

**Department of Land Conservation and Development
Urban Growth Boundary (UGB) Rulemaking
Summary of September 19, 2006 Workgroup Meeting**

The UGB Rulemaking Workgroup met for the 20th time on September 19, 2006 at the Agriculture Building in Salem, Oregon, from 9:30 a.m. to 12:30 p.m. Attendance was as follows:

UGB Workgroup members attending:

Marilyn Worrix, Chair (LCDC); Steve Bryant (League of Oregon Cities); Bob LeFeber (Commercial realtors); Jon Chandler (Oregon Home Builders Association); Chris Crean (Oregon Chapter, American Planning Association); Harlan Levy (Association of Oregon Realtors); Mary Kyle McCurdy (1000 Friends of Oregon); Art Schlack (Association of Oregon Counties); and Greg Winterowd (Winterbrook Planning).

Workgroup members not attending: Dick Benner (Metro); Glen Bolen (Fregonese Calthorpe Associates); Barton Brierly (City of Newberg); Brent Curtis (Washington County); Jim Huber (City of Grants Pass); Terry Moore (ECO Northwest); Kelly Ross (Special Districts Association of Oregon); Don Schellenberg (Oregon Farm Bureau Federation); Damian Syrnyk (City of Bend); and Pat Zimmerman (LCDC Citizen Involvement Advisory Committee).

State Agency Representatives attending: Jerri Bohard (Oregon Dept. of Transportation); Richard Bjelland (Dept. of Housing and Community Services). Not attending: Paul Grove (Economic and Community Development); Jim Johnson (Department of Agriculture).

Guests attending: Linda Ludwig (League of Oregon Cities); Les Sasaki (Marion County); Dick Reynolds (ODOT).

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

Agenda Item #1 – Opening Remarks, Previous Meeting Summary

The following documents were distributed to the workgroup:

- Draft Summary of August 29, 2006 UGB Workgroup meeting;
- Previous Draft Proposed New Administrative Rules dated September 1, 2006;
- Draft Proposed New Administrative Rules dated September 19, 2006 (prepared by Bob Rindy and incorporating edits suggested by workgroup at last meeting, and DLCD staff).
- Alternative language suggested by Bob Rindy regarding proposed Population Rules;
- Proposed Alternative Rule Language submitted 9/18/06 by Damian Syrnyk;
- Proposed Alternative Rule Language submitted 9/19/06 by Jim Huber; and
- Proposed Alternative Rule Language submitted 9/18/06 by Barton Brierly.

Workgroup Chair Marilyn Worrix convened the meeting at 9:45 a.m. and listed major discussion topics for the day's meeting. It was noted that the Land Conservation and Development Commission (LCDC) will consider the final rule recommendations of the workgroup at their

upcoming meeting in Bend, Oregon, on October 5, 2006. As such, this could be the final meeting of the workgroup, at least for this phase of the rulemaking.

Summary notes of the meeting of August 29, 2006, were approved with no corrections.

Agenda Item #2 – Discussion of September 19, 2006 version of proposed new rules

660-024-0000 – Purpose

Per staff recommendation, there was a consensus: the term “must” will replace “shall” throughout the rule.

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

Discussion of section (1)(d) regarding the option to waive certain TPR requirements if land remains in “urbanizable” zoning. ODOT indicated it had previously suggested “...that would generate more vehicle trips...” instead of “...likely to generate...” as used in the new draft. Crean – suggested “...generate substantially more trips...” Rindy – suggested that TPR language be used “...significantly impact a transportation facility.” Bryant – suggested “...urban development...” instead of vehicle trips. Crean – suggested “...or by assigning interim zoning that does not significantly impact a transportation facility.” Rindy – The TPR allows local governments to determine that a zone change will not substantially affect a transportation facility. **Consensus:** DLCD staff will review this section and verify concerns of ODOT, and change language back to previous version to reflect ODOT concern.

660-024-0030 – Population Forecasts

Brierly – explained suggestions submitted in his e-mail of 9/18/06, to revise section (1) to be more general than the current rule, but in his opinion, more consistent with statute. His proposal would be that a county is not required to do forecasts for each city, just for the county. In sections (3) and (4), Brierly suggests clarification that these are safe harbors, optional and not required. Chair Worrix – asked the meaning of “coordinated.” Brierly – responded that the city and county need to make sure that individual forecasts match, but a county doesn’t have to adopt a forecast for each city. Rindy – pointed out that this might conflict with state law, certainly long-standing practice has been otherwise and without better legal analysis we should be cautious about such a major change in past practice; possibly this would conflict with case law. **Consensus:** Not to go in direction suggested by Brierly’s proposal, but agreement that it is preferable to state at the beginning of sections (3) and (4) that both are safe harbors.

