

Department of Land Conservation and Development
UGB Rulemaking Workgroup
Summary of Workgroup Meeting October 14, 2004

The UGB Rulemaking Workgroup met for the sixth time on October 14, 2004, at the Agriculture Building in Salem. The meeting started at 1:10 p.m. and ended at 5:00 p.m. The following workgroup members were in attendance: Marilyn Worrrix (LCDC; workgroup chair), Dick Benner (Metro), Glen Bolen (Fregonese Calthorpe Associates), Chris Crean (OAPA), Jim Huber (City of Grants Pass), Harlan Levy (Association of Oregon Realtors), Mary Kyle McCurdy (1000 Friends), Damian Syrnyk (City of Bend), Don Schellenberg (OFBF), Greg Winterowd (Winterbrook Planning), Pat Zimmerman (CIAC)

Workgroup members not in attendance: Jon Chandler (OHBA), Brent Curtis (Washington County), Terry Moore (ECONorthwest), Dick Sheehy (CH2M), Art Schlack (AOC), Burton Weast (SDAO), Mark Whitlow/Bob LeFeber (Commercial Realtors), Anita Yap (City of Coburg)

State Agency Representatives Present: Lynn Beaton (OECDD), Richard Bjelland (OHCD), Anna Russo (ODOT)

State Agency Representatives Not Present: Jim Johnson (ODA)

DLCD Staff: Bob Rindy, Gloria Gardiner, Jim Hinman, Lane Shetterly, Pam Pearson

Guests: John Boyd (Douglas County), Danielle Cowan (City of Wilsonville), Jim Just (Goal One Coalition), Mike Kohlhoff (City of Wilsonville), Linda Ludwig (LOC), Corinne Sherton (Johnson & Sherton), Peggy Lynch

Opening Remarks:

Chair Worrrix said that LCDC had discussed the timeline of the project and indicated that it was amenable to extending the Goal and rule adoption target date to February. However the commission encouraged us to continue with the current public hearing schedule, which requires that we work quickly to complete the first draft of the goal and rule. Bob Rindy explained that the first draft would be distributed to the public with the understanding that public comment will result in changes to the drafts. He also asked if one or two meetings should be scheduled following the public hearings to discuss the testimony received. Because the draft goal is an LCDC product after the public hearings, we would anticipate that the commission would begin to direct changes to the documents, i.e., the workgroup will need to work with both the commission and department staff on any revisions.

Worrrix: Based on the discussion, it is agreed we need additional meetings and will move the date of the final adoption to February 2004, so that we can have a better product and allow for additional time to receive comments.

LCDC members will attend at least two of the hearings (because the hearings will occur during commission meetings). DLCD field representatives will serve as hearing officers for the other eight hearings and will prepare written summaries for LCDC. Commissioners will also have access to audio recordings of each hearing. Worrix indicated she plans to attend as many hearings as possible.

Zimmerman: Concerns about the product being an unfinished draft during the public hearings and LCDC forming an opinion on something that is different than what they will see in the end. Worrix: Explained that this is exactly the point of the public hearing process. There is no intent for the initial draft to be a finished product, especially since the workgroup is not a body that takes public testimony. The draft will change in response to public testimony, so the final product is expected to be different than what we start with. Rindy: Encouraged the workgroup to attend the public hearings, including those that occur during an LCDC meeting. Zimmerman: Concern that the public is given every opportunity to know what it is they are seeing. The cover memo needs to be explicit as to the fact that this is a draft.

Ludwig: Encourages additional workgroup meetings following the public hearings. It is likely there will be more written comments submitted at the hearings than oral or written testimony. Workgroup members, by show of hands, indicated which public hearings they plan to attend. It appears only one (in Warrenton) will not have a workgroup member present.

Decision: Members agreed to the following future workgroup meeting dates:

- Tuesday, November 23, 1:00 – 5:00 p.m.
- Thursday, December 16, 1:00 – 5:00 p.m.

