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Oregon Chapter

Making Great Communities Happen

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EXHIBIT: 1 AGENDA ITEM: 8
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 9/22/15
SUBMITTED BY: OAPA

September 22, 2015

Land Conservation and Development Commission

Delivered via email to Bob Rindy, Amie Abbott and Casaria Taylor, Department of Land Conservation and Development

Dear Chair Macpherson and Members of the Land Conservation and Development Commission,

The Oregon Chapter of the American Planning Association (OAPA) represents over 850 professional and citizen planners in the State of Oregon. Our mission is to promote the art and the science of planning in Oregon.

Thank you for the opportunity to comment on the proposed rules to implement 2013 HB 2254. We commend the Department, Commission, and the numerous advisory committee members who have devoted years to finding ways to improve the planning for urbanization and urban growth boundaries. Before directing you to our comments on the draft rule, we want to take a moment to recognize the work that's been done to get to this point. The Legislature passed HB 2253 and HB 2254 in 2013. Portland State University's Population Research Center (PRC) worked with the Department of Land Conservation and Development (DLCD) staff and a rules advisory committee (RAC) to create and enable the Commission to adopt rules for the development of population forecasts for every city and county outside of Metro. The PRC just completed the first round of forecasts for ten counties and all of their cities in June of this year. While this was taking place, Department staff were working with a RAC on implementing HB 2254. The RAC has met 11 times over the last two years. Staff has asked a lot from the RAC and the RAC has delivered.

Overall, OAPA is supportive of the proposed draft rules and believe they go a long way in making the process more efficient without compromising the quality of analysis and the rational of the Urban Growth Boundary (UGB) process.

Specifically, OAPA recommends that Land Conservation and Development Commission (LCDC):

- **Keep the eye on the prize and adopt rules that create a simpler, and less time and resource intensive process.** Oregon communities need a simpler process to analyze their UGBs. A single planner working for a community in Oregon should be able to do this work with a spreadsheet.
- **Don't add new definitions.** Keep the definitions recommended by the RAC.
- **Make definitions and assumptions consistent when there is not a compelling reason for them to be different.** There are several places in the proposed rule where definitions are not consistent. For example, Division 38 states that land in UGBs is 50% buildable if it's at least one contiguous acre of more than 25% slope. However, it then states that land outside UGBs is 0% buildable if it's a contiguous five acres with more than 75% of it with more than 25% slope or

any land with more than 40% slope. Similar inconsistencies also occur for lands in the 100-year flood plain.

The LCDC may want to consider simplifying the draft rule and referring Division 8 language for buildable land (660-008-005) and state that there is an assumption of 0% buildable land on areas that are severely constrained by natural hazards as determined under Statewide Planning Goal 7; subject to natural resource protection measures determined under Statewide Planning Goals 5, 6, 15, 16, 17, or 18; have a slope of 25% or more; are in the 100-year flood plain; or that cannot be provided with public facilities.

- **Don't add a layer of value judgments on the proposed residential and employment ranges.** Trust the work completed by the Community Service Center at the University of Oregon. It's the most comprehensive review of development that's occurred in UGBs in Oregon to date.

Some people may find that the development that has occurred does not meet their expectations with respect to density. Efficiency is one of the guiding principles of this effort, with the goal of ensuring that land within urban growth boundaries is used efficiently to accomplish multiple objectives – ensure needed housing, ensure economic opportunities, and provide land for uses that need to be located within urban growth boundaries.

Please be mindful to not devote undue time and energy on whether densities are “too low” or “too high.” The goal is not to achieve a magic number of units or jobs per acre; the goal is develop a process that ensures communities can evaluate their UGBs more frequently to see how they're doing, and to take measures to use land more efficiently as their communities grow and change.

- **Support local communities' ability to make incremental changes to efficiency – at their own pace and in ways that works for them.** In several sections, the draft rule requires communities to propose a “bump” in some metric, such as density. This work will require some close coordination and listening to ensure that communities are doing enough to use land efficiently for housing and jobs, while respecting that different communities will have different expectations on the “bump.” For one community, a one percent increase in density may not move the needle; for another, a one percent increase may be a push.
- **Make sure the paths are clear for determining housing and employment needs.** Consider testimony and be prepared to make changes to the rule to ensure that what's required from a community is clear and that expected outcomes are clear. State law already requires that a community demonstrate that the estimate needs for housing and/or employment cannot reasonably be accommodated on land already inside the UGB before expanding the UGB. Before adopting the final rules, make sure that a community can make this determination with as much certainty as possible before going down the road to expand their UGB. Rely on the work completed by staff and the RAC have completed with respect to density ranges and efficiency measures.
- **Monitor the analysis of serviceability.** OAPA supports the work done to date to improve planning for serviceable land in UGBs. We recommend the Commission and Department monitor how communities are doing with respect to this requirement and make sure such input can inform any improvements to this work.
- **Conduct an evaluation every five years and update the rules as needed.** The Commission is about to adopt its policy agenda for 2015-2017. OAPA recommends the Commission plan an

evaluation of these rules in five years, around the 2020-2022 biennium and update the rules as needed based on that evaluation.

Thank you again for the opportunity to provide feedback on the proposed rules to implement 2013 HB 2254.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Franklin". The signature is written in a cursive, flowing style.

Jason Franklin, AICP
OAPA President

To: Land Conservation and Development Commission
From: Al Johnson via electronic mail
Date: September 21, 2015
Re: Preliminary Comments on Draft UGB Streamlining Rules
Request for additional public process, legislative clarification

Mr. Chair and members of the Commission:

My comments address the September 10 "Public Draft." They are incomplete because the issues involved are too many and too complex for even a retired former land use lawyer to fully address in the short time available before the Commission hearing.

Request for additional Public Hearing, Public Comment, and Citizen Participation Opportunities, and Legislative Clarification before Final Adoption

The significance of the draft rules for Oregon's land use program, especially for its potential to unwind 40 years of affordable housing policy, cannot be overstated. The streamlining statute is intended to reduce litigation, uncertainty, and delay. The current draft threatens to increase all three. The threat is enhanced by the lateness and complexity of the draft rules and their failure to clearly delineate the relationship of the new procedure to other elements of the state's land use program.

I understand the Commission's desire to adopt the proposed rules by the January 1, 2016 statutory deadline, but I ask it to keep in mind recent and painful experiences with premature rollouts of new rules and programs. I fear that the rules are to a considerable extent the result of an unrealistically short statutory deadline and a lack of clarity in the statute itself as to how it relates to the Needed Housing Statute, the Housing Goal, and other components of the state's existing land use program.

I therefore suggest that the Commission to interpret the statutory the deadline as directory rather than mandatory, so that it can give the legislature time to answer critical questions, clarify its intention, and make modifications necessary to provide the guidance required for development of a UGB process that is (a) streamlined in fact as well as in theory; and (b) doesn't have unintended consequences for important state land use policies.

Alternatively, the Commission should include in its rules a request for legislative clarification during the 2016 special session, listing questions that have emerged from the advisory committee and public comments. It is very unlikely that any city would elect to proceed in those circumstances, especially since the rules as

adopted will undoubtedly be subject to appeal in the absence of such clarification.

It is important to meet deadlines. It is more important to avoid yet another hurried launch of another highly-touted state program involving complex issues and serious potential side effects.

My concern is with collateral damage to state affordable housing law.

As a career-long participant in the development, interpretation, and enforcement of Goal 10 and the Needed Housing Statutes, I am very concerned that the draft rules, in their current form, threaten a quiet land use counterrevolution in Oregon's widely and deservedly praised state policy on housing and land use.

The proposed rules, in their current form, will enable local governments that elect to expand or even just evaluate their UGBs on the streamline track to bypass Goal 10, the Needed Housing Statute, regional coordination obligations. The new south-of-Metro bypass will allow them to ignore 40 years of strong Commission, LUBA, and Court decisions elaborating and enforcing Oregon's state housing laws, goals, and rule.

That body of law was designed to restrict local regulatory impediments to affordable housing, to require local governments to accommodate their fair share of needed housing, and to assure that Oregon's rural resource protection policies are balanced by truly available and truly adequate supplies of urban land for that critical urban and social need—a safe and affordable place to live.

The consequences for the state outside of Metro will be less visible and less immediate than other recent notable policy implementation belly-flops. But I firmly believe that they will do substantial and irreparable harm to livability of our state for its low-wage workers, its low-income families, its homeless, and, disproportionately, its minorities. They won't only roll back those policies; they will actually reverse them and send the rest of the state in the opposite direction from the cities and counties that are part of Portland Metro.

The streamlining statute as implemented by the draft rules suggests a lack of interest in, understanding of, and commitment to Oregon's strong statewide housing policies requiring meaningful supplies of buildable, available urban lands for residential housing needs. These policies, and the decisions enforcing them, have earned Oregon deserved praise from leading observers such as Anthony Downs, Norman Williams, and many others.

This indifference is of special concern in light of a growing national awareness of the significant role that facially-neutral but effectively exclusionary local land use regulations have played in the emergence of what is variously and appropriately

labeled as “environmental injustice,” the “architecture of segregation,” “American apartheid,” and the “new Jim Crow.”

It comes at a time when both the U.S. Supreme Court and the Obama Administration have signaled a future in which facially-neutral land use policies risk flunking the federal Fair Housing Act’s “otherwise unavailable” and “disparate impact” tests.

