



Oregon

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TO: Land Conservation and Development Commission

FROM: Bob Rindy, Senior Policy Analyst and Legislative Coordinator

SUBJECT: Agenda Item 7, December 3-5, 2008, LCDC Meeting

PUBLIC HEARING ON PROPOSED NEW AND AMENDED
ADMINISTRATIVE RULES
CONCERNING URBAN GROWTH BOUNDARIES

I. AGENDA ITEM SUMMARY

This agenda item is a public hearing on proposed new and amended administrative rules intended to clarify and streamline the process for amendment of urban growth boundaries (UGBs). This item is also an opportunity for Commission deliberation and possible adoption of the proposed new and amended rules, or to provide guidance to the work group for additional work on the proposal while continuing the hearing to a later date.

The proposed new and amended rules under OAR chapter 660, division 24 (Attachment A) add new provisions to interpret requirements of Goal 14 (Attachment B), especially regarding housing and employment land needs determined by local government in establishing and amending UGBs. The proposed rules include new "safe harbors," described below, to streamline local government efforts to meet UGB amendment requirements. Rules interpreting and clarifying Goal 14 regarding UGB amendments are codified under OAR chapter 660, division 24, but other rules and goals related to UGB determinations are referenced in the proposed rules.

This is "Phase 2" of a "streamlining project" that the Commission began in June 2004 to clarify Goal 14 and reduce local cost and litigation associated with application of the goal. Phase 1 of this project resulted in Goal 14 amendments and a set of new rules interpreting Goal 14: OAR chapter 660, division 24. When it adopted these rules, LCDC decided to continue with a second round, or Phase 2 of this project. In June 2008 LCDC initiated Phase 2 and appointed a work group to advise the department on the second phase. The work group met in the summer and fall of this year, and in October agreed to new "housing density" and "housing mix" safe harbor concepts, which comprise the core of the proposed rules.

In addition to the work group recommendations, the department has proposed new and amended rules not recommended by the work group, as indicated in the public draft. Most of the department's additional proposals were discussed by the work group, but a majority of the work group did not agree to these proposed rules. As such, while some work group members may support them, these additional elements are described in this report as DLCD proposals.

Several documents are attached to and referenced by this report, including the proposed UGB rules, Goal 14, related statutes, short descriptions of the UGB process and safe harbors, research papers conducted to help the work group, and rule hearing notices and economic impact statements. These attachments provide additional background to this report and are referenced throughout, especially the research papers.

For more information about this agenda item, contact Bob Rindy at (503) 373-0050, Ext. 229, or 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 hear testimony and comments regarding the proposed rules and either (1) adopt the proposed rules, (2) adopt some of the rules and continue the hearing for others, or (3) do not adopt the proposed rules at this time, but continue the public hearing until the Commission's January meeting and provide additional direction to the work group and the department regarding further refinements of the proposed rules prior to that meeting.

III. BACKGROUND AND HISTORY

LCDC initiated this project to clarify and streamline the UGB amendment process in June 2004, and for the "first phase" of the project, appointed an advisory work group. In October 2004 that work group proposed amendments to Goal 14 along with a set of new administrative rules interpreting Goal 14's procedures and requirements for UGB amendments. After at least ten hearings statewide, LCDC adopted the Goal 14 amendments in April 2005. After additional work group meetings and hearings, LCDC adopted new UGB amendment rules under OAR 660, division 24, in October 2006.

The amended goal and new interpretive rules clarify and streamline the UGB amendment process (see Attachment E). The rules provide a comprehensive "interpretive guide" to Goal 14 UGB procedures, and also provide a series of "safe harbors" (see attachment F) that, at the option of local governments, provide a less costly and time consuming path to meeting various UGB-related requirements. The division 24 UGB rules adopted in 2006:

- 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 the exchange of land currently inside a UGB for land outside.

When the Commission adopted the new rules in 2006, it suggested the department should continue working on ideas to streamline and clarify the UGB process. LCDC’s “Policy Agenda” for this biennium directed the department to engage “Phase 2” of the UGB streamlining project. Phase 2 is intended primarily for consideration of additional “safe harbors,” especially ideas for safe harbors that had been discussed by the initial “Phase 1” UGB work group, but that either did not gain a consensus of the group or for other reasons were not considered ripe for consideration or adoption as part of the 2006 UGB rules. As part of Phase 2, LCDC directed the department to study 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;
- Goal 5 natural resources Goal 7 hazard areas in land need and supply analyses; and
- Need for maximum urban area lot sizes (i.e., a density “floor” for residential zones).

LCDC also indicated that the Phase 2 effort should consider:

- Providing LCDC with authority to approve UGB amendments where there are minor differences between the amount of land provided and the amount determined to be 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.

The Commission recognized that the time frame for considering these issues was very short, and agreed that the work group should prioritize issues based on, among other considerations, the likelihood that a particular issue could be resolved and result in a consensus recommendation by the work group.

