



# Oregon

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November 15, 2007

**TO:** Land Conservation and Development Commission

**FROM:** Bob Rindy, Policy Analyst

**SUBJECT:** Agenda Item 6; November 29, 2007, LCDC Meeting.

**Public Hearing and Commission Work Session regarding  
Proposed New Administrative Rules for  
Metro Area Urban and Rural Reserves**

This agenda item is intended for public comment and Land Conservation and Development Commission (LCDC) consideration of proposed new administrative rules establishing a process and criteria for designation of urban reserves and rural reserves in the Portland Metro region (see attachment A). Adoption of rules establishing a process and criteria for designating Metro area urban and rural reserves is required by new legislation, Senate Bill 1011, enacted by the 2007 legislature (see Attachment B, especially sections 3, 6, and 11 of the legislation). This agenda item is also an opportunity for a work session by the LCDC to consider the proposed rules and provide recommendations to its appointed workgroup (see Attachment C) regarding further refinement of the proposed rules prior to the January 24, 2008, LCDC public hearing scheduled for adoption of the rules.

Under this item, the Commission will receive public testimony regarding the proposed rules, including testimony from members of the rulemaking workgroup appointed in August 2007 to assist the Commission and the department in drafting the rules.

For additional information on this item, please contact Bob Rindy at 503-373-0050 ext. 229, or by email [bob.rindy@state.or.us](mailto:bob.rindy@state.or.us). Information on this item, including background materials, future workgroup meeting dates, and agendas and minutes from past rulemaking workgroup meetings, is posted on DLCD's website at [http://www.lcd.state.or.us/LCD/metro\\_urban\\_and\\_rural\\_reserves.shtml](http://www.lcd.state.or.us/LCD/metro_urban_and_rural_reserves.shtml).

**Department Recommendation**

The department recommends that the Commission receive public testimony on the proposed rules. Following the public hearing, the department recommends that the commission open a Commission work session to discuss the testimony and the proposed rules, and provide direction to staff and the workgroup regarding further refinement of

the draft rules in anticipation of the January 24, 2008, LCDC meeting, which is scheduled for a second public hearing and Commission adoption of the rules.

### **Workgroup Meetings and Next Steps**

LCDC's appointed rule advisory workgroup (see Attachment C regarding the membership of the workgroup) has met five times since its appointment in August 2007, and has discussed and recommended the preliminary draft rules (Attachment A) for the Commission's consideration. While a "consensus" of the workgroup has been reached regarding distribution of this preliminary draft, the workgroup is by no means unanimous regarding all the provisions in this draft. It is anticipated that individual workgroup members will provide testimony to the Commission regarding various elements of the proposed rules, including recommendations for changes to the draft.

The workgroup has scheduled two additional meetings prior to issuance of second public draft of these rules next January. The second public draft would be issued for consideration at a second public hearing, including possible adoption of the rules, scheduled for the January 24, 2008, LCDC meeting in Beaverton. The workgroup's further discussion of the draft rules will be guided by public testimony at the November LCDC meeting and especially by any recommendations from LCDC reached in the work session scheduled to begin after the conclusion of testimony.

### **Background**

Senate Bill 1011, enacted by the 2007 legislature (codified as Chapter 723, Oregon Laws 2007), authorizes Metro and Metro area counties to designate urban and rural reserves under a new process and criteria to be established by LCDC rules. It is important to note that SB 1011 was supported by a broad coalition of interests in the region, and was also informed by the January 2007 "Shape of the Region" project (known colloquially as the "Ag-urban study"; see Attachment D). In order to better inform the region's approach to growth management and future urban expansion, Metro joined Washington, Multnomah, and Clackamas counties, as well as the Oregon Department of Land Conservation and Development (DLCD) and the Oregon Department of Agriculture (ODA), to conduct this project, which examined land outside Metro's UGB and asked three broad questions:

- What lands are functionally critical to the region's agricultural economy?
- What natural landscape features are important in terms of ecological function and defining a sense of place for residents of the region?
- What attributes allow lands to most efficiently and effectively be integrated into the urban fabric of the region to create sustainable and complete communities?

Urban reserves authorized under SB 1011 are functionally equivalent to urban reserves authorized by current LCDC rules at OAR 660, div 21, adopted in 1992 (Attachment E), and authorized by current statutes (ORS 195.145 enacted in 1993 and amended by SB 1011). Urban reserves are defined in statute as "*lands outside an urban growth boundary that will provide for (a) future expansion over a long-term period; and (b) the cost-effective provision of public facilities and service within the area when the lands are*

*included within the urban growth boundary.*” Urban reserves are also specified in statutes and rules as *“the highest priority for inclusion in the urban growth boundary when the boundary is expanded”* in accordance with Goal 14 and ORS 197.298. It is important to note that the new urban reserve designation process for Metro provided under SB 1011 is intended as an alternative to the urban reserve designation process provided under current LCDC rules at OAR 660, division 21.

Under SB 1011, the designation of urban reserves must be based upon *“factors, including, but not limited to, whether land proposed for designation as urban reserves, alone or in conjunction with land inside the urban growth boundary:*

- (a) Can be developed at urban densities in a way that makes efficient use of existing and future public infrastructure investments;*
- (a) Includes sufficient development capacity to support a healthy urban economy;*
- (b) Can be served by public schools and other urban-level public facilities and services efficiently and cost-effectively by appropriate and financially capable service providers;*
- (c) Can be designed to be walkable and served by a well-connected system of streets by appropriate service providers;*
- (d) Can be designed to preserve and enhance natural ecological systems; and*
- (e) Includes sufficient land suitable for a range of housing types.”*

These statutory factors for urban reserves are not a closed list; the factors include, but are not limited to those specified above. Based on this authorization, the workgroup has recommended additional factors in the proposed rules. The proposed rules are based on DLCDC and the workgroup’s interpretation of the *“include, but are not limited to”* clause as an authorization allowing LCDC alone (through rules) to expand the list of factors, not as an authorization for Metro or counties to expand the list of factors.

