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TO: Land Conservation and Development Commission

FROM: Bob Rindy, Senior Policy Analyst
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SUBJECT: Agenda Item 4, March 11-13, 2009, LCDC Meeting

**PUBLIC HEARING ON AND POSSIBLE ADOPTION OF
PROPOSED NEW AND AMENDED ADMINISTRATIVE RULES
CONCERNING URBAN GROWTH BOUNDARIES**

I. AGENDA ITEM SUMMARY

This agenda item includes a public hearing, deliberation and possible decision regarding proposed new and amended administrative rules concerning the process for adopting or amending an urban growth boundary (UGB). This is the second public hearing on the proposed rules – the Commission held an initial public hearing at its December 4, 2008 meeting. Subsequent to that hearing, the Commission’s UGB Work Group met three times and reached conclusions regarding several issues discussed in the first hearing. The department issued a revised notice and draft of the rules on February 10 (Attachment A). The Work Group also recommended an attachment to the rules, consisting of three tables to help interpret certain safe harbors, to be adopted along with the proposed rules (Attachment B). In addition to the work group recommendations, the department has proposed new rule provisions that were discussed but not recommended by the work group.

The proposed new and amended rules under OAR chapter 660, division 24, are intended to interpret, clarify and streamline the requirements of Goal 14 (Attachment C) regarding UGB amendments, especially with respect to local determinations of “housing and employment needs,” which are critical in establishing or amending a UGB. The proposed rules would provide new “safe harbors” to streamline local government efforts to meet these and other UGB amendment requirements, and would make other clarifying amendments.

For more information about this agenda item, contact Bob Rindy at (503) 373-0050, Ext. 229; email at bob.rindy@state.or.us; or Gloria Gardiner at (503) 373-0050, Ext. 282; email gloria.gardiner@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

The department recommends that the Commission take testimony regarding the proposed new and amended rules. Following the public hearing, the department recommends that the Commission adopt the proposed rules. The Commission may instead: (1) not adopt the proposed rules at this time, or (2) adopt some of the rules and either not adopt or continue the hearing for other portions. If the Commission chooses to continue the hearing for these rules, the department recommends the Commission provide additional direction to the work group and the department regarding further refinements to the proposed rules.

III. BACKGROUND AND HISTORY

This project is “Phase 2” of a Goal 14 rulemaking project that the Commission began in June 2004. LCDC initiated this project to clarify Goal 14 and to reduce cost and litigation associated with the UGB process. In 2005, “Phase 1” of this project resulted in Goal 14 amendments, and in 2006 the Commission adopted new rules interpreting Goal 14 (OAR chapter 660, division 24). When it adopted the new rules, LCDC instructed the department to continue with a second round, or “Phase 2” of this project, in order to address several issues that had been discussed but not resolved by the work group during Phase 1. In June 2008 LCDC reappointed a work group to advise the department on the second phase. The work group met in the summer and fall of 2008, and in October agreed to proposed some new “housing density” and “housing mix” safe harbor concepts, which comprise the core of the proposed rules.

The rules under OAR 660, division 24, are intended to clarify and streamline the UGB amendment process, which is summarized in Attachment F). These rules provide a comprehensive “interpretive guide” to the Goal 14 UGB amendment procedures, and also provide a series of “safe harbors” (see Attachment G). Safe harbors are optional for local governments, and are intended to provide a streamlined and less costly path toward meeting various UGB-related requirements. The current division 24 UGB rules:

- Describe each of the planning “steps,” and local government determinations, necessary for a UGB amendment;
- Guide population forecasts for urban areas;
- Describe the requirements for buildable land studies, needs analyses and other studies necessary for determining the amount and location of land in a UGB;
- Help streamline local consideration of particular requirements of Goal 14 through optional “safe harbors”; and
- Authorize an exchange of land currently inside a UGB for land outside the UGB.

IV. THE PHASE 2 UGB WORK GROUP EFFORT

This report provides a summary of the Phase 2 Work group’s considerations and recommendations, the scope of work group discussions, and a summary of research conducted or contracted by the department to guide the work group. This report includes information provided

to the Commission for its December 2008 meeting, but also includes additional information regarding the work group deliberations after that meeting.

A. WORK GROUP

On June 19, 2008, LCDC appointed a work group to consider issues and, as necessary, propose new or amended UGB rules for the Phase 2 UGB project. The work group membership is listed in Attachment E to this report. The UGB work group met six times from July 15 through November 3, 2008, and held two “subcommittee meetings” on specific topics. Following the Commission’s December 4 hearing, the work group met three more times. Meetings of the workgroup and subcommittees were open to the public and other interested persons were frequently in attendance.

The work group agendas, minutes, and meeting materials are posted on DLCD’s website at [http://www.oregon.gov/LCD/meetings.shtml#UGB Work Group Phase 2](http://www.oregon.gov/LCD/meetings.shtml#UGB_Work_Group_Phase_2)

B. PROJECT SCOPE

When it initiated Phase 2 of the UGB project, LCDC directed the department and the work group to consider additional safe harbors concerning:

- Housing density (an essential component of housing need analyses);
- Housing mix assumptions (also an essential component of housing need analyses)
- Infill and redevelopment assumptions;
- How to treat Goal 5 natural resources and Goal 7 hazard areas in land need and supply analyses; and
- A minimum lot size, or “floor,” for residential zones.

LCDC also indicated that the Phase 2 Work Group should also consider other issues, including:

- Providing LCDC with authority to approve UGB amendments even where there are minor differences in the amount of land provided and the amount determined as needed;
- Providing LCDC with authority to approve population forecasts where the estimates are “close enough” based on requirements for such estimates;
- Whether there is a need for a special UGB amendment process for fast-growing cities;
- Ways for UGB rules to encourage more efficient development of land within UGBs, and encourage planning for more affordable and livable communities;
- Whether there is need for a special process for UGB amendments to site new urban facilities and services, such as sewage or water treatment facilities, water storage, power substations, etc.; and
- Rules or other policy direction regarding adding land to UGBs for schools.

Finally, after the work group began, LCDC directed the group to also consider the question of local adoption and acknowledgment (as a PAPA, including through LUBA) of various elements - or “segments” - of a plan leading to a UGB amendment, and how this prior acknowledgement affects LCDC review of a UGB amendment “in the manner of Periodic Review.”

