



Beery Elsner
& Hammond LLP

December 4, 2008

HAND DELIVERED

John Van Landingham, Chair
Land Conservation and Development Commission
635 Capitol Street, NE, Suite 150
Salem Oregon 97301-2540

Re: Proposed Amendments to OAR 660, Division 24

Dear Chair VanLandingham:

We represent the City of Molalla, the City of Madras, and the City of Grants Pass. Thank you for the opportunity to testify on behalf of these cities regarding the proposed amendments to the Goal 14 rules. The primary focus of our testimony is the proposed "sequencing" rule, 660-024-0080. After reviewing the proposed rule and related materials, we offer the following comments.

The Rule Does Not Address An Identified Problem

The Goal 14 rulemaking effort was initiated for the purpose of simplifying and streamlining the process of complying with the goal. Unfortunately, the proposed rule falls well short of this goal. As drafted, the rule unnecessarily confuses and complicates the Goal 14 rules without solving any identified problems.

The staff report alternately cites a concern that cities may try to "lock-in" comprehensive plan elements, such as a housing need analysis (HNA) or economic opportunities analysis (EOA) prior to a decision to amend the urban growth boundary, versus a concern that Goal 14 compliance is an "iterative" process that is somehow frustrated by adopting these elements as post-acknowledgment plan amendments (PAPAs). Neither of these concerns withstands scrutiny.

First, the staff report does not cite to any instances in which an erroneous HOA, EOA or other element has been relied upon to support a subsequent UGB expansion, and we are not aware of any. Apparently, the concern is not with the substance of the documents, rather with the process for adopting them. The recommendation apparently assumes that periodic review is only process that provides meaningful review of these decisions. However, it is important to keep in mind that DLCDC staff reviews *all* PAPA decisions well in advance of a final decision and we do not understand why that process prevents the department from meaningfully reviewing these

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documents. Indeed, until recently, most local Goal 14 decisions were adopted sequentially with the full knowledge and participation of the department and we have yet to hear a convincing explanation of the problem that suddenly requires this change.

In addition, should these building blocks lead ultimately to a decision to amend the urban growth boundary, that decision is reviewed by LCDC “in the manner provided for periodic review” under ORS 197.626. As the Commission is aware, periodic review is a comprehensive review process that allows the Commission to analyze the not only the subject decision, but the plan elements that support the decision. Any concerns the Commission may have about the decision and supporting elements may be returned to the city as a periodic review work task. Accordingly, the Commission will have ample opportunity to review the local plan elements both at the time of adoption and again when they are submitted with the final UGB decision.

Moreover, in many cases, a city may determine that a UGB expansion is not necessary only after it is well into the analytical process. In those cases, if the city adopted the comprehensive plan elements as PAPAs, the city would have a final decision and an acknowledged comprehensive plan upon which it could rely in making land use decisions. Under the draft rule, the early decisions have to be submitted to the Commission in the manner provided for periodic review and the city would not know for months whether the decisions will be acknowledged.

With respect to the suggestion that Goal 14 compliance is “iterative,” many local decisions that provide the factual basis for a subsequent decision to amend or not amend the UGB are not, in fact, iterative. The work group received comments from the City of Grants Pass explaining why many of the preliminary analytical elements are not iterative, specifically including the housing needs analysis and population projections. There is no response to these comments in the staff report.

Ultimately, the draft rule appears to be a solution in search of a problem. For years cities have incrementally adopted the building blocks of Goal 14 compliance with the full knowledge and participation of the Commission. Now, without adequate explanation, the Department is recommending a new process that denies cities the benefits of the incremental approach without offering anything in return. We understand there may be whispered concerns about cities “gaming the system,” but we are not aware of any evidence to support these concerns and without an adequate factual basis to support them, such suggestions should be disregarded.

The Proposed Rule Is Not Authorized By Law

Under ORS 197.626, a local decision “that amends the urban growth boundary to include more than 50 acres” must be submitted to the Commission “in the manner provided for periodic

review.” The proposed rule attempts to stretch the phrase “amends the urban growth boundary to include more than 50 acres” to include many preliminary decisions, whether or not they ever lead to a UGB expansion. Quite simply, the phrase cannot be stretched far enough to cover this rule.

The text of the rule itself makes it clear that a decision on a HNA or EOA is separate from a subsequent decision to amend the UGB:

660-024-0080

“(1) * * *

“(2) [I]f a local government adopts an element of an urban growth boundary amendment as defined in section (3) of this rule *and* if the city *later amends* the UGB in response to that element . . .”