Rindy discussion of the DLCD alternative wording for population rules (hand out) – explained the staff’s proposed alternative text was crafted to try and balance conflicting views on these sections. However, based on concerns with statutory conflict, the proposal would clearly provide that a city cannot adopt a population forecast without the county also adopting that forecast. The proposal intends that these are safe harbors, not for cities to use without concurrence by the county, but for compliance review. A forecast following the proposed method would be deemed “acknowledged” by LCDC or LUBA. The staff proposal differs from the previous proposals (and the Brierly proposal) in that the safe harbor is not valid if the county does not concur.

Bryant – Sections (3) and (4) imply that county has to act, but what if they don't take an action? Rindy – is not sure there is an example in the past of a county refusing to act, so it is unclear that this is really a problem we have to solve. Chandler – likes the six-month provision previously drafted, as a safe harbor in case a county does nothing. Schlack – this can't be done without changing ORS 195.036, and such a rule would change a county's duty to coordinate all of its city forecasts in violation of the statute. Rindy – repeated that under the DLCDC alternative proposal, either LCDC or LUBA must accept the forecast prepared by the city under this method, if the county agrees, so while it is not a safe harbor if the county does not act, it still has much value when a county does agree. Winterowd – this puts pressure on all parties to come up with something better; agrees that you can't change the statute. Chair Worrix – it motivates counties and gives cities a way to proceed. Chandler – requiring a city-county agreement doesn't achieve more than we have now. Bryant – suggests adding a time limit for county response, with consequence of a *writ of mandamus* if they do not act. Bjelland – doesn't foresee a county objecting to a rational approach to extrapolate data from the PSU forecast.

Rindy – Not sure LCDC has authority to specify legal action (*writ of mandamus*) assuming that is not already allowed. The section (3) safe harbor situation will probably be more common; it allows simply extrapolating the county forecast “trend” to add some years. The section (4) situation would probably be less common (i.e., where there is no county forecast). It is actually more conservative and therefore staff recommends it should be available to any city that wants to use it, even if the county forecast is in effect but less than ten years old. The “applicable laws” referred to in section (3) are ORS 195.025, 195.036, 197.296, and Goal 2. Rindy noted that Steve Shipsey of Dept. of Justice verbally agreed with the approach here, i.e., allowing these safe harbors provided both the city and county agree. Crean – agreed the language is acceptable as written. Rindy – Both (3) and (4) should refer to the same laws. McCurdy – “statutory coordination” reflects that county should deal with all of its cities in one process; we're not addressing the key problem, which is that counties are not updating their forecasts; the result of adopting (3) and (4) will lead to a conglomeration of uncoordinated city forecasts.

Rindy – in section (1) of the proposed rule, a county is required to send notice to all cities in the county before adopting a new forecast for a city. There is no easy way to address McCurdy's concern because cities generally decide to re-do their forecast or expand their urban growth boundary (UGB) in different years than other cities in the county. Discussed recent example: City of Tangent decided to change their forecast at a different time than other Linn County cities. Schlack – a forecast for an individual city will meet statutory requirements for coordination when adopted as a Post-acknowledgement Plan Amendment (PAPA); proposed rule should add a statement of that process.

Rindy – proposed adding a sentence to section (1) in the draft rule that to clarify that cities must also adopt the forecast into their comprehensive plans. Winterowd – a city should adopt a forecast, but not into their comprehensive plan; it can be done by resolution; if it's in their plan, it quickly becomes out-dated. Schlack – anything will change over time. Crean – cited the Park Lane case regarding Metro, suggested the draft just use the word “adopt.” Gardiner – suggested that the population forecast be done first, then the comprehensive plan amendment. Winterowd – the forecast needs to be in findings adopted for a UGB amendment. Bryant – suggested that it

be clarified by saying this. McCurdy – It is a Goal 2 requirement that the findings be adopted consistent with the plan.

Chair Worrix – asked for consensus from the group on which of the two text alternatives is preferred, the suggested language in (3) or (4) brought by staff, or as drafted on the September 1 version? Rindy – proposed another option: to include a separate section indicating that at the end of six months, a county has to explicitly say “yes” or “no.” Winterowd – agreed that Rindy’s proposal is a good compromise. Chandler – prefers language in the September 1 draft; the issue is what happens when a county doesn’t act, and the city should be able to go forward on implied acquiescence; the issue is not about whether a county says “no.”

Crean – a county should exercise its veto, which is consistent with statute. Chandler – agreed. Schlack – objected, because there are many possible reasons for county inaction; counties have the responsibility to follow statute; he prefers a process where litigation is an option for cities to pressure counties. Rindy – a county has no veto authority; they must agree to do something; ORS 197 calls for all levels of government to be accommodated.