Rindy: Noted that there is an additional rule issue we have not discussed: the public mailing will indicate minor proposed changes to Division 004 and likely 026. This is because, if we remove the requirement for an exceptions process in the goal as we have agreed, it will affect administrative rules that refer to that process. Also, there is a recent Court of Appeals case concerning Canby involving a piece of property entirely surrounded by land inside the UGB. The city decided to include it in the UGB as “committed to urban development,” but the court decided it could not be put into the UGB unless the city takes an exception to Goal 14. In the past, LCDC had allowed committed properties to be put in the UGB without addressing the “need factors” of Goal 14. If we want to change the court’s decision, or to give guidance on such a Goal 14 exception for similar situations, we might want to put something in the exceptions rule (Division 004). McCurdy: indicated the property in question was adjacent to the UGB, but was not surrounded by development because one side of the property was bounded only by a road that is at the edge of the UGB.

Shetterly: Noted that the statute requires ten public hearings for goal changes, but not for rule changes, however we believe both the goal and the rule should be seen together in context with each other, so our hearings will be for both.

Review of Draft Goal 14 Amendments

The workgroup then turned to the new draft of the proposed Goal 14 amendments (the October 7 draft).

Worrix: Asked where we are in terms of tying together population and employment. Her notes showed that we had agreed to delete “growth” from the heading. Rindy: “Employment” was removed from the introduction wording of the goal, and from factor 2, but not from land need factor 1. We also removed the requirement for a coordinated employment forecast - we don’t want to restrict jurisdictions from doing an employment forecast, but it is not a mandatory requirement. Bjelland: He agrees with not requiring an employment forecast, but jurisdictions do need to provide the land for employment needs. Rindy: Many jurisdictions will do employment forecasts anyway, but a coordinated employment forecast is not required. In either case, the amended goal still requires that jurisdictions provide land for employment needs.

Lynch: She reads in Land Need factor 2 that jurisdictions are required to establish the need for employment opportunities. Crean: Suggested factor 2 should begin with “Demonstrated need for land to accommodate...” as in factor 1.

Worrix: Page 1, line 20 – “Local” preceded “governments” in the previous draft. She asked why it was removed. There was discussion on whether or not “local” includes Metro. John Boyd: Make sure “local” includes Metro if that word is added back. Does the term include special districts? Rindy: The term was removed in favor of simply listing cities and counties. The rule defines “local” to include regional governments when that term is used, but here we simply list the governments needed to adopt a UGB. This paragraph needs to be read in context and as a whole. Special districts don’t have a role and he doesn’t think it says they do.

Benner: By using the term “cooperative” on line 19 (page 1), do we mean something different than “coordinated”? The role of special districts is already a requirement and he is concerned about changing that by using the term “cooperative.” Rindy: The rule clarifies that we are not changing the coordination requirement for districts. Discussion was held regarding the need to add “local” back to line 20 before “governments.” If so, make sure it means cities, counties and Metro, but not special districts. The rule can specify the definition of “local” for purposes of this goal and rule only if it doesn’t conflict with statute. If there is a conflict with statute, rather than inserting “local,” change lines 19-20 to “cooperative process between cities, counties and regional governments.” That language doesn’t preclude anyone unintentionally. The coordination with districts is required elsewhere.

Decision: Change lines 19-20 to “cooperative process between cities, counties and regional governments.”

Jim Just: Going to the definitions on the last page of the goal, as written urbanizable is a subset of urban. Is that correct? Rindy: We tried to define them as two separate categories. But if we leave it unclear, as currently in the goal, it is important to differentiate between the two. Benner: If we want conversion factors to mean anything, we need to differentiate between urban and urbanizable and they should be two separate categories of land. When land comes into a UGB

and the city plans to not change the zoning, it should be considered urbanizable. If land comes into a UGB it needs to be made available for urbanization and be placed in a holding zone.

Rindy: But do we define urban land as everything in a UGB except for urbanizable land?

