



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Second Floor/Director's Office Fax: (503) 378-5518

<http://www.oregon.gov/LCD>

October 8, 2010

TO: Land Conservation and Development Commission (LCDC)

FROM: Bob Rindy, Senior Policy Analyst, DLCD

SUBJECT: **Agenda Item 5, October 19-22, 2010, LCDC Meeting**

PROPOSED AMENDMENTS TO RULES CONCERNING USES IN METRO AREA URBAN AND RURAL RESERVES

I. AGENDA ITEM SUMMARY

This agenda item is for the commission to conclude its deliberation on proposed changes to the administrative rules for Metro area urban and rural reserves that restrict amendments to comprehensive plans and land use regulations once reserves are designated. This agenda item was carried over from the commission's September 2, 2010, meeting. At that meeting, the commission held a public hearing and heard comments on the proposal, closed the hearing and deliberated on proposed rule amendments. The commission voted to approve a motion to amend the rules (summarized in Section III of this report) but did not reach a conclusion as to the precise wording of the rule amendments. Instead, the commission continued its consideration until its next meeting (this meeting) in order to allow the department and legal counsel more time to carefully review and, if necessary, propose adjustments to the wording of the various rule amendments under consideration.

Because the commission closed the public hearing, no testimony will be allowed under this item. If the commission adopts rule amendments, the rules will be effective upon filing with the Secretary of State approximately October 20, 2010.

For additional information on this item, please contact Bob Rindy at (503) 373-0050 ext. 229; email bob.rindy@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

The department's recommendation for this item is with regard to the wording of rule amendments already approved, in general, under a motion adopted by the commission on September 2, 2010, (see Section III of this report). The department recommends that the commission adopt the rule amendments described in Attachment A to this report which reflects the commission's previously approved motion.

III. BACKGROUND

In 2007, the Oregon Legislature enacted SB 1011 (ORS 195.137 to 195.145) authorizing Metro and the three Metro area counties (Washington County, Multnomah County, and Clackamas County) to designate Urban Reserves and Rural Reserves under requirements different than those applicable in other regions of the state. The statute required LCDC to adopt rules for Metro reserves, and in January 2008 LCDC adopted OAR 660, division 27. Metro and counties designated urban and rural reserves in June of this year and that decision is currently under review by the department (see Agenda Item 7). Land in the reserves became subject to the division 27 rules when Metro and the counties adopted the reserves.

In December 2009 counties and Metro expressed concerns about the rules' prohibition on any future county plan or land use regulation amendments allowing uses of land that were not allowed at the time the reserves were designated. In response, LCDC modified the rules in April 2010, allowing some plan and land use regulation changes, but only for a narrow range of new or amended uses in reserves. However, at that rule amendment hearing Washington County indicated that the proposed (and ultimately adopted) rule amendments would not resolve all its concerns about the rule restrictions. In response, LCDC directed the department to convene a group of stakeholders in the region to discuss the county's additional concerns and to report back to the commission with any recommendations for additional rule changes.

The department reconvened the previously appointed (2007-08) Metro rules advisory committee (with some replacement members) to discuss these issues. The rules advisory committee met five times between May 27 and August 12, 2010, but did not reach a consensus recommendation. The department published draft rules reflecting the discussion by the committee on four main "issues," and "options" to resolve the issues. The various "options" included a "no rule amendments option" for each of the issues, and preferences by members of the committee were reflected in the department's report to the commission.

On September 2, 2010, the commission held a public hearing regarding these draft rule amendments in order to receive public comments and consider the amendments. At the conclusion of the hearing, the commission deliberated regarding the testimony and proposals to amend - or to not amend - the rules. During deliberation, the commission agreed to a preliminary motion. That motion included a decision to NOT amend the rule in response to two of the issues, but to make rule amendments in response to two or three other issues. However, in discussing precise wording of rule amendments to carry out its motion, the commission decided to suspended its deliberation and carry over the item to (this) its next meeting in order to allow the department and legal counsel time to propose specific wording for at least one of the rule amendments under consideration.