Ludwig – a county has the final say on the UGB change. Bryant – yes, a county must adopt the UGB, and as such, would later get to rule on the population. Rindy – asked whether the rule would be interpreted to mean that later, when adopting the UGB, the county could not object to the forecast? Bjelland – useless if it doesn’t mean that – the city needs assurance that forecast is good in order to do its UGB evaluation. Chair Worrix: there seem to now be three alternatives. Crean – it can be argued that a city is using a coordinated number in the form of a county forecast or OEA forecast, which involves some type of coordination. Bryant – county rejection of UGB could be based on many things, not just the forecast. Sasaki – from the county viewpoint, the rule should also consider the county’s mandate for coordination as part of the issue. Argues that (3) is more aggressive, while (4) is more conservative in use of the term “trend.”

Chair Worrix – asked the workgroup to decide on their recommendation: either the wording in the draft of 9/1/06 or DLCD’s suggested version. Bjelland – DLCD option but suggested that an option be added that cities could proceed if there is no county action within six months.

Consensus: Based on a show of hands, the majority recommended the DLCD version be used, with a separate section that includes the six-month provision allowing a unilateral city forecast. McCurdy – abstained from the last vote because she would like to wait for opinion from Steve Shipsey concerning statutory consistency of the six-month provision. Ludwig – is also agreeable to considering some new incentives for counties for do coordinated forecast; remarked that the DLCD grants advisory committee (on which she serves) has not received requests for assistance from counties.

660-024-0040 – Land Need

There was discussion of the issue in section (6), i.e., whether the recent discussion at LCDC regarding the McMinnville UGB proposal raises questions about allowing a city to use the safe harbor for parks. In that case, LCDC expressed concern about lack of assurance that the land presumed needed for parks would actually be used for parks. Chair Worrix – remarked that for McMinnville, the land requested was a much larger amount, far more than the 25% used in the

safe harbor. Winterowd – responded that 25% is a conservative number for most cities. McCurdy – the issue in McMinnville is that park land would all come from buildable land, so 25% is conservative and acceptable. **Consensus:** to use 25% as proposed in the September 1 draft.

Santos – Discussed section (5), suggested we remove provision that implies Goal 9 does not apply to cities in Metro, i.e., the language stating “except within a regional UGB.” He believes the Goal 9 rule is applicable to Metro cities, agrees it does not apply to Metro. Rindy – concerned that we could not check this with Dick Benner, possibly he had stated at one point that Metro cities are also exempt from Goal 9, but not sure. Chandler – the current draft language says that cities do need to address the rule. Santos – Goal 9 applies to comprehensive plans; since Metro doesn’t have a comprehensive plan, Goal 9 doesn’t apply to them; cities do have comprehensive plans, so giving them exemption from the rule is not the same thing as not being subject to Goal 9. Rindy – for Metro boundary, the 20-year employment land need is determined by Goals 2 and 14, not by Goal 9. Santos – repeated his concern about the implication of the wording as staff negotiates periodic review work plans for cities in Metro. Rindy – Goal 9 includes more than a determination of land need; the proposed Goal 14 rule concerns only land need, so he suggested changing the language in (5) to “regional government.” Crean – suggested language of “except for Metro area government.” McCurdy – stated that adding land is not the only way to meet need. Santos – suggested that the staff report clarify the scope. Winterowd – suggested that it would be less confusing to add a separate sentence concerning how this applies to Metro. McCurdy - recalled that the earlier e-mail submitted by Dick Benner had suggested that “cities and counties must...” Bryant – suggested using the original text. **Consensus:** the text should exempt Metro but not cities in Metro.

Discussion concerning section (1) – should the need be “based on . . .”? **Consensus:** “...based on...” is in the text of Goal 14, and is acceptable. Staff suggested that section (2) language of “most relevant” task to be changed to “completion of the UGB work task.” Brierly – suggested “completion of UGB analysis or amendment work task.” Rindy and Winterowd – suggested “the land need work task.” Crean – suggested use of the term “most appropriate.” **Consensus:** to use the phrase “the appropriate work task.”

Discussion regarding subsection (2)(b), there was **Consensus** to accept the language as drafted by staff. Regarding subsection (5)(b), there was **Consensus** to accept the language as drafted by staff. Regarding subsection (6), there was **Consensus** to change “at” to “during” and accept staff language of “streets and roads.”

660-024-0050 – Land Inventory and Response to Land Deficiency

There was discussion of section (2) regarding who can use the safe harbor, and specifically, whether small cities in MPOs could use it. McCurdy – asked how many small cities inside MPOs could use this safe harbor. Chair Worrix – clarified that the discussion concerned the amount of land that would be affected. LeFebre – commented that the purpose was to reduce the financial burden on smaller cities. **Consensus:** to accept the language as written in the September 1 draft, i.e., allowing small cities in MPOs to use the safe harbor.

