;

(ii) A comprehensive plan provision;

(iii) A land use regulation;

(iv) A new land use regulation.

(B) A final decision or determination of a state agency other than the commission with respect to which the

agency is required to apply the goals.
Id.
[FN5]. See id. § 197.180(1) (state agencies must comply with the planning goals).

[FN6]. See id. § 197.175(1)-(2) (local governments must comply with the planning goals).

[FN7]. See id. §§ 197.225-.245 (governing adoption, amendment, and repeal of the goals).

[FN8]. See id. § 197.040(1)(b)-(1)(c)(A) (governing rulemaking).

[FN9]. For a list of the goals, see OAR 660-015-0000(1)-(14) (stating Goals One through Fourteen), OAR 660-015-0005 (stating Goal Fifteen), and OAR 660-015-0010(1)-(4) (stating Goals Sixteen through Nineteen).

[FN10]. Or. Admin. R. 550-015-0000(2) (Goal Two).

[FN11]. Id. 660-015-0000(3) (Goal Three).

[FN12]. Id. 660-015-0000(4) (Goal Four).

[FN13]. Id. 660-015-0000(8) (Goal Eight).

[FN14]. Id. 660-015-0000(14) (Goal Fourteen).

[FN15]. Or. Rev. Stat. § 197.180 (state agencies must carry out planning goals); see also id. § 197.250 (1999) (special districts must carry out planning goals).

[FN16]. See id. § 197.175(2)(c)-(d).

[FN17]. See id. § 197.175(2)(c).

[FN18]. See id. §§ 197.015(1), 251. Acknowledgment is an important landmark for a local government: (1) not only do the goals drop out as review criteria for land use decisions, (2) those things that LCDC "missed" in acknowledgment cannot be revisited until periodic review. See Byrd v. Stringer, 666 P.2d 1332, 1336 (Or. 1995); Urquhart v. Lane Council of Governments, 721 P.2d 870, 873 (Or. Ct. App. 1986).

[FN19]. See Or. Rev. Stat. § 197.825(1). See also id. § 197.835(6)-(7) (LUBA is specifically authorized to determine whether an amendment to an acknowledged comprehensive plan or land use regulation complies with the goals).

[FN20]. See, e.g., id. §§ 215.700-.780. See infra note 96 and accompanying text for an excellent example, in which the legislature undertook a compromise on rural land uses that allowed for stricter minimum lot sizes in exchange for more liberal "lot-of-record" allowances so that dwellings could be constructed on undersized rural parcels.

[FN21]. See id. §§ 215.213, .283.

[FN22]. See id. §§ 197.850-.855 (review of LUBA final orders); id. § 197.650 (review of LCDC final orders).

[FN23]. See id. § 197.850(8).

[FN24]. See id. § 197.030.

[FN25]. See supra notes 15-18.

[FN26]. See Lane County v. LCDC, 942 P.2d 278, 283-85 (Or. 1997) (LCDC had plenary rulemaking power in all cases in which the rule did not directly conflict with state legislation); see also Bruggere v. Clackamas County, 37 Or. LUBA 571, aff'd, 7 P.3d 634 (upholding LCDC's rulemaking authority regarding “lots of record”).

[FN27]. See Or. Rev. Stat. § 197.251.

[FN28]. See id. § 197.175(2)(c).

[FN29]. See id. § 197.629(1).

[FN30]. See id. §§ 197.628-.636; see also Or. Admin. R. 660-025-0010-0220 (1999).

[FN31]. Or. Rev. Stat. § 197.636(2).

[FN32]. Courts of general jurisdiction [hereinafter referred to as “trial courts”].

[FN33]. Or. Rev. Stat. §197.825(3).

[FN34]. See Edward J. Sullivan, From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon, 10 Willamette L. Rev. 358 (1974).

[FN35]. Or. Rev. Stat. §§ 197.178, .633(1)-(4), .644(3)(b).

[FN36]. See id. §§ 197.090(2)(a), .610.

[FN37]. See id. §§ 197.628, .629.

[FN38]. See id. §§ 197.636, .644.

[FN39]. See, e.g., How to Litigate a Land Use Case (Larry J. Smith ed., 2000).

[FN40]. See 1 Kenneth Culp Davis & Richard J. Pierce, Administrative Law Treatise 90-91 (1994 & Supp. 1999) [hereinafter Davis & Pierce, Administrative Law].

[FN41]. Id.

[FN42]. See id. at 90.

[FN43]. See id. at 90-91.

[FN44]. See Or. Rev. Stat. § 197.830(14).

[FN45]. Davis & Pierce, Administrative Law, supra note 40, at 91.

[FN46]. From 1990 to 1999, the following number of appeals were filed with LUBA:
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The above information was supplied from the files of the Oregon Land Use Board of Appeals.

[FN47]. See Or. Rev. Stat. § 197.830.

[FN48]. Id. § 197.825(1).

[FN49]. Id. § 197.015(10).

[FN50]. However, trial courts retain jurisdiction for enforcement and other relief. See supra note 33 and accompanying text.

[FN51]. See Roloff v. City of Milton-Freewater, 27 Or. LUBA 80 (1994). This decision followed the rationale of the Oregon Supreme Court in Petersen v. Klamath Falls, 566 P.2d 1193 (Or. 1977).

[FN52]. See Komning v. Grant County, 20 Or. LUBA 481, 492 (1990); see also Hollywood Neighborhood Ass'n v. City of Portland, 22 Or. LUBA 789 (1991) (order on motion to dismiss). However, determining finality may be difficult. See, e.g., Weeks v. City of Tillamook, 24 Or. LUBA 155 (1992), rev'd, 832 P.2d 1246 (Or. Ct. App. 1992).

[FN53]. LUBA has been upheld in a number of cases on jurisdiction. See, e.g., Mar-Dene Corp. v. City of Woodburn, 944 P.2d 976 (Or. Ct. App. 1997); Terraces Condominium Assn. v. Portland, 823 P.2d 1004 (Or. Ct. App. 1992); Heritage Enterprises v. City of Corvallis, 693 P.2d 651 (Or. Ct. App.), aff'd, 708 P.2d 601 (Or. 1985); 1000 Friends of Oregon v. Wasco County Court (Wasco County I), 679 P.2d 320 (Or. Ct. App. 1984); City of Pendleton v. Kerns, 650 P.2d 101, aff'd, 653 P.2d 992 (Or. 1982).