Given the time frame for this project, the work group prioritized the issues to be addressed. The group decided that the following tasks were the highest priority:

- Safe harbor(s) concerning housing density (an essential component of housing need analyses);
- Safe harbor(s) concerning housing mix assumptions (also an essential component of housing need analyses);
- Safe harbor(s) regarding need for commercial or industrial land, including safe harbors or rules to encourage regional economic opportunity analyses (EOAs);
- Safe harbor(s) regarding housing vacancy rates (a component of a housing need analyses)
- LCDC review of UGB amendments in situations where there are minor differences between the amount of land provided and the amount determined to be needed (see discussion below), and
- LCDC review of population forecasts with regard to minor or technical concerns about the methodology used for the forecast.

The group decided that the following issues were either low priority or could not be addressed in the timeframe allotted for this task, either because the issues were too complex or because group consensus was not likely:

- Safe harbors for land supply analyses concerning Goal 5 natural resources and Goal 7 hazard areas. The group agreed that safe harbors on these issues would be very helpful. However, in general, inventory work on these topics is expensive and it is not clear how safe harbors can short cut necessary inventories. Furthermore, issues raised under Goal 5 are often complex and generate considerable local controversy, and safe harbors are probably not the best approach in such circumstances. Furthermore, circumstances regarding the range of Goal 5 resource types, and the range of particular resources, vary widely throughout the state and even within individual jurisdictions. As such, rules for these topics are extremely difficult to simplify through a set of safe harbors.
- A special UGB amendment process for very-fast-growing cities. The work group concluded that at this point in time there are no very-fast-growing cities, and. In the future the commission should revisit this question as circumstances change, but given the short time frame for this project the group agreed not to consider this topic.
- A process to exempt or streamline UGB amendments for land needed for new city facilities such as sewage treatment facilities, water storage, power substations. The work group did not identify problems with the current process, and thus agreed that special rules for this situation are not warranted. In the UGB research described later in this report, it was determined that over the past ten years a large number of cities have amended UGBs for this purpose. This implies that the current process works well for this type of use.
- Requirements for more efficient development of land within UGBs. The work group decided that safe harbors for housing density and mix would provide a non-regulatory, i.e., a non-mandatory method to accomplish this, and thus the group did not pursue requirements for efficiency or density.

- Special rules regarding land added to UGBs for schools. The work group determined in its first meeting that this issue did not necessarily warrant a set of special rules, but even if it did, such rules would likely be highly contentious and take longer than the time provided for in this project. The department suggests that a set of rules on this topic might be pursued in the future if it is determined that there continue to be problems with UGB amendments regarding school siting. Changes to ORS 195.110 made in the 2007 legislative session mandate school facility plans for “large school districts” by 2010. These plans must be prepared in coordination with city plans. As such, this requirement is likely to provide the department with data and other experience regarding issues associated with school planning.

C. RESEARCH TO GUIDE HOUSING SAFE HARBOR DISCUSSIONS

In its initial meeting, the work group agreed to a method for considering and evaluating ideas for new safe harbors, as follows:

1. The department should research past acknowledged UGB amendments to determine the range of conclusions and assumptions used by local governments, for cities of various sizes, and determine whether the data indicate similar conclusions or assumptions among various groups of cities, that may form the basis for new safe harbors.
2. Based on this research, use the data to evaluate proposed safe harbors. The safe harbors could vary based on population or other factors.
3. In proposing safe harbors, the work group should also consider the general “policy intent” of the state land use program, e.g., more efficient use of land, affordable housing and adequate land supply. These considerations should help the group craft safe harbors that might further this intent.

The group agreed that benchmarks for safe harbors regarding housing density and mix should be based on research as to previous efforts by cities to determine housing mix and density. Cities amending a UGB have, in all previous cases (due to state requirements), studied and made assumptions about the long term need for particular housing densities and mix of housing types. The groups agreed the department should try and determine whether cities with similar populations reached similar conclusions about needed housing density and mix, or whether there were other identifiable trends in past and recent acknowledgements of UGBs regarding housing density and mix. If a representative sample of local government findings on these topics tend to cluster, either based on city size or other parameters, it would be reasonable to conclude that in the future cities would probably continue to reach or trend toward these same conclusions. If so, safe harbors based on these trends would reflect a “likely scenario” for cities projecting such needs in the future. A safe harbor would save time and money for cities, and possibly allow cities to expend additional planning resources on other important aspects of long term planning. Furthermore, depending on the results of the research, the group would be able to consider setting these safe harbors so as to encourage higher densities and a more affordable and diverse housing mix than might typically occur.

The department contracted with Becky Steckler, formerly with ECO Northwest, to conduct this research. In a brief period of time, Ms. Steckler produced a report (see Attachment H) that “collected key data and assumptions (such as housing mix, densities, percentage of land for streets and other infrastructure) used by cities to inventory buildable land and analyze land need for the purpose of evaluating and, if necessary, expanding an urban growth boundary.” This information informed the UGB work group about key data used by cities in the past, and that could be examined to help the work group formulate additional UGB safe harbors to streamline future UGB analyses.

DLCD Urban Planner Angela Lazarean further refined the data in the Steckler report so as to display and focus on certain data or parameters under discussion by the group, and also to generate additional data regarding certain factors such as housing mix (see Attachment I). This data provided information to help the work group set housing density and housing mix safe harbor parameters. The research demonstrated that there are indeed correlations in the assumptions and conclusions used by cities in defined population ranges considered in the study. Although the Steckler/Lazarean reports were not based on a large enough sample to be “statistically representative,” the work group and staff agreed that to obtain a truly representative sample would require an expansion of the study to obtain data from UGB amendments that were acknowledged more than fifteen years ago. Not only would these older plans be suspect in terms of their applicability to current trends, but also data from these “older” acknowledgments is harder to obtain since it is cataloged in a different manner and in different data bases than more recent data and is not easily “searchable”.

It is important to note that, for cities over 2,500, the requirements for housing need analyses are elements of statute, in addition to requirements of Goals 10 and 14. As such, it is important that safe harbors established by Commission rule do not conflict with statute. The department believes that the Steckler/Lazarian research demonstrates that local governments usually reach similar conclusions about certain aspects of housing needs, depending on population. As such, in adopting the safe harbor rules, the Commission would interpret certain statutory requirements for housing needs (as well as interpreting Goal 10 and 14 requirements). The Commission interpretation would essentially declare that a need analysis that conforms to the safe harbor is sufficient with respect to meeting these statute and Goal requirements. The department believes the proposed rules are sufficient to meet these requirements in large part because the data in the Steckler/Lazarian research confirms that, regardless of the safe harbor parameters, local governments are highly likely to reach approximately similar conclusions as provided in the safe harbors with regard to housing density and mix needs.

