



Oregon

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DATE: November 21, 2007
TO: Kate Jackson, Chair, NOWX2 Policy Committee
FROM: Cora Parker, Acting Director *CP*
SUBJECT: DLCD response to questions regarding RPS

Several questions regarding legal and procedural matters in the Collaborative Regional Problem Solving process sent to our regional representative, John Renz, have been discussed by department staff and legal counsel. Our response to these questions is attached.

We are approaching the role of the Land Conservation and Development Commission (LCDC) in the RPS process as a participant leading up to the agreement, and as an evaluator/adjudicator of the eventual comprehensive plan amendments that implement the agreement. With that in mind, our understanding of the nature of the meeting in November is that representatives from the region will brief the Commission regarding the status of the project. It is our understanding that the matter will come back to the Commission later—perhaps as soon as March—for LCDC's agreement on the RPS plan.

The attached answers are predicated on this understanding. Further, we do not believe the Commission will be willing to endorse the agreement without a demonstrated consensus among the on-going state and local participants.

We are certain additional questions will arise, and we will do our best to be responsive in a timely manner.

RPS Issues Clarification

1. What elements are we asking the Land Conservation and Development Commission (LCDC) to focus on in March (and November, to the extent it can)?

The region is asking for LCDC's agreement that:

- The problem statements are appropriate;
- The goals designed to address the problems are appropriate;
- The implementation strategies are appropriate to the goals and problems;
- The flexibility permitted by the Regional Problem Solving (RPS) statute is being used reasonably and appropriately;
- The findings are adequate; and
- The Regional Plan and the Stakeholders Agreement fulfill their purpose.

ANSWER: Most of these elements will be reviewed in the context of whether to sign the Stakeholders Agreement. The statute is not entirely clear regarding the commission's role in the agreement.

ORS 197.656(2) says, in part:

(2) Following the procedures set forth in this subsection, the commission may acknowledge amendments to comprehensive plans and land use regulations, or new land use regulations, that do not fully comply with the rules of the commission that implement the statewide planning goals, without taking an exception, upon a determination that:

(a) The amendments or new provisions are based upon agreements reached by all local participants, *the commission* and other participating state agencies, in the collaborative regional problem-solving process. . . (italics added.)

This appears to provide LCDC a part in the agreement. There is no other definition of LCDC's role or of procedural requirements for agreement. The only criterion for agreement is in ORS 197.656(2)(c): "The agreement reached by regional problem-solving process participants and the implementing plan amendments and land use regulations conform, on the whole, with the purposes of the statewide planning goals."

In order for the commission to endorse the agreement, it must find that the contents required in ORS 197.656(2)(b)¹ are present. The implementing plan amendments, not the

¹ (A) Regional goals for resolution of each regional problem that is the subject of the process; (B) Optional techniques to achieve the goals for each regional problem that is the subject of the process; (C) Measurable indicators of performance toward achievement of the goals for each regional problem that is the subject of

agreement itself, must conform, on the whole, with the purposes of the statewide planning goals, and this is the stage where adequacy of findings is most important.

The department has acted as the commission's agent for the duration of the RPS project and commented on several occasions regarding the proposed problem statement, goals, implementation strategies, and adequacy of findings.² The commission may similarly delegate to the department its responsibilities in reaching agreement, or it may choose to hear and reach a decision on whether to agree.

2. Is the March LCDC action a land use decision? If not, what is it?

The region feels that the LCDC action in March is not a land use decision, as there will be no actual "...amendments to comprehensive plans and land use regulations, or new land use amendments. . ." (RPS 197.656(2)) for LCDC review in March. This agrees with the following opinion by Lane Shetterly, DLCD Director, in a letter dated November 16th, 2005, addressed to the Region 2050 Advisory Board: "The 'regional strategy' is the basis of the agreements reached in a regional problem-solving process and does not generally, by itself, fall under the definition of land use decision. Any plan amendment adopted by a city or county to implement the strategy would, however, be a land use decision."

The region is asking for LCDC's review of the Regional Plan in March so that participating jurisdictions have some sense of the level of approval of LCDC before embarking on the lengthy and expensive comprehensive plan amendment process. The region would request a recognition attached to this level of approval that the region would not be penalized due to unavoidable changes to the plan arising from the realities of the land use decision-making process that each participating jurisdiction would have to go through in order to amend their comprehensive plans.