However, LUBA has also been incorrect on a number of occasions regarding jurisdiction. See, e.g., Wicks-Snodgrass v. City of Reedsport, 939 P.2d 625 (Or. Ct. App. 1997); Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994); Central Eastside Indus. Council v. City of Portland, 875 P.2d 482 (Or. Ct. App. 1994); Southwood Homeowners Ass'n v. City Council of Philomath, 806 P.2d 192 (Or. Ct. App. 1991); Doughton v. Douglas County (Doughton I), 728 P.2d 887 (Or. Ct. App. 1987); Westside Neighborhood Quality Project v. School Dist . 4J, 647 P.2d 962 (Or. Ct. App. 1982); Ochoco Const., Inc. v. DLCD, 641 P.2d 49 (Or. Ct. App. 1987).

[FN54]. See, e.g., Campbell v. Board of County Comm'rs of Multnomah County, 813 P.2d 1074 (Or. Ct. App. 1991); Sauvie Island Agric. League v. GGS (Hawaii), Inc ., 810 P.2d 856 (Or. Ct. App. 1991); Mehring v. Arpke, 672 P.2d 382 (Or. Ct. App. 1984).

[FN55]. Or. Rev. Stat. §§ 197.015(5), .175(1)-(2); see also Baker v. City of Milwaukie, 533 P.2d 772 (Or. 1975).

[FN56]. The planning portions of Goal Two state:

To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions. The plans shall be the basis of specific implementation measures. These measures shall be consistent with and adequate to carry out the plans ....

Or. Admin. R. 660-015-0000(2).

[FN57]. Or. Rev. Stat. §§ 197.610-.625.

[FN58]. See id. § 183.482(8)(b)(B). Whether this provision applies to acknowledged land use decisions is not yet decided.

[FN59]. See id. Both the work program and work task phases of the periodic review process are objection-based.

[FN60]. Although ORS 197.250 requires cities and counties to revise their plans and ordinances to comply with the goals within one year of their adoption, the last plans were acknowledged more than fifteen years from the adoption of the goals in 1974-75.

[FN61]. See Williams v. Clackamas County, 25 Or. LUBA 812 (1993) (order on motion to dismiss); Torgeson v. Clackamas County, 31 Or. LUBA 554 (1996) (order on motion to dismiss).

[FN62]. In two cases, LUBA found internal inconsistency in the plan between the population figures and other portions of the plan based on those figures: D.S. Parklane Dev., Inc. v. Metro Serv. Dist., 35 Or. LUBA 516 (1999), aff'd, 994 P.2d 1205 (Or. Ct. App. 2000); and Concerned Citizens of the Upper Rogue v. Jackson County, 33 Or. LUBA 70 (1997). In two other cases, LUBA sustained DLCD challenges to county population calculations: DLCD v. Douglas County, 37 Or. LUBA 129 (1999); and DLCD v. Douglas County, 33 Or. LUBA 216 (1997).

[FN63]. DLCD may participate in LUBA proceedings as a litigant or by filing a "state agency brief" under OAR 661-010-0038.

[FN64]. Neighbors for Livability v. City of Beaverton, 37 Or. LUBA 408 (1999), rev'd, 4 P.3d 765 (2000); Marcott Holdings, Inc. v. City of Tigard, 30 Or. LUBA 101 (1995); McInnis v. City of Portland, 25 Or. LUBA 376 (1993).

[FN65]. See Or. Rev. Stat. §§ 197.763(1), .835(3), (4).

[FN66]. See id. § 197.763.

[FN67]. Or. Rev. Stat. § 197.763 states in pertinent part:

(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

(2) [governs the notice boundaries for nearby residents].

(3) The notice provided by the jurisdiction shall:

(a) Explain the nature of the application and the proposed use or uses which could be authorized;

(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

(c) Set forth the street address or other easily understood geographical reference to the subject property;

(d) State the date, time and location of the hearing;

(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

(f) Be mailed at least:

(A) Twenty days before the evidentiary hearing; or

(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;

(g) Include the name of a local government representative to contact and the telephone number where additional information may be obtained;

(h) State that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

(i) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and

(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.

(4)(a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public.

Id.

[FN68]. See id. §§ 197.402-.423, 227.160-.180.

[FN69]. Oregon Revised Statute 197.047 was a notice statute passed by the voters at the November 1998 general election that requires cities and counties to give notice of certain rezonings. As of the date of the writing of this Article, the statute had not been substantively tested. Another notice provision that has been tested is that for exceptions under ORS 197.732(5). Two cases involving the notice for an exception have treated these requirements as procedural in nature, requiring the showing of prejudice to the substantial rights of the petitioner: Middleton v. Josephine County, 31 Or. LUBA 423 (1996); and Leonard v. Union County, 24 Or. LUBA 362 (1992).

[FN70]. See Schwerdt v. City of Corvallis, 987 P.2d 1243 (Or. Ct. App. 1999); Hugo v. Columbia County, 967 P.2d 895 (Or. Ct. App. 1998); Nicholson v. Clatsop County, 941 P.2d 566 (Or. Ct. App. 1997); Leathers v. Marion County, 310 Or. LUBA 220, aff'd, 925 P.2d 148 (Or. Ct. App. 1996). But see Horizon Constr. Co. v. City of Newberg, 834 P.2d 523 (Or. Ct. App. 1990).

[FN71]. See Horizon Constr. Co., 834 P.2d at 523.

[FN72]. See Mulford v. City of Lakeview, 36 Or. LUBA 715 (1999); Terra v. Newport, 36 Or. LUBA 582 (1999). When LUBA is satisfied, however, that there is no opportunity to raise the issue, it will not adhere to the objection requirement. See, e.g., Mazeski v. Wasco County, 26 Or. LUBA 629 (1994); Angel v. City of Portland, 20 Or. LUBA 541 (1991).

[FN73]. See Or. Rev. Stat. § 197.835(9)(a)(B). See also Muller v. Polk County, 16 Or. LUBA 771, 774-75 (1988).

[FN74]. McCoy v. Linn County, 752 P.2d 323 (Or. Ct. App. 1988).

[FN75]. 836 P.2d 710 (Or. 1992).

[FN76]. Or. Rev. Stat. § 197.829 states in part:

(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.

(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.

Id.

[FN77]. See Morse Bros. v. Columbia County, 37 Or. LUBA 85 (1999) (citing Forster v. Polk County, 839 P.2d 241 (Or. Ct. App. 1992)); R/C Pilots Ass'n v. Marion County, 33 Or. LUBA 532 (1997) (citing Von Lubken v. Hood River County, 803 P.2d 750 (Or. Ct. App. 1990), adhered to on recon., 806 P.2d 727, rev. denied, 811 P.2d 144 (Or. 1991)); City of Sandy v. Clackamas County, 28 Or. LUBA 316, 320 (1994). However, LUBA has echoed a concern over Clark raised by the Court of Appeals to the effect that such a decision would make adherence to state law a local option. See

Zippel v. Josephine County, 27 Or. LUBA 11, 18 n.6 (1994) (quoting Cope v. City of Cannon Beach, 836 P.2d 775 (Or. 1992)).

