

**Department of Land Conservation and Development
Urban Growth Boundary (UGB) Rulemaking
Summary of July 17, 2006, Workgroup Meeting**

The UGB Rulemaking Workgroup met for the seventeenth time on July 17, 2006, at the Agriculture Building (DLCD) in Salem, Oregon, from 9:30a.m. to 12:30p.m. Attendance was as follows:

UGB Workgroup members attending:

Marilyn Worrix, Chair (LCDC); Dick Benner (Metro); Barton Brierly (City of Newberg); Bob LeFeber (Commercial Realty Advisors NW, LLC); Harlan Levy (Association of Oregon Realtors); Mary Kyle McCurdy (1000 Friends of Oregon); Kelly Ross (Special Districts Assn. of Oregon); Art Schlack (Association of Oregon Counties); and Greg Winterowd (Winterbrook Planning).

State Agency Representatives attending: Jerri Bohard (Department of Transportation); Ann Hanus (OECDD); Dick Reynolds (ODOT); and Richard Bjelland (Dept of Housing and Community Services). Not attending: Paul Grove (OECDD); and Jim Johnson (Dept of Agriculture).

Guests attending: Linda Ludwig (League of Oregon Cities); John Boyd (Douglas County); Peggy Lynch (League of Women Voters of Oregon); Jeff Bachrach (Newland Communities); and Les Sasaki (Marion County).

DLCD Staff attending: Bob Rindy, Gloria Gardiner, Steven Santos, and Jan DeVito.

Workgroup members not attending: Glen Bolen (Fregonese Calthorpe Associates); Steve Bryant (League of Oregon Cities); Brent Curtis (Washington County); Jon Chandler (OHBA); Chris Crean (OAPA); Jim Huber (City of Grants Pass); Terry Moore (ECO Northwest); Don Schellenberg (Oregon Farm Bureau Federation); Damian Syrnyk (City of Bend); and Pat Zimmerman (CIAC).

Agenda Item #1 – Opening Remarks, Previous Meeting Summary

The following documents were distributed to the workgroup:

- UGB Workgroup draft meeting notes of May 31, 2006;
- Summary of June 29, 2006 LCDC hearing on OAR 660, Division 024 Goal 14/UGB Rule;
- Proposed New Administrative Rules: June 1, 2006, Draft – OAR 660, Division 24, Urban Growth Boundaries;
- Copies of comment letters received by the department referring to the proposed UGB rules subject to a public hearing under Item 5 of the commission's agenda of June 29, 2006. A cover sheet which listed 14 discussion issues drawn from the comment letters had been prepared by Bob Rindy and was distributed.

Workgroup Chair Marilyn Worrix convened the meeting at 9:40 a.m. Bob LeFeber was introduced, who was recently confirmed as a new UGB Workgroup member by Land

Conservation and Development Commission (LCDC) to represent the commercial real estate industry (replacing David Glennie). Mr. LeFebre gave a few details of his background as a commercial real estate broker in the Portland area, and his twenty-year involvement in commercial real estate issues.

Summary notes of the May 31, 2006, meeting were approved with no corrections.

Agenda Item #2 – Recap of the LCDC June 29 Public Hearing

Bob Rindy reported on the rulemaking public hearing that was held during the recent LCDC meeting in Pendleton. The Commission had reviewed each section of the draft, discussed population rules in detail, and urged the workgroup to continue with its task. Public comment was less than expected, and some new viewpoints were expressed. Rindy intends to contact some people who testified to get a clearer understanding of their interests. Written comments were received from:

- ODOT Transportation Development Division (Greenleaf 6/26/06)
- City of Bend Community Development Division (Syrnyk 6/26/06)
- Jeff Bachrach Attorney at Law (6/26/06)
- 1000 Friends of Oregon (McCurdy 6/27/06)
- Craig A. Stone and Associates (Harland 6/27/06)
- Douglas County Planning Department (Cubic 6/29/06)
- Special Districts Association of Oregon (Ross 6/27/06)
- City of Salem Community Development Department (Hardin-Woods 6/28/06)
- Home Builders Association of Metropolitan Portland (McCauley 6/30/06)

Jerri Bohard of ODOT requested that discussion of transportation issues in the draft rule be deferred to the next workgroup meeting because she and Dick Reynolds are in the process of developing suggested new text. The chair agreed to postpone this discussion.

At the suggestion of Chair Worrix, the workgroup discussed the Summary of LCDC comments which were made during the recent rulemaking hearing:

660-024-000 – Purpose

No comments.