The motion adopted by LCDC at the September 2 meeting, and direction to staff in continuing this matter, is summarized as follows (based on notes by Commission Assistant Lisa Howard):

“Commissioner Worrix moved to adopt the staff report recommendations to not change the rules regarding Issues 1 and 2, but to adopt changes recommended by Richard Whitman regarding Issues 3 and 4. The commission decided to carry the deliberation

over to its October meeting regarding rule wording questions raised by staff in response to testimony by Wendie Kellington. The department should also confirm the proposed wording for other amendments recommended in the commission's motion. Commissioner Pellet seconded the motion, and the motion passed 7-0."

The department recommendations referenced in the commission's September 2 motion are summarized in DLCD's August 20, 2010, staff report. The DLCD recommendations were to adopt no rule amendments in response to Issues 1 and 2. However, in response to Issues 3 and 4, DLCD recommended that the commission amend reserve rules at OAR 660-027-0040 and 660-027-0070 in the manner reflected in Attachment A to this report. The recommended amendments would allow counties to adopt (with certain restrictions) comprehensive plan and code amendments to allow uses of land that were not allowed at the time urban and rural reserves were designated, as described below:

1. In response to Issue 3, the commission agreed to amend the rules to allow counties to amend their comprehensive plans to alter or expand a use currently authorized in plan and land use regulations implementing a previously acknowledged "goal exception," with certain limitations.
2. In response to Issue 4, the commission agreed to amend the rules to allow counties to amend their comprehensive plans to take a new Goal 11 (Public Facilities) exception where an imminent health hazard can be resolved only through extension of a sewer line or establishment of a new sewer system serving the proposed Goal 11 exception area. This proposal provides for a Goal 11 exception under only one particular circumstance: an imminent but as yet undeclared health hazard.
3. The commission agreed to adopt other clarifying amendments to OAR 660-027-0040 (5) and OAR 660-027-0070 (2) and (3) to provide internal consistency with regard to the rule amendments described above.
4. The commission continued its discussion to this (October 19) meeting with regard to the issue raised by Wendie Kellington in the September 2 hearing. That issue concerned whether the commission's intent in OAR 660 660-027-0070(4)(d) was to allow plan amendments that authorize existing exceptions to increase their size or intensity, or that allow new exceptions, since these amendments could, in theory, be allowed through a plan amendment process at the time reserves were designated. Furthermore, she suggested LCDC change the wording of this subsection to specify that amendments are allowed in reserves if they were "allowable" (as opposed to "allowed") at the time reserves were designated. The department does not recommend this change to the rule, but does recommend clarification. Attachment A recommends adjustment of OAR 660 660-027-0070(4)(d) to better communicate the commission's intent.

The proposed rule amendments recommended by the department – and not recommended – are described below, as well as a brief summary of the issues and options leading to these recommendations. If adopted by the commission, rule amendments in Attachment A would be effective upon filing with the Secretary of State on or about October 20.

IV. SUMMARY OF ISSUES AND OPTIONS

On August 2, 2010, the department published a formal draft of amended rules concerning three main issues, and including various options for resolving these issues. Based on discussion at the final advisory committee meeting (August 12), the department presented LCDC with a modified “Draft 2” which described four ISSUES and various OPTIONS to address each issue. Each set of options included a “no rule amendments” alternative.

The department recommended that the commission take no action (make no rule amendments) with respect to ISSUES 1 and 2. The department recommended some specific rule amendments to resolve ISSUES 3 and 4. In addition, the department recommended other minor amendments to rules at OAR 660-27-0040 and (5) and 660-27-0070 (2) and (3). As described in Section III of this report, the commission approved a motion that included the department’s recommendations.

During commission deliberation, the department and the commission discussed an additional issue raised in testimony concerning the rule amendment adopted by LCDC at its April 2010 meeting under OAR 660-027-0070(4)(d). The commission’s discussion included ideas for changes to that wording. The commission did not reach a conclusion on this topic, but continued its discussion to this (October 19) meeting and directed the department to provide the commission with a recommendation to change this wording based on the discussion. The department’s recommended rule amendments to OAR 660-027-0070(4)(d) are included in Attachment A, and are described in subsection F to this section of the report, below.

A. ISSUE 1: Comprehensive Plan Amendments from One Resource Type to Another

The department labeled as ISSUE 1, and OPTIONS discussed by the rules advisory committee, the question as to whether the rules should allow county plan and zone amendments in reserves that change land from one “resource” designation to another resource designation, e.g., from exclusive farm use (EFU) to Forest use, or from Forest to EFU. One option (OPTION D) suggested that the commission make no amendments to the rules on this topic, an option favored by a plurality of the rule advisory committee and the department. The commission’s motion on September 2, 2010, accepted this recommendation.