Rural reserves authorized under SB 1011 are a new category of rural lands not previously provided by law or rule. Under SB 1011, rural reserves and urban reserves must be designated simultaneously. Rural reserves are rural lands that, once designated, cannot be included within a UGB or re-designated as urban reserves for a period of 20 years, but not more than 30 years, beyond *“the 20-year period for which the district has demonstrated a buildable land supply in the most recent inventory, determination and analysis”* for the Metro UGB. In other words, once designated, rural reserves are required to remain rural reserves for approximately 40 to 50 years.

Throughout the history of the statewide land use program, Goals 3 and 4, and urban growth boundaries (UGBs) have been the primary tool to protect farm and forest land, and to separate urban and rural land. UGB expansion, over time, consumes farm and forest land, especially in the Metro region where future UGB expansion over the next 20 to 30 years has few options that would not encroach on farm land. Under SB 1011, “Rural reserves” are defined as *“land reserved to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”*

SB 1011 provides that rural reserves may be designated (i.e., reserves are not necessarily mandated) through an intergovernmental agreement between a county and Metro. However, as indicated above, if Metro and counties agree to designate urban reserves under the new statute, those local governments must also agree to designate rural reserves.

When designating rural reserves, a county and Metro are required to select land based on consideration of “factors” in the statute, including, but not limited to, *“whether land proposed for rural reserves is:*

- (a) Land situated in an area that is “potentially subject to urbanization” during the urban reserve planning period described above, as indicated by proximity to the urban growth boundary, and as indicated by proximity to “properties with fair market values that significantly exceed agricultural values;”*
- (b) Land “capable of sustaining long-term agricultural operations;”*
- (c) Land that “has suitable soils and available water where needed to sustain long-term agricultural operations;*
- (d) Land suitable to sustain long-term agricultural operations, taking into account:*
  - The existence of a large block of agricultural or other resource land with a concentration or cluster of farms;*
  - The adjacent land use pattern, including its location in relation to adjacent nonfarm uses and the existence of buffers between agricultural operations and nonfarm uses;*
  - The agricultural land use pattern, including parcelization, tenure and ownership patterns; and*
  - The sufficiency of agricultural infrastructure in the area.”*

According to Metro and others involved in drafting the legislation, these factors derived from work done for local governments in the region by the Oregon Department of Agriculture, included as part of the “Shape of the Region Project” (See Attachment D). As such, the factors focus on protection of the agricultural industry. However, the statute also indicates that rural reserves are intended *“to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”* As such, the rules recommended by the Commission’s work group also include rural reserve factors addressing forest land and natural landscape features.

The overall statutory intent and general requirements regarding designation of urban and rural reserves are also provided by this statute. The preamble to SB 1011 provides the reasons and general policy direction underlying the authorization for a new urban and rural reserve process. It declares in part that *“Long-range planning for population and employment growth by local governments can offer greater certainty for ... the agricultural and forest industries, by offering long-term protection of large blocks of land with the characteristics necessary to maintain their viability; and for ... commerce, other industries, other private landowners and providers of public services, by determining the*

*more and less likely locations of future expansion of urban growth boundaries and urban development.”*

This preamble also declares that “*State planning laws must support and facilitate long-range planning to provide this greater certainty.*” To this end, section 11 of the legislation directs that “*the Land Conservation and Development Commission shall adopt the goals or rules required by section 3 of this 2007 Act and ... section 6 of this 2007 Act not later than January 31, 2008.*” Those sections of the act specifically require LCDC to adopt new goals or rules regarding the “*process and criteria*” for designation of Metro area urban reserves and rural reserves.

Section 3 of SB 1011 provides that whether Metro and counties designate urban and rural reserves is not mandatory, i.e., Metro and Metro area county governments are authorized to choose whether or not to declare these reserves (and by implication, may also choose instead to follow the current urban reserve process in OAR 660, division 21, which does not require the simultaneous designation of rural reserves). Again, if Metro does choose to designate urban reserves under this statute, counties and Metro must designate rural and urban reserves simultaneously. Both urban and rural reserves must be designated in accordance with an intergovernmental agreement between Metro and a county, and “*such agreement must provide for a coordinated and concurrent process for adoption by the county of comprehensive plan provisions and by the district of regional framework plan provisions to implement the agreement.*”

The statute also provides that designation and protection of urban reserves or rural reserves is not a basis for a claim for compensation under Measure 37 “*unless the designation and protection of rural reserves or urban reserves “imposes a new restriction on the use of private real property ... and does not impair the rights and immunities provided under ORS 30.930 to 30.947.*” (ORS 30.930 to 30.947 are Oregon’s “right to farm” laws). At the time of this report, the department has not received advice from legal counsel as to whether the passage of Measure 49 in any way affects this provision.

LCDC Approval and Judicial Review: The statute amends current statutory provisions so as to reference the new urban and rural reserve process provided by SB 1011, and require LCDC review and approval of a Metro amendment of “*the district’s regional framework plan or land use regulations implementing the plan to establish urban reserves ...*”, and simultaneous LCDC review and approval regarding “*amendment of the county’s [or counties’] comprehensive plan or land use regulations implementing the plan to establish rural reserves ...*”.