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 also provides a detailed summary of the issues surrounding “segmented UGB” adoption through the post acknowledgment process rather than periodic review, a recent issue that is currently in litigation. The proposed rules for segmentation were discussed by the work group, but the work group recommended that LCDC should not pursue these rules, at least until the Court of Appeals issues a decision concerning this issue. Nevertheless, the department believes that this issue is best resolved by the Commission, through rulemaking. As a result, the department has provided draft rules on this topic, to elicit public comment and frame the issue for LCDC discussion of the topic.

A. WORK GROUP MEMBERSHIP

On June 19, 2008, LCDC initiated Phase 2 of the UGB streamlining project and appointed a work group to consider issues and, as necessary, propose new or amended UGB rules. The work group membership is listed in Attachment D to this report. The UGB work group met six times from July 15 through Nov. 3, 2008, and held two “subcommittee meetings” on specific topics. Meetings of the groups were open to the public and frequently other interested parties were 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. INITIAL DECISIONS BY THE WORK GROUP REGARDING PROJECT SCOPE

In its initial discussions, the work group considered its “charge” from LCDC (summarized under section III of this report, above). Given the short time frame for this work, 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, rather than determine these amounts through an economic opportunity analyses (EOA). Also, safe harbors or other rules to encourage regional EOAs;
- Safe harbor(s) regarding vacancy rates (a component of housing need analyses)
- The “segmented review” issues raised by the *McMinnville* and *Madras* cases, and
- 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).

The group decided that the following issues were either lower 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, these issues are highly contentious and inventory work is very expensive, which may make safe harbors impracticable. Also, circumstances for such resources vary widely throughout the state, and thus policies on these topics are more difficult to simplify through a common set of safe harbors. However, some work group members may continue to press for safe harbor help on this topic.
- A special UGB amendment process for very fast-growing cities. The work group concluded that, at this point in time, there are no fast-growing cities. In the future the commission should revisit this question, but given the short time frame for this project the group agreed not to consider this under Phase 2.
- 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 discussed this issue in its first meeting but did not agree that there were identified problems with the current process to warrant special rules for this. In the UGB research, it was determined that over the past ten years a large number of cities have amended UGBs for this purpose;
- 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 and non-mandatory method to accomplish this, and thus the group did not discuss specific efficiency or density requirements.
- Rules regarding methods to add land 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 this phase of the project. The department suggests that a set of rules on this topic is especially necessary in light of changes to ORS 195.110 mandating school facility plans by 2010. However, the department's recommendations on this topic would probably be new requirements, rather than safe harbors, and as such, we agree the topic does not fit under Phase 2.

In its initial meeting, the work group also agreed to a “road map” for considering and evaluating ideas for new safe harbors, as follows:

1. The UGB process includes steps or assumptions involving:
 - forecasts of population and employment;
 - buildable land inventories (including “developable land” assumptions for Goal 5 land, floodplains, slope, and infill and redevelopment);
 - Projections for long term housing needs, based on past, present and future demographic and other trends;
 - Housing mix assumptions regarding various housing types;

- Density assumptions, for various housing types;
 - Assumptions about long-term household size; and
 - Assumptions about housing vacancy rates
2. For each of the steps or assumptions above, the group should try to create and agree on safe harbors, or amend existing safe harbors if necessary.
 3. 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.
 4. Based on this research, use the data to evaluate proposed safe harbors identified in step 2, above. The safe harbors could vary based on population or other factors.
 5. In proposing safe harbors, the work group should also consider general “policy intent” of the state land use program (e.g., more efficient use of land, affordable housing, etc) and consider ways in which the safe harbors might further this intent.

C. RESEARCH TO GUIDE HOUSING SAFE HARBOR DISCUSSIONS

As described in the “road map” above, the group agreed that setting benchmarks for housing density and mix would be very difficult—if not impossible—without the benefit of research as to previous efforts by cities. In these prior efforts, cities generally studied and made assumptions about housing density and mix. Since a large number of UGB amendments have been acknowledged over this time period, the group agreed it would be worth the effort to determine whether cities tended to reach similar conclusions about needed housing density and mix, and whether there were certain trends in past and recent assumptions and conclusions.

It was agreed that if local “assumptions” tended to cluster based on city size or other parameters, it would be reasonable to conclude that in the future cities would continue to reach or trend toward these same conclusions. If so, safe harbors could allow cities to simply assert these conclusions or trends without additional research, thus allowing cities to spend time and money on other aspects of planning for UGBs. Furthermore, LCDC could set these safe harbors to encourage slightly higher densities and more affordable housing mixes than might generally emerge from a “typical city’s” research and decision process about assumptions and trends, in order to better implement the goals, particularly Goals 10, 11, 12 and 14.