I am particularly concerned with the potential of the new procedure, as implemented by the proposed rules, to undermine Oregon’s long-term commitment to reducing and eliminating regulatory and land-supply barriers to the availability of affordable housing, as expressed in Oregon’s Needed Housing Statute and the Commission’s statewide Housing Goal, together with related interpretive rules, Commission opinions, and case law.

The rules as drafted, in short, will be another step back from what has been sadly lacking in recent years. That is not the making of new rules and policies, but the durable commitment to and energetic enforcement of existing housing policies equal to that given to the Commission’s natural resource protection goals.

In summary if not in short, I respectfully urge the Commission not to make the UGB statute and your own rules the latest chapter or even a footnote in the long history of *de facto* Oregon Apartheid.

MAJOR ISSUES

1. Election to streamline cannot bar future use of normal UGB/Needed Housing processes.

Draft OAR 660-038-0020(5), in its current form, provides that

“(5) A city that adopts a UGB amendment using this division may subsequently add land to the UGB using the ‘traditional’ method described in OAR chapter 660, Division 24, instead of a method described in this division, only if the primary purpose for expansion of the UGB is to accommodate a particular industry use that uses specific site characteristics or to accommodate a public facility that requires specific site characteristics, as provided in ORS 197A.320(6).”

The draft rule is directly contrary to the text of the streamlining statute. ORS 197A.305(1) reads as follows: and is therefore unauthorized by and contrary to law.

“(1) In addition to and not in lieu of the method prescribed in ORS 197.295 to 197.314 and the statewide planning goals, the Land

Conservation and Development Commission shall adopt by rules methods by which a city which is outside Metro may evaluate or amend the urban growth boundary of a city.”

While the streamlining statute is vague on some points, on this issue it is crystal clear: the standard method remains available to local jurisdictions, which have complete discretion to continue to use it whenever they deem it necessary. That includes using it whether or not they have ever used the alternative method.

This language would effectively make a city’s initial use of the streamlined process a “poison pill” that forever after prevents (or excuses) it from using the normal UGB and Housing Needs statute processes for their primary purpose: to enable cities to maintain and update their Urban Growth Boundaries and long-term supplies of urban and urbanizable lands.

Some cities will see this as a welcome invitation to long-term insulation from pressure to accommodate newcomers. Other jurisdictions will see it as a trap and a snare for their long-range planning visions. Both will be right.

Under the law as it is written, a non-Metro jurisdiction can’t be required to update its boundary every five years, but neither can it be prevented from doing so. The legislature had no intention of allowing this Commission, by rule, to forbid Salem, Springfield, or Bend from doing the kind of regular and timely maintenance that Wilsonville and the other Metro cities are required by statute to do. Nor did they authorize the Commission to make streamlining a one-way street.

In summary: As drafted, proposed 660-038-0020(5) makes the streamlining process an “instead of and in lieu of” method.” As such, it is contrary to and unauthorized by the enabling statute and should not be added to the agency’s growing basket of invalidated rules. See, e.g., **Wetherell v. Douglas County**, 342 Or 666 (2007), **McKnight v. LCDC**, 74 Or App 627 (1985), and **1000 Friends v. LCDC**, 292 Or 735 (1982).

2. The statute does not and rules cannot preempt or bypass the Housing Statutes and cripple the Housing Goal.

To the extent that language in either or both draft rules equates compliance with the streamlining statute to compliance with Goal 10 and the Needed Housing Statutes, it is inconsistent with the Commission’s governing statutes. The reasons for this, which I will develop further when I have time, are much the same as those that the Oregon Supreme Court has given when invalidating other broad per se declarations such as for the same reasons that the Commission’s early goal amendments equating city limits to Urban Growth Boundaries.

I personally find it hard to believe that the Oregon legislature intended any such thing and that it should be given the chance to correct the statute during the coming special session.

3. The Streamlining Statute's shortened planning period must be clearly defined to begin and end in the future.

The rules must clearly define a full 14-year planning period that begins only when implementation can actually begin. The 14-year clock should start no sooner than the date on which the expansion and the implementing measures actually take effect under Oregon law, i.e., when the expansion order is no longer subject to further appeal and is deemed acknowledged.

The rules should also allow cities, at their discretion, to reset the starting year and update their analyses and UGB adjustments without restarting the whole process if, for any reason, their actual planning period is reduced to less than 14 years.

Assuring that electing cities will get the full 14 years called for by the statute is essential for a host of reasons. Here are a few:

- (a) the lack of explicit guidance in the statute;
- (b) the critical need of local governments to have such guidance if they are going to elect the streamlined UGB option at all;
- (c) the shortened time period for implementation;
- (d) the legal, practical, and logical problems entailed in planning for the past;
- (e) the statute's new restrictions on local governments' ability to timely update their land supplies, which essentially requires them to drop down to a 7-year supply before updating; and
- (f) the need to reduce incentives to further shorten the new planning periods through appeals, remands, more appeals, and more remands, albeit on a somewhat faster carousel.

The new UGB streamlining statute reduces by more than a third the normal 20-year planning period that has been assumed to be necessary almost since the goals were adopted and that is actually prescribed in the Needed Housing Statute, Economic Development Goal, and other integral elements of the state's land use planning framework.

In so doing, the new statute deepens the existing divide between the Portland Metro Area and the rest of the state. Let us count the ways:

1. Unlike the rest of the state, Portland Metro and, by extension, its member cities and counties, are required to maintain a rolling 20-year UGB with regular 5-year updates. The new statute moves the rest of the state's cities, large and small, in the opposite direction. It curtails the planning period mandated for Metro by over a third.

2. The new statute does the opposite of the Metro housing supply statute by actually prohibiting electing cities from maintaining a rolling supply.

3. The new statute requires electing cities to demonstrate that they have less than half the supply Metro is required to maintain before they can replenish using the streamlined method. See ORS 197A.305(3).

The new rules would make all this irreversible for an electing city, even if that city evaluated its land supply and decided not to expand it. A vested right to no growth and no poor folks. How tempting is that?

3. Housing Capacity Must be Realistic.

The draft rules are correct in recognizing that the streamlining statute, read in context with state housing laws and goals, must produce a useable and credible inventory of urban and urbanizable lands that are realistically likely to be available to accommodate the full range of housing needs projected for the 14-year planning period.

Although some of the language needs clarification and sharpening, the rules are generally realistic about constraints such as topography, facility costs, water bodies, restrictive covenants, and regulatory impediments such as deferral of implementing zoning and standards that are not clear and objective.

a. Private zoning regimes

Restrictive covenants, deed restrictions, and plat restrictions have tremendous potential to frustrate public land use policy. They can't be ignored and the rule can't authorize local governments to ignore them if local buildable land supplies are to be based upon realities, and not upon denials of inconvenient truths.

What makes private land use regulations especially dangerous to public policy is that they are so easy to discount or ignore. They are the "dark matter" of the land use universe, invisibly distorting the path of public land use policy. For an excellent treatment of the subject, see McKenzie, **Privatopia: Homeowner Associations and the Rise of Residential Private Government** (Yale, 1994).

The idea that such restrictions either are or can be easily and frequently amended is utter nonsense, as anyone who belongs to a homeowners' association well knows. I have drafted a variety of homeowners' association documents over the years. Consistent with what I believe to be the universal practice, all have required supermajorities to amend. As southern senators would say of the filibuster, that's the whole idea.

"Under the general rule, all of the parties entitled to enforce the covenant must agree to the amendment." Korngold, **Private Land Use Arrangements** §11.13 (Shepards/Mcgraw-Hill 1990). Oregon's Planned Community Act reduces the requirements for Homeowner Association voting from unanimity to supermajority on some issues, but retains the requirement of unanimity for deed restrictions, including land division and density restrictions. See ORS 94.590.

These restrictions are enforceable by owners of other lots in the same subdivisions and planned unit developments. They can also be enforceable by other "benefitted" property owners, land trusts, and governmental entities.

Except where a developer still owns a supermajority of lots, I can't easily imagine a circumstance where a supermajority of homeowners would vote to reduce or eliminate a restriction on development of community open space or a restriction on development type or density. I am certainly unaware of any such instance in Oregon. As one authority says:

"When dealing with real estate and recorded instruments that create and regulate rights relating to . . . real estate, change is not easy. . ." Hyatt, **Condominium and Homeowner Association Practice**, § 9.01 (3rd Edition, ALI-ABA 2001).

Lands subject to such restrictions are similar to lands which are restricted by conservation easements, lands owned by land trusts, and lands dedicated as wetlands, golf courses, or other open space pursuant to planned unit development approvals.

Oregon's Needed Housing statute and goal place the burden of "demonstrating" that its residential land inventory is reasonably likely to be able to accommodate demonstrate housing needs for the relevant planning period. ORS 197.296(2). Read in context with the housing statutes, goals, and rules, which it implements and can neither amend nor undermine, the proposed streamlining rule can do no less.

Moreover, it is critical as a practical matter that this fundamental burden-of-proof requirement of Oregon's state housing policies not be watered down by weak or unclear interpretive rules, and that escaping responsibility for meaningful

compliance with state housing policy does not become an incentive or reward for choosing the streamlined UGB process.

No local government can reasonably project that needed housing types will be built at all, much less during the 14-year planning period, where the assumed development is prohibited by private deed restrictions. This means that land inventoried for needed housing may not be counted for higher yields or different housing types than those allowed by documented deed restrictions, plat restrictions, or restrictive covenants unless the record affirmatively shows otherwise. For example, a city's record might show that that restrictions have been amended by the requisite supermajority of votes or removed as the result of foreclosure, legislative action, or judicial decision.