Related to this, the statute provides a special expedited process for “*judicial review of a Land Conservation and Development Commission order concerning the designation of urban reserves under ORS 195.145 (1)(b) or rural reserves ...*” under the new process provided in SB 1011. Jurisdiction for judicial review is conferred upon the Court of Appeals, notwithstanding other laws (ORS 197.650) regarding LUBA review of land use decisions. SB 1011 provides timelines for this review, and indicates that review of the

Commission's order is confined to the record. Furthermore, the court "*may not substitute its judgment for that of the Land Conservation and Development Commission as to an issue of fact.*" *The Court of Appeals may affirm, reverse or remand* the Commission's order, but may reverse or remand the order only if the court finds the order is:

*"(a) Unlawful in substance or procedure. However, error in procedure is not cause for reversal or remand unless the Court of Appeals determines that substantial rights of the petitioner were prejudiced.*

*(b) Unconstitutional. [or,]*

*(c) Not supported by substantial evidence in the whole record as to facts found by the commission."*

Furthermore, the statute provides that "*the Court of Appeals shall issue a final order on the petition for judicial review with the greatest possible expediency. ... If the order of the commission is remanded by the Court of Appeals or the Supreme Court, the commission shall respond to the court's appellate judgment within 30 days.*"

### **Rulemaking Schedule**

SB 1011 took effect immediately upon the Governor's signature last July, and requires LCDC to adopt administrative rules for urban and rural reserves by January 31, 2008. As noted above, the department recommends that LCDC schedule the adoption of the proposed rules at LCDC's January 24, 2008, meeting in Beaverton, and has already provided broad notice indicating that schedule (see Attachment F).

### **Required LCDC Rulemaking Criteria and Procedures**

The Commission's procedures for rulemaking derive from ORS Chapter 183 and are specified in LCDC's procedural rules at OAR 660-001-0000. In general, prior to adoption of a rule, the Commission must hold a public hearing and provide an opportunity for interested parties to testify on the proposed rule. The Commission must deliberate in public and, if the commission makes a decision to adopt any or all of the proposals, a majority of the commission must affirm the motion to adopt.

The Commission is also guided by ORS 197.040, as follows:

***"197.040 Duties of commission; rules.***

*(1) The Land Conservation and Development Commission shall:*

*....*

*(b) In accordance with the provisions of ORS 183.310 to 183.550, adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197. Except as provided in subsection (3) of this section, in designing its administrative requirements, the commission shall:*

*(A) Allow for the diverse administrative and planning capabilities of local governments;*

*(B) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;*

*(C) Assess the likely degree of economic impact on identified property and economic interests; and*

*(D) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.*

*(c)(A) Adopt by rule in accordance with ORS 183.310 to 183.550 or by goal under ORS chapters 195, 196 and 197 any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 19, [and]*

*(B) Adopt by rule in accordance with ORS 183.310 to 183.550 any procedures necessary to carry out ORS 215.402 (4)(b) and 227.160 (2)(b). .*

...

*(3) The requirements of subsection (1)(b) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule.”*

The department issued formal rulemaking notice for publication in the November 2007 Secretary of State’s Bulletin, and has mailed notices to interested parties (See Attachment F).

The Commission has also adopted “Citizen Involvement Guidelines for Policy Development” (the “CIG”) in order “... to provide and promote clear procedures for public involvement in the development of Commission policy on land use,” which LCDC has committed to follow “to the extent practicable in the development of new or amended statewide planning goals and related administrative rules.” CIAC member Ann Glaze was appointed as a member of the Metro Reserves workgroup.

The CIG recommends that the Commission “*consult with the CIAC on the scope of the proposed process or procedure to be followed in the development of any new or amended goal, rule or policy.*” On October 11, 2007, workgroup member Ann Glaze gave the CIAC a general overview of the process and progress of, and handed out a paragraph of the draft rule that spoke to citizen involvement. According to the minutes of that meeting, “CIAC was pleased with the inclusion of ‘citizen involvement’ requirements in the rules.”

The CIG recommends that, as part of a rulemaking process, the department “shall, to the extent practicable:

- Prepare a schedule that clearly indicates opportunities for citizen involvement and comment, including tentative dates of meetings, public hearings and other time-related information;
- Post the schedule, and any subsequent meeting or notice announcements of public participation opportunities on the Department’s website, and provide copies via paper mail upon request; and

- Send notice of the website posting via an e-mail list of interested or potentially affected parties and media outlets statewide, and via paper mail upon request;
- Provide background information on the policy issues under discussion via posting on the Department's website and, upon request, via paper mail. Such information may, as appropriate, include staff reports, an issue summary, statutory references, administrative rules, case law, or articles of interest relevant to the policy issue."

The department has followed these guidelines with regard to this rulemaking. The workgroup determined its schedule at its first meeting, and the department established a website and a list of interested parties to receive notices of this workgroup, in the manner outlined by the CIG. The website includes agendas and minutes for each workgroup meeting, information about future meetings, background information, draft rules under consideration by the workgroup, and copies of formal notices. The department has sent notice of meetings to the public and interested parties, including notice of this LCDC hearing, electronically and by mail. Prior to the January 24, 2008, LCDC hearing on the rules, the department will publish notice in newspapers serving the Metro area.

### **Summary and Explanation of Proposed Rules**

After five meetings, the workgroup has recommended that the department publish (as a first public draft), and the Commission consider, the attached new rules providing criteria and procedures for adoption of both Urban Reserves and Rural Reserves (Attachment A). The new rules would be codified in OAR 660 as a new "division 27." The proposed new division would be organized into nine rules, as follows:

#### **660-027-0005 Purpose**

The proposed introduction to the new rules does two things. First, it generally describes the intent of the rules, not only by indicating that they implement SB 1011 (2007 Oregon Laws Chapter 723) and by paraphrasing the statutory intent, but also by announcing that they prescribe "criteria and factors" that counties and Metro must apply when choosing lands for designation as urban or rural reserves. The second thing the purpose section does is to anchor the "findings" that local governments must make in designating urban and rural reserves. In that regard, this statement also serves as a yardstick that the Commission will use in evaluating the designation once it is submitted for review.