“(3) (b) ‘Amends the urban growth boundary’ and ‘UGB amendment’ mean: for a city with a population of 2,500 or more within its urban growth boundary to adopt an amendment to a UGB, *or* to adopt one or any combination of the following elements *that are preliminary to* a UGB amendment . . .”

The rule explicitly recognizes that decisions to adopt a HNA or EOA “preliminary” to a later decision to amend the UGB. However, ORS 197.626 expressly applies only to “a decision to amend the urban growth boundary to include more than 50 acres,” it does not apply to preliminary decisions. Accordingly, the proposed rule is inconsistent with the plain language of ORS 197.626.

The Proposed Rule Is Unworkable for Small Cities

The Land Use Board of Appeals (LUBA) recently decided that nothing in Goal 10 or Goal 14 prohibits cities with fewer than 25,000 residents from adopting a housing needs analysis without simultaneously amending the UGB under Goal 14. *GMK Developments v. City of Madras*. LUBA’s decision was welcomed by Oregon’s small cities that are faced with increasingly strained budgets and, by necessity, break the Goal 14 process into smaller, discrete decisions that can be scheduled and accommodated within predictable budget cycles. The proposed rule overturns the *Madras* decision and denies small cities the certainty the decision provides.

The staff report suggests that submitting local decision to the Commission in the manner provided for periodic review provides cities with greater certainty than adopting the same decisions as PAPAs. However, the vast majority of local decisions relating to Goal 14 are unlikely ever to be appealed because they rely on safe harbors or are otherwise not controversial. If these decisions are adopted as PAPAs, they become final and are deemed acknowledged after 21 days, after which the city may proceed to the next steps. On the other hand, if they are

submitted to LCDC in the manner provided for periodic review, it may be months before the city even hears whether the decision will be acknowledged or whether more work is necessary. Moreover, if the Commission's decision is appealed to the Court of Appeals, the timeline for a decision on appeal from the Commission is considerably longer than the timeline for an appeal from LUBA.

It is exceedingly difficult to budget for a scenario in which it takes months to get a response to a decision, and the nature and scope of the response cannot be known, particularly if the various decisions have to be bundled into a single decision, as the rule seems to require. Conversely, when the different elements are adopted as discrete decisions, the city knows very quickly which ones may give rise additional costs. For this reason, a process for incrementally adopting Goal 14 decisions should not be based on periodic review.

The Provisions For Complying With Other Goals

The proposed rule contains many provisions that should properly be included in the administrative rules for other goals. For example, the proposed amendment to OAR 660-024-0040 (and renumber as subsection (8)), says that the proposed safe harbors may be used to determine compliance with the OAR for Goals 7, 8 and 10. It is difficult to know how a person drafting findings of compliance with Goals 7, 8 and 10, and the related OAR's would know to look in the OAR's for Goal 14 to find the safe harbors. This provision, or at least a reference to this provision, should be added to the relevant OAR's for Goals 7, 8 and 10.

The Proposed Rule Will Inhibit Valuable Planning

Cities with fewer than 10,000 residents are exempt from periodic review. ORS 197.629. If the process for complying with Goal 14 becomes too difficult, complicated, and expensive many of these cities will simply decline the task. The City of Molalla is a city of 8,000 residents. It's comprehensive plan was acknowledged in 1980 and has not been substantially updated since then. The City has already spent hundreds of thousands of dollars in a multi-year effort to update its comprehensive plan and comply with Goal 14. If the process becomes unmanageable, the city will simply drop the effort and it will be many years, if ever, before the city undertakes the task again.

Molalla is not alone in this respect. It is hard to imagine any small city in Oregon undertaking a hopelessly complicated, expensive and uncertain task when it can simply do nothing and put the money to other uses. This is not a good outcome for the state or statewide planning program and the Commission should not endorse this result.

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There Is No Support For The Rule

The Commission established a work group to assist in developing revisions to the Goal 14 rules. The membership of the work group represented a broad spectrum of interested parties and Commissioner Worrix graciously and diligently kept the group on task. Despite the group's best efforts, it was unable to achieve a majority opinion, much less consensus, about the precise nature of the problem or the specifics of a regulatory response. Accordingly, at its last meeting on November 3, 2008, the group overwhelmingly agreed *not* to make a recommendation to the Commission, in favor of a report summarizing the issues and a request for guidance.