Oregon's courts have shown no interest in favoring land use regulations over private covenants, at least in the absence of a clear legislative statement that such covenants are contrary to public policy. Such restrictions will generally be enforced by the courts notwithstanding land use regulations allowing higher densities. For example, in *Cadbury v Bradshaw*, 43 Or App 33, 602 P2d 289 (1979), the Oregon Court of Appeals held that restrictions in a 1946 deed recorded with an attached proposed subdivision referred to "parcels" as shown on the plat. This meant that subsequent parcel owners could not divide or develop those parcels contrary to the following deed restrictions, regardless of what applicable land use regulations might allow.

In *Albino v. Pacific First Federal Savings and Loan Association*, 257 OR 473, 479 P2d 760 (1971), the Oregon Supreme Court ruled that deed restrictions limiting development to single-family residential still had "substantial value" to benefitted lot owners and would be enforced even though 7 of 31 lots in the original subdivision had already been rezoned G-3, the surrounding area had built up with additional apartments and businesses, and there was substantial increased traffic.

b. Standards and Procedures must be Clear and Objective to realistically project required yields during shortened planning periods.

The rules must recognize that lands inventoried for needed housing must be planned and zoned accordingly subject only to clear and objective standards subject only to limited exceptions. ORS 197.307(4)-(6). This is especially important when yields must be achieved during a shortened planning period instead of the 20 years that the Commission has deemed necessary going back to its early housing policy papers and acknowledgment decisions.

1000 Friends' claim, in its comments on the current draft, that state law allows cities to plan and zone lands inventoried for needed housing using a discretionary permitting track alone is simply wrong. A discretionary track is

permitted only as an alternative track, and then only when a clear and objective permitting track is (a) in place and (b) doesn't itself impair the availability of inventoried lands by unduly narrow or onerous restrictions. See, e.g., **Creswell Court v. City of Creswell**, 35 Or LUBA 234 (1998)(objective spacing standards effectively excluded needed housing type).

It is more than disappointing to see 1000 Friends backsliding from one of its proudest early achievements: successfully advocating for an Oregon land use housing policy that would be as aggressive and effective as Oregon's rural resource land use policies.

1000 Friends' current position on this issue is inconsistent with current law, its own past position on the subject, and the Commission's clear and unequivocal position on the issue going back to its early decisions on land use appeals. The Commission spelled it out clearly and unequivocally in **1000 Friends v. City of Lake Oswego**, 2 LCDC 138, 148 (1981):

" Goal 10 requires a jurisdiction to 'encourage' adequate numbers of housing units. . . . [C]ase by case upzoning would undermine the plan and result in a Goal 10 violation. . . ."

". . . [T]o comply with Goal 10, a jurisdiction must demonstrate how its identified need for housing types at specific densities is met through the application of the zoning to vacant buildable lands. A jurisdiction can accomplish this either by rezoning residential buildable lands to reflect plan map density designations, or by developing a rezoning process, including (1) a justification in the plan for the use of the rezoning process; *and* (2) a plan policy or policies to explain the jurisdiction's intent to use the rezoning process to meet housing needs; *and* zone change standards in the zoning ordinance, which are clear and objective and consistent with the rezoning justification and policies. . . ."

1000 Friends contribution in the early days was substantial and praiseworthy. The critical role of clear and objective standards was a centerpiece of that contribution.

It is a chapter of Oregon's statewide land use story worthy of a short refresher course. A good place to start is a very upbeat Winter, 1980, 1000 Friends newsletter, in which 1000 Friends, quite properly, actually bragged about the **Milwaukie** decision:

"Oregon's nationally important housing program made important advances in 1979. . . . LCDC, in a case brought by 1000 Friends, requires local governments to remove vague and discretionary approval criteria from plans and implementing

ordinances. . .” [citing **1000 Friends v. Milwaukie**, 3, Or LCDC 1 (1979).”

“In other housing matters, the Commission denied acknowledgment to a number of cities because their plans or ordinances failed to comply with Goal 10. Commonly, those plans were found not in compliance because they lacked buildable lands inventories for residential use, contained vague and discretionary approval criteria, or failed to provide adequate land for housing types identified as needed.”

“Several months following the Milwaukie decision, LCDC adopted a nationally significant policy paper on housing. That policy today plays a major role in plan review for compliance with Goal 10, Housing. **In adopting the policy, the Commission selected language prepared by 1000 Friends of Oregon which significantly amended the policy proposed by LCDC’s staff.** The 1000 Friends alternative had the support of such agencies and organizations as the State Housing Council, State Housing Division, Oregon Home Builders Association, Portland Metropolitan Home Builders Association, the Manufactured Housing Dealers Association, and the Oregon Business Planning Council.”
Emphasis added.

1000 Friends explained that

“The policy’s purpose is to assure that those housing types identified as needed in a particular community can be provided in adequate numbers, more affordable prices, and without unnecessary administrative delay. . . . To accomplish this result, local government standards and procedures governing development proposals must be clear and objective and may not have the effect of discouraging needed housing types.”

As 1000 recognized, a vague and discretionary standard

“. . . invites costly and time-consuming citizen appeals by neighbors . . . Such vague standards are a fruitful source of exclusionary decisionmaking. The discourage, rather than encourage, needed housing types, and thereby violate the Housing goal.”

The 1979 1000 Friends newsletter expresses well-deserved pride for its role in developing the the Commission’s ground-breaking “St. Helens” housing policy paper, based on several strong early LCDC decisions recognizing the importance of clear and objective standards in making land actually rather than theoretically available for needed

housing. As 1000 Friends recognized in an earlier newsletter, the state's land use policy requires equal vigor on both sides of the UGB:

"This affirmative requirement—to provide for Oregon's housing needs—is one of the central requirements of the state's land conservation and development program. It is closely coordinated with other statewide goals . . . to assure that development, including housing, occurs on inventoried, buildable lands within established urban growth boundaries, and not on natural resource lands outside those boundaries" March, 1978.

Just as the Commission's natural resource goals have been reinforced by rulemaking, the prioritizing statute, and other legislation in subsequent years, so has the St. Helens Housing Policy been codified and reinforced in the Needed Housing statutes.

This is no time to step back.

c. Efficiency measures must be much more specific as to content, application, and yield.

The efficiency measures and alternative performance standards are hopelessly inadequate to provide any level of assurance of any particular outcome. To meet its own obligation to comply with the Needed Housing Statute and Housing Goal, the Commission can only "identify by rule" measures that are likely, if adopted by a local government, to produce the yield specified by the Commission. They can't be blank checks or get-out-of-Housing-Goal-Jail cards.

A list of elements to be included in a local measure is meaningless in assessing the potential impact of any particular measure. The rules must be far more specific about the required language and application, preferably including model ordinance language based upon ordinances currently in use somewhere in Oregon. They should quantify the minimal projected yields of such measures by location, housing type, and affordability range during the 14-year planning period. They should require that all yield projections be supported by findings, reviewable by LUBA, that those yields are indeed probable, supported by substantial evidence in the record concerning any assumed incentives, such as SDC reductions, fee waivers, etc.

So please, Commissioners, take your time and get it right. Please make the streamlined UGB route a choice that cities will want to make, and that they will want to make for the right reasons, not to avoid their responsibilities under Oregon's housing laws.

Respectfully,

Al Johnson



EXHIBIT: 3 AGENDA ITEM: 8
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 9/22/15
SUBMITTED BY: LOC

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September 22, 2015

Land Conservation and Development Commission

Re: Agenda Item 8 – Proposed Administrative Rules Establishing Streamlined UGB Process

Chair Macpherson and Commissioners:

The League of Oregon cities represents all 242 cities within the state of Oregon, and has been an active member of both the stakeholder group that drafted HB 2544 in 2013 and of the rulemaking advisory committee (RAC) working to draft these proposed rules. Our focus through the entire process has been to provide cities with a system that is more efficient and that provides users of the alternative process clear standards that lead to finalized decisions. Many of our cities that have attempted to expand their Urban Growth Boundary (UGB) using the traditional method have spent years and hundreds of thousands of dollars to only face appeals and remands as they reach the edge of the existing UGB. As a result, cities have looked for a better means for addressing the need to accommodate more residents and more economic development using a method that provides assurance that, in the end, there will be new lands to plan and develop.

As the RAC has heard the studies from the University of Oregon of our past land development patterns, we believe that they reflect that cities are doing well with the lands that are brought into the UGB and the city's incorporated boundaries. In order to assure the multiple goals of the alternative system, cities need to know that the decisions that they make using this new system do not lead to new types of time consuming appeals. The new system must allow a city to feel that the decisions it makes are clearly defined options. Providing cities using this new method finality at the end of the process is key for making this method the preferred option of cities.

However, where cities must make decisions supported by findings, it must be clear how cities can show that the local decision is sufficiently supported. Where the rule does not allow a city to consult a chart or pick from a range, there must be clear standards by which the decision will be measured. Without objective means of evaluating options, cities will be back in the position of defending every UGB evaluation in the appeals process instead of developing community visions and long term development strategies.

The League will continue working within the RAC with this lens of decisions moving forward. The draft of the rules currently before the commission still need work and we are committed to getting the work accomplished in time for these rules to be adopted prior to January 1, 2016. Cities have been facing a long wait for improvements to the UGB process and do not want to further delay the process if it can be avoided.