The proposed purpose statement clarifies that the urban reserves process described by these rules is intended to provide Metro with "an alternative process" to LCDC's current urban reserve designation process currently under OAR 660, division 21. Metro and counties have the opportunity to designate urban reserves under these new rules, but may instead choose instead to designate urban reserves through the existing process under division 21. However, it is highly doubtful that the region will choose to follow the division 21 process.

**660-027-0010 Definitions**

The proposed new division includes definitions for terms used throughout the division. Definitions currently in state land use laws (ORS 195 and 197) and definitions adopted as part of the Statewide Planning Goals generally apply to terms used in the proposed new rules – there are a number of terms in the proposed new rules that are already defined by law or by the Commission, and we do not need to repeat each and every one of these definitions for purposes of this rule. But there are new terms not defined here and not elsewhere, and a couple of terms so basic to these rules they are defined here even though they are also defined elsewhere (e.g., UGB). Although most of the definitions are straightforward, it may be helpful to explain the intent of a few definitions, as follows.

Definitions (1) and (2) refer to two categories of land mapped in the 2007 Department of Agriculture (ODA) report to Metro entitled “*Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands.*” That report (See attachment G) mapped land throughout the region into three categories, and was an important basis of the region’s proposal for the enactment of SB 1011. The criteria that ODA used in mapping these lands were the basis for the “factors” placed in SB 1011 regarding selection of rural reserves. Two of the mapped categories of farmland are the subject of proposed rules later in the division, and as such, those terms are defined here by referring to the ODA report. The report itself is available online at Metro’s website and through a link to DLCD’s website. The reference in the rule intends to refer to the 2007 report; any later amendments to the mapping in that report would not be automatically replace the report referred to in this definition. There is more discussion about this under rules at 0040, below.

Definition (3) concerns the “intergovernmental agreements” between metro and each county that are a prerequisite to adopting urban and rural reserves in the metro area. SB 1011 defined these agreements by citing some general statutes about agreements (such as the statute describing intergovernmental agreements for Regional Problem Solving). The department notes that the particular statutes cited in SB 1011 seem somewhat irrelevant to the agreements contemplated with respect to Metro reserves. Furthermore, the statute definition for agreements does not include citizen involvement requirements for the agreement process. Since the agreement process is vital with regard to the reserves, and will conclude with actual maps of the reserves, the workgroup decided to add requirements that are not in statute ((e.g., citizen involvement, discussed under Rule 0030, below). As such, the definition indicates that an agreement must also meet “requirements in this division,” in recognition that the referenced statutes do not include all the requirements that the workgroup believes are necessary for these particular agreements. We note that Metro and counties have indicated that they anticipate the agreements will also include a map of the areas to be designated as urban or rural reserves. This definition does not require that an agreement include a map of the proposed reserve areas (nor any other proposed rule in this division), but it does not preclude such a map.

Definition (4) regarding “livable communities” is provided because that term is used as

part of the intent statement (see discussion under Rules 0050, above). There is no precedent in rule to help define this term. In this case, Metro proposed the definition to the workgroup.

Finally, definition (6) regarding “important natural landscape features,” requires some more detailed explanation. The definition is provided because this term occurs in several of the proposed rules in the division, and by providing a definition we avoid explaining the term each time it is used. However, members of the workgroup discussed a preference to further expand and clarify the “definition” of this term provided in SB 1011. The statute does not actually define “important natural landscape features,” but does define “rural reserves” as *“land reserved to provide long-term protection for ... important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”*

The expanded definition in the rule provides that rural reserves, by “limiting”<sup>1</sup> urban development, “provide long-term protection and enhancement of the region's natural resources, public health and safety, and unique sense of place.” This wording (which is not in statute) may serve as an expanded “purpose statement” regarding the protection of important natural landscape features.

The expanded definition of “important natural landscape features” further provides that “these features include, but are not limited to, plant, fish, and wildlife habitat; corridors important for ecological, scenic, and recreational connectivity; steep slopes, floodplains, and other natural hazard lands; areas critical to the region's air and water quality; and historic, cultural, or other geographic features that define and distinguish the region.” The individuals, including at least one workgroup member (Jim Labbe), the Department of Fish and Wildlife, and other interested parties such as Audubon, based the expanded definition<sup>2</sup> on the SB1011 statute language and “work that was the basis of the statute itself performed by ‘The Greenspaces Policy Advisory Committee’ and an associated ‘Ecological Elements Charette’ used in developing a ‘Natural Landscape Features Inventory’ for Metro’s ‘New Look’.” The intent of the expanded definition “is to be inclusive enough in the specific examples listed to capture the component elements of the New Look Natural Features Inventory.” (NOTE: DLCD’s website for this rulemaking includes a link to Metro’s “Shape the Region Symposium,” which links to several studies, including the “Natural Features Inventory” describing the committee, charette, and “New Look” mentioned here.<sup>3</sup> The department believes the additional words in this

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<sup>1</sup> The workgroup discussed the word “limit” and expressed some concern as to which of at least two possible meanings may have been intended by the statute. For example, the word may mean something that bounds or confines, i.e., by setting a line or boundary, but it may instead connote something that restricts or hampers development within boundaries. Discussion among staff and workgroup members seemed to conclude that the former meaning is the intent here.

<sup>2</sup> According to an October 30 email from Jim Labbe to the Department, forwarded to workgroup members.