3. Is the signing of the Stakeholders' Agreement a land use decision?

The region feels that the signing of the Stakeholders' Agreement is not a land use decision, and for similar reasons outlined above. The signing of the agreement is a commitment by the jurisdictions to implement the Regional Plan as agreed to by LCDC, but always with the understanding that the realities of the land use decision-making process may force adjustments to the plan and agreement.

the process; (D) A system of incentives and disincentives to encourage successful implementation of the techniques chosen by the participants to achieve the goals; (E) A system for monitoring progress toward achievement of the goals; and (F) A process for correction of the techniques if monitoring indicates that the techniques are not achieving the goals

² See: July 8, 2005 memo ("DLCD position on Regional Problem Solving Goals and Policies"), September 20, 2005 letter ("Deviation from administrative rules in a regional problem solving (RPS) project"), and December 15, 2005 letter ("Clarification of DLCD position on compliance with administrative rules in regional problem solving") from DLCD; and September 1, 2006 letter ("State Agency Comments and Recommendations on the Regional Plan") and April 4, 2007 letter ("The State of Oregon's Comments and Position on the findings in support of urbanization of commercial farm land and other matters") containing comments from all participating state agencies.

ANSWER TO QUESTIONS 2 AND 3: The commission will review the Regional Plan to the extent that it is part of the agreement. Similarly, the content of the agreement determines whether agreeing to its contents is a “land use decision.”

The agreement is not required to include the contents of the Regional Plan, and the more the “solution” is defined in the agreement, the more likely it would be a land use decision. If LCDC decides that the materials presented to it are complete and comply with the statewide planning goals, they could decide to instruct the director to sign the agreement.

The definition of “land use decision” in ORS 197.015 provides, in relevant part:

(11) “Land use decision”:

(a) Includes:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

(i) The goals; * * *

(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals * * *

Even if the agreement does not amend a comprehensive plan, a final decision that concerns application of the goals is a land use decision. The agreement is not a “final decision,” however, unless it binds the signatories to a specific course of action. If the agreement provides an individual city discretion on implementation of the Regional Plan, then the final decision would not occur until adoption of the local comprehensive plan amendment. DLCD believes that the Regional Plan should be a “regional growth strategy” Even if the agreement does not amend a comprehensive plan, a final decision that concerns application of the goals is a land use decision. The agreement is not a “final decision,” however, unless it binds the signatories to a specific course of action. If the agreement provides an individual city discretion on implementation of the Regional Plan, then the final decision would not occur until adoption of the local comprehensive plan amendment. DLCD believes that the Regional Plan should be a “regional growth strategy” that does not oblige a city or the county to make a pre-determined decision. It should contain goals and policies, and potential urban reserve boundaries that await local confirmation through the local land use decision process. This is to ensure the agreement is not a land use decision and also to maintain flexibility for local decision-makers to respond to public input.

The definition of “land use decision” does not include any action by LCDC. LCDC’s decisions are not reviewed by the Land Use Board of Appeals, which is the body that hears appeals of land use decisions. The comprehensive plan amendments that implement the agreement will be reviewed according to the procedures for acknowledgment or periodic review, and any final order under these procedures can be appealed to the Court of Appeals. The initial commission action will be to decide whether to concur with the agreement, so the same guidance regarding avoidance of pre-determined outcomes applies to the commission the same as it does to local signatories.

4. Following the implementation of the plan through changes to the comprehensive plans of participating jurisdictions, is ANY local amendment that is related to the Regional Plan subject to the RPS statute (LCDC must approve, appeals go to the Court of Appeals)?

Barring existing state requirements for review by LCDC (and appeal to the Court of Appeals) for certain land use actions, the region feels that there should be a threshold for minor RPS changes, such as adjustments to codes and ordinances, that would not be subject to the RPS approval sequencing.

ANSWER: ORS 197.656 provides, in relevant part:

(3) A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation in order to implement an agreement reached in a regional problem-solving process shall submit the amendment or new regulation to the commission in the manner set forth in ORS 197.628 to 197.650 for periodic review or set forth in ORS 197.251 for acknowledgment.

(4) The commission shall have exclusive jurisdiction for review of amendments or new regulations described in subsection (3) of this section. A participant or stakeholder in the collaborative regional problem-solving process shall not raise an issue before the commission on review that was not raised at the local level.

If a comprehensive plan amendment is undertaken in order to implement the agreement, then the amendment must be submitted in the manner of periodic review or acknowledgment. "In the manner of periodic review" does not require a commission action; the DLCD director has the authority to make an initial decision, which can be appealed to LCDC.