In order to produce research of this nature in time for the group’s consideration, the department contracted with former DLCD staff Becky Steckler (also formerly with the firm ECO Northwest). In a short period of time, Ms. Steckler produced a report (see Attachment G) 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 is intended to inform the UGB work group about key data used by cities, in order to

help the work group in formulating additional UGB safe harbors to streamline future UGB analyses.”

After Becky Steckler completed her research, as the work group was considering how to construct safe harbors and adjust their parameters based on that research, 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, or to generate additional data in certain categories (see Attachment H). The department decided that this refined data provided sufficient information to set and to verify housing density (and housing mix) safe harbor parameters. Based on this research, the department determined that there are indeed some correlations in the assumptions and conclusions used by “clusters” of cities in defined population ranges 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”.

D. RESIDENTIAL SAFE HARBORS PROPOSED BY THE WORK GROUP

As one of its most important assignments, the work group spent a considerable amount of time discussing residential density and housing mix safe harbors. These safe harbors are intended to establish standard “assumptions” cities may use to more easily generate housing needs. Assumptions about housing mix and density, the subjects of these safe harbors, are core components of a housing need analyses, and typically require a considerable amount of research and policy debate at the local level. Furthermore, these are often controversial issues in LCDC reviews of UGB amendments. As such, safe harbors on these issues are a way toward a more streamlined and less contentious UGB process.

The work group agreed to housing density and mix safe harbors, and recommended two options for each category. The proposal from the work group was by no means unanimous, but it appears that a general “structure” of the proposal was agreed to by most, even though the various parameters within that structure were subject to debate. The various parameters within the safe harbor structure were under debate as the work group concluded its last meeting. This report (and the proposed rules and safe harbors in Attachment A to this report) provides the parameters that appear to have the majority of work group support, even though some of these are not supported by some work group members and may not be supported by the department.

Any 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 “moving parts.” That is somewhat of a problem, since the intent of this effort is to simplify the process. Describing these components accurately, as rule language, results in a fairly lengthy and complex set of rules, especially for those who did not participate in the work group discussion. This report will carefully describe all the components of the safe harbors.

To begin, note that the department has proposed several new or amended definitions at the beginning of division 24. Almost all these definitions pertain to the proposed housing mix and density safe harbors discussed below. The public draft erroneously includes **two** different definitions of the same term, “detached single family housing” (definitions (3) and (5)). It was the department’s intent to include only definition (5). Note that many “new” definitions in this section are identical to definitions in the Goal 10 interpretive rules: OAR 660, divisions 7 and 8. Also note that the department proposed definition (5) rather than (3), because definition (5) includes manufactured housing, as described below.

The department and work group designed the housing “mix” safe harbors (described below, page 11) with a two-tiered structure similar to the structure (but not the same values) used in the Metro housing rules adopted in 1981. The related definitions describe the two types of housing that make up the housing mix in the safe harbor proposals: 1) “detached single family housing” and 2) “attached housing.” Due to statutes enacted since the Metro housing rules, the department has proposed a modified definition (based on the definition in OAR 660, division 7) of “detached single family housing,” i.e., definition (5)). Mobile homes and manufactured dwellings are included due to the requirements for such housing types under ORS 197.475 through 197.492. The modification ensures that the proposed housing mix safe harbors do not allow or appear to allow cities to avoid their responsibility to plan for these housing types. Other proposed new definitions, especially “net buildable acre,” are important to the operation of the “housing density” safe harbors described below and are also based on definitions in other LCDC rules.

1. Standard Housing Density Safe Harbors

As the Steckler/Lazarean research became available, the department and work group members used it to propose a “structure” for a set of housing density and housing mix safe harbors. The structure has different density “parameters” or “values” for larger and smaller cities. The concept of the safe harbor is illustrated by the following table, which was considered by the work group and adjusted as the work group deliberated. We are calling these “standard density” safe harbors in this report to differentiate them from “incremental density” safe harbors described later.

“Standard Density” Safe Harbors

Forecasted 20-year Population	Min Avg	Projected avg	Opportunity avg
<2500	3	4	6
2,500-10,000	4	6	8
10,000-25,000	5	7	9
25,000-100,000	6	8	10

Note: The values assigned to the table above were adjusted over the course of two or three work group meetings. For purposes of this report, the values in the table represent the values in the proposed safe harbor rules attached to this report (Attch A).

In the table above, which the work group used to discuss this concept, four population ranges are proposed – each range represents the forecast population for the urban area inside the UGB at the end of 20 years. For each population range, the safe harbor average density assumption for housing development in the UGB over the planning period is provided in the “middle” column on the chart (4, 6, 7 and 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 planning what proportion of growth will occur within the existing urban area and any new areas proposed to be added to the UGB. As such, this number is key for purposes of estimating land need for the 20-year planning period.