<sup>3</sup> DLCD’s rulemaking notice to the Secretary of State – see Attachment F – indicates that this rulemaking relies on Metro’s Great Communities, Final Report, which may incorporate the documents and Charette described here, but does not mention them in particular. As such, if the Commission agrees to adopt this

definition would not conflict with the statute because, by prefacing the examples with the word “including,” the statute does not intend to provide a closed set of examples.

Definition (12), for the term “walkable,” was suggested by the department and staff from DLCD and ODOT’s Transportation and Growth Management Program based on several studies and sources concerning walkable neighborhoods. However, staff was unable to locate a formal definition in state law or other agency rules. The term is used in Section 6(4)(d) of SB 1011, but is not defined there, and is used in 660-027-0050(1)(d) of the proposed rules.

### **660-027-0020 Authority to Designate Urban and Rural Reserves**

This section is intended establish which entity – Metro or counties or both – has authority to designate reserves, and to make it clear that this division is “an alternative” to the authority to designate urban reserve areas granted by LCDC’s current urban reserve rules under OAR 660, division 021. One very important difference between the SB 1011 urban reserve process and the current OAR 660, division 21, process is that, under the proposed new rules, an intergovernmental agreement is a prerequisite for designating reserves.

The rules proposed under 0020 specify that Metro alone has authority to designate urban reserves provided Metro first adopts an intergovernmental agreement with each county where urban reserves are designated, and provided the agreements are implemented by amendment of the regional framework plan and the county comprehensive plan in accordance with the process and criteria in this division. The statute and proposed rule also grants counties – rather than Metro – the authority to designate rural reserves, provided there is an intergovernmental agreement concerning these reserves, between the county and metro for each county where the reserves are designated, and provided the county amends its plan and zoning to implement the agreement.

Finally, this rule makes it clear that a county and Metro may not enter into an intergovernmental agreement to designate urban reserves in the county unless the county and Metro simultaneously agree to designate rural reserves in the county.

### **660-027-0030 Urban and Rural Reserve Intergovernmental Agreements**

This rule is intended to provide criteria for the intergovernmental agreements that are prerequisite to urban and rural reserve designation. First, this rule specifies that an intergovernmental agreement between Metro and a county to establish urban reserves and rural reserves must provide for a “coordinated and concurrent process” for adoption (by Metro) of regional framework plan provisions and (by the county) of comprehensive plan and zoning provisions to implement the agreement.

We note that, rather than “coordinated and concurrent,” SB 1011 uses the term “simultaneously.” It is expected that a county and Metro would do their "considering"

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proposed expanded definition, DLCD and legal counsel will determine whether there is a need for a revised formal notice prior to the January 24 meeting.

and "evaluating" together, in the same meeting or meetings, and Metro and a county would "simultaneously" adopt (or sign) the agreement. The formal "designation," however, would be the adoption of implementing plan provisions, which cannot legally or practically be done "simultaneously" by a county and Metro, or by all the counties and Metro, i.e., at the identical moment in time. However, the designation by the various jurisdictions can be done "concurrently," by which we mean that Metro and the local governments would schedule the formal plan and/ordinance adoptions to occur in approximately the same time frame, and in a coordinated manner. The rules under 0080 require submittal to LCDC "jointly."

The second provision of this rule provides for citizen involvement in the development of an intergovernmental agreement. For plan amendments that implement agreements, Goal 1, the acknowledged local plans and state laws provide for broad notice and citizen involvement. However, intergovernmental agreements are not necessarily covered by these laws or local plans. Because the agreements to designate reserves will probably include maps of reserve areas, the workgroup suggested that it is very important for citizen involvement and broad notice during the development of the agreements, rather than later, after the agreements have been signed, when formal amendments are proposed to implement the agreements. As such, the proposed rules require Metro and counties to follow a coordinated citizen involvement process that provides for broad public notice and opportunities for public comment regarding lands proposed for designation as urban and rural reserves under the agreement. Furthermore, the rules require that the State Citizen Involvement Advisory Committee (CIAC) be provided an opportunity to review and comment on the proposed citizen involvement process.

Finally, the proposed rules would clarify that an intergovernmental agreement made under this division is not a final land use decision under ORS 197.015(11). The department sought legal counsel advice on this provision and it was agreed that the proposed rules should clarify that "an intergovernmental agreement made under this division shall be deemed a preliminary decision that is a prerequisite to the designation of reserves by amendments to Metro's regional framework plan and to a county's comprehensive plan" (emphasis added). Because an agreement is not a final land use decision, LUBA review would not be appropriate. Rather, the Commission will be required to determine whether statutory and rule requirements have been followed with respect to such agreements, since, by law, the agreements are a prerequisite to the designation of reserves. The rule provides that an intergovernmental agreement must be submitted to LCDC, along with adopted amendments to the regional framework plan and county comprehensive plans.

Although the rule clarifies that the agreements are preliminary land use decisions, this is not intended to imply there are no statutes or other requirements that apply to such agreements: SB 1011 specifically references statutes related to agreements. Also, the workgroup agreed to add requirements for citizen involvement pertaining to intergovernmental agreements as part of the proposed new division, as described above.