We also note that the department has conducted “case studies” to test the safe harbors. This is described in Section VI of this report and in Attachment J.

V. PROPOSED FEBRUARY 10 DRAFT RULE: Description of proposed new and amended rules in Attachments A and B

Attachments A and B are the “public draft” provided on the DLCD website on February 10, along with notices to interested parties. The February 10 draft is an amended version of the draft rules issued November 17, 2008, which were the subject of the first LCDC hearing in December

of 2008. In some cases, the amendments are very minor, but with respect to the housing mix safe harbors and the “segmentation” or LCDC Review proposed rules (660-024-0080), the amendments are substantial. The proposed new and amended rules are as follows:

OAR 660-024-0000: Purpose and Applicability

The department has proposed an “applicability” date for the new and amended rules: April 16, 2009. To be clear, division 24 interprets Goal 14 as amended by LCDC in April 2005. Some local governments may still be under the “old” Goal 14, and as such, these rules would not apply to those local governments. Goal 14 and related definitions were substantially amended on April 28, 2005, effective April 28, 2006, but the amended Goal included provisions allowing jurisdictions to continue using the “old” Goal 14 for a UGB amendment initiated using the previous goal. Similarly, the division 24 UGB rules currently indicate that the rules apply only to the version of Goal 14 adopted in April 2005 (i.e., not the “old” Goal 14). Similar to Goal 14 itself, the rules declare that a local government that “initiated” an evaluation of the UGB prior to April 28, 2005 is authorized to apply the “old” Goal 14 to the adoption of such UGB amendment, even if the amendment is adopted after April 28, 2006. “Initiated” is defined to mean that prior to April 28, 2005, the local government either:

- (a) Issued a public notice of a proposed plan amendment for the purpose of evaluation or amendment of the UGB, or
- (b) Received LCDC approval of a periodic review work task for the purpose of evaluation of the UGB land supply and, if necessary, amendment of the UGB.

The department has determined that there are no local governments that qualify under (b) above that have not finished work tasks intending to use the “old” Goal 14. Therefore, that subsection is no longer needed, and the department recommends its removal from the rule. In addition, the dates in the applicability rule need to be changed if LCDC adopts amendments to division 24. The amendments propose a date anticipated for rule filing if LCDC adopts this proposal.

OAR 660-024-0010: Definitions

The department has proposed several definitions at the beginning of division 24 (see OAR 660-024-0010). These definitions pertain to terms used in the rules in division 24. However, they are the same as definitions in other pertinent rules (the Goal 9 and 10 rules in divisions 7, 8, and 9). Note that the revised draft also includes several definitions that apply to the proposed housing mix and density safe harbors and attached tables, discussed later in this report. The definition of “net buildable acre” was moved from section 0040 to the definitions section in 0010 because this term is used in more than one section of the division.

OAR 660-024-0030: Population Forecasts

The work group has recommended amended rules for population forecasts in order to address the “close enough” concepts described in LCDC’s initial charge to the work group. The proposal (see Attachment A, page 4, lines 16 – 20) authorizes LCDC approval of population forecasts in certain situations where the Commission finds that a failure to meet a particular requirement of this rule is insignificant in nature and is unlikely to have a significant affect on the needs need determinations.

The department has proposed a second minor amendment to rules under this division (lines 21 – 23). This amendment makes it clear that a local government may employ only one of the population safe harbors. These safe harbors were not designed to be used together. This amendment also renumbers the safe harbors.

OAR 660-024-0040: Land Need

The focus of the workgroup has been on new safe harbors for need analysis under the Land Need Rules at 0040. There are a number of proposed amendments to these rules.

Regional EOA (OAR 660-024-0040(6)): The workgroup has proposed adding provisions to clarify that cities and counties may conduct a regional economic opportunity analysis. Goal 9 already provides for this, but it was felt that the UGB rules should include it as well, since such an analysis would be an important component of a UGB needs analysis. The amended provision also clarifies that a regional EOA may include portions of more than one county.

The work group discussed “employment land need” safe harbors at several meetings before the December hearing but did not reach final agreement on a safe harbor. At its September 30 meeting, the work group had an extensive discussion of the many good reasons local governments may conduct “regional” EOAs, rather than have each city in the region determine employment land needs separately. Even though the work group did not recommend any rules regarding regional EOAs, the department chose to provide rule proposals in the draft published for the December 4 meeting, including a safe harbor, in order to elicit public comment and to guide LCDC discussion about this topic. Following the December hearing, the work group discussed the department’s proposal but decided to not recommend it to the Commission. Although some members of the group did not favor a rule authorizing regional EOAs, largely because they are already permitted in the OAR 660, division 9 Goal 9 rules, the department has included, as OAR 660-024-0040(6), a provision that authorizes regional EOAs that may include areas in more than one county. (See Attachment A).

Also related to this issue, department staff noticed that division 24 doesn’t include a definition of “suitable vacant and developed land,” a term that is used in OAR 660-024-0050(1) concerning employment land inventories, based on definitions of these terms in the Goal 9 rules. Therefore, staff proposes a definition in OAR 660-024-0010(8) that refers to definitions in Goal 9 rules, OAR 660, division 9. Staff also added a definition of “EOA” to section 0010, also referring to the Goal 9 rules.

Vacancy Rate Safe Harbor: OAR 660-024-0040(8)(e): When determining housing need for the 20-year planning period, the work group has proposed a safe harbor to allow a local government to rely on the vacancy rate for its urban area specified in the most current U.S. Census Bureau statistics

Housing Density and Mix Safe Harbors: The workgroup has proposed several safe harbors to determine housing density and mix, as components of an overall housing needs analysis. The work group agreed to a set of housing density and mix safe harbors – actually two alternative approaches for each. The general “structure” of the proposed safe harbors was agreed to by most

work group members, although there was not unanimous agreement on the various parameters within that structure.