Note that this assumption is in “units per net buildable acre” (see definition) and applies only to buildable residential land in the UGB. It is an “average overall density” for all buildable land in the UGB, a density the city may “assume” will occur for planning purposes when it estimates the total amount of buildable land it will need for the 20-year planning period. Bear in mind that, if this safe harbor is not used, every city expanding its UGB will need to make an assumption as to the average density likely to occur on buildable land in the UGB (not just the expansion area). Such assumptions 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 also agreed on a proposed safe harbor for vacancy rate, see below).

The Steckler research showed that when a city assumed the average overall density for future development in the UGB it typically assumed all land would not develop at the maximum allowed density under zoning assigned to its buildable land. Therefore, the work group has proposed that the “assumed” overall average density provided by the safe harbor (again, the “middle column”) will be less than the maximum allowed density. As such, the proposed safe harbor would include a requirement that the city allow the opportunity for a higher density: if a city is to assume land will develop and an average density less than the allowed density, the allowed density should also be declared.

The right-hand column of the table represents this higher “density opportunity” requirement (i.e., 6, 8, 9 and 10 units per net buildable acre), a “requirement” if the city chooses to use the safe harbor. These numbers represent an “overall average density” that **MUST** be allowed by the city’s comprehensive plan and zoning regulations if a city uses the housing density safe harbor in the middle column. The city must zone buildable land in the proposed UGB to **ALLOW** (through clear and objective standards as required by Goal 10 rules and ORS 197.307(3)(b)), the **OPPORTUNITY** for development of at least the overall average density represented by the right hand column of the chart, at least. This higher “opportunity average density” was set by the work group to a level that generally matches or exceeds the maximum densities allowed by many cities as they amended their UGBs in the past 10–15 years, according to the Steckler/Lazarean research described above.

The work group also proposed that, in order to use the density safe harbor (in the middle column), the city must also establish a **MINIMUM** density, or “density floor,” for all buildable residential land in the UGB. Therefore, if the city uses the average density safe harbor, it cannot

allow development that, on average, is lower than the minimum density provided by the left-hand column. Note that this minimum would also vary according to population category. The minimum density provided in the left-hand column of the chart (3, 4, 5, and 6) is a “floor,” a bottom limit to the overall average for buildable residential land in the UGB that the city must maintain through zoning. Thus, in general, very large residential lot sizes for residential subdivisions inside UGBs would be discouraged because a city could not use the density safe harbor if it authorizes very large lot sizes.

The table and the above description is reproduced as text in the proposed new “density safe harbor rules” in Attachment A, Page 7, lines 4–35; proposed OAR 660-024-0040(8)(e), paragraphs (A) through (D). Note that section (8) of this 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. A number of cities have already used the current safe harbors in UGB amendments proposed since LCDC adopted the division 24 rules in 2006.

2. “Incremental” Housing Density Safe Harbor

An alternative structure for density safe harbors was also recommended by the work group. The group agreed that cities that are currently developed at a very low density would probably not choose the “standard density” safe harbors described above. The standard safe harbors are adjusted to be at or slightly higher than the density levels used by most cities in the study, but there are a number of cities that would consider these density assumptions too difficult to achieve given their current 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 work well 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 cities that are currently at a very low average density would be more likely to use this safe harbor than that which is described in 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..

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)), the OPPORTUNITY for at least the average density represented by 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 “standard density” safe harbor. Note that this minimum or density “floor” also varies with population 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 this 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. This concept is provided in the proposed rule, Attachment A, Page 7, lines 37 – 44, and Page 8, lines 1 and 2, or OAR 660-024-0040(8)(f).

3. “Standard” Housing Mix Safe Harbors

The research performed by Becky Steckler provided some information on housing mix, but that research did not provide a “current housing mix”; i.e., the mix of built housing units at the time of the UGB amendment. Rather, she reported only “proposed housing mix” for the next 20 years for those UGB amendments in the study. Angela Lazarean refined and augmented the Steckler research to determine current housing mix, where such data were available. Although there were fewer data available for mix than for density, again 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, “standard” housing mix safe harbors, are illustrated by the chart below, and are described in the proposed rule in Attachment A, Page 8, lines 4 – 23, or OAR 660-024-0040(8)(e), paragraphs (A) through (D)..

Work group’s Proposed Standard Housing Mix Safe Harbors

	Allowed %	Allowed %	Allowed %	Allowed %
Forecast 20-year Pop		2,500-	10,000-	25,000-
	<2500	10,000	25,000	100,000
Attached Housing	30%	35%	40%	50%
Detached SF Housing	70%	65%	60%	50%

Note: The values assigned to the table above were adjusted over the course of two or three work group meetings. For purposes of this report, the values in the table represent the values in the proposed safe harbor rules attached to this report (Attch A)

The structure of this safe harbor is based on two new definitions of Detached Single Family Housing and Attached Housing. The safe harbor specifies percentages of each of these two basic housing types. Note that the percentages in these safe harbors represent those that must be **ALLOWED** (under clear and objective zoning) for buildable land in the UGB. There is no guarantee that actual development will achieve these exact percentages, although regulatory measures can increase the likelihood of this occurring. Making sure that local governments clearly authorize these mixes, rather than require them, is a longstanding principle of Goal 10,

which is consistent with a statewide pattern of this type of housing mix variability on the basis of size. Note that larger cities must allow a higher percentage of attached housing.