[FN78]. Highland Condo. Ass'n v. City of Eugene, 37 Or. LUBA 13 (1999) (citing Gage v. City of Portland, 877 P.2d 1187 (Or. 1994); Beveled Edge Mach., Inc. v. Dallas, 28 Or. LUBA 790 (1995)).

[FN79]. See, e.g., Marquam Farms, Inc. v. Multnomah County, 32 Or. LUBA 240 (1996), aff'd, 936 P.2d 990 (Or. Ct. App. 1997); Goose Hollow Foothills League v. City of Portland, 24 Or. LUBA 69, aff'd, 843 P.2d 992 (Or. Ct. App. 1992); McKy v. Josephine County, 33 Or. LUBA 687 (1997).

[FN80]. 31 Or. LUBA 131 (1996).

[FN81]. See id. at 134.

[FN82]. See id. at 137.

[FN83]. deBardelaben v. Tillamook County, 922 P.2d 683 (Or. Ct. App. 1996).

[FN84]. See supra note 77 and accompanying text.

[FN85]. See Central Eastside Indus. Council v. City of Portland, 875 P.2d 482 (Or. Ct. App. 1994); Casey v. City of Dayton, 5 Or. LUBA 96 (1982).

[FN86]. See Tylka v. Clackamas County, 22 Or. LUBA 166 (1991) (citing Fifth Ave. Corp. v. Washington County, 581 P.2d 50 (Or. 1978)). See also Komning v. Grant County, 20 Or. LUBA 481, 492 (1994).

[FN87]. According to the Oregon Blue Book, the state produces more than $1.77 billion in agricultural products annually, including $492 million in greenhouse products, $363 million in cattle, $341 million in hay, $333 million in grass seed, and $238 million in wheat. Oregon Secretary of State, Oregon Blue Book 181-82 (1999-2000).

[FN88]. Goal Three contains priority soil classifications for inclusion in EFU zones; however, the legislative impetus for preservation of a maximum amount of farmland was the policy statement codified as ORS 215.243, see infra note 93, particularly subsection (2). LUBA has been particularly watchful over the definition of "farmland." See, e.g., Kaye/DLCD v. Marion County, 23 Or. LUBA 452 (1992); DLCD v. Curry County, 888 P.2d 592 (Or. 1995); DLCD v. Coos County, 24 Or. LUBA 137, aff'd in part and remanded in part, 844 P.2d 907 (Or. Ct. App. 1993), on remand, 25 Or. LUBA 643 (1993).

[FN89]. See Or. Rev. Stat. §§ 215.213, .283; see also Edward J. Sullivan, The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use, 9 Willamette L. Rev. 1 (1973).

[FN90]. See Sullivan, supra note 89, at 2.

[FN91]. Or. Rev. Stat. § 215.263.

[FN92]. See id. § 215.243. This section states in part:

The Legislative Assembly finds and declares that:

(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones.

Id.

[FN93]. See id. §§ 215.213(3), .284.

[FN94]. These sections provide:

(1) A use allowed under Or. Rev. Stat. §§ 215.213 (2) or 215.283 (2) may be approved only where the local governing body or its designee finds that the use will not:

(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

(2) An applicant for a use allowed under Or. Rev. Stat. §§ 215.213(2) or 215.283(2) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective.

Id. § 215.296(1)-(2). These statutes were originally part of a legislative experiment known as "marginal lands," in which counties voluntarily entering the program placed high-quality farmland in zoning classifications in which few nonfarm uses would be permitted, but allowed more flexibility in lower-quality farmland. See 1983 Or. Laws ch. 826, § 3 (codified at Or. Rev. Stat. § 215.213(3)(a)).

[FN95]. See, e.g., Schellenberg v. Polk County, 21 Or. LUBA 507 (1991); Zippel v. Josephine County, 27 Or. LUBA 11, aff'd, 882 P.2d 1114 (Or. Ct. App. 1994).

[FN96]. This acronym stands for "Big Land Use Bills," a term akin to the legislative compromises crafted by free and slave states in the days before the American Civil War. A "BLUB" would make changes that would satisfy, and appall, state legislators, but the balance would be an acceptable one.

[FN97]. See 1993 Or. Laws ch. 215.

[FN98]. Or. Rev. Stat. § 215.760 provides:

(1) Except as provided in subsection (2) of this section, the following minimum lot or parcel sizes apply to all counties:

(a) For land zoned for exclusive farm use and not designated rangeland, at least 80 acres;

(b) For land zoned for exclusive farm use and designated rangeland, at least 160 acres; and

(c) For land designated forestland, at least 80 acres.

Id.

[FN99]. See id. § 197.646.

[FN100]. See Clark v. Jackson County, 836 P.2d 710 (Or. 1992).

[FN101]. This standard, established in McCoy v. Linn County, 752 P.2d 323 (Or. Ct. App. 1988), has been partially overruled (at least with respect to some governing body interpretations) by Clark v. Jackson County, 836 P.2d 7109 (Or. 1992).

[FN102]. See Clark, 836 P.2d 710.

[FN103]. See, e.g., Williams v. Wasco County, 18 Or. LUBA 61 (1989); Younger v. Jackson County, 32 Or. LUBA 177 (1996).

[FN104]. See, e.g., Donnelly v. Curry County, 33 Or. LUBA 624 (1997); Forster v. Polk County, 22 Or. LUBA 380 (1991); McCoy, 752 P.2d at 323.

[FN105]. See Or. Rev. Stat. § 197.829(1).

[FN106]. Or. Admin. R. 660-015-0000(3).

[FN107]. Or. Rev. Stat. § 215.203.

[FN108]. See id. § 215.203(2)(a).

[FN109]. Id. §§ 215.213(1)(g), .283(1)(f).

[FN110]. See id. §§ 215.213(3)(b), .284(3)(b).

[FN111]. See id. §§ 215.700-.710.

[FN112]. See id.

[FN113]. “Martini farmers” are commonly known as purchasers whose primary goal with development is not agricultural use.

[FN114]. 18 Or. LUBA 853 (1990).

[FN115]. See id.

[FN116]. See id. at 854.

[FN117]. Or. Rev. Stat. §§ 215.283(1)(e), .416(9).