The work group spent a considerable amount of its meeting time discussing and adjusting the residential density and mix safe harbors. These safe harbors are intended to allow local governments to make “assumptions” – for purposes of UGB analysis – about housing needs, especially the need for specific housing density and the mix of housing types, but in return, the local governments must “allow” greater densities and “prevent” low density patterns. A determination of the housing mix and density, the subjects of these safe harbors, are core components of a housing need analyses conducted in order to update a UGB. Typically, an analysis of such needs requires a considerable amount of research at the local level. Local government’s conclusions as to the mix and density are often controversial issues, both locally and as LCDC or LUBA reviews UGB amendments. As such, safe harbors on these issues would probably provide a more streamlined and less contentious UGB update process.

Agreement on these safe harbors is a major accomplishment by the work group. That said, the work group’s safe harbor proposal is fairly complex, and has many parts. Some may rightfully argue that this complexity goes against the general intent of this effort, i.e., to simplify the process. However, it is important to keep in mind that “complexity” in the land use process does not necessarily correlate with the length of a rule. Many steps in the land use process are complex because they do NOT include clear or detailed descriptions of the requirements or the various steps necessary in meeting those requirements. Furthermore, safe harbors, even if complex in and of themselves, will ultimately reduce local cost, work load and litigation. Several work group members, including planners with experience in UGB processes, have agreed that the proposed safe harbors will probably simplify local UGB amendment work and be less costly than the current process for determining density and mix.

In response to suggestions by the Commission and others at the December 2008 public hearing, the department has included a set of tables in the rule, to help interpret and illustrate the rules. The tables are a part of the rules, and are referred to in the rules (see attachment B to this report). They are intended to make the safe harbors more understandable, and do provide an illustration of the more complex wording in the rule that describes the various components of the table.

Note that section (8) of the proposed rule consists only of residential safe harbors; subsections (a) through (d) of section (8) are safe harbors previously adopted by LCDC in “Phase 1” of its UGB streamlining project. Subsection (e) is the new proposed vacancy rate safe harbor, and subsection (f) is the standard density and mix safe harbor described above. (A number of cities have already used the current safe harbors (a) through (d) in adopting UGB amendments after 2006).

Also note that this report describes housing mix and density safe harbors separately, even though the standard mix and density safe harbors are combined in division 24. The issue of whether or not the rules should combine the mix and density safe harbors is also discussed separately in this report, after the discussion of the various safe harbors.

Finally, note that the density safe harbors do not apply to all urban areas with populations greater than 25,000; they are available only to cities whose most recent estimated population is less than 25,000, but whose coordinated 20-year population forecast for its urban area is more than 25,000. This is due to a potential conflict between the division 24 safe harbors and ORS 197.296, which applies to Metro and to cities outside Metro with populations of 25,000 or more. It is presumed that the more detailed requirements of ORS 197.296 regarding housing needs cannot be met by these safe harbors.

1. Standard Housing Density Safe Harbor in 0040(8)(f)

The work group used the Steckler/Lazarean research to evaluate a set of “housing density safe harbors.” The first set of density safe harbors we term the “standard density” safe harbors (see below) to differentiate them from the second set, the “incremental density” safe harbors (described later, below). In the tables, with respect to density, there are different density “parameters” or “values” for cities depending on population (note that the tables also indicate housing mix; here we are only discussing the density part of the tables). These are based on four “population ranges.” Each “population range” represents the forecasted population for the urban area inside the UGB at the end of 20 years. For each population range, the safe harbor allows a local government to “assume” a density that will occur over the forecast period, for purposes of the UGB analysis. This “assumption” is specified by the second “bullet” in the middle line of Column B in table. It represents a density that a local government may “assume” will occur with respect to housing development over the planning period (i.e., either 4, 6, 7 or 8 units per net acre). The number in this column specifies the density in units per net buildable acre that the city may “assume” will occur over the 20-year planning period, for purposes of determining residential density within the existing urban area and within any new areas proposed to be added to the UGB. As such, this number is essential to estimating land need for the 20-year planning period. Below is the density portion of Table 1:

Table 1

A. Coordinated 20-Year Population Forecast	B. Density Safe Harbor Numbers are in Dwelling Units (DU) per net buildable acre
Less than 2,500	<ul style="list-style-type: none"> • Required Overall Minimum: 3 • Assume for UGB Analysis: 4 • Zone to Allow: 6
2,501 – 10,000	<ul style="list-style-type: none"> • Required Overall Minimum: 4 • Assume for UGB Analysis: 6 • Zone to Allow: 8
10,001 – 25,000	<ul style="list-style-type: none"> • Required Overall Minimum: 5 • Assume for UGB Analysis: 7 • Zone to Allow: 9
More than 25,000 but not subject to ORS 197.296	<ul style="list-style-type: none"> • Required Overall Minimum: 6 • Assume for UGB Analysis: 8 • Zone to Allow: 10

Note that the “assumption” (or “Assume for UGB Analysis”) in the table is in “units per net buildable acre” and applies only to buildable residential land in the UGB. Moreover, it is an “average overall density” for all buildable land in the UGB.

We note that, even if LCDC does not adopt this safe harbor, every city evaluating its UGB will need to decide what density is likely to occur on buildable land in the UGB (including both land already in the UGB and any expansion area). Such decisions are necessary for a city to project total residential land need, in conjunction with other estimates about the 20-year population, household size, vacancy rate and the forecast total of needed dwelling units. Division 24 already provides safe harbors for population and household size (and the work group has agreed on a proposed new safe harbor for vacancy rate, see below).

The Steckler/Lazarean research showed that when a “typical” city decided an average overall density for future development in its UGB, it never expected all land would develop at the maximum allowed density under zoning assigned to buildable land in the city. In other words, cities typically assume a certain amount of “under-build.” Therefore, the work group has proposed that the “Assume for UGB Analysis” density allowed by the safe harbor will be less than the maximum allowed density. However, a very important element of the group’s consensus on this point is that the proposed safe harbors **ALSO INCLUDE** a requirement that the city allow the opportunity for a higher density. Thus, although a city may assume that land will develop at an average density that is less than the “allowed” density, the “allowed” density is specified in this safe harbor. It has been set to a number that will generally represent a slightly higher density than might typically be set without the safe harbor (based on the Steckler/Lazarean research).