With regard to the parameters in the housing mix safe harbor, at the final work group meeting a majority of members of the work group who were present suggested different parameters for the density mix safe harbor than had been proposed by the department. The department’s suggestion for the standard mix safe harbors, as follows, is based on the Steckler and Lazarean research:

DLCD Proposal for Standard Housing Mix Safe Harbors¹

	Allowed %	Allowed %	Allowed %	Allowed %
Forecast 20-year Pop		2,500-	10,000-	25,000-
	<2500	10,000	25,000	100,000
Attached Housing	30%	40%	45%	50%
Detached SF Housing	70%	60%	55%	50%

Note that these housing mixes would require cities to ALLOW a somewhat higher percentage of attached housing than the proposal in the rule recommended by the work group (Attachment A), which is illustrated in the previous table of this section. The department believes these mixes better achieve the Commission’s charge to the work group “to encourage more efficient development of land within UGBs, and encourage planning for more affordable and livable communities” consistent with Goals 10 and 14.

4. “Incremental” Housing Mix Safe Harbors

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” safe harbor for density. 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-weighted mix at the time of the UGB evaluation.

The incremental mix safe harbor is described in the proposed rule in Attachment A, Page 8, lines 25–36, and Page 9, lines 1–5, or OAR 660-024-0040(8)(h). Under this safe harbor, a local government must determine the existing housing the percentages of both attached housing and

¹ This mix is also supported by work group members Greg Winterowd and Terry Moore.

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%). As noted in footnote 4 on page 8 of the published rule draft (Attachment A), the work group did not agree on the methodology for determining this 15% increase. Some members advocate that the 15% represent an increase in the number of attached housing units in the urban area at the time the local government initiates its UGB evaluation (“Method A”). The department and other members of the work group advocate that the 15% should represent an increase in the overall percentage of attached housing units in the entire UGB, as amended (“Method B”). To illustrate the difference between these two methods:

Method A

Current mix: 80% SF detached, 20% attached

15% of 20% = 3%

20% + 3% = 23%

Projected 20-year mix is 77% SF detached, 23% attached.

Method B

Current mix: 80% SF detached, 20% attached

20% + 15% = 35%

Projected 20-year mix is 65% SF detached, 35% attached.

These methodologies will produce significantly different results in the amount of attached housing allowed. “Method A” allows acknowledgment of 20-year housing mix with very minor increases in the amount of attached housing allowed. The department believes that “Method A” is probably not consistent with Goal 10 and therefore recommends that the Commission adopt “Method B” in the new rule.

5. 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 some of them very strongly, but many work group members 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, but those linkage sections are highlighted in yellow to allow the Commission to remove or modify the linkage text if it wants to allow the safe harbors to work independently.

The department and some work group members support linking the two safe harbors because they believe that both safe harbors are needed to ensure that a range of affordable housing types

is provided in each community. 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 may be compromised.

6. Vacancy Rate

Early in its deliberations, the work group conceptually agreed to a safe harbor on housing vacancy rate. The work group proposal was straightforward and appeared to have broad agreement by the group. Nevertheless, the department inadvertently did not include this safe harbor in the draft of the rule mailed to the rule list and posted on the department’s website. The department urges the Commission to include this provision in its consideration. The proposed rule should have included the following safe harbor under OAR 660-024-0040(7)(e). As such, the four residential safe harbors currently proposed as (e) through (h), if the Commission chooses to adopt them, should be renumbered to (f) through (i). The proposed safe harbor is as follows:

7. **0040(7) “(e) Local governments may estimate the housing vacancy rate for the 20-year planning period using the vacancy rate for the urban area indicated in the most current data for the urban area published by the U.S. Census Bureau.”**

The department will provide an updated draft of the rules with this wording inserted, at the Commission hearing.

E. SEGMENTED ADOPTION 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*.^{2,3} *McMinnville* was settled in 2001, but *Madras* is still under appeal. 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.

The *McMinnville* and *Madras* cases concern 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, such as the population forecast, the buildable lands analysis or the land need analysis as a separate stand-alone plan amendment prior to adopting the UGB amendment itself. Prior to this 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. But because the “post-acknowledgement plan amendment” (PAPA) process provides a possible route for “acknowledgement” of such individual segments, these cases raise the

² *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.

³ 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.

question as to whether cities may “lock in” acknowledgement of an individual UGB element before LCDC reviews the final UGB decision. Cities pursuing this track are likely presuming that, when the city ultimately submits the UGB amendment for LCDC review as required by statute (ORS 197.626),⁴ most of the key decisions are “off the table” for persons objecting to the decision as well as for the commission itself.