Redevelopment Expectations

With the studies provided to the RAC, it was noted that there is limited information tracked related to redevelopment projects within a city. This has left the means of calculating an appropriate range of expected redevelopment difficult, as required in proposed OAR 660-038-0030 (6) and 660-038-0190 (4). In the calculation of expected redevelopment rates in OAR 660-038-0030, cities need to be able to choose realistic rates of redevelopment, which requires the Commission to set the ranges at attainable rates that neither put too low a bottom but do not prohibit a city from seeking to meet the goals of the statewide land use system of encouraging more intensive use of urban lands to protect the land for all of

its uses. Therefore, the ranges within this area must be flexible for each city to chart their course with a realistic examination of redevelopment patterns within city limits.

The League very concerned about the requirements for planning for residential lands added to the UGB. As drafted, cities must either adopt new policies that often face significant opposition at the local level, either because they change the perceived community standards or because they require a subsidization of particular housing types at the expense of other services provided by the city, or make a showing that the city already exceeds the median rate of redevelopment and infill. However, the research that was conducted to assist in drafting these rules uncovered that there is little information for cities to use to make this showing. At this time, the League plans to offer alternatives to OAR 660-38-0190 (4) so that cities that have worked to encourage redevelopment efforts within the city will be able to meet a clear standard of evidence that their efforts to create more housing opportunities within current neighborhoods means that they do not need to add more controversy in adopting new policies.

Employment Lands

The evaluation of needed employment land is a difficult calculation to make on a statewide basis as every community has a variety of employer types and therefore a varied range of "density" of employment lands. In addition, the economic development direction of a growing city may significantly change over time, moving from one type of industrial employer into a very different job market. A city may seek to attract new types of employers to encourage a variety of employment types within the city to encourage more growth that is more resilient in times of economic downturns. The employment land needs process needs to allow for a city to consider these types of changing market conditions. Clear guidance is necessary on how to convert employment forecasts into land need that can account for the variety of intensity of land use within employment land classifications.

In addition, there is a significant conversation occurring about the availability of shovel ready industrial lands of a variety of sizes across the state. We need these rules to allow cities to account for a variety of parcel sizes to attract more employers to the state to help meet the economic development goals of the state, county and city. Without careful consideration of how these methods meet the needs of cities trying to develop more economic opportunity, the new method will not meet the needs of cities that are marketing Oregon as a place to build a business. This is a daunting task that needs more review.

Study Areas and Priorities

While we know that the new rules related to prioritizing lands to be brought into a city must apply to both the new method and the traditional method, a number of cities are concerned that because they have been working under the traditional method and are nearing the end of their process, they will have to redo years worth of work to reselect lands or change findings to meet new standards. Requiring current UGB expansion efforts to redo significant work would undermine the entire purpose of creating these clarifying rules. The Commission should work to ensure that these cities are not impacted by the changes to the new requirements.

In addition, as we look at the areas for excluding areas for consideration, this process needs to provide clear guideposts for cities to elect to avoid studying areas that are clearly incompatible with development needs. While some areas that are suggested for exclusion may be better protected within the city, the idea of adding these areas to the study area must be balanced against the resources to study the area and how it balances against the limit on how much land may be taken into the UGB as land to meet other needs such as transportation, parks, and education uses. However, flexibility must be provided to cities to consider if it can build the infrastructure to safely and legally develop an area for any type of use.

Conclusion

As we move forward with the RAC, some of these issues will likely reach consensus based solutions. However, where the Commission is asked to finalize policy decisions, cities need rules that limit the possibility of fomenting appeals, encourage a community to determine its development values and capacity, and encourage the use of this method of UGB expansion by simplicity and clarity. If a city perceives that this system does not provide relief to the resources a city needs to devote to a UGB process or to the likelihood they will face appeals regardless of the decisions the city makes, it is unlikely that the new method will be used.

The League does remain concerned that the requirement for comparing cities within a region was not carried through, but recognize that with the limited number of cities within each proposed region there was not sufficient evidence that there are regional differences in development patterns. Moving forward, it will be important for the Commission to evaluate if there are regional differences in using this method. With a limited number of cities that are truly growing in population, ongoing attention should be paid to any trends in development moving forward to amend the rules if more evidence supports such a change.

Other issues that the Commission will need to examine are what the next steps will be. Some issues that will impact cities in choosing this method will need to be addressed, such as how cities will meet the obligations of periodic review after using this process. The Commission's ongoing review of these rules will assist in assuring that this new method truly is simpler and clearer.



EXHIBIT: 4 AGENDA ITEM: 8
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 9/22/15
SUBMITTED BY: Eugene Planning

September 22, 2015

Greg Macpherson, Chair
Oregon Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, Oregon 97301-2540

RE: Draft Rules for Division 24 Urban Growth Boundaries

Dear Chair Macpherson and Members of the Commission:

Thank you for the opportunity to comment on the draft OAR 660, Division 24 rules released on September 15, 2015. This letter supplements the comments provided to you in a letter from our City Attorney's office dated September 17, 2015, urging you to specify that the new Division 24 rules will not be applied to Eugene's current UGB review. The City of Eugene provides the following more detailed comments on the draft Division 24 rules. The comments in this letter are generally applicable to the Division 38 rules at 660-038-0160 and 660-038-0170, as well.

Given the short amount of time these rules have been available, we have not yet been able to consider all of the ramifications these rules would have if they were imposed at this stage in our current UGB review, or to forecast their impacts on future UGB reviews. To ensure these rules work on a practical level and also result in an outcome supported by the statewide planning goals, we believe the rules need to be tested in a "practice application" on at least a few cities. Eugene has conducted substantial mapping and analysis of the lands surrounding our UGB as part of our current UGB review. We believe this information would be extremely useful and would be more than happy to share it with DLCD staff and the UGB Rules Advisory Committee as to assist in refining, clarifying and improving these rules.

660-024-0065 Study Area

(1)(b): This subsection requires that for cities with a population over 10,000, that we must establish a study area that includes all land within a distance that is at least "X" miles in all directions from the acknowledged UGB.

Without a number provided in the draft rule, it is impossible to determine the impact this will have on our current or any future UGB expansion analysis. Rather than provide a set distance, we recommend that the rule allow for more flexibility for all cities (not just those who have already initiated a UGB review). Each city is uniquely situated, and should be allowed to consider those unique circumstances and characteristics in establishing a study area.

In our current UGB review, we have identified a need for 495 acres of employment land. Our study area contains nearly 18,000 acres, even though in many cases it does not include land beyond one-half mile from our current UGB.

For very good reasons (not all addressed in draft Division 24), the study area used in Eugene's current UGB expansion analysis includes all lands west of Interstate 5, south of the McKenzie River and east of the Amazon's A Channel that fall within one or more of these categories:

(1) land within one half mile of the current UGB;

- (2) land within the Eugene-Springfield Metropolitan Area General Plan (Metro Plan) boundary;
- (3) exception areas or non-resource areas (see ORS 197.298(1)(b)) that about the current UGB.

Eugene's study area for a community park needed to serve a specific neighborhood (River Road/Santa Clara) includes the portion of the above study area that falls within the River Road/Santa Clara planning sub-area identified in our park project and priority plan. Because the park need is identified for a specific area of the city that is underserved, the study area must necessarily be limited to that area. Eugene's study area for a school site in the Bethel School district includes the portion of the above study area that falls within the Bethel School District boundaries. In this case, it would not make sense to look for a school site in another school district to serve Bethel's students.

(For the simplified UGB rules under division 38, consider using a range, such as ½ mile to 2 miles rather than a set number to allow for flexibility within parameters).

(2): This subsection requires that, after excluding the areas in subsection (3), our study area contains at least 200 percent of the need deficiency. As discussed further below, given the allowable exclusions in subsection (3), this may often become an issue. If the exclusions result in only 190%, what are the remedies? How should land be added back to the study area?

(3): This subsection provides that a city "may" exclude land from the study area if it meets certain characteristics or is shown on certain maps.

(3)(a): Regarding landslides, in Eugene's case, it appears removal of these lands from the study area results in a Swiss cheese effect, in that small disconnected portions of large lots would be excluded from the study area, but the lands completely surrounding these portions would be included. While we agree that consideration of landslides is prudent and good planning, excluding these lands from the study area raises several questions. Is this referring to the identified landslide only or to the lands located downslope? Would these identified landslides be required to be excluded from the UGB expansion (resulting in holes in the UGB) or would they be allowed to be included, but have no development capacity? Also, would it be possible for a city to conduct more detailed study of these areas to determine if mitigation is possible?

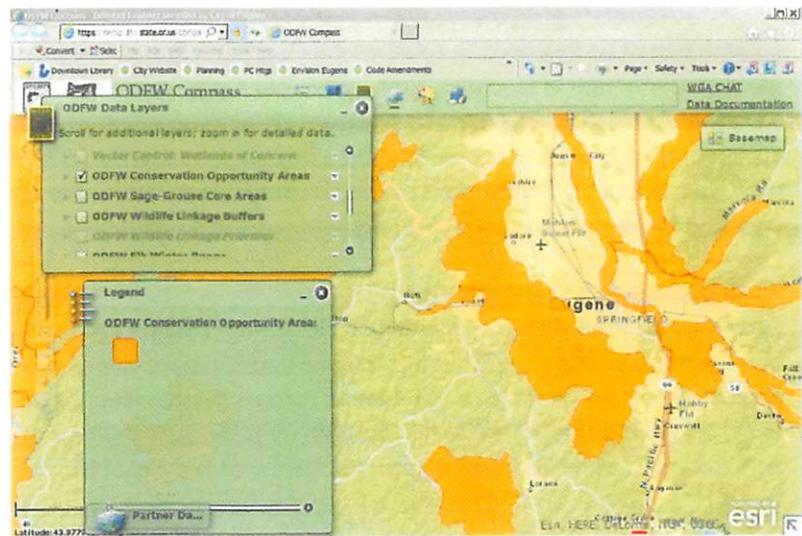
(3)(b): Regarding floodplain, again, we agree that consideration of floodplain is prudent and good planning. Since floodplain doesn't follow tax lot or parcel boundaries (some lots may have a small corner in the floodplain or be crossed by a channel in the floodplain and other lots may be completely in the floodplain) clarity is needed on what land is to be excluded under this subsection. For clarity, floodway needs to be added here.