[FN118]. 18 Or. LUBA 853 (1990).

[FN119]. See note 48 and accompanying text.

[FN120]. 728 P.2d 887 (Or. Ct. App. 1987).

[FN121]. See id. at 890.

[FN122]. 15 Or. LUBA 576 (1987).

[FN123]. Id. at 578.

[FN124]. Id. at 582. Following Doughton I, LUBA decided a number of cases on the nature of "farm use," particularly in connection with requests for farm dwellings. See Matteo v. Polk County (Matteo I), 11 Or. LUBA 259, aff'd, 687 P.2d 820 (Or. Ct. App. 1984); Matteo v. Polk County (Matteo II), 14 Or. LUBA 67 (1985). Both of these cases denied farm dwellings because it had not been shown that the dwelling would be used in conjunction with an existing farming operation.

LUBA's decisions on these matters were given policy direction by the adoption of certain administrative rules relating to farmland by LCDC. See Or. Admin. R. 660-005-0030(4) (1986) (repealed in 1997) (referring to and including the rationale of the two Matteo cases). This approach was ultimately accepted in toto by the Court of Appeals in Newcomer v. Clackamas County (Newcomer I), 16 Or. LUBA 564, rev'd., 758 P.2d 369 (Newcomer II), aff'd as modified on reconsideration, 764 P.2d 927 (Newcomer III) (1988). See also Forster v. Polk County, 22 Or. LUBA 380 (1991).

[FN125]. Or. Rev. Stat. § 215.283(1)(f).

[FN126]. Id. § 215.203(2)(a).

[FN127]. 11 Or. LUBA 259 (1984).

[FN128]. See id. at 261.

[FN129]. See Matteo v. Polk County (Matteo II), 14 Or. LUBA 67 (1985).

[FN130]. See id. (elaborating on the need to have an existing farm use before a dwelling could be granted in conjunction with that use).

[FN131]. See supra note 124 and accompanying text.

[FN132]. Id.

[FN133]. 758 P.2d 369 (Or. Ct. App. 1983).

[FN134]. Id. at 373.

[FN135]. 764 P.2d 927 (Or. Ct. App. 1988).

[FN136]. See former Or. Admin. R. 660-005-0030(4) (1986) (repealed 1992).

[FN137]. See Newcomer III, 18 Or. LUBA at 7.

[FN138]. See former Or. Admin. R. 660-005-0030 (1986). These particular rules were repealed in 1992, when they were superseded by Or. Admin. R. 660-033-0135 (1999).

[FN139]. See Or. Admin. R. ch. 660, div. 33.

[FN140]. Miles v. Clackamas County, 18 Or. LUBA 428 (1989).

[FN141]. 22 Or. LUBA 380 (1991). This same permit was revisited by the Board of Commissioners on remand in

Forster v. Polk County (Forster IV), 24 Or LUBA 476 (1993), with the same result. Both cases illustrate the rigor with which LUBA weighs farm dwelling permit applications. See also supra note 124 .

[FN142]. 22 Or. LUBA 380, 381.

[FN143]. 839 P.2d 241, 244 (Or. Ct. App. 1992).

[FN144]. 23 Or. LUBA 420 (1992).

[FN145]. 24 Or. LUBA 476 (1993).

[FN146]. See id. at 482.

[FN147]. Id.

[FN148]. 23 Or. LUBA 452 (1992).

[FN149]. See id. at 455-456.

[FN150]. See Or. Admin. R. 660-005-0010(1).

[FN151]. See id. 660-005-0005(1).

[FN152]. See id. 660-005-0010(3); see also Kaye, 23 Or. LUBA at 457.

[FN153]. See Kaye, 23 Or. LUBA at 461.

[FN154]. See Smith v. Clackamas County, 19 Or. LUBA 171 (1990).

[FN155]. See Or. Rev. Stat. § 215.263(4).

[FN156]. See Smith v. Clackamas County, 19 Or. LUBA 171, 179 (1990).

[FN157]. 1 Or. LUBA 339 (1980).

[FN158]. See id.

[FN159]. See id. at 345.

[FN160]. See id. at 346.

[FN161]. 13 Or. LUBA 146 (1985). This was the third case of that name to come before LUBA. In Goracke v. Benton County, 12 Or. LUBA 128, 137 (1984), LUBA stated:

[T]he creation of lots smaller than entire commercial farm units in the area is permissible where, as here, (1) the area's commercial agricultural enterprise consists of farm units made up of noncontiguous parcels of diverse size, rather than single, large tracts and (2) given the nature of the agricultural enterprise, the proposed lots are of sufficient size to be profitably farmed as parts of larger operations. However, if there is credible evidence in such cases that the size of the proposed lots is detrimental to commercial agriculture in the area, the county must demonstrate that the

benefits to the area's agricultural economy outweigh the negative impacts. See Or. Admin. R. 660-005-0020(1). The comparative benefits to the area's commercial agricultural enterprise resulting from denial as well as from approval of the proposed land division should also be considered in the balancing analysis.
Id.
[FN162]. See Goracke v. Benton County (Goracke II), 13 Or. LUBA 146, 147 (1985).

[FN163]. See id. at 151. The rule cited was OAR 660-005-0020, now superseded, which imposed a rigorous test for the approval of land divisions on farmland. However, LUBA has from the beginning of its existence dealt with land divisions of farmland and upheld broad state policy for preservation of farmland in ORS 215.243. See also Kenagy v. Benton County, 6 Or. LUBA 93 (1982); Sane Orderly Dev. v. Douglas County, 2 Or. LUBA 196 (1980); Thede v. Polk County, 1 Or. LUBA 339 (1980).

[FN164]. LUBA added:
Evidence that other crops are more profitable than crops presently grown does not show a land division is beneficial to the agricultural economy. The result of the division is to remove land devoted to grass seed and grain crops and divert it to a new crop. Less acreage is then available for use in the existing grass seed and grain enterprise. A farmer seeking to continue a grass seed and grain enterprise utilizing the remaining 40 acres of the 80-acre parcel will be required to expend effort to achieve a smaller return because of a smaller crop. Also, should the filbert enterprise for some reason not be initiated or should it fail, the existing commercial agricultural enterprise suffers from a land division which is harmful to grass seed and grain farming."
Goracke II, 13 Or. LUBA at 152.
[FN165]. See Or. Rev. Stat. § 215.284; Or. Admin. R. 660-033-0130(1), (3), and (4). Oregon Administrative Rules 660-005-0025 and -0030, which provided parameters up until 1992, are no longer effective.