Current law is unclear as to whether “segments” previously “acknowledged” under the PAPA process are within the purview of LCDC review of a UGB amendment submitted “in the manner of periodic review” under ORS 197.626. If the PAPA process authorizes acknowledgment of UGB segments prior to LCDC review, it calls into question why LCDC is reviewing UGB amendments at all, since the key issues may have been decided in advance.

Equally troubling is that the UGB amendment process in practice is best approached as an “iterative process” – decisions made early in the process often need to be revisited and sometimes revised as later decisions are made. As such, housing or employment need assumptions, and other conclusions made at an early stage of the process, often need to be changed later in the process. For example, as a city determines whether land needs can be accommodated within the UGB, or applies the “efficiency” measures required by Goal 14 or ORS 197.296 as the last step in the “need” analysis. Goal 14 requires that measures such as rezoning surplus parcels in the UGB, increasing planned densities, or changing the housing mix, likely to accommodate more of the 20-year land need within the existing UGB, must be considered prior to expansion of a UGB, even if those density or mix decisions were “final” at an earlier stage in the process. If successful, such measures will increase the efficiency of the UGB to accommodate the city’s identified 20-year land need, and will reduce the amount of land, such as farmland, that the city needs to urbanize in order to accommodate long-term need.

Alternatively, if a city adopts “segments” under the PAPA process early on, when a “final” UGB amendment is submitted, LCDC would generally be placed in the position of possibly having to remand the earlier decisions, decisions that a city may have assumed were previously settled through the PAPA process. Sending a UGB back for more work due to a problem with a segment completed very early in the process carries a high cost beyond lost dollars and time. As such, the emerging trend of cities seeking formal acknowledgment of segments of a UGB amendment poses some difficult questions as to the basic operation of the state’s UGB amendment process.

The fact that current law likely 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 a one-time, final review is necessarily the best policy for the state. 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

⁴ 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.”

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 partial approval at various stages of the process.

In the *Mcminnville* case (2001), the city adopted a segment (a housing need analysis) as a separate PAPA, and DLCD appealed this decision to LUBA arguing that this and other “segments” of a UGB amendment should not be acknowledged under the PAPA process because they were necessarily part of a UGB amendment. LUBA agreed, seemingly based on provisions of LCDC’s Goal 10 housing rule that supported the department’s position. Thus, after *Mcminnville*, cities could not adopt an individual housing needs analysis or other “segment” of a UGB through the PAPA process. However, in its more recent *Madras* decision, LUBA appeared to say that its *McMinnville* decision hinged on ORS 197.296 (state law regarding UGB amendments for cities over 25,000), and thus was only applicable to cities over 25,000. In other words, *Madras* may open the door for cities to gain acknowledgement of individual segments, regardless of whether these are final UGB decisions. However, the LUBA decision in that case does not address whether or not, in its final review of the UGB amendment that is usually supported by an individual segment, LCDC may review the previously acknowledged segment and even remand it. *Madras* was appealed to the Court of Appeals and a decision has not been issued as of the date of this report.

It is important to note that there are some very good reasons for cities to seek acknowledgement 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. As such, it is unclear whether LCDC has jurisdiction (LCDC would not have jurisdiction if the UGB amendment is less than 50 acres). Second, cities often pursue UGB updates in stages for budgetary reasons. But most important, 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 underlies later assumptions turns out to be flawed, and this error is not “discovered” until years of work is completed. But again, we must note that the periodic review process, including cities’ recent statutory authorization for a customized periodic review focusing on narrow issues, would give cities most of the segmentation process and “certainty in stages” that they may be seeking.

In order to help the work group discuss this issue, the department presented a memo at the group’s first formal meeting describing the issue, similar to the explanation above. The department’s memo concluded by outlining some potential rulemaking solutions to resolve this issue:

1. A rule might define “amend the urban growth boundary” in ORS 197.626 to include adoption of preliminary studies, analyses, plan elements, etc., such as buildable land inventory, housing need analysis, and employment opportunities analysis. This could allow cities to put

the relevant components of a UGB evaluation before LCDC “in the manner of periodic review,” either as the city adopts them one at a time, or all at once at the end of the process. This proposal did have some support, as discussed below.

2. A rule might authorize cities to submit a UGB component individually to LCDC for some type of nonbinding preliminary opinion on compliance with the goals, before the city adopts it as a post-acknowledgment plan amendment. This would give cities some level of certainty early in the process, before they spend significant time, money, and political capital doing the rest of the UGB analysis. This proposal did not find support with many work group members. The question of a “nonbinding” approval by LCDC brings with it many other questions. For example, does that mean the Commission’s nonbinding opinion cannot be appealed to a higher authority?
3. Elements of a UGB amendment that were previously adopted by plan amendment may be reviewed *de novo* and declared invalid by LCDC during review of the completed UGB proposal. There is reason to believe that this is the current law, although it is not explicitly stated. However, many members of the work group did not like this option, especially cities, for the reasons outlined above. Moreover, Chair Worrix expressed that the Commission may also be averse to this, since it puts LCDC in the uncomfortable position of remanding a segment that was adopted very early in a city’s process to amend a UGB.