(3)(c)(A)(i): Regarding big game winter range or big game migration corridors, it's our understanding this is intended to refer to the wildlife inventory maps adopted by a county as part of their Goal 5 inventory. Based on Lane County's adopted Wildlife Habitat Maps (1980), the area south of Eugene's current UGB is shown as major big game habitat. If Eugene excluded this big game habitat from the study area, it appears that the entire south hills would be off limits for consideration. This area includes two of the largest areas of exception lands contiguous to our current UGB (500+ and 790+ acres). Lands not within big game habitat are generally high value agricultural lands.

(3)(c)(A)(ii): Regarding Conservation Opportunity Areas (COA), the map to the following page shows COAs surrounding Eugene. This map is taken from the Oregon Department of Fish and Wildlife's website. It is unclear if this represents the "adopted" COA. However, as shown on this map, well more than half of the lands surrounding Eugene's UGB are within a COA. Included within the COA are two of the largest exception areas contiguous to our current UGB. Lands that are not within a COA are generally agricultural lands with high value soils.

While COAs do provide important information, they are not regulatory in nature. If Eugene excluded these lands from our study area, it may not be possible for us to meet subsection (2) above which requires our study area include 200 percent of our need deficiency. Additionally, it would have the unintended consequence of a likely expansion into high value agricultural land.

The exclusions for big game habitat and COAs are deserving of more discussion and consideration, including any unintended consequences, and a balancing of the various resource lands.



Other Study Area or Priority Land Considerations

County Goal 5 Inventory: It is unclear at what point cities are required to consider the county's adopted Goal 5 inventory for wetlands and riparian areas.

Public Lands: Airports, schools, parks, utility facilities (such as electrical substations) and other publically owned lands that are not identified as surplus lands by the agency who owns the property should be excluded from the study area, or excluded from consideration during evaluation of the lands by priority under OAR 660-024-0067. The draft rule does not do so. In Eugene's case, the airport and the surrounding vacant lands that are reserved for future airport expansion are outside our UGB and located on exception land. There appears to be nothing in the draft rule that would provide us the ability to exclude these lands from consideration at any step, unless we had more than enough land in the first priority land category. Similarly, Lane Community College, a publically owned and operated community college, is located on exception land, and would be required to be considered for an employment or housing expansion. Additionally, there are publically owned park lands outside of our current UGB that we would be required to study for inclusion as employment or housing.

Conservation Lands: Similarly, there are rural lands dedicated to conservation purposes (such as land owned by the Nature Conservancy or other similar charitable organization) that remain designated as lands that would be required to be considered under the priorities for UGB expansion for employment or housing. A city should be able to exclude such lands from consideration either under the study area section (-0065) or the evaluation of land based on priorities section (-0067), depending on where it makes the most sense. Further discussion is warranted to determine the right place in the process to make those exclusions.

Compatibility Issues: Consideration should also be given to nearby or surrounding uses that would be clearly incompatible. In Eugene's case, there is an area of exception land that is located between the Metropolitan Wastewater Management Commission's (MWMC) biosolids management facility and biocycle farm. At this facility, biosolids generated from the regional wastewater treatment facility are turned into organic materials and used to fertilize stands of poplar trees on the biocycle farm. As you might imagine, these uses generate unpleasant odors. Considering this nearby use, this is an undesirable and stigmatic location for housing. In addition, all adjacent and nearby lands within the UGB are designated and zoned for light-medium or heavy industrial uses. Given the relatively small size of the exception area in comparison to the size and prominence of the MWMC uses and the industrial properties, it would be extremely difficult to provide a buffer between those uses and the subarea to minimize the odor, noise, and other industrial use impacts on a neighborhood of residential homes in this area. This is an undesirable area to site new housing.

Eugene would be required to consider this land as a first priority for UGB expansion, and only if there was more than enough first priority land within our study area to accommodate a housing need, would we be able to consider not including it (using the Goal 14 location factors). If there were not enough first priority land within the study area to accommodate a housing need, we would have choice but to include these lands into our UGB. While they may make sense for employment uses, it would be disastrous to expect housing to occur on these lands.

Another consideration is the City of Eugene's Airport Noise Contour, which extends south of the airport. This is an area where the State of Oregon and the City of Eugene's Airport Master Plan strongly discourages the siting of new housing due to noise and safety concerns generated by aircraft departing from and arriving at the nearby airport. According to the Eugene Airport Master Plan, Eugene is the second busiest airport in Oregon, behind Portland International Airport with up to 46 arrivals/departures daily (2010), and passenger rates are anticipated to grow. Considering the proximity of the airport and the noise generated by airplanes flying over the subarea, this is an undesirable area to site new homes. Again, the only time we could consider this impact is if there is more than enough land within our study area to accommodate our need, and then we could use the Goal 14 location factors.

The rules should explicitly allow a city to exclude such lands from consideration either under the study area section (-0065) or the evaluation of land based on priorities section (-0067), depending on where it makes the most sense. Further discussion is warranted to determine the right place in the process to make those exclusions.

660-024-0067 Evaluation of Priority Lands

(2)(c): For clarity, insert the word "designated" so that this reads "Land that is designated nonresource land."

(4): The term "predominately" needs to be defined.

(7) and (8): These terms are crucial, and it is impossible to test these draft rules without such terms defined. Although the term "land" is used in multiple places in this rule, this definition is limited to the evaluation of agricultural or forest capability. It is not clear if the rules refer to the impacted land, or an entire parcel or a development site. In context of UGB review, these distinctions can mean a difference of hundreds of acres. The term "suitable" has been a central issue in UGB litigation, and deserves thoughtful consideration.

(10): Cities are required to consider "evaluation methodologies recommended by service providers." What does this mean? Why was storm water removed from consideration?

Other Considerations:

Given all of the study exclusions provided under -0065 above, it is possible that a city would end up having to expand onto land not contiguous to its current UGB. Would the city be allowed to take in the intervening lands? Would those lands excluded from a study area be able to be included in a UGB if needed to connect to the UGB or to ensure that the UGB did not include holes?

Thank you for the opportunity to provide these comments. I look forward to working with DLCD staff and the UGB Rules Advisory Committee to refine these draft rules based on our collective experiences and mutual desire for improved rules for UGB expansions.

Sincerely,



Alissa Hansen
Senior Planner

peggy lynch (LWVOR Natural Resources Action Committee)

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September 23, 2015

To: Land Conservation and Development Commissioners

Re: Comments on 9/10/2015 "Redline" DRAFT of OAR 660 Division 38

First of all, I continue to object to this "sprint to the end" process. The RAC has not had enough time to discuss the various more controversial issues, so this draft will not reflect the best work of this diverse group. In fact, we have missed some important voices during this process.

I wonder if the official Secretary of State notice sent recently meets the legal requirements of that notice. It may meet the date requirement, but, since the actual proposed rule was not available until Sept. 10th, it may violate the intent of the law. Then I wonder, if the Sept. 10th rule is "substantially changed", doesn't a second round of SOS notice requirements kick in? We have had few voices from cities. They are a prime constituency missing from this process.

Then I question if this process honors LCDDC's own Citizen Involvement Guidelines. This rule is not only about a proposed new UGB process, but it "**..makes changes to the existing UGB process...**". And now we have a Division 24 amended rule for you to consider—just having shown up in the last few days. This is significant and affects ALL Oregon local governments. A broader public discussion of these changes is really important.

Lastly, this process absolutely violates the agreed upon RAC Operating Principles. Having served on a number of advisory committees for different agencies, except for whatever personal responsibility members have taken upon themselves, in this case there has been little public input. Our recent agendas have not provided for "public comment", for instance. After a good beginning of public in the audience, it has now dwindled to a few diehards! And even those are not given a chance to provide input although some have provided comments for your hearing.

In the spirit of continuing to do my part to develop these rules, I offer the following. They are as much questions as content suggestions. But they are serious comments.

1) OAR 660-038-0010 Definitions:

Page 2, lines 12-14: So schools, libraries, police & fire stations are all "commercial" under this scenario? This seems confusing and, later when the calculation of "commercial jobs" occurs, it affects that calculation. Normally, you figure x number of commercial per population, but these public entities do not fit within that kind of

calculation.