Regarding section (1), it was suggested by LeFebre to delete “and available.” **Consensus:** to accept this change. Regarding section (5), Rindy noted that “urbanizable” has been described in the draft in the same manner as defined in Goal 14. He suggests removing “planned” from the text because it is not in that definition. **Consensus:** to accept this change.

660-024-0060 – Boundary Location Alternatives Analysis

Rindy – pointed out that section (1) could be interpreted to require that a full twenty-year need be added any time the UGB is amended, even for a quasi-judicial application where an applicant desires to put in a particular parcel that is less than an amount that is probably less than a full 20-year supply. As such, in order to reflect past practice for quasi-judicial applications less than the full 20-year need, we probably need a new section for the rule. This is complicated because the term “quasi-judicial” cannot easily be defined and there is a great deal of case law as to that definition. Winterowd – sometimes it’s not possible to distinguish between a legislative and quasi-judicial UGB amendment. Crean – pointed out that one difference is that a legislative proposal allows a city to decide not to act; a quasi-judicial proposal requires a city to make a decision. Rindy – asked whether a new section should be added to provide an exception for quasi-judicial. Winterowd – suggested adding language to subsection (1)(a) “to accommodate all or part of the land need deficiency...” Crean – responded that the issue should instead be addressed in subsection (1)(c), suggesting “local government can approve an application for a permit for less than the need.” Rindy – stated that a comprehensive plan amendment is not a permit. Crean – suggested language that “can approve application for permit or plan amendment that doesn’t meet full need...” Chandler – it is okay for a property owner to propose adding land piece-meal, but not okay for a city to do so. Rindy – for cities with population over 25,000, ORS 197.296 doesn’t permit any addition for less than full need. Chandler – suggested that language be in a separate provision, not as a revision to the existing sections. **Consensus:** to approve the concept to allow quasi-judicial applications for less than full need, and leave it to staff to draft.

Discussion of staff recommendation in (1)(c) - **Consensus** that the staff proposed language be approved. Discussion of staff recommendation in section (6) – **Consensus** that the draft should use storm water “management” instead of “disposal.”

660-024-0070 - UGB Adjustments

There was discussion of the section (3) proposal for “less than or equal to” wording, and whether it might allow a city to remove land from the UGB that had been brought in for need housing. Chandler – agreed with this concern and objected to the “less than or equal to” language. Rindy suggested alternative language proposed by Lane Shetterly in a recent discussion: “substantially equivalent.” Winterowd – suggested that if this is a safe harbor, there should be better clarification that the needs analysis is waived in this circumstance. **Consensus:** That the language clarify waiver of needs analysis.

Santos – suggested that subsection (3)(b) language be modified to remove “and available” because it is not applicable standard for “employment land.” **Consensus:** to accept the suggestion by Santos. Also, per staff recommendation regarding (2)(a), there was a **Consensus** to accept proposed wording: “taking into consideration any land added to the UGB.”

General discussion of new Rules

Winterowd – asked when the new rules might be effective, and whether they will be applied retroactively. He noted that Woodburn’s UGB request is currently before the Commission. Rindy – the rule could be set to start six months from adoption. Brierly – Local governments should be allowed to not use the rule if they are already underway, the trigger for that would be a local government’s submission of 45 day notice to DLCDC before the effective date of the rule. Rindy – questioned whether this could be abused because a city could submit notice in the next six months without having really begun work. Winterowd – posed the situation of a city doing UGB analysis in phases (i.e., Newberg). In that situation, the city may have a long term plan to amend the UGB but already begun. Chair Worrix – responded that the six month time period will address most situations. Winterowd – suggested one year instead of six months from time of adoption of the rule, not the notice. Rindy – responded that he prefers the six-month date and is concerned about cities wanting exceptions to the rule, especially when they haven’t yet done anything to indicate the work is already underway. Chair Worrix – agreed. Winterowd – suggested using the same applicability language as used for Goal 14 amendments. **Consensus:** staff should add an applicability provision similar to the one used for triggering the April 2005 Goal 14 amendments, and provide a six month period in which a city can choose whether or not to give notice that it is already underway and thus be exempt from the new rule.

Agenda Item #3 – Future Meetings

The Land Conservation and Development Commission will consider the rule recommendations of the Workgroup during their meeting of October 5, 2006, in Bend. As such, there is no time for any future meetings on this proposal.

Agenda Item #4 – Wrap up

Chair Worrix thanked all the workgroup members for their productivity throughout the process, which was much longer than originally anticipated. She was very pleased to work with everyone, noting that they have all stayed focused on the issues throughout. Winterowd – thanked Chair Worrix and DLCDC staff for their efforts.

The workgroup adjourned at 12:30 p.m.