B. ISSUE 2: Transportation Improvements that Require an Exception

The department labeled as ISSUE 2 the discussion by the advisory committee as to whether the reserve rules should allow new transportation facilities requiring a plan or land use regulation amendment and a Goal **exception**. Many types of transportation facilities may be approved on rural lands without an exception, including road widening or conversion of an intersection to an interchange. However, for example, a new road on rural lands typically would require an exception if it is serving more than a “rural function.” Exceptions for new roads and other transportation facilities usually concern Goals 3, 4, 11 and/or 14, as described in detail and regulated by the transportation planning rules (“the TPR”) at OAR 660-012-0070.

The department’s draft rules provided four OPTIONS for resolving ISSUE 2. The first three options would have authorized counties to amend their comprehensive plans to allow a new

transportation use that requires goal exceptions. The fourth option (OPTION D) suggested that the commission make no amendments to the rules on this topic, an option favored by a plurality of the rule advisory committee. The department recommended no rule amendments on this issue, and the commission's motion on September 2, 2010, accepted this recommendation.

C. ISSUE 3: Alteration or Expansion of Existing (currently acknowledged) Exceptions in Urban or Rural Reserves

The department labeled as ISSUE 3 the question as to whether the reserve rules should allow counties to alter or expand a use currently authorized in the plan and land use regulations under a previously acknowledged "Goal Exception" on land in urban or rural reserves. Typically an exception will authorize only uses already occurring at the time the exception was taken, or (in the case of a "reasons" exception) only the uses requested in response to a particular "reason." The department provided three OPTIONS for resolving ISSUE 2. The department and a majority of the rules advisory committee recommended changing the rules as per OPTION B, which would amend the rules to allow changes to use in existing exception areas under certain conditions. The commission's motion on September 2 agreed to this recommendation, and Attachment A to this report reflects the commission's preference. This proposal would not allow new exceptions (including Goal 14 exception; however, amendments proposed under ISSUE 4 below would allow new Goal 11 exceptions).

D. ISSUE 4: New Goal 11 Exceptions in Reserves to Allow Sewer Systems

The department labeled as ISSUE 4 the question as to whether the reserve rules should be amended to allow counties to take a Goal 11 (Public Facilities) exception where an imminent health hazard can be resolved only through extension of a sewer line or a new sewer system outside an urban growth boundary. An example of this was discussed in testimony to the commission concerning existing marinas or moorages in Multnomah County (see F, below). The department recommended changing the rules as per OPTION B of ISSUE 4, and the commission's motion on September 2 agreed with that recommendation. As such, Attachment A to this report recommends final rule wording consistent with the commission's motion.

E. Minor Rule Amendments for Consistency

The department suggested minor amendments for "consistency" with regard to amendments agreed to in the commission's motion with respect to ISSUES 3 and 4, as well as amendments adopted last April. Proposed amended rules in Attachment A (Page 2, Line 5) concerning OAR 660-027-0040 (5) provide that "Metro shall not re-designate rural reserves as urban reserves, and a county shall not re-designate land in rural reserves to another use during the period described in section (2) or (3) of this rule, whichever is applicable, **except as provided in OAR 660-027-0070.**"

This amendment would recognize that the referenced rules at 0070 actually do allow certain limited types of plan amendments, which arguably is a "re-designation to another use." Rules under OAR 660-027-0070 (2) and (3) prohibit amendments to uses under the current reserve plan and zoning. However, some amendments to plans and zones (and smaller lots or parcels) are now

allowed in section (4) through (6) of this rule, so the wording of this prohibition should be modified to indicate “...**except as specified in Sections (4) through (6) of this rule.**” (See Attachment A, Page 3, lines 12 and 17).