The first “bullet” in Column B of the table represents this higher density opportunity using the term “zone to allow” (i.e., 6, 8, 9 and 10 units per net buildable acre). Again, as a “requirement” if the city chooses to use the safe harbor, the city must zone land to allow this density. These numbers represent an overall average maximum density that **MUST** be allowed by the city’s comprehensive plan and zoning regulations, for all land in the UGB (including any buildable land added to the UGB) if a city uses the standard housing density safe harbor. Zoned to allow means: through clear and objective standards as required by Goal 10 rules and ORS 197.307(3)(b) and (6)). This is an OPPORTUNITY density (i.e., a clear and objective opportunity for a land owner or developer to develop at this density), and would also vary according to the population size category.

Finally, as a third element of this safe harbor, in order to use the average density safe harbor, the local government must also establish a MINIMUM density, or “density floor,” for all buildable residential land in the UGB. The city must establish zoning that in some manner ensures that development, on average, will NOT occur at lower than the minimum density provided by the “Required Overall Minimum” under the third bullet in column B. Note that this minimum would also vary according to the population size category. The “Required Overall Minimum” densities provided in column B (3, 4, 5, and 6) are a “floor,” or a bottom limit to the overall average density for buildable residential land in the UGB. In general, this element is intended to discourage very large residential lot sizes for residential development inside UGB; a city will probably find that it cannot use the density safe harbors if it permits very large lot sizes in its

residential zones, since this would make it very difficult to ensure the “Required Overall Minimum” density in the safe harbor.

2. “Alternative density safe harbor for Small Exception Parcels and High Value Farm Land in 0040(8)(g)”

Following the December 2008 Commission hearing, the work group discussed and decided to recommend a variant to the standard density safe harbor, pertaining to Small Exception Parcels and High Value Farmland. Under this option, a local government must first choose the standard density safe harbor. If it chooses the standard density safe harbor, it may also use (but is not required to use) the Small Exception Parcels and High Value Farmland safe harbor. This option is illustrated in Table 2 (see attachment B, Table 2). The option allows a local government to assume different densities for small exception parcels and high value farm land parcels to be added to the UGB. The standard density safe harbor provides only one average density for the entire UGB, for both the existing UGB and land added to the UGB, regardless of the type of land. This “alternative” safe new harbor allows a local government to “assume” lower density will occur for small exception parcels. However, at the same time, the local government must assume a higher density will occur on any high value farmland added to a UGB. The idea is based on two assumptions by the work group: 1) authorizing lower density assumptions for small exception parcels recognizes that these parcels frequently have limited potential for future development at urban densities compared to larger exception parcels; thus, using this safe harbor removes a “disincentive” to add these lands to a UGB, and 2) requiring a higher residential density for high value farm land may lead to less farmland added to UGBs, thus better implementing state policies to protect and preserve farmland and ensure efficient use of urban land.

The work group agreed to define a “small exception parcel” as one that is 5 acres or less in area and has an existing house (see Table 2 in Attachment B). The density numbers for Small Exception Parcels and High Value Farm Land in Columns B and C, respectively, of Table 2 are based on the standard density safe harbor numbers in Column B of Table 1 as follows. A local government that uses the OAR 660-024-0040(8) (g) safe harbor may plan and zone Small Exception Parcels to achieve an average density that is 2 units fewer per net acre than the average density in the standard density safe harbor (compare the “Assume for UGB Analysis” numbers in Column B of Tables 1 and 2). At the same time, that local government **MUST** plan and zone high value farmland added to the UGB at least 2 units per net acre **MORE** than the density assumed in Table 1 (the standard density safe harbor). Note that the other parameters also change: the Required Overall Minimum, the Assume for UGB Analysis **AND** the Zone to Allow (compare Table 1, Column B with Table 2, Column C). For any and all land added to the UGB that is not either Small Exception Parcels or High Value Farm Land, the local government must use the standard density (and mix, see below) safe harbors in OAR 660-024-0040(8)(f).

3. “Incremental Density Increase” Safe Harbor in 0040(8)(h)”

An alternative density safe harbor was also recommended by the work group. The group agreed that cities that are currently developed at a very low residential density would probably not choose the “standard density” safe harbors described above. The standard safe harbors are

calculated to be at or slightly higher than the density levels used by most cities in the research project, but there are a number of cities, especially small cities, that would consider these density assumptions too difficult to achieve given their current low density development patterns. While the work group did not question that the Commission should encourage these cities to develop more efficiently in the future, they agreed that the standard safe harbors would not likely be chosen in cases where the city has an established pattern of low density development.

Therefore, the work group proposed an alternative safe harbor to specify a PERCENTAGE INCREASE above the existing density for DEVELOPED RESIDENTIAL LAND in the UGB at the time the UGB amendment was initiated. The number chosen was 25%. To rephrase, this safe harbor allows a city to assume that the overall density of residential development over the forecast 20-year planning period would be 25% higher than the overall density of developed residential land in the UGB at the time the local government initiated the evaluation or amendment of its UGB. Many members of the work group indicated a preference for this method, since those cities that are currently at a very low average density would be more likely to use this safe harbor than the “standard density” safe harbor option described above. Other work group members did not favor this method over the method above, because it may be perceived to “reward” cities that have developed with a low density over time by allowing them to continue developing at a slightly higher but still low residential density. (See attachment B, Table 3, for methodology to calculate increment).

It is important to note that under this “incremental density” safe harbor option, a local government must also plan and zone its buildable residential land in the entire UGB to ALLOW, through clear and objective standards (as required by Goal 10 rules and ORS 197.307(3)(b) and (6)), the OPPORTUNITY for at least the average density represented by Zone to Allow in the right hand column of the chart above – the same requirement for a maximum density that is in the “standard density” safe harbor.

Furthermore, in order to use the “incremental density” safe harbor option, the local government must also establish a MINIMUM density for all buildable residential land in the UGB in the same manner as for the Required Overall Minimum in the standard density safe harbor chart above. Note that this minimum or density “floor” also varies with the population size category.

This means that while a historically low-density city may assume that the land in its UGB will develop at a lower density than if it used the “standard density” safe harbor, cities that use the “incremental density” safe harbor must still ALLOW a high density equivalent to that of cities that use the “standard density” safe harbor, and must ensure that very low, large-lot density residential development does not occur, on average, inside its UGB.