- 2) Page 2, lines 31-33: Definition of “roughly proportional” still needed. “The department suggests that this term needs more specificity. The RAC has not discussed this topic,....”
- 3) Page 3, lines 11 & 12: “...until appropriate public facilities and services are available or planned.” I just want to flag that these generalizations may move us to yet more lawsuits that will undermine the idea of having a flexible but certain process for UGB expansion. I have begun to read the staff report and their view of Goal 14 wording. But it is still important to recognize that, without more clarity, the certainty meant to be built in to this new rule is lessened.
- 4) Page 3, lines 13-17: “Section (10): The department is also considering whether to suggest or allow using a ratio of improvement to land value as another option for cities evaluating vacant employment land. However, **this has not been discussed with the employment work group or with the RAC** so a proposal is not yet provided in the draft.”
- 5) OAR 660-038-0020 Applicability
Page 3, line 20: I still challenge this timeline. July 1, 2016, makes more sense and provides for both the RAC to complete its work AND for the public (including cities who might want to use this product) to comment on a more complete proposal.
- 6) Page 5, lines 11-13: This needs to be said more clearly---they still need findings for the selection of the “range”. The required statement could simply refer to the appropriate Table, but not having ANY requirement to indicate why the city chose a particular set of numbers seems counter to the general principles of land use decision making.
- 7) Page 5, lines 22 & 23: Need clarity regarding Goal 5 and its application and relationship between both current UGB/city boundaries and proposed expansion.
- 8) Page 6, lines 2-5: ☺ I appreciate this addition to the latest version of the rule.
- 9) Page 6, lines 10-16: The issue of how to address what were requirements under “Periodic Review” continue to concern me. Many people worked over many years to require certain actions “at the time of Periodic Review”. During our deliberations, we have been told not to worry about the details of THIS RULE (OAR 660, Division 38)—since it is to be reviewed in 5 years. Well, that’s what we were promised with Periodic Review. Yet the dates kept changing and the years have passed without some jurisdictions EVER updating their Comprehensive Plans. Again, this issue is being put aside because there’s “not time” to address this issue.
- 10) OAR 660-038-0030 Residential Land Need
Page 6, line 33: We have been promised that the definition/explanation of “group quarters” from the Census will be inserted here so that others do not have to look up this definition.
- 11) Page 7, lines 3-5: We were promised that these concepts would be “tested”. In this

and other places—perhaps using a currently successful UGB expansion and applying this new process would be a good idea. Testing would allow us to “sell” these rules to cities willing to use these rules.

12) Page 7, lines 6 on: In a number of places there are percentages selected without clarity as to why these numbers were selected and their basis in research. Specifically, I have concerns that the range in lines 12-13 don’t recognize that many small cities have always developed as “mixed use” and setting a low 1% standard will not encourage their downtown redevelopment, walkability and reduction in services costs.

13) OAR 660-038-0040

Page 8: lines 24-26: Allowing only single-family detached as low density and all others high density for cities under 2,500 does them a disservice and doesn’t address the issue of increasing density to assure efficient use of public services. It’s these smaller cities that have even less money to increase both hard and soft public facilities. And for cities over 2,500 to allow dwellings of 5 or more to be considered “high density” is too low. (Line 30)

14) OAR 660-038-0060

Page 10, Section 2: This concept of classifying—does it set up something similar to Fasano—when we created plan designations that then became a governing part of our land use system?

15) OAR 660-038-0070

Page 12, lines 31-34 continuing on Page 13, lines 1-6: I know that Bend did this, but I believe Damion has said this is VERY time consuming. Is it worth it to put into this process? Are we encouraging more deed restrictions to avoid density by citing this option?

16) OAR 660-038-0080

Page 13, lines 22-24: Some employment lands should not be redesignated—particularly industrial lands, but also some commercial lands that, by their location or major prior investment in providing special services should be preserved for those purposes. Some process for evaluating these lands due to these factors should be considered.

From the staff report: “The definition in the Goal 9 rule at OAR 660-009-0005, is very similar, but not identical to the proposed definition.....Industrial uses may have unique land, infrastructure, energy, and transportation requirements. Industrial uses may have external impacts on surrounding uses and may cluster in traditional or new industrial areas where they are segregated from other non-industrial activities.”

17) OAR 660-038-0110

Starting on Page 15: I cannot see how this process makes sense. The OED forecast is not only a 10-year forecast, but it’s a “regional” forecast—multiple counties even. I know this is part of the legislation, but it may be something we need to amend. We didn’t spend enough time prior to legislation passage to review this method and consider this data. And we certainly haven’t seen the data during the RAC process.

18) OAR 660-038-0120: Starting on Page 14: These numbers may be problematic. We simply had not had enough time before the legislation was drafted to consider the reality of these numbers/this set of calculations. You can see by the redline version how much

new language has been inserted by staff—without consideration by the RAC. Need to address this redevelopment calculation. I can point to MANY places where redevelopment is happening, especially in small towns. But also larger ones. People's commercial choices change and jobs/industrial uses change—that's a normal part of our changing world—similar to the change in mix of single family/multi-family. We've spent much time on market changes in residential, but little discussing "employment lands".

- 19) OAR 660-038-0150: Need to figure out a way to address this "redesignation" concept since some lands are not interchangeable.
- 20) OAR 660-038-0160: Much of this section needs A LOT of discussion. Issues like how does a city determine if certain lands should be excluded? What's the definition of "impracticable"—line 10 on page 22? Some hazard areas are acceptable as park lands or may have other uses that help make the city more "complete". Can we cite a city's Goal 5 inventory? And, if no inventory, then the city would need to do before using this process? Does DSL have maps related to wetlands?

What's "long-term preservation"—line 25, page 22? Need clarity of "habitat", line 28, page 22. I understand that it's important to address the movement of animals from range to range while balancing the need for protection of high value farmland. Are there conservation plans that could be used? Does ODFW have maps that could be cited? Can we link some real data to this issue? Are there lessons from the SORPP process? Is this the right placement of this issue?

These issues relate to the need to get Goal 5 inventories done. The discussion about alternate Periodic Review processes is important. Goal 5 is really important to many Oregonians. Should we consider a special local government grant fund request related directly to getting these inventories done? (A 2017 POP?)

What are "rural uses", line 7, page 23? Again, cities get to decide what's "impracticable"—line 9, page 23? On page 24, lines 7-10—I understand this relates to Urban Service Agreements, but it's unclear that cities are to notice ALL districts and counties.

- 21) OAR 660-038-0170, Much of this is new and has not been considered by the full RAC.
- 22) OAR 660-038-0180, We now have an incomplete definition of "roughly proportional" but what about on Page 28, line 7: What is "generally consistent".
- 23) Page 28, Section (2): So ODOT gets to override concerns of ODA, ODFW and DSL? It's yet another discussion that needs to happen.
- 24) Page 28, beginning on line 29: What's the timing of these designations? How to enforce if not done? Citizens might see this as "taxation without representation" if they receive new designations that cause an increase in property taxes. And this is UGB

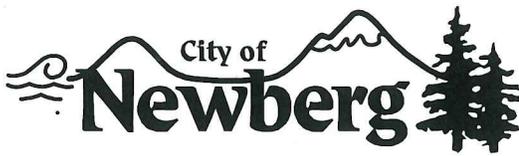
land, not necessarily city land—so the county still has primary zoning jurisdiction. Should there be some requirement of counties to “protect” this new UGB land?

25)OAR 660-03-0210: This Serviceability section needs more discussion. This review should be an integral part of the decision to consider UGB expansion. And the costs associated with the expansion needs to be very public information—both initial physical expansion and longer term maintenance and on-going service costs. What’s “committed financing”? Should we ask for a history of failure or success of bond measures as guidance for whether the “identified funding sources” is realistic?

These comments above are not meant to be final comments, but notes related to concerns about the 9/10 redline DRAFT. They are a substitute for a RAC meeting where these issues would be raised, discussed and hopefully resolved after hearing for all RAC members. It’s important to hear from others with varying viewpoints to know if we’re close to a successful Rule.

I regret that I have not had time to review and compare the entire staff report to the latest draft nor have I had time to read the comments of others that might help provide clarity or closure to issues. This is why it is important to have the time for the broad membership of the RAC to participate in discussions and, hopefully, come to agreed upon conclusions for you to consider.

As of 10a on September 23rd, we have some dates proposed for RAC meetings but no specific times. It is critical to get all voices around the table to conclude this effort. I hope the testimony today helps to understand why some are asking for more time.



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September 23, 2015

Land Conservation and Development Commission
Greg Macpherson, Chair
Department of Land Conservation and Development
Jim Rue, Director
635 Capitol Street, Suite 150
Salem, OR 97301

**Re: 9/24/15 LCDC Agenda Item 8 – Public Hearing regarding Proposed Administrative Rules
Establishing Streamlined Urban Growth Boundary Process**

Dear Chair Macpherson and Members of the Commission:

The City of Newberg has been participating in the Employment Path Workgroup as part of the overall UGB streamlining process. We have had an opportunity to review the University of Oregon study prepared for the HB 2254 Rulemaking Advisory Committee (*Analysis of Land Use Efficiency in Oregon Cities: A Report to the HB 2254 Rulemaking Committee*) and the draft OAR Chapter 660, Division 38 rules, and we have several comments, questions, and suggestions we would like to forward to the Commission for consideration.

First, we agree with the approach of using the UO study as the empirical basis for the rulemaking, and we agree with using the UO numbers to provide the range of employees per acre as the methodological basis in the rule. The study adequately addresses the requirements outlined in HB 2254 to “be based on an empirical evaluation of the relation between population and employment growth and the rate and trends of land utilization...”, and is the most comprehensive statewide data available. The UO analysis also shows that their analysis of employment densities falls within expected ranges, which are consistent with the ranges in the Goal 9 workbook.