F. Amendment of OAR 660-027-0070(4)(d) in Response to Public Comment

OAR 660-027-0070(4)(d) allows a county to “... *adopt or amend comprehensive plan provisions or land use regulations as they apply to lands in urban reserves, rural reserves or both ... in order to allow uses and land divisions that are allowed by state statute or administrative rule at the time of the designation of urban and rural reserves.*”

A question was raised by Wendie Kellington as to whether this rule provision was intended to authorize a county to approve a plan amendment for a use that was “allowable” (rather than “allowed”) at the time reserves were designated. The problem with this suggestion is that virtually anything *may* be allowed through the exception process. For example, a large sports stadium is theoretically “allowable” on farm land if exceptions to Goal 3, 11 (for sewer) and 14 (an urban use on rural lands) are approved by a county as part of a plan amendment. In other words, the suggestion to amend the rule using the word “allowable” rather than “allowed” has the potential to eviscerate the prohibition on plan amendments to allow new uses within reserves.

LCDC adopted OAR 660-027-0070(4)(d) in April 2010 to resolve concerns raised in public comment during the first round of rulemaking on this topic. Specifically, Metro area counties testified that their comprehensive plans do not currently allow all uses on farm and forest lands that are allowed or that may be allowed through a conditional use process by statute and rule. One example is the concern raised in Multnomah County comments to the commission:

“The regulatory framework that applies to rural lands in Oregon is substantially based on state rules. Prior state enactments have included regulations that counties must adopt, and others that allow counties discretion to implement. Counties should retain the ability to make these policy choices in reserve areas. An example is our ability to consider whether the county now wants to provide for land divisions in EFU zones that would allow dividing a dwelling from a larger parcel to allow public acquisition by a provider of open space or parks. The county adopted the provisions in ORS 215.263(10) for Goal 3 areas, but not for Goal 4 land.” (Karen Schilling, Multnomah County)

Department Response: Based on the record from the commission action on April 22, 2010, to amend these rules, particularly at OAR 660-027-0070(4)(d), the department believes the intent of OAR 660-027-0070(4)(d) was to allow a county to amend its comprehensive plan to allow uses that are either allowed outright under statutes and state rules, or that a county *may* allow through a conditional use process, on farm or forest lands.

The intent of OAR 660-027-0070(4)(d) was that a “use” (for example, farm stands) must have been “allowed” either outright or through a conditional use process under the statutes and rules in place at the time of reserve designation, even if the county had not yet amended its comprehensive plan to reflect the authority allowed by state statute or rule. A proposed clarification of that intent is provided in the amendment to OAR 660-027-0070(4)(d) in

Attachment A, Page 3, line 30 through 32. Under the proposed clarification, zone changes from one resource designation to another are not allowed.

V. DEPARTMENT RECOMMENDATION

At its September 2, 2010 meeting, the commission adopted a motion (see Section III of this report) regarding several rule amendment “issues” considered in the public hearing. After adopting the motion September 2, the commission carried over its final adoption of precise wording of the rule amendments agreed to under its motion. As such, the department’s recommendation for this item concerns only the precise wording of rule amendments already agreed to under the motion approved by the commission on September 2, 2010. The department recommends that the commission adopt the rule amendments described in Attachment A to this report, which reflect the commission’s previously approved motion.

VI. ATTACHMENTS

A. Rule amendments recommended by the department

NOTE: The previous DLCD report (August 20, 2010) and attachments to that report (including previously published draft rules and public testimony) are available on the department’s web site.

LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

DIVISION 27

URBAN AND RURAL RESERVES IN THE PORTLAND METROPOLITAN AREA

DRAFT 3 – OPTIONS FOR RULE AMENDMENTS

October 7, 2010

For consideration by LCDC at a public hearing on October 19, 2010

Proposed new words **are underlined in bold**, deletions are [~~struck and bracketed~~]

1 **660-027-0000** [No changes are proposed for rules at OAR 660-027-0000] ...

2 **660-027-0010**

3 **Definitions**

4

5 [Note: The department provided formal notice indicating that LCDC may consider new or
6 changed definitions in OAR 660-027-0000. However, no changes to definitions in this rule
7 are suggested.]

8

9 **660-027-0020** and **660-027-0030** [NOTE: No changes are proposed for rules in this
10 division at 0020 and 0030]

11

12 **660-027-0040**

13 **Designation of Urban and Rural Reserves**

14 (1) Metro may not designate urban reserves under this division in a county until Metro and
15 applicable counties have entered into an intergovernmental agreement that identifies the
16 lands to be designated by Metro as urban reserves. A county may not designate rural
17 reserves under this division until the county and Metro have entered into an agreement that
18 identifies the lands to be designated by the county as rural reserves.