Just: Yes, it makes a difference to separate the two categories. He sees urban land as land zoned for urban uses with facilities and services readily available. The goal requires a test to be able to provide the facilities and services (the conversion factors) in order to change from urbanizable to urban. Rindy: I think there is a lot of variation among cities as to what that test is, if there is a test. The goal currently leaves lots of room for interpretation – but it should be more clear as to what is required.

Winterowd: Suggested splitting urban and urbanizable, defined as land zoned at urban densities and land not yet zoned at urban densities. Land that is in a holding zone with lower densities is urbanizable and would need to meet any public facilities test. Rindy: It becomes more controversial then, agree it needs to be held at lower densities, but a conversion test raises lots of issues we haven't discussed. Jon Chandler and others have disagreed that there should be "a line within a line."

Benner: Likes Winterowd's idea regarding definition but there is no common agreement on what is urban density and use. We don't have time to distinguish a subset of land within a boundary. We need to understand to which lands the conversion standards apply. The proposed definition in the draft makes it clear that land is urbanizable if it is still zoned with the county's prior zoning.

Levy: UGBs are created to define urban from rural and that implies that we have two types of land: urban and rural. Rindy: However, on page 1, lines 15-16 says the boundary separates urban and urbanizable from rural, so that implies urban includes two separate categories.

Hinman: We should not convert a subcategory to a category. Worrix: We need two separate definitions, one for urban and one for rural. Crean: Has a problem separating them. Seems if it is in the UGB, it is legally urban. We can say urban also includes land that is not available for development due to certain factors.

Rindy: We seem to be going toward defining urban land as land inside a UGB except for urbanizable land, that is, "urbanizable" would be defined as a third type of land. Levy and Crean: Don't agree it should be a third type. Rindy: We will need to define it regardless. Lynch: Part of this is a jurisdictional issue. Urban land may be land within a UGB and urbanizable land is usually outside city limits, held by a county. Bjelland: We're talking semantics; urban growth boundary land that is either urban or urbanizable.

Worrix: Are we creating problems elsewhere by changing these definitions here? Sherton: Many jurisdictions have plans and conversion factors based on the existing definitions.

McCurdy: The issues are the conversion factors to make the land urban. Rindy: We will work with our legal counsel on options we have for this. It appears we agree on the policy to protect urbanizable land, but not on whether we describe urban land as two different categories.

Boyd: Suggested adding a (c) to the definition of rural land on page 4 for rural communities.
Rindy: Agreed.

Rindy: Moving on to the factors. We added a third need factor. Note that on page 1, the second sentence of (3) in “Land Need” in effect provides a definition to the otherwise vague term “efficient.” However, that term appears later in the separate section on page 3, and it is likely local governments will have to interpret what it means.

Ludwig: Asked that her written comments be reviewed, but she indicated it is lengthy and she is sensitive to the timelines for the meeting today. She indicated she is willing to speak to Bob Rindy at another time regarding these. The group did not go through the comments.

Review of Draft OAR 024

The group turned to the revised draft of the proposed new UGB rules, dated October 11.

Rindy: noted that rather than go line by line, there are some key issues we want to make sure we address today:

1. Population forecast rules
2. Section 0050
3. Section 0060
4. Definition of specific land need.

660-024-0030 – Population Forecasts

Syrnyk: Linda Ludwig shared some comments on this section and it reminded him of something we talked about in the Population Subcommittee regarding allocating using the OEA forecast. Linda suggested a safe harbor using a certain percentage of OEA’s forecast, or indicating that if a community is within a certain percentage of the OEA the forecast is acceptable. McCurdy: In some cases a small percentage could be a huge difference in the forecast.

Worrix: This issue came up in her discussions with her cohorts; that there should be more leeway, but recognizing it doesn’t take much swing to have a big difference. She also heard much dislike for OEA numbers, especially as a safe harbor. Syrnyk: Deschutes County has experienced problems with the OEA numbers in that the county didn’t understand changes made in the numbers. He wants more opportunity to provide input to OEA as they develop their numbers. Ludwig: This is a political issue. It is an issue especially for small cities in a county with a declining forecast. These cities need to be allowed more flexibility. Worrix: Small cities are the more likely jurisdictions to use safe harbors and if the safe harbor is one they are not comfortable with, we haven’t done the work we ought to. Rindy: OEA is only one safe harbor; these cities have other options.