After much discussion, the work group developed a position that is reflected in the PROPOSAL below, a three-part segmentation where one segment, a population forecast, can be acknowledged through the PAPA process and not later reviewed by LCDC, and where two additional segments may be packaged and individually submitted to LCDC for a final decision. The work group at one point signaled agreement on this proposal, although some members expressed a desire to check further with the constituencies they represent. However, at the final work group meeting, many members of the work group reversed direction of this, and joined in proposing a recommendation that the Commission should not take action on this matter until after the Court of Appeals decision in *Madras* is issued.

Two arguments in particular resonated with work group members. First, some are skeptical about LCDC’s authority to interpret ORS 197.626 to define “UGB amendment” in the manner proposed. More important, it was pointed out that if the Court of Appeals decision in *Madras* is based solely on a statute, LCDC may not be able to alter that decision. But cities in particular view the PROPOSAL below as “losing” flexibility that they think they have gained in the LUBA decision in the *Madras* case.

Since these issues have broad implications for the UGB process, and since the department was asked to consider these questions through the work group process, the department decided to draft rules along the lines of the initial work group discussion and “near-agreement.” Although the rule draft makes it clear that these rules are not recommended by the work group, the department chose to provide them in the published draft in order to elicit public comment and to guide LCDC discussion about this topic at its December 4 meeting. Should the Commission choose to further address these questions prior to the pending Court of Appeals decision in the

Madras case, these rules provide a way to allow cities to adopt individual “segments” of a UGB analysis and amendment, and have those acknowledged by LCDC.

PROPOSAL

The proposed new rules would require that:

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. (This is the wording in statute).

2. The statute above includes the terms “Amends the urban growth boundary” and “UGB amendment.” The proposed rule would define these statutory terms to include three broad “segments” of a UGB amendment. These segments are necessary components of a UGB amendment, and as such should be considered to be part of a “UGB amendment”.

A. Population forecast. This segment would not require LCDC review, and thus could be acknowledged under the PAPA process, since such a forecast may be necessary for a number of planning requirements, including transportation or public facility requirements.

B. A housing need analysis or employment need analysis, including:

- a “housing needs projection” (or forecast)
- An Economic Opportunities Analysis
- A coordinated regional EOA described in the proposed new OAR 660-024-0040(6),
- An analysis demonstrating need for other types of land inside a UGB under Goal 14 “Land Need” requirements,
- Any component of a need analysis such as an analysis of housing or employment need
- A buildable land inventory for housing,
- An analysis of employment land capacity per OAR 660-009-0015(3),
- An inventory of land for other urban uses, such as public facilities, streets and roads, schools, parks and open spaces, including an analysis of infill o
- An analysis of redevelopment potential for buildable land

C. An analysis of location factors under Goal 14 and OAR 660-024-0060, or a determination of UGB expansion areas under those provisions.

3. At the option of a local government, each of A, B, and C above may be considered to constitute one element of a UGB amendment that may be adopted by the local government and submitted individually to the Commission in the manner provided for periodic review (provided the city’s population is 2,500 or more within its urban growth boundary). However, for B above, the plan amendment must include a determination of the amount of land needed to be added to the UGB and all the elements bulleted above that are necessary for such determination. For C

above, the plan amendment must include the adoption of the UGB expansion determined consistent with applicable goals, rules and statutes.

4. Note that the rule provides “the director or Commission” may approve the preliminary element described A, B, or C. This is because, under periodic review, a UGB element may be approved by the department without Commission review. Furthermore, if a local government adopts an element of an urban growth boundary amendment later amends the UGB in response to that element in a manner that adds less than 50 acres to the UGB, neither the UGB amendment nor any preliminary element of the UGB amendment that has not already been adopted must be subject to LCDC review.

5. The “segmented review” described by this proposed new rule would provide an opportunity for cities to have one or two elements of the UGB analysis “approved” prior to finally adopting the UGB amendment. The proposed rule provides that the director or Commission may not re-evaluate or amend its determination of compliance for that preliminary element, provided the final UGB amendment is submitted to the Commission for review within two years after acknowledgement of the preliminary elements.

F. FUTURE WORK GROUP MEETINGS

The work group agreed that it would schedule at least one additional work group meeting after the LCDC meeting on December 4. The purpose of this meeting would be to respond to any direction that the Commission provides based on testimony and decisions at the December 4 meeting.

