

October 20, 2008

To: UGB Phase 2 Workgroup

FROM: Bob Rindy

RE: Proposed rules regarding “segmented” submittal of UGB work tasks

At a previous work group meeting, the department reported on conversations that had been occurring between DLCD and local governments regarding the question of “piecemeal” or “segmented” acknowledgment of UGB amendments, i.e., through the post-acknowledgment plan amendment process. By “segmented,” we mean acknowledgement of local government’s population forecast, buildable land inventories, land need analyses and UGB location evaluations, as separate elements from a final UGB amendment. The question raised in two LUBA cases – *McMinnville* and *Madras* – involved cities’ efforts to adopt and “lock-in” separate elements of a UGB analysis, such as the housing need analysis, through the post-acknowledgment plan amendment (PAPA) process PRIOR to submittal of the final UGB amendment to LCDC “in the manner of periodic review” under ORS 197.626. In *McMinnville*, LUBA concluded that cities could not do this, but in *Madras*, which is currently under appeal, LUBA seemed to reverse itself and concluded cities outside Metro with populations under 25,000 could propose various elements as PAPAs, and have those acknowledged prior to LCDC submittal of the final UGB proposal.

In the workgroup meeting, the department indicated its concern that despite the fact that a UGB evaluation is an iterative process the *Madras* decision allows most cities to “lock in” and use their preliminary need assumptions and conclusions for later UGB decisions. This is a concern because the UGB process was established and has been interpreted throughout the 30+ year land use program as an “iterative” process: later steps in the process for decisions about a UGB could and often should change prior decisions, such as when a local government tries to determine whether it can meet its housing needs without expanding the UGB (an explicit Goal 14 requirement), and in doing so decides to increase density on “buildable land,” which effectively changes previous assumptions about infill and redevelopment. In the work group discussion, local governments indicated their desire to nevertheless have certain major decisions approved in a “segmented” fashion, so that they may have some level of “certainty” about initial decisions when they move to later steps of the UGB analysis.

The department noted that currently there is no clear answer to a very fundamental question in this debate, a question not addressed in either of the LUBA cases: Is LCDC necessarily “bound” by a previous PAPA decision to acknowledge an element of a UGB analysis? If not, LUBA’s rulings in these cases would not provide the “certainty” local governments were seeking. If so, the “iterative process” of UGB amendments is compromised. The department has asked the Department of Justice for an informal opinion regarding this critical question, but at this point DOJ has not provided an answer. As such, the department is recommending that the workgroup proceed to try and resolve

this debate under the assumption that, without rule or statute change, previous acknowledgements of “segments” of UGB analysis are binding on LCDC. The relevant statute is as follows:

“197.626 Expanding urban growth boundary or designating urban or rural reserves subject to periodic review. 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 or that designates urban reserve under ORS 195.145, or a county that amends the county’s comprehensive plan or land use regulations implementing the plan to establish rural reserves designated under ORS 195.141, shall submit *the amendment* or designation to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.650.”
(*Emphasis added*)

In discussion, the workgroup seemed to be approaching agreement on a way to resolve this question through rulemaking. The group seemed to agree that we should try and resolve this issue in a manner that might resolve local governments’ and DLCD’s (and others’) concerns about the iterative process. In August, the group discussed a proposal whereby UGB analysis could be “segmented” into three parts:

1. A 20-year population forecast
2. A “need” analysis, either for housing or employment land, or both, need for other needs, and anything related to a needs analysis (such as a BLI, EOA, etc), and
3. A “location analysis”.

The group apparently agreed that step 1 should not necessarily be subject to LCDC approval under ORS 197.626, especially since a population forecast is fundamental to other planning issues such as transportation planning that clearly do not require LCDC approval outside the PAPA process. (We didn’t discuss whether this would be an “option” or we would declare that in no case is the population forecast part of the UGB amendment. However, the department is suggesting that this and other elements to allow “segmented” review should be a local option, not a requirement). The group agreed to further discuss ways to provide a “segmented” submittal process for steps 2 and 3, above, provided these “steps” (i.e., 2 and 3 above) would be the only valid “segments” of a UGB amendment process. In this memo, the department is suggesting some ways to accomplish this, for group discussion at the October 21 meeting. The department’s suggestions do not involve Metro UGB amendments, or UGB amendments by cities outside Metro with populations greater than 25,000, but would apply to any city in the manner of the statute (see statute, above. I removed the portions of that statute that apply to Metro because I am presuming Metro, and also ORS 197.296 cities above 25,000, don’t have a “segmented adoption” option based on the *Madras* decision).

Possible rulemaking concepts

1. LCDC, through its authority to “interpret” statutes, define the statutory wording in ORS 197.626 such that a local action to “amend the urban growth boundary” (that phrase is used in the statute, see above) would include any action to adopt a plan element that included one of the “products” described as part of steps 2 or 3, above, (e.g., a buildable land inventory, housing need analysis or employment opportunities analysis, and/or pieces of those, such as a determination of housing mix or density). This is what LUBA and the Court of Appeals determined in McMinnville. The rule would not declare that the population forecast, by itself, is necessarily a portion of a UGB amendment. If LCDC defines the other elements as part of an action to “amend the urban growth boundary,” any of these elements would require LCDC approval, and the relevant components would need to be submitted to LCDC “in the manner of periodic review,” rather than as a PAPA, whether the city adopts them one at a time or all at once. We would have to deal with the problem that, when a local adopts an early “element”, such as a BLI, it may not know whether the UGB will be amended to include more than 50 acres.
2. LCDC may proceed with defining the statutory wording in ORS 197.626 as per concept 1, above, but the rule would also indicate that cities may submit a “need analysis” (i.e., step 2) to LCDC for some type of *non-binding preliminary opinion* on compliance with the goals, before the city proceeds with later steps in the UGB evaluation process. This would give cities some level of certainty early in the process, before the city spends significant effort with the rest of the UGB analysis.
3. LCDC may proceed with defining the statutory wording in ORS 197.626 as per concept 1, above, but the rule would also declare that elements of a UGB amendment previously adopted and acknowledged through the PAPA process *may*, at LCDC’s discretion, be reviewed and possibly “remanded” by LCDC during its review of the completed UGB proposal.
4. LCDC may proceed with defining the statutory wording in ORS 197.626 as per concept 1, above, but the rule would also declare that cities may gain preliminary approval of “Step 2” only by use of the periodic review process (including., the new special periodic review “lite” process under ORS 197.---).