The agreement could specify those decisions required by the local governments that "implement" the agreement. For example, the agreement could list adoption of plan or ordinance amendments establishing or amending (1) Urban Reserve Area boundaries, (2) ordinances implementing agricultural buffers, and (3) [other agreed-upon amendments] as the decisions that implement the agreement. This would make it clear that unlisted local plan amendments are not subject to the RPS statute.

5. In the Deschutes County RPS process, how was the acknowledgment process achieved?

The material we have is not entirely clear on the acknowledgment process, but it appears that the Deschutes RPS project presented LCDC with the amendments required for the implementation of the preferred strategies without the step Southern Oregon is proposing in March. Is this correct?

ANSWER: The South Deschutes County RPS project was a task on the county's periodic review work program. ORS 197.656(3) provides:

A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation in order to implement an agreement reached in a regional problem-solving process shall submit the amendment or new regulation to the commission in the manner set forth in ORS 197.628 to 197.650 for periodic review or set forth in ORS 197.251 for acknowledgment.

The Deschutes County process, again, utilized the first option, periodic review. Not only was the review “in the manner” of periodic review, but it was actually a task.

The “agreement” under ORS 197.656(2)(b) was not considered by the Commission separately from the plan amendments implementing the agreement. The nature of the “agreement” was a series of memoranda of understanding (MOUs) between the county and a variety of state agencies and service districts and a non-profit organization. The final RPS plan included reference to the roles that each of these entities would have in implementing the plan, as spelled out in the MOUs.

The MOUs were submitted by the county as attachments to the plan, not the other way around. The Commission’s final order did not specifically cite or in any way address the “agreement” separately from the larger package of plan amendments.

This does not suggest that the Bear Creek project must follow this same model. The Deschutes County project was fundamentally different than NOWX2 because there was only one local government involved—the county—so the comprehensive plan amendments needed to implement the RPS plan were straightforward relative to NOWX2.

6. The question has been raised locally about inserting a termination clause in the agreement. Jurisdictions would like to know what happens if a jurisdiction doesn’t wish to participate further in the monitoring and review period following the acknowledgment of the comp plan amendments?

Beyond the disincentives in the agreement, the Region does not believe that remaining jurisdictions should be impacted by a jurisdiction’s decision to pull out of the process. Once the comprehensive plans have been amended and acknowledged by the state, jurisdictions that are complying with the Plan and with their own comprehensive plans should not be affected. There is the question, though, whether the state would require more justification for a future UGB expansion from a city that is not complying with the Plan (and thus the agreement) than from one that is.

ANSWER: The nature of the review and monitoring functions currently being discussed in the region will probably not be adversely affected if a participant decided to terminate. There is another concern, however, regarding potential withdrawals.

An effect of successful conclusion of the RPS process is that the Regional Plan will supplant those administrative rules with which the plan does not comply, as LCDC will

have found that the plan conforms with the statewide planning goals. Therefore, a primary issue affecting remaining jurisdictions if a jurisdiction terminates its participation in the plan is whether subsequent comprehensive plan amendments would be required to comply with applicable administrative rules rather than the Regional Plan.

For example, if the urban reserve area (URA) boundary for each individual city complies with the administrative rule for designating URAs, then one city opting out should have no effect on another city. Alternatively, if the Regional Plan has the effect of transferring one city's growth to another, giving the latter city a larger URA than would otherwise be justified, then there would be a higher level of interdependency among the cities and a more significant consequence in the event of a lost participant.

It is difficult to answer the question regarding the effect of a city terminating its participation decisively because thus far there has been no identification of which administrative rules the plan would be inconsistent with.

7. Can LCDC acknowledge each jurisdiction's set of necessary amendments as they are completed, or will each jurisdictions have to wait for all the jurisdictions to complete their work before implementation can occur?

The Region feels it would be most appropriate to allow jurisdictions to complete their necessary local amendments at the pace most appropriate for them, and to have them acknowledged immediately thereafter. A requirement to stay the implementation phase until all participants have completed their amendments would pose a hardship for the jurisdictions that are most in need of timely urban growth boundary expansion, would delay the most important long-range transportation planning, and, depending on how long the delay might take, could also place jurisdictions in danger of potential non-compliance with a variety of state regulations.

ANSWER: We find nothing in the RPS statute that would prevent the comprehensive plan amendments from coming to the commission separately. The agreement could provide for this arrangement to provide even more assurance.

8. Since this is a regional plan created under RPS intended to provide regional solutions to regional problems, should the findings be written at the regional level?