**660-027-0040 Designation of Urban and Rural Reserves**

The new statutes pertaining to Metro reserves specify that the reserves are “designated.” The department, on advice from legal counsel, believes the term “designate” means the formal “adoption” of the reserves by adoption or amendment of Metro framework plan provisions for Urban Reserves, and County land use plan and zoning provisions for Rural Reserves. The proposed rules under 0040 provide several requirements that pertain to the designation of urban and rural reserves. These include rules for designating urban reserves, as follows:

- A requirement that Metro may not designate urban reserves until Metro and applicable counties have entered into an intergovernmental agreement that identifies the land to be designated by Metro as urban reserves.
- Urban reserves (which consist of the combined total of lands designated for urban reserves in all counties that have executed an intergovernmental agreement) must be planned to accommodate urban population and employment growth for at least 20 years, and not more than 30 years, beyond the 20-year period that is the basis for the Metro UGB (Metro may choose a period from 20 to 30 years, but is required to specify the particular number of years for which the urban reserves are intended to provide a supply of land).
- If Metro designates urban reserves prior to December 31, 2009, the 20 to 30 year period is to begin on the year 2029.
- Metro must adopt policies to implement the reserves and must show the reserves on its regional framework plan map.
- A county in which urban reserves are designated must adopt policies to implement the reserves and show the reserves on its comprehensive plan and zone maps.
- Designation of urban reserves must be “coordinated” with the cities in any county where such reserves are considered, and with local governments, state agencies, special districts and school districts that may provide services to the urban reserves when they are added to the UGB

The rules under 0040 include designation requirements for Rural Reserves, as follows:

- Neither Metro nor a local government may amend a UGB to include land designated as rural reserves during the 20-30 year period described above. Since this period is in addition to the 20-year UGB period, rural reserves may not be included in any UGB (i.e., the Metro UGB as well as any other UGB in counties that have designated rural reserves) for a 40-50 year period.
- Also, Metro may not re-designate rural reserves as urban reserves, and a county may not re-designate land in rural reserves to any other land use, during the 40-50 year period.
- Metro and counties must adopt policies to implement the rural reserves. Counties must show the reserves on their comprehensive plan and zone maps, and Metro must show the reserves on its regional framework plan maps.

- Designation rural reserves must be “coordinated” with the cities in any county where such reserves are considered.

Sections (9) and (10) of the proposed designation rules specify that “factors” must be the basis for Metro and County decisions to “simultaneously identify, select and designate both urban and rural reserves.” The specific “factors” are specified in rules under 0050 and 0060, described below in this report, and were based on factors that are included in SB 1011. It is important to note that the factors in SB 1011 were expanded, as allowed by that statute, to address additional concerns discussed by the workgroup (see discussion under 0050 and 0060 below for more detailed discussion of the particular factors proposed by the workgroup).

The workgroup discussed the term “factors,” and the proposed rules were based on the understanding that “factors” are a special type of “criteria” similar or the same as the type of “factors” described for UGB location under Goal 14. As such, factors are not “independent criteria,” i.e., every parcel or area considered for urban or rural reserves would not be required to meet each and every factor. Instead, when the factors are applied, weighed and balanced to select and evaluate land for designation as urban or rural reserves. Metro and the counties must “apply” the factors, not merely “consider” them, and must use the factors to compare alternative locations for these reserves. The group decided that the requirement to “consider” the factors in the statute is not meant to imply that any factor may be simply considered but then disregarded – all the factors must be considered, applied together (which also implies they must be “balanced” in the manner of Goal 14), and Metro and counties must demonstrate that they have done this.

The proposed rule requires that Metro and those counties that are partially within Metro shall identify, consider, evaluate and designate proposed urban and rural reserves “concurrently and in coordination with one another,” and adopt a single, joint set of “findings and statement of reasons” that demonstrates how they applied the factors. The findings and statement of reasons must “explain why the local governments selected the areas adopted as urban and rural reserves and how the adopted reserves achieve the objectives set forth in the purpose statement (OAR 660-027-0005).

The workgroup discussed whether SB 1011 required “criteria” *in addition to* factors, since that statute requires LCDC to adopt “a process and *criteria*” for designating reserves. Based on advice from legal counsel, it was determined that “factors” are a type of “criteria,” based on case law, and furthermore, the proposed rule contains many provisions that are mandatory criteria (rather than “weighed and balanced” criteria, as in the case of “factors”).

However, the workgroup spent a significant amount of time discussing whether the proposed factors set a sufficiently “high bar” for determination of reserves. Many members of the workgroup urged the group to “raise the bar,” especially with regard to the factors used to select rural reserves. Workgroup members, including members representing various agricultural land interests, ODA, the Oregon Association of Nurseries, the City of Portland, and 1000 Friends of Oregon, urged that the proposed

rules should provide stronger assurance that important farmland will be designated as rural reserves. Several ideas to strengthen the factors were proposed, including adding additional factors, criteria, or other measures, as follows:

- Providing a “safe harbor” that “deems” Foundation Agricultural Land or Important Agricultural Land (mapped in the ODA report to Metro) to qualify for designation as rural reserves under the factors without further explanation. (see discussion under 0060, below).
- Adding an additional factor that refers to the ODA mapped lands, especially the two categories Foundation Agricultural Land and Important Agricultural Land.
- Adding one or two additional criteria that require counties to designate, as rural reserves, Foundation Agricultural Land, and possibly Important Agricultural Land also, unless the land is demonstrated to be needed for special mixed-use transit-connected development in the Metro area.
- Requiring that Metro cannot include Foundation Agricultural Land or Important Agricultural Land in urban reserves unless it demonstrates that it has first evaluated all other lands and demonstrate that these other lands are unable to serve particular purposes for urban reserves.