[FN166]. Or. Rev. Stat. § 215.284(3)(b). This standard is derived from Rutherford v. Armstrong, 572 P.2d 1331 (Or. Ct. App. 1977). The "generally unsuitable" standard is very different from those standards that attempt to locate nonfarm uses so as not to affect nearby farm uses in the area.

[FN167]. 17 Or. LUBA 1234 (1989).

[FN168]. See id. at 1235-36 .

[FN169]. See id. at 1237.

[FN170]. Id. at 1244-46. LUBA constructed an analysis about the interpretation of "stability of the overall land use pattern of the area" as follows:
... a three step inquiry in deciding whether a nonfarm dwelling will materially alter the overall land use pattern of the area. First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. In the county's determination of the uses occurring in the selected area, it may examine lot or parcel sizes. However, area lot or parcel sizes are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels. It is conceivable that an entire area may be wholly devoted to farm uses notwithstanding that area parcel sizes are relatively small. Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area.
Id. at 1245-46. This construct has served LUBA and the public well because it articulates the standards by which compliance with this broad phrase will be judged under the current administrative rule, OAR 660-033-0130(4)(a)(D).
[FN171]. See Sweeten, 17 Or. LUBA at 1246.

[FN172]. In 1993, OAR 660-005-0005 through 660-005-0020 were repealed and replaced with, among other things, the 80-acre minimum.

[FN173]. 32 Or. LUBA 40 (1996).

[FN174]. See Or. Admin. R. 660-005-0015(6)(c) (1998).

[FN175]. See id. 660-005-0015(6)(b).

[FN176]. See Still, 32 Or. LUBA at 48.

[FN177]. See Or. Admin. R. 660-033-0130(3)(c)(iii).

[FN178]. See Friends of Linn County v. Linn County, 37 Or. LUBA 280 (1999).

[FN179]. 18 Or. LUBA 71 (1989), aff'd, 834 P.2d 482, aff'd and modified, 841 P.2d 651 (Or. Ct. App. 1993). This was a "marginal lands" case in which special regulations are applicable only to two counties in the state (Washington and Lane) under now-repealed statutory provisions. The law allows these two counties to have a different land use regime than other counties. See supra note 93 .

[FN180]. See McKay Creek Valley Ass'n, 18 Or. LUBA at 76.

[FN181]. Id.

[FN182]. See McKay Creek Valley Ass'n v. Washington County, 834 P.2d 482, 484-85 (Or. Ct. App. 1992).

[FN183]. Id. As mentioned in McKay Creek Valley Ass'n, 18 Or. LUBA at 71, this case is of limited value because it is precedent for only two counties. However, it does demonstrate the fidelity of LUBA to state agricultural lands policy. For the same approach to non-"marginal lands" counties, see supra note 124 and accompanying text.

[FN184]. J & D Fertilizer v. Clackamas County, 20 Or. LUBA 44, aff'd, 803 P.2d 280 (Or. Ct. App. 1990).

[FN185]. Best Buy in Town, Inc. v. Washington County, 35 Or. LUBA 446 (1999).

[FN186]. See Alliance for Responsible Land Use v. Deschutes County, 37 Or. LUBA 215 (1999).

[FN187]. 33 Or. LUBA 711, aff'd, 838 P.2d 1103 (Or. Ct. App. 1998), rev. denied, 971 P.2d 412 (Or. 1998).

[FN188]. See id. at 712 .

[FN189]. See Or Rev. Stat. § 215.780 (1999); see also Dorvinen, 33 Or. LUBA at 714.

[FN190]. 33 Or. LUBA at 717.

[FN191]. 957 P.2d at 182 (Or. Ct. App.), rev. denied, 971 P.2d 412 (1998).

[FN192]. See id.

[FN193]. 37 Or. LUBA 215 (1999) .

[FN194]. See id. at 218 .

[FN195]. Or. Rev. Stat. § 215.253(3).

[FN196]. See id. § 215.263(2).

[FN197]. See Alliance for Responsible Land Use, 37 Or. LUBA, at 223.

[FN198]. See id.

[FN199]. Alliance for Responsible Land Use v. Deschutes County, 995 P.2d 1227 (2000).

[FN200]. These cases consider "farm use" in the context of nonconforming use permits on Goal Three agricultural land, rather than "farm use," as it is a required prerequisite for nonfarm dwellings. Although interpreted by the local zoning code, the term as it is set out in ORS 215.213(2)(c) and 215.283(2)(a) is "commercial activities that are in conjunction with farm use."

[FN201]. 33 Or. LUBA 412 (1997), rev'd., 950 P.2d 368 (Or. Ct. App. 1997); 34 Or. LUBA 634 (1998), aff'd sub nom., 972 P.2d 1229 (Or. Ct. App. 1998).

[FN202]. Id. at 409.

[FN203]. See City of Sandy v. Clackamas County, 28 Or. LUBA 316, 319 (1994). However, in Brentmar v. Jackson County, 900 P.2d 1030 (Or. 1995), the Supreme Court limited county regulation of those uses listed in ORS 215.213(1) or 215.283(1), based on the legislative history of that provision. Yet in Lane County v. LCDC, 942 P.2d 278 (Or. 1997), that court also ruled that LCDC, by goal or administrative rule, could impose greater standards on such uses.

[FN204]. See Lung v. Marion County, 21 Or. LUBA 302 (1991).

[FN205]. See e.g., Chauncey v. Multnomah County, 23 Or. LUBA 599 (1992); Best Buy in Town, Inc. v. Washington County, 35 Or. LUBA 446 (1999). However, in Craven v. Jackson County, 16 Or. LUBA 808 (1988), aff'd, 764 P.2d 931 (Or. Ct. App. 1988), aff'd, 779 P.2d 1011 (Or. 1989), LUBA did find a commercial sales area was sufficiently related to a vineyard so as to find it a permissible "commercial activity in conjunction with farm use."

[FN206]. 3 Or. LUBA 101 (1981).

[FN207]. See id. at 107-08 .

[FN208]. See Valley & Siletz R.R. v. Laudahl, 642 P.2d 337 (Or. Ct. App. 1982), aff'd, 681 P.2d 109 (Or. 1984).

[FN209]. See Laudahl, 681 P.2d 109 (Or. 1984).

[FN210]. See id. at 111.

[FN211]. See id. at 114.

[FN212]. 28 Or. LUBA 316.

[FN213]. See id. at 317-18.

[FN214]. See id. at 322.

[FN215]. Or. Admin. R. 660-006-0015(1).

[FN216]. See id. 660-006-0010, -0015(1).

[FN217]. Or. Rev. Stat. § 527.630.