4. “Standard Housing Mix” Safe Harbors in 0040(8)(f)

The research performed by Becky Steckler provided information on housing mix, but that research did not provide a “current housing mix”; *i.e.*, the mix of “already built” housing at the time of the UGB amendment. Rather, she reported only the “proposed housing mix” for the next 20 years (for those UGB amendments in her study). Angela Lazarean refined and augmented the Steckler research to determine current housing mix (*i.e.*, prior to the UGB amendment), where

such data were available. Although there were fewer data available for mix than for density, the refined research allowed the work group and the department to construct a structure for two types of “housing mix” safe harbors. The first set, the “standard” housing mix safe harbor, is illustrated here, and also by the chart in Table 1 of Attachment B to this report.

“Standard Housing Mix” Safe Harbors			
Percentage of Dwelling Units that must be Allowed by zoning			
Coordinated 20- Year Population Forecast	Low Density Residential 2-6 du/nba	Medium Density Residential 6-12 du/nba	High Density Residential 12-40 du/nba
Less than 2,500	70%	20%	10%
2,501 – 10,000	60%	20%	20%
10,001 – 25,000	55%	25%	20%
More than 25,000 But not subject to ORS 197.296	50%	25%	25%

As explained earlier in this report, after the first Commission hearing on these proposed rules, the work group changed the “standard housing mix” safe harbor from a two-tiered structure to a three-tiered structure. The revised proposed safe harbor describes three density ranges, and specifies percentages of each of the three housing density ranges that may be assumed by a local government as part of its housing needs analysis if it follows the safe harbor. Note that the percentages in these safe harbors represent the amount (*i.e.*, percentage) of the overall housing mix that must be ALLOWED – under clear and objective zoning – on buildable land in the UGB. Statewide goals and laws do not require that a forecast housing mix will actually occur, and as such, it is unlikely a city will actually achieve these exact percentages. However, clear and objective zoning to ALLOW these percentages can increase the likelihood of such development. Making sure that local governments clearly authorize a forecast housing mix, rather than require that mix, is a longstanding principle of Goal 10. Note that under the proposed mix safe harbor, larger cities must allow higher percentages of medium density and high density housing, and a lower percentage of low density housing.

5. “Incremental Housing Mix” Safe Harbors in 0040(8)(h)

As an alternative to the standard mix safe harbors described above, the work group proposed a method to estimate housing mix by simply increasing the proportion of attached housing over the existing mix—similar to the concept for the incremental density safe harbor. Note that this is a two-tiered structure based on housing types, compared to the three-tiered structure based on density ranges in the standard housing mix safe harbor. The incremental mix safe harbor is designed for cities with a current development mix that includes a very small percentage of attached housing. The work group suggested that these cities will likely not be able or willing to

use the standard mix safe harbors described above, because they require the city to assume a very large percentage increase over the current mix. At the same time, as with the incremental density safe harbor, the incremental mix safe harbor requires a fairly large increase in the percentage that must be ALLOWED (by clear and objective zoning) in the city's plan. While the standard mix safe harbor is likely to be preferred by cities with an average or above-average proportion of attached housing in their mix (based on the research), a safe harbor that allows a city to increase the attached housing allowed by 15% will likely be more attractive to lower-density cities with a single-family detached-weighted mix at the time of the UGB evaluation.

The incremental mix safe harbor is described in the proposed rule in Attachment A, and Attachment B, Table 3. Under this safe harbor, a local government must determine the existing mix percentages – of both attached housing and single family detached housing on developed land in the UGB at the time the amendment of the UGB is initiated. The local government must then plan and zone to authorize at least a 15% increase in the percentage of attached housing allowed, for all buildable residential land in the UGB (not just the expansion area) for the 20-year planning period -- and a corresponding decrease in the percentage of detached single family housing by 15%. Table 3 in Attachment B provides two illustrations of the methodology for the incremental housing mix safe harbor.

6. Linkage of Density and Mix Safe Harbors

DLCD proposed to the work group that, if a city chooses to use the density safe harbors, it must also use the housing mix safe harbor, and *vice versa*. Some members of the work group supported this “linkage” and others suggested that the density and mix safe harbors should be de-linked, allowing a local government to use either the density or mix safe harbors and to use both only if it chose to do so. Ultimately, the work group as a whole agreed that the rule proposal and this report should recommend that LCDC decide whether these two residential safe harbor categories should be linked or not. The published rule proposal (Attachment A), is written based on a linked set of safe harbors. The research (described in Section J of this report) also presumes these safe harbors are linked.

The department strongly recommends linking the two safe harbors because BOTH safe harbors are necessary in order to ensure that a range of needed housing types is provided in each community consistent with state laws regarding needed housing. If a city uses a density safe harbor but plans for a “low” percentage of attached housing, the efficiency and affordability intended by Goals 10 and 14 and state laws may be compromised.

OAR 660-024-0050(5): Minor Differences in Need and Supply

The work group has recommended amended rules for Land Inventory in order to address the “close enough” concepts described in LCDC’s initial charge to the work group. The proposal under OAR 660-024-0050(5) authorizes LCDC to determine that a difference between the estimated 20-year needs and the amount of capacity added to the UGB by a submitted UGB amendment is unlikely to significantly affect land supply or resource land protection. Note that this authorization only applies to LCDC, and thus is only applicable when a UGB amendment is reviewed by the Commission.

OAR 660-024-0050(7): “Efficiency” Safe Harbor

Following the first LCDC hearing on proposed amendments to division 24, a member of the work group presented a safe harbor concept for the “Land Inventory and Response to Deficiency” section of the division 24 rules. The work group discussed this proposal and agreed to the concept. Department staff then drafted the language, and the work group agreed to recommend it to the Commission. Under this new safe harbor, if a local government uses the combination of the standard residential density and the standard mix safe harbors described above, but not either of the incremental density and mix safe harbors, it is deemed to satisfy two “efficiency” requirements in Goal 14: 1) the requirement to evaluate development capacity of residential land inside the current UGB, which is specified in two provisions of division 24, Section 0050, and 2) the requirement to demonstrate that residential needs cannot be reasonably accommodated on residentially-zoned land inside the current UGB per Goal 14. The safe harbor goes on to specify other UGB “efficiency” requirements that are NOT subject to this safe harbor and must be satisfied separately, including the required demonstration that residential needs cannot be reasonably accommodated by re-zoning non-residential land inside the current UGB, and compliance with the Goal 14 boundary location factors. The new “efficiency” safe harbor is proposed as OAR 660-024-0050(7) (see Attachment A).