In all the proposals above, ODA suggested that the new criteria should refer to Foundation Agricultural Land and Important Agricultural Land within **three miles** of a UGB.<sup>4</sup>

It is important to note that the last two bullets above were not agreed to by the workgroup but were strongly advocated by workgroup members representing various agricultural land interests – Oregon Department of Agriculture (ODA), the Oregon Farm Bureau, the Oregon Association of Nurseries, and 1000 Friends of Oregon. The department anticipates that the Commission will receive detailed comments in support of these proposals (however, written comments from agricultural interests on this issue were not received at the time this report was mailed; see attachment H for other comments). Adding one or both of the last two bullets would provide for a much higher degree of assurance that “Foundation” and “Important” agricultural land would be protected. Currently, the draft rules do not clearly specify that these two categories of land **must** be designated as rural reserves, or that they cannot be designated as urban reserves. That assurance is probably one of the most important unresolved issues for the workgroup, and a matter where LCDC direction is most needed.

In discussing the above proposals, the workgroup agreed to add the first bullet, the “safe harbor” (see section (4) of attachment A under 0060, page 6, lines 41-43). The group did not agree to add the additional suggestions in the last three bullets, above, although there was no formal discussion of the second bullet.

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<sup>4</sup> In ODA’s proposal discussed by the workgroup, this distance was originally 2 miles. In the discussion, it was suggested that 3 miles is already referenced in ORS 215 and other DLCD rules. As a result, ODA has revised its suggestion to indicate 3 miles. ODA was clear that its intent was not to require all mapped Foundation and Important lands to be given highest consideration for rural reserves, but only those within 3 miles of a current UGB.

In a related discussion, there was a consensus to also strengthen the overall findings required under 0040 (10) (see page 4, lines 38-45), by adding the word “best”, in either one of the two places discussed below:

- (a) In 0040(10), as follows: “The findings and statement of reasons shall explain why the local governments selected the areas adopted as urban and rural reserves and how the adopted reserves **BEST** achieve the objectives set forth in OAR 660-027-0005.” Or
- (b) In the Purpose Statement of the rule (0005, specifically on page 1, lines 19-21) referred to by section (10) described above, provide that “The objective of this division is the designation of urban and rural reserves that, together, ~~help~~ **BEST** ensure livable communities, the viability and vitality of the agricultural and forest industries and protection of the natural landscape features that define the region for its residents.”

The “best” wording in 0040 (10) was proposed by the City of Portland with the expressed intent to increase the power of the factors. In that workgroup discussion it was suggested that the current factors are not very directive or specific when they are simply “weighed” and “considered” with no standard as to how to resolve conflict, for example, where land meets factors for both urban reserves and rural reserves. By providing a new and higher “standard” (i.e., that the reserves selected must be demonstrated as “best” meeting the purpose of the rules as a whole), it is suggested that the factors would be more effective in achieving the intent of the legislation. While there was a strong workgroup consensus to add the word “best” in one of the two places listed above, there a split, i.e., no consensus, as to WHICH of these two places should include that word. As such, the public draft does not include the word, but the department emphasizes that the workgroup did reach a consensus to add the word in at least one of these two places, with the understanding that the standard for findings would be higher under either option. Furthermore, based on the group discussion, there was a general understanding that, if the Commission agrees to option (a), above, this would provide a higher standard than option (b). It should be noted that option (a) had more workgroup “votes” than option (b).<sup>5</sup>

Metro indicated a concern that the addition of the word “best,” especially under option (a), may require that all the potential areas for reserves be “ranked” or “rated”, so that findings could definitively prove that the “best” selection had been made. As such, it was suggested that if the Commission agrees to include “best,” the rules should be drafted to clarify that the word refers to “the whole package” of reserves, and should not be used to compare one parcel or area against another. To that end, although Metro does not necessarily suggest adding the word at all, if it is added, Metro prefers option (b), with the understanding that that option would apply the “best” standard to the entire package of urban and rural reserves. Metro further indicated that, if the word is added to section (10) of 0040 (option (b)), it may suggest adding words to clarify that the standard refers

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<sup>5</sup> It should also be noted that the workgroup does not formally “vote” on issues, but on occasion the Chair does ask for a show of hands to gauge support for various options.

to the reserves "in their entirety", e.g., the findings must "explain why ... the adopted reserves, **in their entirety, best** achieve the objectives...".

The department also notes that, while adding the word "best" is intended to "raise the bar" for applying the factors, it is not entirely certain how this would play out. Also, even if this change is agreed to by LCDC, it would not resolve the concerns expressed by the workgroup members representing agricultural land interests. Those members have indicated their concern regarding the factors for reserves can only be resolved by adding additional criteria that requires counties to designate Foundation Agricultural Land, and possibly Important Agricultural Land, as rural reserves, unless certain findings are made, and/or by requiring that those categories cannot be designated as urban reserves until all other types of land are determined inadequate for particular urban purposes (refer to the bullets on page 15). The department believes the current lack of workgroup consensus on this point is significant; this is a core issue regarding the proposed rules. It is recommended that LCDC provide further direction to the workgroup regarding:

(1) Whether to include wording such as that described in the last three bullets on page 15, and

(2) Whether to add the term "best" to the findings requirements, as described above, and if so, where should the term be added in the rules.

### **660-027-0050 Identification, Selection and Designation of Lands for Urban Reserves**

The rules under 0050 provide the factors for determining which land to designate as urban reserves. According to Metro, these factors are derived from the "great communities" factors developed as part of Metro's agriculture/urban study (that study is linked to DLCD's website on this rulemaking, at <http://www.metro-region.org/index.cfm/go/by.web/id=25147>).

Metro's "ad hoc group" recommended some modifications to these factors, and the workgroup itself agreed to some modifications. In general, these modifications are minor edits to statute factors and additional factors not in the statute, such as factors (g) and (h).

The term "walkable" was not defined by the statute; the department has proposed a definition. Also, "a well-connected system of streets" is not defined currently by Goal 12 or related rules. A definition has not been provided for these rules. Metro's *ad hoc* group suggested the language referring to "pedestrian and bicycle facilities," and that it be phrased consistent with the Transportation Planning rule.