Boyd: Sees the potential for litigation with the draft rule in specifying that forecasting be based on only these options. A workgroup discussion followed regarding the option for communities to develop their own forecasts, that option leaves much flexibility under a process different than

OEA. It was asked if we want another safe harbor option. Benner: Option (1)(b) is consistent with some cases out of Douglas County, and is another option.

Worrrix: Does this language go further in its specificity than the Douglas County case or what we would feel comfortable with? Discussion on the term “demographers.” It was agreed that in (2)(b), we should replace “standards and practices endorsed by professional practitioners in the field of demography” with “commonly accepted methodology” which can include peer review. Benner: Perhaps the state can provide assistance to smaller cities for that peer review.

Hinman: Sometimes the forecast is simply extending historical trends with a ruler. Commonly accepted methodologies include those used in past-acknowledged plans. Winterowd: However, there have been some bad plans acknowledged in the past using that kind of forecast. Hinman: The argument can be made that this method was accepted at acknowledged plan and therefore can be used again. Rindy: I would be reluctant to endorse processes used at one point in the past but that were later determined to be a problem. Worrrix: When she asked if this wording adds a new burden to a local jurisdiction, it was determined that it does not as it is just one option.

Rindy: Perhaps another method needs to be added here to allow a straight line projection if it goes back at least 20 years? Winterowd: Recommends more than 20 years and the option be limited to cities of a certain maximum size. McCurdy: Concerned about how a straight-line projection could be used. If there were multiple methods available, cities would simply “shop” for the most favorable projection. Court of Appeals won’t get into a war on numbers. Cited an example of a city that forecast with a straight line but today, years later, the actual population is 30 percent less than forecast.

Ludwig: Suggestion for another option is to project out so that it is consistent with a prior forecast. Rindy: “Consistent” is not defined but is used throughout the rule. One way to define it could be that the projection is within a certain percentage of a prior forecast. There are three types of consistency: with the plan, timeframe or with OEA. Also, do we want to allow a forecast to be aspirational for employment, but not allowing the population forecast for residential to be adjusted accordingly?

Benner: The county drives the population forecast and cities drive employment forecasts. He will read these sections again to see if they are understandable and meet our intent. We need to clarify that in section (1), subsection (a) is one approach, (b) is another approach, and (c) is a combination.

Rindy: Section (5) on page 6 requires consistency from another perspective: assuring the city coordinates with others and that the plan is consistent with the forecast. Line 36 on page 5 addresses one city within two counties (Salem). Line 22-23 on page 4 – as written Salem is out of compliance. Need to rewrite so that the county is the coordinator. On line 23, page 4, “be based on and consistent” is changed to “coordinated.”

(6)(c) is one of four methods a city may propose an amendment to a county forecast. The implication is that the county has to respond in some manner, but language needs to be added.

Sherton: This is for when the county hasn't kept current. One option in an earlier draft required the county to consider the city's forecast. Rindy: Will go back to that earlier draft to see what was written.

Benner: Make a reference back to when the county allocation was made and also when it was no longer current.

McCurdy: Page 4, line 32-34. It is too much to require consideration of the effect of the allocation on farm and forest land. Schellenberg: Make sure Goal 3 is applied. Rindy: Goal 14 is written to assure Goals 3 and 4 are met.

Decision: Delete “, and the effect of the allocation on farm and forest land” on line 34.

Bolen: Page 5 (c) allows an expansion of the UGB even with declining population, for population that doesn't exist. Rindy: UGB is based on the number of people and not on the rate. He agrees that it needs to be rewritten and suggested replacing “forecast” with “population” on line 34. Something is needed for nongrowing cities, though this may not be it.