19 (2) Urban reserves designated under this division shall be planned to accommodate
20 estimated urban population and employment growth in the Metro area for at least 20 years,
21 and not more than 30 years, beyond the 20-year period for which Metro has demonstrated a
22 buildable land supply inside the UGB in the most recent inventory, determination and
23 analysis performed under ORS 197.296. Metro shall specify the particular number of years
24 for which the urban reserves are intended to provide a supply of land, based on the
25 estimated land supply necessary for urban population and employment growth in the Metro
26 area for that number of years. The 20 to 30-year supply of land specified in this rule shall
27 consist of the combined total supply provided by all lands designated for urban reserves in
28 all counties that have executed an intergovernmental agreement with Metro in accordance
29 with OAR 660-027-0030.

30 (3) If Metro designates urban reserves under this division prior to December 31, 2009, it
31 shall plan the reserves to accommodate population and employment growth for at least 20
32 years, and not more than 30 years, beyond 2029. Metro shall specify the particular number
33 of years for which the urban reserves are intended to provide a supply of land.

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- 1 (4) Neither Metro nor a local government may amend a UGB to include land designated as
2 rural reserves during the period described in section (2) or (3) of this rule, whichever is
3 applicable.
- 4 (5) Metro shall not re-designate rural reserves as urban reserves, and a county shall not re-
5 designate land in rural reserves to another use **except as provided in OAR 660-027-0070**
6 during the period described in section (2) or (3) of this rule, whichever is applicable.
- 7 (6) If Metro designates urban reserves under this division it shall adopt policies to
8 implement the reserves and must show the reserves on its regional framework plan map. A
9 county in which urban reserves are designated shall adopt policies to implement the
10 reserves and must show the reserves on its comprehensive plan and zone maps
- 11 (7) If a county designates rural reserves under this division it shall adopt policies to
12 implement the reserves and must show the reserves on its comprehensive plan and zone
13 maps. Metro shall adopt policies to implement the rural reserves and show the reserves on
14 its regional framework plan maps.
- 15 (8) When evaluating and designating land for urban reserves, Metro and a county shall
16 apply the factors of OAR 660-027-0050 and shall coordinate with cities, special districts
17 and school districts that might be expected to provide urban services to these reserves
18 when they are added to the UGB, and with state agencies.
- 19 (9) When evaluating and designating land for rural reserves, Metro and a county shall
20 apply the factors of OAR 660-027-0060 and shall coordinate with cities, special districts
21 and school districts in the county, and with state agencies.
- 22 (10) Metro and any county that enters into an agreement with Metro under this division
23 shall apply the factors in OAR 660-027-0050 and 660-027-0060 concurrently and in
24 coordination with one another. Metro and those counties that lie partially within Metro
25 with which Metro enters into an agreement shall adopt a single, joint set of findings of fact,
26 statements of reasons and conclusions explaining why areas were chosen as urban or rural
27 reserves, how these designations achieve the objective stated in OAR 660-027-0005(2),
28 and the factual and policy basis for the estimated land supply determined under section (2)
29 of this rule.
- 30 (11) Because the January 2007 Oregon Department of Agriculture report entitled
31 "Identification and Assessment of the Long-Term Commercial viability of Metro Region
32 Agricultural Lands" indicates that Foundation Agricultural Land is the most important land
33 for the viability and vitality of the agricultural industry, if Metro designates such land as
34 urban reserves, the findings and statement of reasons shall explain, by reference to the
35 factors in OAR 660-027-0050 and 660-027-0060(2), why Metro chose the Foundation
36 Agricultural Land for designation as urban reserves rather than other land considered under
37 this division.

1 **660-027-0050** and **660-027-0060** [No changes are proposed for rules 0050 and 0060]

2 **660-027-0070**

3 **Planning of Urban and Rural Reserves**

4 (1) Urban reserves are the highest priority for inclusion in the urban growth boundary
5 when Metro expands the UGB, as specified in Goal 14, OAR chapter 660, division 24, and
6 in ORS 197.298.