Second, we have several questions we believe are not adequately answered in the draft rule:

- In section OAR 660-038-0020 Applicability, we don’t see a method that allows a city to subsequently amend the UGB for site specific quasi-judicial UGB amendments that are not related to a specific industrial or public facility use. From time to time we have landowners adjacent to the UGB that desire to submit an application to be brought into the UGB and then subsequent annexation to the city. These types of UGB amendments are quasi-judicial and analyzed under the “traditional” method in OAR 660 Division 24. We are concerned that if we adopted a UGB amendment using the “new” method that we would be precluding individual quasi-judicial UGB amendments from being allowed.
- In section OAR 660-038-0030 Residential Land Need, subsection (2) specifies cities must use the most recent final forecast issued by the Portland State University Population Research Center

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under OAR 577-050-0030 through 577-050-0060. Those OAR sections are specific to the Oregon Population Forecast Program details, and specify that the first forecast cycle will be from July 2014 to June 2017 and that the forecasts will be prepared and released in three regional groups (one group per year). The question we have is whether cities would also be allowed to use a previously adopted coordinated population forecast for their county and cities that was also prepared by the PRC if they wanted to take action before the new forecast is issued for their region under the new schedule.

- In section OAR 660-038-0100, subsection (6) directs cities to reduce the forecast of jobs by 20% to account for jobs that will occur on land that is zoned for residential or other uses. This number seems relatively high, and we are wondering what the methodological basis is for the 20% reduction. In Newberg specifically, we currently have approximately 9,777 total jobs and 561 school district jobs on residentially zoned property (including all schools within Newberg city limits and including staff at the district office, physical plant and the COLA program (about 61 non-school employees)), which comes out to about 6% of all jobs.
- In OAR 660-038-0180 Planning Requirements for Land added to a UGB, subsection (6) says that lands included within a UGB and zoned for industrial or residential uses must remain so zoned. The questions are whether that is also applicable to commercially zoned land, and the length of time the zoning must remain in place.

Third, we have two suggested text amendments for your consideration (proposed additions shown in underline):

- OAR 660-038-0130 Buildable Land Inventory for Employment land within the UGB: "A city must identify all vacant and partially vacant land within the UGB with an employment comprehensive plan designation (for example, "commercial" or "industrial"). This proposed change would make it clear that there may be other employment comprehensive plan designations outside of simply commercial or industrial that should be included in the inventory.
- OAR 660-038-0170 Evaluation of Land in the Study Area for Inclusion in the UGB; Priorities. Add the following: (1)(a)(i) For evaluation of land to meet the identified residential land deficiency, a city must evaluate all land within the study area. (1)(a)(ii) For evaluation of land to meet the identified employment land deficiency, a city may exclude the following land within the study area from consideration: rural residential exception land parcels that are 2 acres or less in size; and land within the study area that is more than one mile from an identified collector or arterial roadway. This proposed change would streamline the residential and employment UGB processes by not requiring evaluation of unsuitable land to meet the identified need.

We respectfully request the Commission consider the questions and proposed text additions to OAR 660-038 in their deliberations on the draft rule.

Sincerely,



Doug Rux, AICP
Community Development Director



Jessica Pelz, AICP
Associate Planner

"Working Together For A Better Community-Serious About Service"

Y:\FILES\UGB\EMPLOYMENT PATH WORKGROUP\LCD\ LETTER_2015-0923.DOC

EXHIBIT: 7 AGENDA ITEM: 8
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 9/23/15
SUBMITTED BY: Sid Friedman



P.O Box 1085
McMinnville, OR 97128

September 23, 2015

Helping to shape the use of our natural resources to protect the quality of life in Yamhill County.

Land Conservation and Development Commission
635 Capitol St NE, Suite 150
Salem OR 97301

Re: Agenda Item 8- UGB rulemaking

Dear Commissioners and staff:

Friends of Yamhill County (FYC) works to protect natural resources through the implementation of land use planning goals, policies, and laws that will maintain and improve the present and future quality of life in Yamhill County for both urban and rural residents. Consistent with our mission, FYC has been involved in numerous urban growth boundary issues in Yamhill County. In addition, I have been involved professionally in several other UGB issues around the state.

As the Commission is aware, some UGB amendments have been quite contentious. We therefore had high expectations for rulemaking to streamline the process in accordance with HB 2254. The draft rules before you are a great disappointment. In short, they are not yet ready for a hearing.

We share both the general and detailed concerns expressed by 1000 Friends of Oregon in their September 17 letter to you. The hard work of your Rules Advisory Committee was making good progress to a rule that would truly streamline the process and would truly implement HB 2254. Instead, hasty last-minute drafting (including the use of critical "blanks" to be filled in later) have resulted in a flawed proposal.

We understand the legislative deadlines imposed by HB 2254. However, the overall goal of the legislation is too important to allow adoption of an insufficiently drafted and insufficiently reviewed rule that fails to accomplish the legislative objectives.

The Commission and Department must ask the legislature for an extension of time in order to get it right. In the long run, rushing through a rule the "gets it wrong" will prove far more damaging and difficult to deal with than any reluctance to go back to the legislature.

Sincerely,

Sid Friedman
Friends of Yamhill County

CITY OF SPRINGFIELD

CITY MANAGER'S OFFICE



225 FIFTH STREET
SPRINGFIELD, OR 97477
541.726.3700
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September 23, 2015

Greg McPhearson, Chair
Oregon Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, OR 94301-2540

EXHIBIT: 8 AGENDA ITEM: 8
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 9/23/15
SUBMITTED BY: City of Springfield

Re: Comments from the City of Springfield on Proposed Amendments to OAR
660 Div. 24.

Dear Chair Macpherson,

The City of Springfield is providing these additional comments on the September 15, 2015 draft of the proposed amendments to OAR 660 Division 24 rules. These comments are in addition to the City's letter dated September 17.

The proposed amendments to Division 24 are in response to ORS 197A. The purpose of ORS 197A is to provide simplified methods for a city that is outside Metro to evaluate or amend the urban growth boundary. While we appreciate the attempt to improve the process and to add more clarity to the rule, the City of Springfield has concerns about some of the specific language included in the proposed rules as well as some potential consequences ensuing from these new rules that we do not believe were envisioned, and certainly not intended by the legislature.

It is our understanding that the 2013 Legislature intended to allow cities like Springfield the option to choose the "traditional" UGB evaluation methodology of OAR 660 Division 24 (retained without substantive amendment) *or* the "simplified" UGB evaluation methodology established by these new rules in OAR 660 Division 38. As drafted, the rules allow only Portland Metro communities to apply the "traditional" methodology which, among other provisions not included in the simplified methodology, provides for accommodating specific employment growth needs by limiting consideration to land that has the specified characteristics needed to accommodate this identified future development. It is our position that this is unintentionally inequitable and could easily be addressed through revisions to language identifying procedural applicability as a local option.

The proposed rule OAR 660-038-0000 Purpose (1) states: "ORS 197A.320 regarding the establishment of study areas and the priority of lands applies both to the "streamlined methods" under this rule and to the "traditional" UGB method described in OAR 660, division 24." Thus, it is the City's position that both

methods—as applied to all cities, not just Metro— should include the following language of 197A.320:

“When the primary purpose for expansion of the urban growth boundary is to accommodate a particular industry use that requires specific site characteristics, or to accommodate a public facility that requires specific site characteristics and the site characteristics may be found in only a small number of locations, the city may limit the study area to land that has, or could be improved to provide, the required site characteristics. Lands included within an urban growth boundary for a particular industrial use, or a particular public facility, must remain planned and zoned for the intended use:
(a) Except as allowed by rule of the commission that is based on a significant change in circumstance or the passage of time; or
(b) Unless the city removes the land from within the urban growth boundary.”

This language is consistent with Goal 14, which requires urban growth boundaries to be established and amended based on demonstrated needs to accommodate population, consistent with 20-year population forecast and demonstrated need for employment opportunities. “In determining need, local government may specify characteristics, such as parcel size, topography or proximity, necessary for land to be suitable for an identified need.” [OAR 660-015-0000(14)] This language is consistent with ORS 197.298 (3) “Land of lower priority under subsection (1) of this section may be included in an urban growth boundary if land of higher priority is found to be inadequate to accommodate the amount of land estimated in subsection (1) of this section for one or more of the following reasons:

(a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands.”

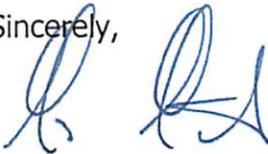
As drafted, the “traditional” UGB method described in OAR 660, division 24 as applied to cities outside of Metro, lacks this language. As drafted, if Springfield were to choose the “traditional” method described in OAR 660, division 24, section 0050 would be available only for use by Metro, not the other cities.

We respectfully request the Commission either to retain the *existing* language of 660-024-0060 as an option applicable to local governments outside of Metro *OR* to add language in proposed OAR 660-024-0065 or 660-024-0067(8) that retains the intent of the *existing* provisions of OAR 660-024-0060 (1)(e), (3), (4) and (5). These provisions are needed to include land within UGBs to address Goal 9 Economy of the State — by continuing to allow local governments to specify the “characteristics such as parcel size, topography, or proximity that are necessary for land to be suitable for an identified need,” and to limit their consideration to

land that has the specified characteristics when it conducts the boundary location alternatives analysis and applies ORS 197.298.