660-024-0050 Need Estimates

Sherton: Concerns with (3) cross referencing with (1). Rindy: Met with agency attorneys, as there are some court cases about “specific identified land need.” We may have a policy choice here. LCDC may have leeway in defining “identified land need,” and depending on how they define it, it may provide some flexibility regarding the hierarchy. He suggested we need a definition and gave an example from the attorney who suggested writing it narrowly. Benner: What is the value of defining it here? It may be better to allow the courts to wrestle with it for a while. Rindy: The courts are wrestling and seeing more cases coming down the road. Benner: It would be helpful to know if the Commission wants to define it narrowly or broadly. Rindy: Wants to reduce confusion and do a service to the courts and those using the system. Benner: This term isn't one of the general categories of land need. What's here is already the law. Sherton: Some of the suggested language of the attorney is in conflict with statute.

Decision: Need to know the Commission's preference on how to define “identified land need.”

Lynch: Asked if the draft will indicate this question has been asked of the Commission. Worrix: We will get input from the public and the Commission as this is a policy issue and not just wordsmithing.

Bolen: Delete child and adult care facilities from lines 35-36 on page 8 as these are not land needs. Also delete all language regarding semi public uses in (2)(b) on page 8. Winterowd agrees with deleting the language about child and adult care facilities but disagrees with the other. If you don't look at need for some of these uses, you underestimate land need. Benner: Resists calling out a list of specific uses, which will call for an analysis of the need of each use. We do need to account for semi public, public and institution uses though. Bolen: If residential land were consumed by these uses, then at the next regular adjustment period the city would have to add more residential. Benner: They need to be addressed but we don't need to list each

specific item. Rindy: Some jurisdictions call these needs and plan for them and some don't. Need to adjust rule to allow for both.

Decision: Delete "cultural and religions institutions, child and adult care facilities" from lines 35-36, page 8. Add language for those cities that do consider them.

Winterowd: Line 19, page 8 – delete "need and the amount and" with "need, based on the."

McCurdy: Hold up on changing this language because it relates to Goal 9. Other committees are dealing with consistency with Goal 9. The list in lines 20-22 is in conflict with Goal 9. Rindy: Will leave as a placeholder. Levy: Leave in "20-year land need" on line 19.

Rindy: 0050 requires looking at both housing and employment. Does that conflict with (4) on page 9? Do we want to restrict jurisdictions from being able to do single purpose expansions? One suggestion was to add language in (1) on page 8 to allow (4) on page 9 as an exception. Benner: We don't want to require a capacity analysis just to add for employment.

Decision: Leave (4) on page 9 as is and change other section(s) to include "except as allowed in (4)." Also confine (4) so it is more quasi-judicial; such as "nothing precludes from doing an amendment for one purpose...." Worrix: We are agreed to allow jurisdictions to do the smaller amendments and we have a couple of suggestions for how this can be done.

Sherton: Page 7, (4)(d) has unintended consequences. Rindy: We need to discuss this content because it is new policy. Currently, we don't have any means to force communities to address shrinking land supply. This provides some way. Benner: There should be language in statute that triggers a requirement to initiate periodic review, not just every 5 or 10 years. The Periodic Review Workgroup may make that recommendation. (4)(d) would be one of those triggers. Worrix: There is a need for a way to get a city to act when it has less than a 10-year supply of buildable land for housing needs, but she is not sure we have it here. She is concerned that this allows any state agency or person to make the claim.

Sherton: Doesn't see this as inconsistent with 0050 (4). However, 0060 (1) is inconsistent with 0050 (4).

Wrap Up, Other Items

- DLCD is close to finalizing the Intergovernmental Agreement with Metro for the research project. Data will be ready before the December LCDC meeting.
- Huber: Park district used in a couple of places, but not all jurisdictions have them. It could be a city parks department.
- Huber: Cautioned against referring to DOGAMI maps, as the final maps were never issued.

Email additional comments to Bob Rindy, including if the topics are in the correct order and additional terms that need to be defined.

Worrrix will call or email individual members to get more information from them on some specific issues.

Meeting adjourned.