7 (2) In order to maintain opportunities for orderly and efficient development of urban uses
8 and provision of urban services when urban reserves are added to the UGB, counties shall
9 not amend comprehensive plan provisions or land use regulations for urban reserves
10 designated under this division to allow uses that were not allowed, or smaller lots or
11 parcels than were allowed, at the time of designation as urban reserves until the reserves
12 are added to the UGB, **except as specified in Sections (4) through (6) of this rule.**

13 (3) Counties that designate rural reserves under this division shall not amend
14 comprehensive plan provisions or land use regulations to allow uses that were not allowed,
15 or smaller lots or parcels than were allowed, at the time of designation as rural reserves
16 unless and until the reserves are re-designated, consistent with this division, as land other
17 than rural reserves, **except as specified in Sections (4) through (6) of this rule.**

18 (4) Notwithstanding the prohibitions in sections (2) and (3) of these rules, counties may
19 adopt or amend comprehensive plan provisions or land use regulations as they apply to
20 lands in urban reserves, rural reserves or both, unless an exception to Goals 3, 4, 11 or 14
21 is required, in order to allow:

22 (a) Uses that the county inventories as significant Goal 5 resources, including programs to
23 protect inventoried resources as provided under OAR chapter 660, division 23, or
24 inventoried cultural resources as provided under OAR chapter 660, division 16;

25 (b) Public park uses, subject to the adoption or amendment of a park master plan as
26 provided in OAR chapter 660, division 34;

27 (c) Roads, highways and other transportation and public facilities and improvements, as
28 provided in ORS 215.213 and 215.283, OAR 660-012-0065, and 660-033-0130
29 (agricultural land) or OAR chapter 660, division 6 (forest lands);

30 (d) **Other uses and land divisions that are a county could have allowed as an outright**
31 **permitted use or as a conditional use under ORS 215.213 and 215.283 or Goal 4 if the**
32 **county had amended its comprehensive plan to conform to the applicable state statute**
33 **or administrative rule prior to its designation of rural reserves** ~~by state statute or~~
34 ~~administrative rules at the time of the designation of urban and rural reserves;~~

1 **(5) Notwithstanding the prohibition in subsections (3) and (4) of this rule a county**
2 **may amend its comprehensive plan or land use regulations as they apply to land in a**
3 **rural reserve that is subject to an exception to Goals 3 or 4, or both, acknowledged**
4 **prior to designation of the subject property as rural reserves, in order to authorize an**
5 **alteration or expansion of uses allowed on the land under the exception provided:**

6
7 **(a) The alteration would comply with the requirements described in ORS 215.296,**
8 **applied whether the land is zoned for farm use, forest use, or mixed farm and forest**
9 **use;**

10
11 **(b) The amendment conforms to applicable requirements for exceptions and**
12 **amendments to exceptions under OAR 660, division 004, and all other applicable**
13 **laws; and**

14
15 **(c) The amendment would not expand the boundaries of the exception area unless**
16 **such expansion is necessary in response to a failing on-site wastewater disposal**
17 **system.¹**

18
19 **(6) Notwithstanding the prohibitions in subsections (2) through (5) of this rule, a**
20 **county may amend its comprehensive plan or land use regulations as they apply to**
21 **lands in urban reserves or rural reserves or both in order to allow establishment of a**
22 **new sewer system, the extension of sewer lines, or the extension of sewer systems**
23 **provided the exception meets the requirements under OAR 660-011-0060(9)(a).²**

24 (57) Counties, cities and Metro may adopt and amend conceptual plans for the eventual
25 urbanization of urban reserves designated under this division, including plans for eventual
26 provision of public facilities and services, roads, highways and other transportation
27 facilities, and may enter into urban service agreements among cities, counties and special
28 districts serving or projected to serve the designated urban reserve area.

29 (68) Metro shall ensure that lands designated as urban reserves, considered alone or in
30 conjunction with lands already inside the UGB, are ultimately planned to be developed in a
31 manner that is consistent with the factors in OAR 660-027-0050.

32 **660-027-0080** *[No changes to Rule 0080 are proposed]*

¹ New provisions in (5)(a) through (c) reflect the department’s recommendation under ISSUE 3, OPTION B authorizing amendment of uses in existing (currently acknowledged) exceptions in urban or rural reserves.

² This reflects the department’s recommendation under ISSUE 4, OPTION A – Authorization for a Goal 11 exception in order to allow sewer service to rural lands in order to prevent a health hazard where the particular circumstance in OAR 660-011-0060(9)(a) is met, but not for other possible circumstances for an exception allowed under OAR 660-011-0060(9).