With this understanding, we were very disappointed to discover the proposed sequencing rule was included in the staff recommendation. This was contrary to the express wishes of the work group and for this reason alone the Commission should defer any action on the proposed sequencing rule and refer it back to the work group for further review.

Thank you for your time and the opportunity to present this testimony.

Sincerely,

Christopher Crean

cc: Kris Woodburn, City of Grants Pass
Tom Schauer, City of Grants Pass
John Atkins, City of Molalla
Shane Potter, City of Molalla
Nick Snead, City of Madras
Mike Morgan, City of Madras

Bob Rindy - Comments of Urban Growth Boundary Amendments Rules

From: Barton Brierley <barton.brierley@ci.newberg.or.us>
To: "'bob.rindy@state.or.us'" <Bob.Rindy@state.or.us>
Date: 12/01/2008 4:17 PM
Subject: Comments of Urban Growth Boundary Amendments Rules

Thank you for the opportunity to comment on the proposed UGB amendment rules. I appreciated the opportunity to be on the work group and participate in the rulemaking effort. I have several comments on the November 16, 2008 draft. Will you please forward these to the Commission?

Overall Progress

This latest effort was the "Phase 2" effort to clarify and streamline the UGB amendment process. While the draft rules do make some progress, there is still more to be done. One area that I felt we made little progress was in identifying needs for non-residential land. A safe harbor would be very useful in identifying need for commercial, industrial, and institutional lands. I hope that DLCD continues to work on this area.

Definitions

The "attached housing" definition includes condominiums. However, condominiums can be detached dwellings, or non-residential uses.

The "buildable land" definition defines that term as only meaning **residential** land. I think it would be better use the term "buildable residential land" to distinguish it from other types of buildable land.

Definition (3) and (5) both define "Detached Single Family Housing.

The definition of "Net Buildable Acre" also need not be restricted to residential land.

Housing density and mix safe harbors

The proposed safe harbor requires the jurisdiction to "determine the existing housing [sic] the percentage of both attached housing and single family detached housing on development land in the urban area at the time the local government initiated the evaluation or amendment of the UGB." I recommend adding "or at the last census." The census information is very easy to find and use – the percentage at date of UGB amendment initiation would take quite a bit of work to determine.

I recommend that the housing density and housing mix safe harbors not be required to be linked. Housing density and mix address different goals: density primarily addresses efficient land use (Goal 14), and mix address housing types and affordability (Goal 8). A local jurisdiction may have a very good idea and good data to support what it wants to do with one of those factors but not the other. It should be allowed to use just the one that it feels is appropriate. In the examples given at the work group of past UGB amendments, several of those jurisdictions could have qualified under on of the safe harbors but not the other. Not using both would have disqualified them from using either.

For the alternate housing mix safe harbor, the percentage should be percent decrease in single family detached units. If the last census said the community was 80% SFD, then $80\% \times -15\% = -12\%$. Therefore, the community could plan for 68% single family and 32% other.

Thank you again for the opportunity to comment.

Barton Brierley, AICP Planning and Building Director
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Mike Morgan, City Administrator 541-475-2344, e-mail mmorgan@ci.madras.or.us
City of Madras, 71 S.E. D Street, Madras, OR 97741

November 25, 2008

John VanLandingham, LCDC Chair
635 Capitol St. NE, Suite 150
Salem 97301-2540

Dear Chair VanLandingham, LCDC Commissioners and DLCD Staff:

The City of Madras urges the Commission not to adopt the new proposed OAR 660-024-0080, "LCDC Review Required for UGB Amendments," at this time. The stakeholder community and DLCD have not had enough time to explore whether there is really a problem at all. Nor has there been time for the recently proposed, very complex solution to be evaluated by the community. From our perspective, the rule proposed would dramatically reduce local control over planning, to solve a problem that does not really exist. Further, the proposed rule will result in unnecessary risk and cost to our taxpayers.

New rules are not needed

Apparently, there is a perception that local governments frustrate the state's "iterative" review of UGB amendments by "locking in" housing and employment analyses adopted as PAPAs. Local governments use the PAPA process (which the proposed rule would eliminate completely in favor of LCDC review of everything) to control and preserve their very limited budgets by taking the planning process step-by-step. Local governments are not trying to "game the system."