V. SUMMARY OF PROPOSED ADMINISTRATIVE RULES

As discussed in Section IV of this report, the work group did not have sufficient time to address all the issues identified in the Commission’s initial charge, but was able to reach a partial consensus on some important issues. However, the department chose to include rule wording for some of the issues that the work group discussed but did not reach agreement on. Furthermore, the department included some amendments to the rules on UGB land exchanges even though those amendments were not discussed by the work group. Each of these is described below:

A. PROPOSALS AGREED TO BY THE WORK GROUP

The work group agreed to the following conceptual proposals reflected in the proposed rules, but not the actual wording of the rules (the rules were drafted after the final work group meeting):

1. Rules to rules that address the “close enough” concepts described in LCDC’s initial charge to the work group. However, it is important to note that, as for the housing safe harbors described above, the work group conceptually agreed to these proposals, but did not agree to specific wording. Two proposed rule amendments in the department’s public draft of the rule would authorize LCDC approval of:

- Population forecasts, where a failure to meet a particular requirement of this rule is technical or minor in nature (see page 4, line 20 – 27), or
- UGB amendments in situations where there are minor differences between the amount of land provided and the amount determined to be needed (see page 11, lines 9 – 14).

2. Density and mix safe harbors for estimating residential land need, described above.

B. PROPOSALS BY THE DEPARTMENT THAT WERE NOT SUPPORTED BY THE WORK GROUP

The department has included in the draft rules two major elements which were discussed by the work group but for which there was no work group agreement:

- Proposals to authorize a regional economic opportunity analysis (EOA), on page 6, lines 15–21;
- The proposed regional EOA safe harbor on page 9, lines 19–34;
- The proposed new “segmentation” rule 0080 on pages 14 and 15.

1. Regional economic opportunity analysis (EOA)

The work group discussed “employment land need” safe harbors at several meetings, but never reached 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 should conduct “regional” EOAs, rather than have each city in the region determine employment land needs separately. The group appeared near to agreement on ideas to encourage regional EOAs, perhaps through a safe harbor, but ran out of time on this issue and did not have time to discuss it further. As such, even though the work group did not recommend any rules regarding regional EOAs, the department chose to provide rule proposals in the published draft, including a safe harbor, in order to elicit public comment and to guide LCDC discussion about this topic at its December 4 meeting, should the Commission choose to further address this.

2. Segmented Review of UGB Amendments

Similarly, the work group at one point seemed very close to agreement on a proposal to resolve the *McMinnville* and *Madras* issues and provide for “segmented” acknowledgement of UGB elements. However, the group backed away from that agreement at its final meeting. Instead, the work group (or a majority of those present at the final meeting) recommended that LCDC should not consider this issue until the *Madras* decision is issued by the Court of Appeals. DLCD cannot predict when a decision will be issued in that case, or whether it will resolve all the questions around these issues.

C. PROPOSALS BY THE DEPARTMENT ON ISSUES NOT DISCUSSED BY THE WORK GROUP

The work group did not discuss amendments to the land exchange rules on page 14, lines 2 – 9. The department has proposed these changes to clarify ambiguity in section (3) of this rule that has been raised by local governments and other interests after the work group had completed its work. The department believes the proposed amendments to this section are desirable to clarify that, for land exchanges, the terms “the same as” do not mean that all employment land is the same, nor that all residential land is the same. Rather, industrial and retail employment lands are different, and attached and single family detached housing land are different.

D. OTHER RULE ISSUES NOT ADDRESSED BY THE WORK GROUP OR THE RULE DRAFT

Applicability rules at 0010

Goal 14 and related definitions were substantially amended on April 28, 2005, effective April 28, 2006. This rule currently indicates that the new division applies only to the version of Goal 14 adopted in April 2005. However, this rule goes on to 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. For purposes of this authorization, “initiated” was 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 the work task and that intend to use the “old” Goal 14. As such, that subsection is no longer needed, and the department therefore recommends it be removed from the rule. The department has not yet determined whether any local governments are qualified to use the exception under (a) above. Furthermore, the dates in the applicability may need to be changed if LCDC adopts amendments to this division. However, at this time the draft does not indicate new applicability dates. The department will be prepared to propose amended dates for these rules at the public hearing, if LCDC chooses to adopt any of the rule proposals.

VI. DLCD RECOMMENDATIONS

The department recommends that the Commission hear testimony and comments regarding the proposed rules and either (1) adopt the proposed rules, (2) adopt some of the rules and continue the hearing for others, or (3) not adopt the proposed rules at this time, but continue the public hearing until the Commission’s January meeting and provide additional direction to the work

group and the department regarding further refinements to the proposed rules prior to that meeting.

VII. ATTACHMENTS

- A. Proposed new and amended UGB rules**
- B. Goal 14 (as amended in 2006)**
- C. Applicable Statutes**
- D. Phase 2 UGB Work group**
- E. Summary of the UGB Amendment Process**
- F. Safe Harbor Principles**
- G. Research by Becky Steckler**
- H. Research by Angela Lazarean**
- I. Public Notices**