OAR 660-024-0070: UGB Adjustments Rule “Housekeeping”

The department proposed these changes to clarify an ambiguity in section (3) of this rule that local governments and other interests raised after the “Phase 1” work group had completed its work in 2006. The department believes the proposed amendments to this section are desirable to clarify that, for land exchanges, the term “the same” does not mean that all employment land is the same, nor that all residential land is the same. Rather, industrial lands are different from retail employment lands, and attached housing lands and single family detached housing lands are different. These amendments had not been discussed by the work group at the time of the December 2008 hearing. Between hearings, the group discussed the December draft, department staff revised the amendments, and the work group approved the proposed amendments to OAR 660-024-0070 that are in Attachment A.

OAR 660-024-0080: LCDC Review of UGB Amendment Components

Shortly before the work group began its work, the Chair of LCDC asked the department to make sure the work group considered the issues under debate in two LUBA cases; *LCDC v. McMinnville* and *GKM Development, et al v. City of Madras*.^{1,2} The work group was asked to determine whether the issues in these cases could be resolved through recommendations for the Goal 14 interpretive rules under division 24. It was pointed out that, if LCDC does not consider this issue, the courts will probably end up deciding state policy on this important question, rather than the Commission. However, *Madras* was affirmed by the Court of Appeals after the first LCDC hearings on these rules (see below). As such, the department has proposed an alternative set of rules regarding LCDC review of UGB amendments, based on advice from the Department of Justice.

¹ *DLCD v. City of McMinnville*, LUBA No. 2001-093, remanded December 17, 2001; *GKM Development, LLC, et al v. City of Madras*, LUBA Nos. 2008-003 & 2008-005, affirmed July 22, 2008.

² Many UGB amendments require LCDC review, either because they are periodic review work products, or because they expand the UGB of a city with an urban area population of 2,500 or more by 50 acres or more, and therefore are reviewed “in the manner of periodic review” under ORS 197.626 and OAR 660, division 25.

The *McMinnville* and *Madras* cases concerned an issue that is becoming more prevalent: cities are increasingly choosing to adopt (or propose to adopt) individual elements or “segments” of a UGB amendment process, such as the population forecast, the buildable lands inventory or the land need analysis, as a separate stand-alone plan amendment prior to adopting the UGB amendment itself. Before this recent trend, UGB amendments usually came to the department and LCDC to review after all the segments had been adopted as one package, along with the UGB amendment, as required by statute, either as a periodic review work program task or “in the manner of periodic review.”³ But because the “post-acknowledgement plan amendment” (PAPA) process provides a possible route for “acknowledgment” of such individual segments, these cases raised the question as to whether cities may “lock in” acknowledgment of an individual UGB element before LCDC reviews the final UGB decision. Cities that have been pursuing this track probably presumed that, when the city ultimately submitted the UGB amendment for LCDC review, most of the key decisions would be “off the table” for persons objecting to the decision, as well as for the Commission itself.

At the last work group meeting before the December 2008 hearing, many members of the work group joined in a recommendation that the Commission should not take action on this matter until after the Court of Appeals issued its decision in the *Madras* case. After the December LCDC hearing, the Oregon Court of Appeals issued its decision in the *Madras* case. Taking the *McMinnville* and *Madras* decisions together, current law appears to be as follows: (1) local jurisdictions subject to ORS 197.296 (Metro, and urban areas outside Metro with 25,000 or more people) must submit all components or “segments” of a UGB amendment process together “in the manner of periodic review” after the process is completed, but (2) smaller cities may pursue acknowledgment of components or “segments” as individual PAPAs.

There is not a consensus among the work group members to support the revised section 0080. In fact, most work group members do not seem to support this. However, the department has put this forward for LCDC consideration in order to make DLCD’s position clear to any local governments that may believe PAPA’s are immune from LCDC review at periodic review or “in the manner of periodic review.”

The proposed new rule at OAR 660-024-0080 has two components:

1. A city with a population of 2,500 or more within its urban growth boundary that amends the urban growth boundary to include more than 50 acres shall submit the amendment to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.650. (OAR 660-024-0080(1) in Attachment A). Note that this is the wording in statute, ORS 197.626. It is repeated here in order to provide context for (2), below.
2. When reviewing a UGB amendment proposal “in the manner of periodic review,” the department or Commission may approve or remand individual components as well as

³ ORS 197.626 requires that “a city with a population of 2,500 or more within its urban growth boundary that amends the urban growth boundary to include more than 50 acres * * * shall submit the amendment * * * to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.650.”

the entire proposal, even if those components were acknowledged previously as PAPAs (OAR 660-024-0080(2) in Attachment A.)

The fact that current law gives LCDC the authority to review all “segments” at the end of a UGB process, regardless of their previous acknowledged status, does not necessarily mean that LCDC will exercise that authority. However, until recently, the vast majority of UGB amendments came to LCDC either in one package for review (*i.e.*, of all segments), or else through periodic review, where cities could seek LCDC “approval” of a segment as a “work task” under a periodic review work program. In periodic review, an approval of a work task (or a “partial approval” of a UGB amendment) has been standard procedure for many cities, but has always carried with it the ability of the Commission to return to a work task if a later “segment” affects the earlier segment (and LCDC’s approval of the earlier segment). While a remand of an earlier segment by LCDC has not occurred in most cases, it has always been an option for LCDC. The periodic review process remains a tried and true method for cities to submit “segments” and have LCDC review and issue partial approval at various stages of the segments, regardless of whether these are final UGB decisions.

It is important to note that there are some very good reasons for cities to seek acknowledgment of segments prior to completing a UGB amendment. First, for segments concerning population forecasts, buildable land inventories, and even housing need analyses, at the point where these are adopted by the city it may not be clear whether they will result in a UGB amendment of more than 50 acres. It is unclear whether LCDC has jurisdiction at that point because LCDC would not have jurisdiction if the UGB amendment were less than 50 acres. Second, cities often pursue UGB updates in “stages” for budgetary reasons. But, most importantly, it is no surprise that cities would like to have some certainty at various stages of the process before proceeding to the next. Every city’s nightmare is a remand of a UGB amendment after years of studies that may turn out to be flawed because the initial assumptions that underlie later assumptions turn out to be flawed, and this error is not “declared” until years of work is completed. But, again, we must note that the periodic review process, including the recent statutory authorization for a “customized” periodic review focusing on narrow issues, provides cities most of the “segmentation” process and “certainty in stages” that they may be seeking.