ORS 197.656(2)(c) of the RPS statute provides for a measure of flexibility from the letter of the statewide planning goals by stipulating that the solutions arrived at in the regional agreement “. . .conform, on the whole, with the purposes of the statewide planning goals.” Because the goals are administrative rules, this ability to make findings based on the goals' purpose statements, and not their full texts, is consistent with ORS 197.656(2), which allows flexibility from “. . .the rules of the commission.” In addition to these specific provisions for flexibility provided for in the RPS statute, the region will respect the repetitive regional theme in the statute by preparing the findings on a regional basis, rather than preparing them on a city-specific or even URA-specific basis. Pertinent details on a city or urban reserve area level will be included where appropriate for support or illustration.

ANSWER: There are a number of issues raised in this question. First, the provision for demonstrating compliance with the goals in ORS 197.656(2)(c) should not be conflated with the ORS 197.656(2) provision that allows “amendments to comprehensive plans and land use regulations, or new land use regulations, that do not fully comply with the rules of the commission that implement the statewide planning goals, without taking an exception. . .” The latter refers specifically to rules that implement the goals, not the goals themselves. Taken together, these two sections of the statute allow a Regional Plan that does not “fully comply” with implementing rules, without taking exceptions, as long as the plan complies “on the whole” with the purposes of the goals.

Given this, the findings must address both the implementing administrative rules and the goals. If the plan treats the entire region as a unit, then region-level findings are appropriate. For example, if the findings demonstrate that the URA contains the appropriate amount of land to accommodate regional growth, irrespective of the needs of any single city, then region-level findings are sufficient. On the other hand, if the population is allocated to individual cities and the URA is designed to accommodate that allocation, then more specific findings for each city regarding compliance with the appropriate rules, or reasons why those rules should not apply, would be needed.

Finally, we are unable to find any judicial interpretations regarding a distinction between initial goal statement and the remainder of the goal text. We see no basis to make such a distinction. If a goal includes a specific requirement, then compliance with that provision must be demonstrated. However, we find few if any such requirements that apply to the Regional Plan in any of the goals.

9. Can the concept of the regional community, with its diverse city neighborhoods, be compatible with the purposes of Goal 14?

This region believes that its concept of participating cities as diverse, individual “regional neighborhoods” making up the larger “regional community” is entirely consistent with Goal 14. Just as neighborhoods in actual cities provide different mixes of uses and services, and lend their individuality to a collective identity of the larger community in which they are contained, so do the region’s unique municipalities offer that to the regional community. The concept of the Greater Bear Creek Valley regional community not only permits cities to be different from one another, but actively promotes it.

Where the cities are choosing to provide different levels and mixes of employment or housing types, the ability to prove that the regional balance conforms with Goal 14 is a fairly simple matter. In the case of this RPS process, the Regional Economic Opportunities Analysis and the Regional Housing Analysis provide a sound rationale for that distribution of uses being able to “. . . accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land. . . .”

Where the region is attempting to provide a diversity in what it considers livable communities, proving adequate conformity with Goal 14 is potentially more problematic. While aggressive gross density targets such as those being planned by Medford and Eagle

Point (at 6.5 and 6.4) have proven to be very attractive to DLCD based on their unambiguous compliance with the “. . .efficient use of land. . .” part in the goal, a proposal such as Jacksonville’s, to observe a village pattern with decreasing densities towards its urban edges, has been less so. While the process [region?] can appreciate the importance to the state in ensuring that urban land is utilized efficiently, the portion of Goal 14 that speaks to the need for “livable” communities introduces an important qualitative element to a determination of what can constitute conformity with the goal. When embedded in a regional process such as this one, in which a balance is sought in the regional community that permits diversity its neighborhoods, we believe that the case for permitting the less dense Jacksonville “neighborhood” to be more than compensated for by the remaining denser “neighborhoods” can be made.

ANSWER: We believe there is nothing in Goal 14 that prevents the region from accommodating regional land needs on a regional basis; that is, if it can be demonstrated that, on the whole, the purpose of the goal is achieved, precisely where the land for the various urban needs gets designated is not necessarily important. Goal 14 does not require that every neighborhood demonstrate the same density of development, and there is no apparent reason this concept could not be extended to the region as a whole. In other words, the Regional Plan could assume a different density and housing type mix for a city than that city could justify working alone as long as needed housing is accommodated within the region and for each urban area. However, Goal 14’s call for efficient use of land does not provide for *inefficient* or non-urban land use patterns in any city.