[FN218]. Or. Admin. R. 660-006-0025 (adopted in response to 1000 Friends of Oregon v. LCDC (Lane County), 752 P.2d 271 (Or. 1988)). See infra note 248 and accompanying text .

[FN219]. See Or. Admin. R. 660-006-0026 (1990).

[FN220]. See id.; see also id. 660-006-0027. The statute does not make a distinction between forest and nonforest dwellings. LUBA has based its review in this context on the "necessary and accessory" standard. See supra note 248 and accompanying text .

[FN221]. Or. Admin. R. 660-006-0025(1)(d) (1990). From the beginning, LUBA interpreted even the less protective Goal Four (1974) so as to limit or prohibit nonforest uses on forest lands. See, e.g., Lamb v. Lane County, 7 Or. LUBA 137 (1983); SEPA v. Washington County, 4 Or. LUBA 236 (1981); 1000 Friends of Oregon v. Marion County, 1 Or. LUBA 33 (1980).

[FN222]. See Or. Rev. Stat. §§ 215.720-.750.

[FN223]. Id.

[FN224]. See Or. Admin. R. 660-006-0025(1)(e).

[FN225]. See id. 660-006-0025(3)(j), (n).

[FN226]. See id. 660-006-0026(1)-(2).

[FN227]. 25 Or. LUBA 729, 732 (1993).

[FN228]. See id. at 732.

[FN229]. Id.

[FN230]. See id. at 737.

[FN231]. 32 Or. LUBA 430 (1997).

[FN232]. See id. at 438.

[FN233]. See id. at 439.

[FN234]. 31 Or. LUBA 142 (1996).

[FN235]. See id. at 148.

[FN236]. Id.

[FN237]. 10 Or. LUBA 37 (1984).

[FN238]. See id. at 39.

[FN239]. See id. at 43.

[FN240]. See id. at 45.

[FN241]. See id.

[FN242]. 33 Or. LUBA 624 (1997).

[FN243]. See id. at 626-27.

[FN244]. See id. at 630-33.

[FN245]. Id. at 633. See also Cotter v. Clackamas County, 36 Or. LUBA 172 (1999).

[FN246]. 1000 Friends of Oregon v. LCDC (Lane County), 752 P.2d 271 (Or. 1988).

[FN247]. See Publishers v. Benton Co., 6 Or. LUBA 182 (1982).

[FN248]. 1000 Friends of Oregon v. LCDC (Lane County), 731 P.2d 457 (Or. Ct. App. 1987), on recon., 737 P.2d 975 (Or. Ct. App.), aff'd, 752 P.2d 271 (Or. 1988).

[FN249]. See, e.g., Dodd v. Hood River Co ., 22 Or. LUBA 711 (1992); see also DLCD v. Coos County, 25 Or. LUBA 158 (1993); Lardy v. Washington County, 24 Or. LUBA 567 (1993).

[FN250]. 7 Or. LUBA 137 (1983).

[FN251]. See id. at 138-139.

[FN252]. See id. at 141.

[FN253]. See id. at 142.

[FN254]. See id. at 143.

[FN255]. See Or. Admin. R. 660-006-0025(2)(c).

[FN256]. 33 Or. LUBA 687 (1997).

[FN257]. See id. at 692.

[FN258]. See id. at 693.

[FN259]. See Or. Rev. Stat. § 215.780(1)(c).

[FN260]. 28 Or. LUBA 242 (1994).

[FN261]. See Or. Admin. R. 660-004-0028(3).

[FN262]. See 1000 Friends of Oregon v. Yamhill County, 27 Or. LUBA 508 (1994).

[FN263]. See id. at 519.

[FN264]. 17 Or. LUBA 1223 (1990).

[FN265]. See id. at 1225.

[FN266]. See id. at 1228.

[FN267]. See id. at 1232-33.

[FN268]. Or. Admin. R. 660-015-0000(14).

[FN269]. Or. Rev. Stat. § 215.243. A principal reason for the passage of S.B. 100 (now codified mainly in Or. Rev. Stat. ch. 197 (1999)) was the preservation of farmland. It is not surprising that these two land use reforms were passed at the same time.

[FN270]. Id. 215.243(3).

[FN271]. Or. Admin. R. 660-015-0000(9)-(14).

[FN272]. See id. 660-015-0000(3)-(4).

[FN273]. See id. 660-015-0000(11). The goal itself makes the distinctions on the levels of public facilities and services based upon the location of the land inside or outside the UGB.

[FN274]. Or. Rev. Stat. § 197.296.

[FN275]. The one exception to this rule results from 1999 legislation, now codified as ORS 197.626, which provides that a city with a population over 2,500 that amends its UGB or designates urban reserves by fifty or more acres must present the amendment or designation to LCDC in the manner provided by the periodic review statutes (i.e., ORS 197.628-197.644).

[FN276]. 27 Or. LUBA 195 (1994).

[FN277]. See former Or. Rev. Stat. § 197.190(1) (1993), renumbered Or. Rev. Stat. § 195.025(1) (1999) and Or. Rev. Stat. § 268.385(1) (1999).

[FN278]. See id. at 203. See also City of Portland v. Washington County, 27 Or. LUBA 176, aff'd, 886 P.2d 1084 (Or. Ct. App. 1994). Metro is the regional government for the Portland metropolitan area, charged with overseeing transportation, planning, and other matters of regional concern. See Or. Const. art. XI, § 14; Metro Charter; Or. Rev. Stat. §§ 197.290, 268.380-.393.

[FN279]. Washington County v. City of Portland, 27 Or. LUBA 204, aff'd, 886 P.2d 1084 (Or. Ct. App. 1994).

[FN280]. 27 Or. LUBA at 207 (1994).

[FN281]. Or. Admin. R. 660-015-0000(14).

[FN282]. 724 P.2d 268 (Or. 1986).

[FN283]. See id. at 288.

[FN284]. See DLCD v. Klamath County, 19 Or. LUBA 459 (1990).

[FN285]. 724 P.2d 268 (Or. 1986). Before the Curry Co. decision, Goal Fourteen was often cited as the "process goal" without any substantive requirements. See 1000 Friends of Oregon v. LCDC, 591 P.2d 387 (Or. Ct. App. 1979). That view changed with Willamette University v. LCDC, 608 P.2d 1178 (Or. Ct. App. 1980).

[FN286]. Shaffer v. Jackson County, 16 Or. LUBA 871, 873 (1988) (citing Curry Co., 724 P.2d at 268).

[FN287]. 16 Or. LUBA 75 (1987), aff'd, 747 P.2d 373 (Or. App. 1987).