And the "lock-in" problem may not even exist. The UGB Workgroup memo (10/20/08) stated that DLCD had not received an answer from DOJ to the "critical question" of whether LCDC would be "locked-in" to a housing or employment analysis adopted in a PAPA. DLCD should get an answer to this question before proposing complex new rules to address the assumed answer.

DLCD and stakeholders should also take time to analyze which planning building blocks really need to be "iterative," and which are acceptable to "lock in." For example, if a local government adopts a Goal 10 housing needs analysis, all elements of that analysis are not necessarily "locked in" when LCDC reviews a later UGB expansion. Parts of the analysis—i.e., a population forecast, identification of housing needs, and land inventory analysis—are not "iterative," meaning, they are not subject to change later, when Goal 14 efficiency criteria are applied. On the other hand, a local government may select a capacity/density assumption for available lands as part of the Goal 10 process that is consistent with local housing policy. Later, when applying the Goal 14 requirement to demonstrate that its housing need cannot be met without expanding the UGB, the local government might have to revisit its original capacity/density assumption to ensure that it satisfies the more stringent Goal 14 efficiency requirement. Earlier acknowledgment that the capacity/density assumption complied with Goal 10 would not frustrate later review under the distinct Goal 14 efficiency criteria.

DLCD has successfully used segmented review in the past and has noted that elements of an earlier PAPA adoption will be reviewed by LCDC later. When reviewing the Madras/Jefferson County housing report, DLCD implied that the Goal 10 housing analysis would have to be shown to comply with Goal 14 later, during review of a future urban reserve or UGB expansion proposal. The DLCD comments stated:

"A goal without commitment and determination is a lost dream."

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“Please note that any future proposal will be required to demonstrate compliance with the above-cited state laws for UGB amendments and urban reserves.” (DLCD letter to City of Madras dated July 3, 2007, pages 4-5).

DLCD’s comments in the Madras/Jefferson County PAPA proceeding also show how full LCDC review of everything (as the proposed rule would require) is not the only way to get meaningful state participation in the local process. Today, DLCD participates meaningfully in PAPA adoption of Goal 10 housing analyses, with an eye toward encouraging a Goal 10 adoption that is likely to be consistent with the Goal 14 criteria to be applied in the future. In the Madras/Jefferson County proceeding, DLCD disagreed with our multifamily density assumptions, which we altered in response to DLCD’s comments. DLCD pointed out that taking its comments into consideration would help us comply in the future with the requirements for URAs and UGBs: “We believe that the comments contained in this letter will assist the city in making the necessary findings for any such [future] boundary or urban reserve proposal.” (DLCD letter, page 5.) Thus, even if all planning decisions were “locked in” by the PAPA process, which they are not, they are already developed in functional cooperation and coordination with DLCD.

The existing system works, and we do not believe that it should be changed. At the very least, the Commission should direct the Workgroup to explore further whether there is really a problem and, if there is one, what the right solution is.

The new rule bundles all planning efforts as a “UGB amendment”

The new rule prevents any preliminary planning analysis adopted under Goal 9 or Goal 10 from being adopted separately from a UGB land need analysis, and it requires all planning analyses to be reviewed by LCDC, rather than by LUBA. Although we appreciate DLCD’s efforts to create more finality in this draft, by allowing the UGB land need analysis to be finally approved by LCDC before the actual UGB decision is made, we continue to object to the rule as proposed.

First, the rule may conflict with appellate decisions by blurring Goals 9 and 10 together with Goal 14. The two Goals are distinct goals with distinct objectives, except possibly where ORS 197.296 applies to meld the two. LUBA recognized that Goal 10 and Goal 14 are distinct in *GMK Developments v. Madras*, and the Court of Appeals may soon agree with LUBA. We believe they should have different functions, because not all planning efforts are directly and immediately related to UGB amendments.

Second, in addition to blurring Goal 10 and Goal 14, it is inconsistent with plain language to say that adopting a housing needs projection is the same as amending an urban growth boundary. For DLCD to interpret the phrase “amends the urban growth boundary” in ORS 197.626 to encompass every housing needs projection would cause Goal 14 to swallow Goals 9 and 10 entirely, without any statutory authorization for doing so.

Finally, and most importantly, the proposed rules are unworkable for small jurisdictions. Small jurisdictions need to be able to tackle one thing at a time, and get finality on discrete elements so that their budgets are not subject to an endless loop of LCDC reviews and appeals. These rules would take away what little control local governments have and limit their ability to achieve finality in step-by-step planning efforts.