It should be noted that SB 1011 provided that the factors for urban reserves listed in that bill were "not limited to" those listed. As discussed previously, the workgroup agreed that this provision should be interpreted to mean that LCDC may add additional factors, through this rule, but that this language does not authorize Metro to add factors to those listed in the rule.

### **660-027-0060 Identification, Selection and Designation of Lands for Rural Reserves**

These proposed rules provide factors that would be applied to designate rural reserves in order to protect farm land, forest land, and natural landscape features. The statute (SB 1011) provided only one set of factors – for farm land. However, the statute is also clear that “rural reserve” means “land reserved to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”

As such, the workgroup agreed to add additional factors for rural reserves that are designated to protect forest land and natural landscape features. The factors proposed to determine whether rural reserves should be designated to protect natural features are significantly different than those in the statute for farm land, and therefore the rules provide these factors as a separate rule section (section 3). The factors for forest land have been woven into the factors for farm land. This does make these factors more complex – but at this point the workgroup has not indicated significant concern with this method. Early on, the group also explored having a third set of factors specifically for forest land. This option is still available if testimony indicates concerns with the combined farm and forest factors.

Because rural reserves are likely to be designated for all three of the purposes described above, section (1) indicates that metro shall specify which areas designated for rural reserves are intended for which purpose. This will determine which factors to apply. However, it should also be noted that the findings required for LCDC rule will address all the factors and all the areas included, so it is conceivable that some areas will be included for a combination of “purposes,” rather than for farm, forest or natural features alone. We also note that the factors do not specifically describe how to treat land that is both farm and forest land. The workgroup had noted this for discussion, but so far there has not been a group discussion on this issue.

It is important to note that subsection (2)(a) changes the word “and” in the statute to “or” (see page 5, line 43). The workgroup believes the intent of this requirement is to consider proximity to a UGB or proximity to land with fair market values that significantly exceed agricultural values – but not necessarily both simultaneously.

### **660-027-0070 Planning of Urban and Rural Reserves**

This set of rules begins by describing one of the most significant planning ramifications in designating urban reserves: such areas are the highest priority for inclusion in the urban growth boundary when the boundary is expanded, as specified in Goal 14, OAR 660, division 24, and ORS 197.298. That fact is not mentioned in SB 1011, but was certainly well-understood by the various interests that drafted the legislation. It should be noted that 20-30 year urban reserves in the Metro area are likely to include a fairly significant amount of land, and this land will include a variety of farmland, forest land, exception areas, and other features. There are no rules or statutes that require Metro to

indicate **which** land in urban reserves might be the first or highest priority land considered when the UGB is expanded. The workgroup did not discuss this issue.

The second section of these rules ensures that land in the reserves is maintained in larger parcel sizes (unless it was previously parcelized), so as to preserve opportunities for orderly and efficient development of urban uses and provision of urban services when urban reserves are added to the UGB.

The proposed rules also direct counties to maintain the zoning for uses on rural reserves allowed at the time they were designated, and not allow smaller lots or parcels, on land designated as rural reserves (unless and until the reserves are re-designated consistent with statewide planning goals and other requirements in this new division). This provision was recommended by Metro's *ad hoc* group prior to LCDC's workgroup meetings and was embraced by the workgroup. It provides a powerful protection for rural reserves that is in addition to other protection already provided in statute and in 660-027-0040 (4) and (5). These provisions together carry out the primary directive of SB 1011, that rural reserves are intended to "provide long-term protection for agriculture, forestry or important natural landscape features." (Emphasis added).

Finally, the proposed urban reserve "planning" rules provide that "*counties, cities and Metro may adopt conceptual plans for the eventual urbanization of urban reserves designated under this division, including plans for eventual provision of public facilities and services for these lands, and may enter into urban service agreements among cities, counties and special districts serving or projected to serve the designated urban reserve area.*" Part of this provision was recommended by Metro's *ad hoc* group, but was embraced by the workgroup, and augmented by the department, to include some of the provisions currently in rules for urban reserves under OAR 660, division 21, that clarify the ability to plan for services in urban reserves.

### **660-027-0080 Adoption and LCDC Review of Urban and Rural Reserves**

While these proposed rules parrot statutory requirements for LCDC review of reserves, it is important to note that those requirements have been augmented. First, section (1) makes it clear that plan amendments and other land use actions to implement the designation of urban reserves must be in accordance with current laws for plan amendments (ORS 197.610 to 197.650). This assures public notice requirements.

Section (3) was suggested by DOJ rather than the workgroup. This provision anticipates that the submittal to LCDC will very likely be large and complex, and will be subject to multiple comments based on LCDC's previous experience with UGB decisions in the Metro area. Furthermore, while appeals may not necessarily occur, they are a possibility, and section (3) will facilitate the department's required "records" work in responding to an appeal.

**Conclusion and Recommendation**

As previously noted, the department recommends that the Commission receive public testimony on the proposed rules. Following the public hearing, the department recommends that the commission open a Commission work session to discuss the testimony and the proposed rules, and provide direction to staff and the workgroup regarding further refinement of the draft rules in anticipation of the January 24, 2008, LCDC meeting, which is scheduled for a second public hearing and Commission adoption of the rules.

**Attachments**

- A. Proposed new rules for Urban and Rural Reserves
- B. Senate Bill 1011
- C. Appointed rulemaking advisory workgroup
- D. The "Shape of the Region" summary report
- E. Urban Reserve Rules under OAR 660, division 21
- F. Rulemaking notices
- G. Department of Agriculture "Ag/Urban Study"
- H. Written Comments received prior to mailing of this report