[FN288]. See id. at 77-78.

[FN289]. See id. at 90.

[FN290]. See id. at 82.

[FN291]. Hammack & Assoc., Inc. v. Washington County, 747 P.2d 373, 375 (Or. Ct. App. 1987).

[FN292]. 18 Or. LUBA 408 (1989).

[FN293]. See id. at 410-11.

[FN294]. See id. at 426 (citing Dougherty v. Tillamook County, 12 Or. LUBA 20, 20-29, 32-33 (1984)).

[FN295]. See id.

[FN296]. See id. at 427.

[FN297]. See id.

[FN298]. 17 Or. LUBA 466 (1989); see also Caine v. Tillamook County, 25 Or. LUBA 209 (1993).

[FN299]. See LCDC v. Douglas County, 17 Or. LUBA at 473.

[FN300]. See id.

[FN301]. 29 Or. LUBA 263 (1995).

[FN302]. See id. at 264.

[FN303]. See id.

[FN304]. LUBA might have been influenced by the fact that churches are a permitted urban use under ORS 215.283(1).

[FN305]. 29 Or. LUBA, at 267. This result has been subsequently superseded by OAR 660-033-0120.

[FN306]. 17 Or. LUBA 256 (1988), after remand, 17 Or. LUBA 1284 (1990).

[FN307]. See id. at 258.

[FN308]. See id. at 261-62.

[FN309]. 29 Or. LUBA 68 (1995).

[FN310]. See id. at 69.

[FN311]. See id. at 74-75.

[FN312]. See id. at 75.

[FN313]. See id. at 75.

[FN314]. See id. at 75.

[FN315]. See id. at 75.

[FN316]. See id. at 75-76.

[FN317]. 33 Or. LUBA 624 (1997).

[FN318]. See id. at 627.

[FN319]. See id. at 628.

[FN320]. See id. at 629.

[FN321]. See id. at 632 (citation omitted).

[FN322]. Or. Admin. R. 660-015-0000(14).

[FN323]. See Or. Rev. Stat. § 268.390(3). Only the Portland metropolitan area qualifies for this statutory allowance for a regional agency to establish, maintain, and alter a UGB. See id. § 268.020(3), .310-.320, .347-.354, .380, .390.

[FN324]. City of Salem v. Families for Responsible Gov't, 668 P.2d 395 (Or. Ct. App. 1983), rev'd on other grounds, 694 P.2d 395 (Or. 1985); BenjFran Dev. v. Metro Serv. Dist., 17 Or. LUBA 30 (1988). The seven factors of Goal Fourteen are listed in an undifferentiated fashion; however, practice and the foregoing case law have provided these two different functions for those factors.

[FN325]. These "need" factors state: "(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals; (2) Need for housing, employment opportunities, and livability." Or. Admin. R. 660-015-0000(14).

[FN326]. 17 Or. LUBA 30 (1988), aff'd, 767 P.2d 467 (Or. Ct. App. 1989).

[FN327]. See id. at 35-36.

[FN328]. See id. at 36-37.

[FN329]. See id. at 42.

[FN330]. Id.

[FN331]. See id.

[FN332]. See id. at 40.

[FN333]. See id.

[FN334]. See 1000 Friends of Oregon v. Metro Serv. Dist ., 18 Or. LUBA 311 (1989).

[FN335]. See id. at 319.

[FN336]. 25 Or. LUBA 52 (1993).

[FN337]. See id. at 56.

[FN338]. See id.

[FN339]. See id. at 56-59.

[FN340]. 27 Or. LUBA 468 (1994).

[FN341]. See id. at 470.

[FN342]. See id. at 473 (citing Baker v. Marion County, 24 Or. LUBA 519, 521-23 (1993), to the effect that previous LUBA decisions have always required satisfaction of the need component).

[FN343]. Concerned Citizens of Upper Rogue v. Jackson County, 33 Or. LUBA 70 (1997).

[FN344]. 27 Or. LUBA 372 (1994).

[FN345]. See id. at 374.

[FN346]. See id. at 380.

[FN347]. See id. at 384.

[FN348]. 31 Or. LUBA 181 (1996).

[FN349]. See id. at 183.

[FN350]. See id. at 184.

[FN351]. See id. at 185.

[FN352]. 33 Or. LUBA 70 (1997).

[FN353]. See id. at 72.

[FN354]. See id. at 80-83.

[FN355]. Id. at 98 (quoting 1000 Friends of Oregon v. Marion County, 842 P.2d 441, 443-44 (Or. Ct. App. 1992)).

[FN356]. See id. at 108.

[FN357]. The "location" factors require consideration of:

(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 area;

(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. Or. Admin. R. 660-015-0000(14).

[FN358]. Id..

[FN359]. 31 Or. LUBA 181 (1996).

[FN360]. See id. at 183.

[FN361]. See id. at 185.

[FN362]. See id. at 186.

[FN363]. See id. at 187.

[FN364]. See id. at 188.

[FN365]. 27 Or. LUBA 372 (1994).

[FN366]. See id. at 385-90.

[FN367]. See id. at 388.

[FN368]. See id. at 390.

[FN369]. 36 Or. LUBA 26 (1999).

[FN370]. See id. at 35-41.

[FN371]. See id. at 41-42.

[FN372]. 14 Or. LUBA 730, 738-39, aff'd, 728 P.2d 77 (Or. Ct. App. 1986).

[FN373]. See id. at 738-39.

[FN374]. See id. at 735.

[FN375]. See id. at 739.

[FN376]. Or. Admin. R. 660-014-0030; see also 1000 Friends of Oregon v. LCDC (Curry Co.), 724 P.2d 268 (Or. 1986).

[FN377]. See id. 660-014-0040(2).

[FN378]. See Or. Admin. R. 660-004-0020(2)-(3).

[FN379]. 2 Or. LUBA 387 (1981).

[FN380]. See id. at 390.

[FN381]. See id. at 391.

[FN382]. 16 Or. LUBA 75 (1987).

[FN383]. See id. at 78.

[FN384]. See id. at 90.

[FN385]. See id. at 91.

[FN386]. See 18 Or. LUBA 408 (1989), modified on other grounds, 842 P.2d 441 (Or. Ct. App. 1992).

[FN387]. See id. at 411.

[FN388]. See id. at 413-14.

[FN389]. See supra note 88.

[FN390]. Id.

[FN391]. See id. at 270.

[FN392]. See id. at 283-84.

[FN393]. 25 Or. LUBA 209 (1993).

[FN394]. See id. at 211.

[FN395]. See id. at 227-28.