660-024-0010 – Definitions

Rindy - clarified that the safe harbor definition in subsection (2) for “Net Buildable Acre” is intended for residential use only. Schlack – concurred with Rindy that “net acreage” allows for density transfers due to physical constraints; suggested that the definition be left as is. Bjelland – stated that the definition should be somewhere between “net buildable” and “gross.” Rindy – will review the statute for more specific language; referred to page 3, line 39 of the draft rule as well as page 4, line 19 (a method for local government to compute an estimate of net need.)

Benner – referred to 660-024-0040 Land Need (6) on page 4 that results in netting out twice. Rindy – responded that this is what is added to net acreage of need, to determine amount of land to add for streets, etc. Boyd – the safe harbor doesn’t clearly say that. Rindy and Worrix did not

agree with Boyd. Bjelland – page 4, line 29 of the draft rule should be “25%” of gross buildable acres.” Boyd – “net” in this instance doesn’t mean what planners usually refer to as “net.” Rindy – to clarify, he will use the definition from the beginning of the rule at 0010(2) and place it in 0020(6). Bjelland – clarify that 25% is “added” in order to end up with 125%.

Rindy – advised that he has responded to the concern of legal counsel, Steve Shipsey, regarding the definition of “urbanizable land” in (6).

660-024-0020 – Adoption or Amendment of a UGB

(1)(d) As requested by Jerri Bohard of ODOT, discussion of this transportation issue was deferred to the next workgroup meeting to allow her to work with Dick Reynolds in developing suggestions for revised text. Rindy - summarized concerns by ODOT about how much alternatives analysis should be done. Benner – recalled that for the Metro 2002 UGB expansion, ODOT accepted “ball park estimates” from Metro, but this didn’t resolve the site selection issues; factors other than cost had to be considered; also, Metro didn’t have funding for any of the transportation improvements. Rindy – stated that the proposed rule doesn’t tell local governments how to respond to comparisons, just requires that a comparison be made. McCurdy – all Goal 14 factors are supposed to be balanced; we don’t want to direct addressing one particular factor. Benner – analysis is useful later if changes are proposed in planning designations. Chair Worrix – early workgroup discussions didn’t conclude that extensive analysis is required; in revising text, ODOT should address needs of small communities and not just Metro. Brierly – expressed concerns about cities adopting very small amendments having to coordinate with ODOT. Bohard – stated that ODOT would like early involvement, and sometimes even small amendments can have large effects. Rindy – noted that even for a very small proposed quasi-judicial application, a city will still need to do a complete locational analysis.

Chair Worrix advised the workgroup that transportation issues would be discussed again at the next meeting, and that ODOT would send their proposal for revised text.

660-024-0030 - Population Forecasts

Chair Worrix – summarized pros and cons for cities as to whether the current population forecast process is sufficient; the present situation seems to indicate we have a problem with updating forecasts. Rindy – reminded the group that proposed (3) and (4) are for very different situations; (3) allows a city to “straight-line” to a 20 year forecast that was previously adopted by a county. Ultimately, the city and county must both adopt the same UGB. Benner – posed a situation where county approval of city straight-lining doesn’t satisfy county coordination requirement when another city does something later based on a different allocation. Rindy – doesn’t see a statutory violation with (3) if a county agrees with a city’s forecast. However, section (4) is entirely different and is more problematic because the county has never completed a coordinated forecast.

Worrix – asked if the proposed wording of (3) would allow a county to later refuse to approve the city’s straight-line extension. Rindy – clarified that, as written, the rule doesn’t seem to force a county to accept the cities forecast. Worrix – It seems that (3) implies that a city can act without county action (if a county doesn’t act in 6 months) because it is a “safe harbor.” Ludwig

– indicated she believes Keith Cubic’s concern is that (3) and (4) could serve a wider purpose and could be used to allow an alternative county-wide coordinated forecast.

Boyd – thinks that the current language is silent on whether counties are bound by city’s alternative forecasts, and doesn’t lock them in. Rindy – stated that the language doesn’t lock a county in, but enables the city to ask a county to accept a city’s “straight-line.” Benner – gave an example to illustrate the point raised by John Boyd.