It is the City's position that it is not equitable to enable these provisions for Metro and not for local governments. For communities like Springfield, application of the proposed rules as currently drafted would force impractical, inefficient and illogical leapfrogging patterns of urban growth, and would have the unintended effect of eliminating viable opportunities for creating needed jobs and diversification of Oregon's economy. It is difficult for us to imagine the retention of an existing methodology is proposed if that methodology is somehow deficient in achieving the purpose of the Goal and Rule, or is somehow inferior to the proposed new methodology since the purpose of the rule making is a simplification of this challenging comprehensive planning requirement. We fail to see the logic in denying an opportunity to apply either process if, in the opinion of the City, one of those processes provides the best opportunity for the City to complete its requirements under the law. Application of the proposed rules as currently drafted to the City of Springfield and other cities outside of Portland Metro may unintentionally result in outcomes that are contrary to the intent of Statewide Planning Goal 14: **"To provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities** [OAR 660-015-0000(14)] and the Oregon land use planning program.

Sincerely,



Gino Grimaldi
City Manager

GOAL ONE COALITION



EXHIBIT: 9 AGENDA ITEM: 8
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 9/23/15
SUBMITTED BY: BOC

Goal One *is* Citizen Involvement

September 24, 2015

Land Conservation and Development Commission
c/o Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301

Re: HB 2254 rulemaking

Members of the Commission:

Our comments today address our concerns about the recent decision by Department staff to essentially circumvent the Rulemaking Advisory Committee review of and participation in the proposed language that will implement HB 2254.

We are concerned that there has been inadequate review by the Rulemaking Advisory Committee (RAC) whose job it is to craft, test, review results of and make necessary adjustments to proposed language that will implement HB 2254.

Staff's job should be as facilitator and partner in the RAC process, however the recent turn of events indicates a rather unnecessary and forceful taking of the reins by staff.

DLCD staff recently, and seemingly without the knowledge of at least most of the RAC members, crafted proposed language for important elements of the Rule changes which should have been worked on by the RAC. Instead, at least the majority of RAC members were informed about the staff language only a month ago, at their August 20 meeting. Additionally, the current draft version posted on the DLCD website on September 10 has even more changes which haven't been reviewed yet.

At this point, there really is not enough time before your upcoming meeting hearing for RAC members to review or do any refining of staff's proposed language. And there seems to be no explanation from staff as to why they have given themselves the authority to circumvent the process at the point

GOAL ONE COALITION

when one of the most nuanced portions of the rule has yet to be reviewed by the RAC, as expected.

One can only guess as to the intentions behind this bureaucratic subversiveness, and speculate about the players involved, because there is no evident reason for such seemingly special-interest serving behavior. The members of the RAC take their work seriously and have put every effort into the job they were charged with doing. One of the most inconsiderate acts that any agency or organization can take when working with volunteer citizens and citizen organizations is to circumvent and marginalize them from the work they agreed to do on behalf of the people who still believe state and local agencies work on behalf of the public good.

The proposed timeline to adopt new rules in Division 24 AND 38 is too truncated, and unnecessary. The September 10 posted draft will barely have time to be reviewed by jurisdictions, land use attorneys, land use community groups and other related organizations, much less the RAC, before your September meeting. Keeping to an artificial agency or Commission timeline is less important than allowing the RAC to finish the job it was assigned to do, exemplifying not only respect for their time, expertise, and commitment, but also an understanding of the reason for an advisory committee and its work in the first place.

Oregon's statutory provisions regarding citizen participation expect Oregon's once premier land use program to provide the most opportunity for public involvement. Agency bureaucrats and staff who should have an interest in serving the needs of communities should not be allowed to step on an established process for the sake of some unknown, unspoken of arrangement made outside of the public process.

We request that the Commission show their support and respect for the work of the RAC by allowing them to continue their work reviewing and refining the Rule.

Thank you.

Hope Vaccher
Executive Director
PO Box 5347
Eugene OR 97405



September 24, 2015

Land Conservation and Development Commission
c/o Casaria Taylor
635 Capitol St., Ste. 150
Salem, Oregon 97301

Land Conservation and Development Commission,

We are writing to submit comments on the draft OAR CHAPTER 660, DIVISION 38
"Simplified Urban Growth Boundary Method."

It is vital that any proposed "streamlining" of UGB expansion decisions not come at the expense of natural resource planning and conservation essential to successful *comprehensive* planning in Oregon. Among other things, this means allowing for new and/or updated natural resource information to inform planning decisions.

We are supportive of the approach to UGB expansions in this proposed rule in seeking a better balance between farmland protection, natural resource conservation, and urbanization throughout Oregon. However, we are concerned that this new rule seeks to "streamline" planning decisions at the expense of including the new and updated natural resource information necessary to identify natural features that could be particularly vulnerable to urbanization. As written, the rule excludes the local knowledge of citizens in identifying critical natural resource lands that should not be included in the UGB.

We urge LCDC to revise the OAR 660-038-0160 "Establishment of Study Area to Evaluate Land for Inclusion in the UGB" to allow the opportunity for ODFW and other adjacent local governments to propose new and updated natural resource information including critical habitats, water resource areas, or scenic resource areas that should be excluded from study areas because of their incompatibility with urbanization. Relying entirely on the existing natural resource inventories listed in OAR 660-038-0160 is insufficient because 1. past natural resource inventories have been incomplete or not updated due to insufficient funding and 2. natural resource areas and their vulnerability to urbanization change over time.

Allowing for better more up-to-date information to inform UGB expansion decisions will simply make for better decisions for people and their environment. "Streamlining" at the expense of including better information to support better decisions is not justified. Moreover, there is also a point a which "streamlining" UGB expansion decisions inevitably comes at the expense of Goal 1's promise for "the opportunity for citizens to be involved in all phases of the planning process." Goal 1 is foundational to Statewide Land-Use Planning in Oregon.

In that respect, we are pleased to see that that OAR 660-038-0180 "Planning Requirements for Land added to a UGB" at least maintains the existing Goal 5 planning process under OAR Chapter 660, division 23 for the nomination of Goal 5 resource sites. The Goal 5 rule has many shortcomings in its effectiveness to adequately conserve natural resource as part of growth management in Oregon,¹ but the access of ordinary citizens to the process of identifying Goal 5 resources is one of the strongest features of the existing Goal 5 rule.

Identifying critical natural resource sites for conservation is not just a technical process to be left solely to professional opinion and technical data. It must also be about collecting and assessing local knowledge of Oregon's landscape much of which comes from ordinary Oregonians. It is critical this local knowledge and the Oregonians who hold this knowledge is not "stream-lined" out of the planning processes, including those governed by OAR 660-038.

Thank you for the opportunity to comment on this proposed rule.

Sincerely,



Jim Labbe
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¹ Pam Wiley, *No Place for Nature: The Limits of Oregon's Land Use Program in Protecting Fish and Wildlife Habitat in the Willamette Valley*, Defenders of Wildlife, West Linn, Oregon, 2001.
http://www.defenders.org/publications/no_place_for_nature.pdf

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September 24, 2015

Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, OR 97301-2540

Re: Draft Division 38 and 24 Rules

Dear Commissioners:

With this letter I would like to endorse the written comments of Al Johnson dated September 21. I support his recommendation to get it right rather than to do it fast.

I am particularly interested in ensuring that the new rules make it very clear that any amendments leave fully intact the current state law regulating planning for and development of needed housing. This issue is the common thread in the Johnson letter.

I am struck by the recommendation of 1000 Friends, at page 24 of its September 17 letter, that land in a residential Buildable Land Inventory does not need to be land that is developable under clear and objective standards. As the Johnson letter explains, this is a rollback from its position of three decades ago. More importantly, it is flatly contrary to state law.

However, the 1000 Friends new position, that the BLI can include land that is developable only under discretionary standards, has been catching on. The City of Eugene, now setting its UGB under HB 3337 (2007) in its Envision Eugene process, is counting in its draft BLI land that is developable only under discretionary standards. 1000 Friends is aggressively supporting the city's position. If Eugene sticks with this approach, the matter will surely come before this Commission in the next year or so.

Eugene is not alone. Although the Needed Housing Statute has been in place since 1981, some cities simply turn a blind eye to it. Most recently, LUBA reversed a City of Corvallis denial of a 10-unit apartment on a 0.8 acre lot in its BLI. It denied the project based on the usual discretionary standards that come with a planned development overlay. LUBA reversed the denial, explaining that the Needed Housing Statute guarantees the owner of land in the BLI the right to have only clear and objective standards applied to it. See *Group B LLC v. City of Corvallis*, LUBA No. 2015-019 (August 25, 2015). See also the similar LUBA reversal of a denial of a 50 unit project in *Parkview Terrace Dev't Inc. v. City of Grants Pass*, LUBA No. 2014-024, July 23, 2014).

LCDC

September 24, 2015

Page 2

As LUBA and the Court of appeals have explained in a number of contexts, if land is developable only under discretionary standards, then it can't be counted as truly "available." It just might be available if the government decides it wants to approve the development. It is "maybe" property, not "available" property.

When the DLCD was reviewing Eugene first comprehensive plan in 1981, it began its review under Goal 10 with this sentence: "GOAL 10 HOUSING: "The Housing Goal requires a demonstration in the plan that sufficient, suitable and available residential land is designated under clear and objective standards to meet identified housing needs." See DLCD Acknowledgment Report on Metro Plan, June 12, 1981, at 67. This was sound advice in 1981. It is sound advice today. It is advice that needs to be simply and clearly preserved in these amendments.

Thank you for your consideration.

Sincerely,

Bill Kloos

Bill Kloos