Other Housekeeping Amendments

A definition for “Metro boundary” was added as OAR 660-024-0010(5). It refers to the statutory definition.

An “umbrella” phrase was added to the Population Forecasts safe harbors previously adopted as OAR 660-024-0030(3), (which has been numbered as subsection (4) because the new “close enough” rule for forecasts has been designated as subsection (3)), for ease of use.

The definition of “net buildable acre” was moved from section 0040 to the definitions section, 0010, because this term is used in more than one section of the division.

VI. Case Studies Using Proposed Safe Harbors

Department staff (primarily Angela Lazarean) tested the proposed residential safe harbors on three cities in three of the four population range categories in the Standard Density and Standard Mix Safe Harbors table in Attachment B. The purpose of this exercise was to compare the densities and mixes obtained using the proposed safe harbors with the actual densities and mixes in the cities' UGB amendments. Hubbard's 20-year population is in the 2,501-10,000 range, Ontario's is in the 10,001-25,000 range, and Redmond's is more than 25,000. Each of these cities provided residential UGB amendment data to the department. Ontario and Redmond adopted UGB amendments, and Hubbard submitted a 45-day post-acknowledgment plan amendment notice but has not yet adopted the UGB proposal.

Each of the three case studies, presented in Attachment J, contains the following:

- 20-year population forecast;
- Existing built residential densities;
- Future densities in the city's UGB proposal;
- Existing housing mix;
- Future housing mix in the city's UGB proposal;
- The relevant standard density and mix safe harbor numbers (highlighted in yellow on the table);
- Calculation of the safe harbors using the Standard Density, Alternative Density, Standard Mix, and Alternative Mix safe harbors; and
- Comparison of the two density safe harbor figures and two mix safe harbor figures with the figures in the city's UGB proposal.

Here are some specific findings from the study:

Hubbard

- Required Overall Minimum standard density: City projection is way below the safe harbor because all of its residential zones have maximum densities but no minimum densities (*e.g.*, the effective minimum density for each zone is 0, allowing the development of very low density housing in all three residential zones).
- Assume for UGB Analysis standard density: City projection exceeds the safe harbor by 2 units per acre.
- Zone to Allow standard density: City projection exceeds the safe harbor by 2.8 units per acre.
- Alternative Density: City projection exceeds the safe harbor by 1.19 units per acre.
- Standard Mix: City projection falls below the combined Medium and High Density safe harbor share by 12.5% and exceeds the Low Density share by the same amount.
- Alternative Mix: City projection falls below the combined Medium and High Density share by more than twice the standard mix differential (27.5%), and exceeds the Low Density share by the same amount.

Ontario

- Required Overall Minimum standard density: As with Hubbard, the city's projection is way below the safe harbor because its residential zones have no minimum densities (*e.g.*, the effective minimum density for each zone is 0, allowing the development of very low density housing in all three residential zones).
- Assume for UGB Analysis standard density: City projection is below the safe harbor by 2 units per acre.
- Zone to Allow standard density: City projection exceeds the safe harbor by an unknown amount because its residential zones have no maximum densities (only set or average densities).
- Alternative Density: City projection is below the safe harbor by 0.375 units per acre.
- Standard Mix: City projection falls below the combined Medium and High Density safe harbor share by 17% and exceeds the Low Density share by the same amount.
- Alternative Mix: City projection falls below the combined Medium and High Density share by 16% and exceeds the Low Density share by the same amount.

Redmond

- Required Overall Minimum standard density: City projection is way below the safe harbor because all of its residential zones have maximum densities but no minimum densities (*e.g.*, the effective minimum density for each zone is 0, allowing the development of very low density housing in all three residential zones).
- Assume for UGB Analysis standard density: City projection is only 0.5 units per acre below the safe harbor.
- Zone to Allow standard density: City projection is below the safe harbor by 1.25 units per acre.
- Alternative Density: City projection exceeds the safe harbor by 1.125 units per acre.
- Standard Mix: City projection falls below the combined Medium and High Density safe harbor share by 10% and exceeds the Low Density share by the same amount.
- Alternative Mix: City projection falls below the combined Medium and High Density share by 12% and exceeds the Low Density share by the same amount.

Because there are inconsistencies in how data was categorized and presented for different cities, the comparisons are rough. The results vary. Both Hubbard's and Redmond's projected future densities and housing mixes exceeded some safe harbors and fell below others. Ontario's projected future densities and mix fell below all of the safe harbors. None of the three cities exactly met any of the safe harbors. All three have minimum residential densities of 0 and have no chance of getting near the Required Overall Minimum safe harbor. The smallest one

(Hubbard) was the only one to exceed the standard Assume for UGB Analysis and Zone to Allow densities. For all three, as the work group suspected would be the case, the city's projected future numbers were closer to the alternative safe harbors than to the standard safe harbors. (In other words, the standard safe harbors require future development to be more efficient.) None of the three came anywhere near the safe harbors for housing mix. These results support the department's position that the density and safe harbors must be "linked"; if only the density safe harbors are used, a community may achieve a reasonable average overall residential density without having enough attached single-family and multi-family housing units.

VII. DLCD RECOMMENDATIONS

The department recommends that the Commission take testimony regarding the proposed new and amended rules. Following the public hearing, the department recommends that the Commission adopt the proposed rules. The Commission may instead: (1) not adopt the proposed rules at this time, or (2) adopt some of the rules and either not adopt or continue the hearing for other portions. If the Commission chooses to continue the hearing for these rules, the department recommends the Commission provide additional direction to the work group and the department regarding further refinements to the proposed rules.

VIII. ATTACHMENTS

- A. Proposed new and amended UGB rules**
- B. Tables attached to the rules**
- C. Goal 14 (as amended in 2006)**
- D. Applicable Statutes**
- E. Phase 2 UGB Work group membership**
- F. Summary of the UGB Amendment Process**
- G. Safe Harbor Principles**
- H. Research by Becky Steckler**
- I. Research by Angela Lazarean**
- J. Case Studies**
- K. Rulemaking Notices**
- L. Comments Received by February 23, 2009**