Bjelland – there are methodology issues with percentage growth (i.e., among cities) as well as rate of growth. Boyd – sees the issue as proportion, not growth rate; counties want to use ratio of city population to total County population, which allows total county population numbers to grow. Rindy – commented that the proposed rule automatically “increases the size of the pie” but keeps the proportions the same for individual pieces based on the adopted county 20-year forecast; suggested that Keith Cubic is misinterpreting the intent of the safe harbor; a county shouldn’t add the city’s extended forecast into the outdated overall county 20-year forecast; instead the county should clearly indicate that the city’s extension is for additional years beyond the original county forecast. Boyd – cities shouldn’t be allowed to grow beyond the county projections and force counties to redo the negotiation process. Worrix – stated that population forecasts are always done within a specific time frame. McCurdy – a safe harbor shouldn’t allow entities to ignore statute; agrees that (3) is less problematic than (4), but both are problems. McCurdy sees this as a gray legal area, and is not sure that the language addresses the county action requirement; population coordination is important for many reasons.

Bjelland – the issue is how to define a coordinated population forecast. Rindy – this is a method of relieving counties from re-doing population forecasts in line with city forecasts. By show of hands, Chair Worrix determined that most of the workgroup members accepted the language of (3) as written (she noted that Art Schlack was out of the meeting room at the time).

Discussion continued: Rindy – asked if the group wishes clarification that compliance with (3) equals coordination with current county forecast (i.e., is the county bound by a city’s population number?) LeFeber – asked Rindy whether amending the language in (3) would cause the county to be bound by a specific number. Benner – suggests language that “forecast by a city shall be deemed coordinated by the county forecast”; the county should be allowed to reject a city forecast after a county has update its forecast. Rindy – will write clarifying language.

McCurdy – asked whether a county have the option of rejecting a city forecast within the six month period, even though a county has not completed its own forecast. Rindy – responded that the city might then be stymied. Boyd – the safe harbor is an exception, not a rule; cities can use this as an option. Rindy – the language clarifies how cities and counties can move forward. Boyd – the population numbers will never be synchronized. Brierly – suggested leaving (1) as is with “coordinate’ and no numeric standard. Benner – that is what is expressed in (3). Rindy – the problem occurs when a city and county don’t agree. Worrix – stated that (3) is based on current practice throughout the state, and this section just seems to clarify the current practice.

Sasaki – advised that when city boundaries reach into two counties, it is even more difficult to coordinate population numbers; in all cases, growth rate is important to consider. Worrix –

growth rate and proportionality stay the same, but the time frames always change; is this still a coordinated projection? Rindy – asked whether language should give a county the opportunity to disagree and negate use of the safe harbor. Sasaki – a simple formula won't work. Worrix – (3) doesn't require a complete new county projection, just a number for a particular city (without changing the whole population projection.) Rindy – two options can be proposed; (1) language as currently written; (2) add language that this only works as a safe harbor if the county agrees (not forcing the county to do something.)

McCurdy – other variable factors to consider include number of years “stale”, only available to cities under a certain size (size to be determined), and what the county must do within the six month period.

Consensus: Chair Worrix again polled the group for consensus on the language as written. There was general consensus, with Schlack and McCurdy opposed.

Bjelland – stated that the key is a definition of what constitutes a coordinated forecast. Rindy – if the entities don't agree, there should be a way to proceed. Ludwig – don't change the current practice throughout the state. Schlack – expressed concern that the rule as written is a statutory violation by counties. Chair Worrix and staff agreed to end the population forecast discussion on this day, and resume with discussion of 0030(4) at the next workgroup meeting.

660-024-0060 - Boundary Location Alternatives Analysis

Jeff Bachrach, a land use attorney from Portland, appeared before the workgroup to request a change in this section of rule (see the text of his e-mail of June 26, 2006, submitted for the LCDC public hearing on the proposed UGB rule). He asked that the case concerning *City of West Linn v. LCDC and Metro*, 201 Or App 419 (2005) be cited in rule text, Section 660-024-0060 (1). Concerning page 5, line 23, he believes that suitability is the issue, i.e., that the requirement is NOT for simply a quantitative analysis. Bachrach stated that the current rule language expresses an older interpretation that is contrary to the Court of Appeals ruling in *City of West Linn v. LCDC and Metro*.

Gardiner – noted that she is a member of Oregon State Bar, and expressed her viewpoint that she sees no inconsistency between the proposed rule (which is based on the Goal 14 amendment of last year) and the rule language as written. The rule language defines “adequate” to include quantitative as well as suitability analysis. Rindy – opposes silence on the court case, otherwise only lawyers can know the correct policy; the citizen or planner should be able to find the case in the rule, and rely on the rule, and should not have to search out specific legal opinions. Bachrach – stated that clarity is provided by the Court of Appeals decision; the LCDC rule is different than that decision and attempts to “trump” the Court of Appeals decision. Rindy – stated that the rule is consistent with the court decision. Levy – believes that inconsistency exists; stated that a quote from the case “does not necessarily limit”; and suggested that more discussion is needed.