[FN396]. See id. at 229.

[FN397]. 31 Or. LUBA 220 (1996).

[FN398]. See id. at 222-23.

[FN399]. See id. at 232-33.

[FN400]. See id. at 233-34.

[FN401]. See id. at 232.

[FN402]. See id.

[FN403]. See id. at 234.

[FN404]. Id.

[FN405]. 35 Or. LUBA 493 (1999).

[FN406]. See id. at 497.

[FN407]. See id. at 499.

[FN408]. See id. at 500.

[FN409]. 724 P.2d 268 (Or. 1986).

[FN410]. 1000 Friends of Oregon v. Wasco County Court, 742 P.2d 39 (Or. 1987) (Wasco County VII); 1000 Friends of Oregon v. Wasco County Court, 723 P.2d 1034 (Or. Ct. App. 1986) (Wasco County VI); 1000 Friends of Oregon v. Wasco County Court, 723 P.2d 1039 (Or. Ct. App. 1986) (Wasco County V); 1000 Friends of Oregon v. Wasco County Court, 703 P.2d 207 (Or. 1985) (Wasco County IV); 1000 Friends of Oregon v. Wasco County Court, 686 P.2d 375 (Or. Ct. App. 1984), modified, 703 P.2d 207 (Or. Ct. App. 1985) (Wasco County III); 1000 Friends of Oregon v. Wasco County Court, 679 P.2d 320, withdrawn on reh'g en banc, 686 P.2d 375 (Or. Ct. App. 1984) (Wasco County II); 1000 Friends of Oregon v. Wasco County Court, 659 P.2d 1001 (Or. Ct. App.), rev. denied, 668 P.2d 381 (Or. 1983) (Wasco County I).

[FN411]. A “county judge” in this land use context is merely the chair of the Board of County Commissioners.

[FN412]. 1000 Friends of Oregon v. Wasco County Court, 5 Or. LUBA 133 (1982).

[FN413]. 659 P.2d 1001 (Or. Ct. App. 1983), rev. denied, 668 P.2d 381 (Or. 1983).

[FN414]. See supra note 285.

[FN415]. 1000 Friends of Oregon v. Wasco County Court, 5 Or. LUBA 133 (1982).

[FN416]. See Sandy v. Clackamas County, 3 LCDC 139 (1979); Conarow v. Coos County, 2 Or. LUBA 194 (1981). See also Lemmon v. Clemons, 646 P.2d 633 (Or. Ct. App. 1982); Meyer v. Lord, 586 P.2d 367 (Or. Ct. App. 1978).

[FN417]. 1000 Friends of Oregon v. Wasco County Court, 679 P.2d 320 (Or. Ct. App. 1984).

[FN418]. 1000 Friends of Oregon v. Wasco County Court, 686 P.2d 375 (Or. Ct. App. 1984).

[FN419]. See id. at 381.

[FN420]. 1000 Friends of Oregon v. Wasco County Court, 703 P.2d 207 (Or. 1985).

[FN421]. See id. at 222-24.

[FN422]. See id. at 228.

[FN423]. See id. at 228-29.

[FN424]. 1000 Friends of Oregon v. Wasco County Court, 14 Or. LUBA at 318 (1986).

[FN425]. See id. at 321.

[FN426]. 1000 Friends of Oregon v. Wasco County Court, 723 P.2d 1039 (Or. Ct. App. 1986).

[FN427]. 1000 Friends of Oregon v. Wasco County Court, 742 P.2d 39 (Or. 1987), cert. denied, 486 U.S. 1007 (1988).

[FN428]. See id. at 43.

[FN429]. When the Oregon legislature considers an expedited review procedure for certain land use decisions, the tendency has been to include LUBA in that process for reasons of speed and efficiency. See 1991 Or. Laws ch 3, § 9; Seto v. Tri-County Metro. Transp. Dist., 21 Or. LUBA 185, aff'd, 814 P.2d 1060 (Or. 1991).

[FN430]. Or. Admin. R. ch. 660, div. 21.

[FN431]. Id. 660-021-0000.

[FN432]. Id.. 660-021-0030(1). The rules are now permissive, rather than mandatory in nature. Id. 660-021-0020.

[FN433]. Id. 660-021-0040(1)-(2).

[FN434]. See supra note 62.

[FN435]. D.S. Parklane Dev., Inc. v. Metro Serv. Dist., 35 Or. LUBA 16 (1999).

[FN436]. See id. at 530.

[FN437]. See id. at 554.

[FN438]. See id.

[FN439]. See id. at 546-55.

[FN440]. See id. at 572. The criteria for a "reasons exception" under Goal Two were applied in this case. LUBA decided that finding that resource land is more appropriate or superior for urbanization does not satisfy the meaning of the phrase "areas that do not require a new exception cannot reasonably accommodate the use." Or. Admin. R. 660-004-0010(c)(B)(2).

[FN441]. Or. Admin. R. 660-021-0030(2).

[FN442]. See D.S. Parklane Dev., Inc., 35 Or. LUBA at 556-60.

[FN443]. See id. at 573-76, 578-80.

[FN444]. See id.

[FN445]. See 1979 Or. Laws ch. 772, § 28.

[FN446]. See 1983 Or. Laws ch. 827, § 59.

[FN447]. On average, LUBA receives between 200-300 appeals that result in about one-hundred final opinions. Approximately thirty cases per year are appealed from LUBA to the Oregon Court of Appeals and, on average, the Oregon Supreme Court reviews approximately three LUBA cases. See Appendix.

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[FN448]. See supra note 447.

[FN449]. Of the one-third of LUBA's final opinions appealed to the Court of Appeals, approximately 26% of these result in a remand to LUBA. See Appendix.

[FN450]. The Oregon Court of Appeals has one permanent law clerk assigned to assist the ten judges of that Court with land use cases. This approach is rational, given that this Court, like LUBA, has a set timeline for decisions in land use cases. Or. Rev. Stat. § 197.850(7). The approach also gives a measure of continuity in review of land use decisions.

[FN451]. The most recent indication of this valuable role was in D.S. Parklane Dev., Inc. v. Metro Serv. Dist., 35 Or. LUBA 516 (1999), the significance of which is discussed at supra note 442 and accompanying text.

[FN452]. See Or. Const. art. I, § 10; Or. Rev. Stat. § 135.747; see also State v. Ivory, 564 P.2d 1039 (Or. 1977).

[FN453]. See Or. Rev. Stat. § 197.830(14).

[FN454]. A typical case in which a Portland attorney is used may cost between $8,000 and $12,000 in year 2000 dollars.

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