Based on these four options, the department has drafted some draft new rules for discussion:

660-024-0080

LCDC Review Required for UGB Amendments

(1) For purposes of this rule, OAR 660-024-0090 and ORS 197.626, the following definitions apply:¹

(a) “Amends the urban growth boundary” means for a city with a population of 2,500 or more within its urban growth boundary to adopt an amendment to a UGB, or to adopt one or any combination of the following elements that are preliminary to a UGB amendment except for the coordinated population forecast described in OAR 660-024-0030:

(A) A housing “need” analysis or employment need analysis as described in OAR 660-024-0040, a “housing needs projection” described in OAR 660-008-0005(4), an Economic Opportunities Analysis described in OAR 660-024-0040(5) and OAR 660-009----, or an analysis demonstrating need for other types of land inside a UGB under Goal 14’s “Land Need” requirements, or any component of a need analysis described in this subparagraph, including an analysis of housing or employment density or housing type, or employment density or type, or the numbers of acres available or needed for such uses;

(B) A buildable land inventory for housing, or an analysis of employment land capacity (cite?), or both, or for other types of land described UGB under Goal 14’s “Land Need” requirements, including an analysis of infill or redevelopment potential for buildable land under such an inventory, as per OAR 660-024-0050 and OAR 660-008-0005;

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

(b) “The amendment” shall have the same meaning as subsection (a), above.

(2) 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 or designation to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.650.

(3) For purposes of (2) of this rule and ORS 197.626, if a local government adopts an element of an urban growth boundary amendment defined in (1) of this rule, and if the city later amends the UGB in response to that amendment so as to include less than 50 acres in the UGB amendment, neither the UGB amendment nor any of the preliminary elements of the UGB amendment shall be subject to LCDC review as provided in section (2) of this rule.

¹ It may be preferable to include these definitions in the “definition” section of the UGB rules, OAR 660-024-0010, rather than here.

660-024-0090

Process for LCDC Review of UGB Amendments

(1) Land use decisions amending an urban growth boundary for a city with a population of 2,500 or more within its urban growth boundary, and where the amendment includes more than 50 acres, including decisions adopting elements of an urban growth boundary amendment decision described in OAR 660-024-0080, must be submitted to the department for review with the statewide planning goals and related statutes and rules if the land use action is not a task on a periodic review work program

(2) The standards and procedures in OAR 660-025-0175 and the requirements of this rule govern the local government process and submittal, and department and commission review.

(3) The local government must provide notice of the proposed amendment according to the procedures and requirements for post-acknowledgment plan amendments in ORS 197.610 and OAR 660-018-0020.

(4) The local government must submit its final decision to the department according to all the requirements for a work task submittal in OAR 660-025-0130 and 660-025-0140. This requirement applies to a decision amending its urban growth boundary, including any of the preliminary elements of the decision, as provided in 660-024-0080.

(5) Department and commission review and decision on the submittal from the local government must follow the procedures and requirements for review and decision of a work task submittal in OAR 660-025-0140 to 660-025-0160.

(6) Notwithstanding sections (5) and (6) of this rule, if a local government adopts an element of an urban growth boundary amendment decision described in OAR 660-024-0080(1)(a)(A) or (B), or both, separate from a final decision to address the remaining UGB requirements and amend the UGB in a manner that includes more than 50 acres, the local government may proceed either under (a) or (b) of this section:

(a) The local government may adopt the element as a post-acknowledgement plan amendment in accordance with ORS 197.610 through 197.625, and the adoption may be considered acknowledged in the manner declared under ORS 197.625, provided a later decision to amend the UGB based on the element does not result in an amendment to a UGB that includes more than 50 acres. If an amendment to the UGB based on the element is later adopted and the amendment includes more than 50 acres, the local government must submit its final decision to the department according to this rule and all the requirements for a work task submittal in OAR 660-025-0130 and 660-025-0140. Any previous acknowledgement of the element under ORS 197.625 must also be submitted at that time, and would not be considered “acknowledged” for purposes of the department’s or LCDC’s review under OAR 660-025-0175, or

(b) The local government may submit an element of an urban growth boundary amendment decision described in OAR 660-024-0080(1)(a)(A) or (B), or both, separate from a decision to amend the UGB, in the manner of OAR 660-025-0130 and 660-025-0140. However, the local government may request that LCDC issue a non-binding preliminary opinion regarding compliance with the goals for the element(s) prior to the local government's proceeding to adopt the UGB amendment and submit it to the department, if necessary under section (1) of this rule, in accordance with all the requirements for a work task submittal in OAR 660-025-0130 and 660-025-0140.

Please note that the above draft rules are provided here for purposes of workgroup discussion. These are not formal proposed rules for purposes of formal rulemaking.