Benner – indicated that he believes the Gardiner and Bachrach interpretations are the same; on page 5, line 21, “adequate” includes both suitability and amount. There may be a problem with the rule text “exceeds need deficiency,” which can be read to be limited to amount; he suggested re-phrasing to clarify that this is not only a number. Rindy – will replace with “is not adequate to meet the need”; the text intent is consistency with case law; LCDC is not limited in

policymaking to what a particular court opinion expresses; and unless the court is interpreting a statute, LCDC may change policy.

Bachrach – the Court of Appeals decision says you can go to land of a lower statutory priority that is “more suitable,” even if there is enough “suitable” land of higher priority. Worrix – doesn’t perceive differences in intent. McCurdy – stated that the Court of Appeals case is probably moot because it is based on the old Goal 14 language; the revised goal expressly says to look at suitability when determining need up front; the Court of Appeals decision addressed this issue. Rindy and McCurdy – disagreed with Bachrach, that lower priority land can’t be used simply because it is found “more suitable”; that interpretation is not within the law. Bachrach – stated that the statute is what the court addressed, and it hasn’t changed. McCurdy – noted that because Goal 14 was changed, there is no longer a dispute; “suitability” can be considered in determining need. Bachrach – asked whether suitability analysis be done without comparison. LeFeber – suggested that Bachrach propose revised rule language to clarify its intent. Ludwig – stated that the land need section doesn’t list a procedural process; it may need to be simply re-stated from Goal 14 for clarification.

Chair Worrix – advised that however the language is changed, it must be clarified in terms of consistency with the Goal “in determining need.” Rindy – emphasized that we need language such as 0060(1) in the rule because the Goal doesn’t explain the process for interpreting the parallel provisions of statute and goal location factors; we should also provide this clarity because of the Court of Appeals case, in order to avoid continued argument about what it means.

Action item: At their request, Rindy will send text of the Court of Appeals case to workgroup members.

660-024-0070 - UGB Adjustments

The workgroup discussed topic #12 from the Discussion Issues List: “Rule does not provide a clear path through “existing thicket of goals” (a comment submitted by City of Salem). Ludwig – agreed that various statutes cited by the rule should not be paraphrased; suggested changing the citations to titles or descriptions of the particular statutes and rules and not just citations of them. Lynch – agreed that it is frustrating to citizens. Rindy – gave an example of Buildable Lands Inventory where paraphrasing can lead to problems; and proposes to give better frame of reference to statutes.

Concerning #11 topic from the Discussion List, Kelly Ross had raised the issue that land exchange rules should not allow serviced land to be removed from a UGB; (2)(b) is not adequate to make sure cities account for special district investments made in land that could be considered for removal; proposed either prohibiting removal of land with public facilities investments, or obtaining consent of service providers who made investments in land to be removed. Chair Worrix – LOC believes that proposal means that service providers could veto the UGB exchange; is there a better compromise? Ross – suggested adding a consideration to (b) of impact on investments when consulting with districts and providers. Chair Worrix – believes that (b) includes consideration of costs. Rindy – asked which services are of concern. Ross – responded that park districts, as well as sewer and water providers (perhaps schools?); admitted that this will be a rare occurrence, especially post-Measure 37. Ludwig – stated that she had

asked Ross for specific examples. Chair Worrix – advised that the options submitted for Commission consideration should be limited. Ludwig – stated that she would oppose anything that could allow a district to veto a UGB amendment. Rindy – suggested trying to draft a objective criterion for the situation when land should not be removed from the UGB because of existing facilities investments.

Action Item: Ross and Ludwig will prepare optional language for workgroup consideration.

Agenda Item #3 – Next Meeting:

The workgroup agreed to schedule the next meeting for Tuesday, August 1, 2006, from 9:30a.m. to 12:30 p.m. at the Agriculture Building (DLCD) in Salem, in the Basement Hearing Room.

The workgroup scheduled additional future meetings, as follows:

Tuesday, August 29, 9:30 a.m.-12:30 p.m., DLCD Basement Room D.

Tuesday, September 19, 9:30 a.m.-12:30 p.m., DLCD Basement Hearing Room (this is a tentative meeting)

The workgroup adjourned at 12:30 p.m.