“A goal without commitment and determination is a lost dream.”

LCDC LETTER
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Amendment to OAR 660-024-0080(5)

If, despite the objections of cities across the state, LCDC proceeds with adopting OAR 660-024-0080, we request that OAR 660-024-0080(5) be amended so that cities have five years to submit UGB amendments to the Commission for review.

The proposed rule is an improvement over the rule circulated and rejected by the DLCD UGB Work Group in October because it allows the UGB land need analysis to be finally approved by LCDC before the actual UGB decision is made. However, the timeline proposed by OAR 660-024-0080(5) is unworkable. As currently drafted, a city must submit a completed UGB amendment to LCDC within two years of when a preliminary element is acknowledged. If an appeal of the preliminary element is filed with the Court of Appeals, two years could easily pass before the appeal is resolved, which would deprive the local jurisdiction the opportunity to avoid having the preliminary element re-evaluated. Additionally, if a preliminary element demonstrates that there is not a demand in the near term for expanding the UGB, a city should not be forced into a de minimis, but very expensive, UGB review so that the effort put into the preliminary element can be preserved. Lengthening the vesting period to five years would address both issues.

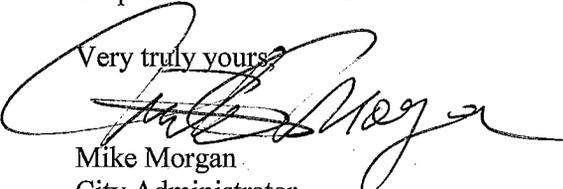
An underline/~~strike out~~ of the proposed amendment to OAR 660-024-0080(5) is:

(5) If the director or Commission approves the preliminary element described in paragraph (4)(a)(A) of this rule, the director or Commission may not re-evaluate or amend its determination of compliance for that preliminary element at such time as the element described in paragraph (3)(s)(B) of this rule is submitted to the Commission, provided the element described in Section (3)(s)(B) of this rule is submitted to the Commission for review within ~~two~~ five years after acknowledgement of the preliminary element described in paragraph (4)(a)(A) of this rule.

Conclusion

It should be obvious from the feedback the LCDC and DLCD staff are receiving, that there is real concern about the proposed rule. Rule changes of this magnitude need ample public vetting and a meaningful opportunity for affected jurisdictions to participate in this dialogue. This has not happened. Based on our experience, this proposal represents a substantial and unnecessary cost risk for Cities. The more prudent path is to collaboratively develop policies that lend themselves to certainty and protect the public's very limited tax dollars. For the reasons explained above, the City of Madras urges the Commission not to adopt new OAR 660-024-0080.

Very truly yours,


Mike Morgan
City Administrator

Cc: Richard Whitman, DLCD Director and Bob Rindy, DLCD Policy Analyst and Legislative Liaison and; Linda Ludwig, AOC.

"A goal without commitment and determination is a lost dream."

ECONorthwest

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3 December 2008

Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

Subject: Proposed Goal 14 Rule Amendments (Agenda Item #7)

Dear Chair Van Landingham and Members of the Commission:

ECONorthwest has a long history of providing planning services to local governments throughout Oregon. We are currently assisting several Oregon cities (Grants Pass, Junction City, Medford, Jacksonville, Eugene, and Sandy) with studies that pertain to Goal 14 and UGB expansions. Thus, we have a compelling interest in the proposed revisions to the Goal 14 rule.

We are strong supporters of the statewide land use planning program. The program makes important contributions to quality of life, urban form, economy, and environment of Oregon. Moreover, we strongly support the efforts of the Goal 14 Committee to provide additional avenues to local governments in the Urban Growth Boundary review process.

We have reviewed the draft Goal 14 rule language posted on November 16th and have a number of concerns with some of the proposed language. We have also reviewed the written testimony provided by Greg Winterowd. Rather than reiterate the points that Mr. Winterowd made in his testimony, we will state that we concur with those points.

While we appreciate the considerable effort that the Goal 14 Committee has invested in getting the revisions to this point, we think the proposed revisions need additional work before they are ready for adoption. We understand that the Goal 14 Committee will meet again in December. **We support Greg Winterowd's recommendation that the Commission remand the draft rule to the Goal 14 Committee to further review the language related to the housing density and mix safe harbors, the regional EOA safe harbor, and the process for sequential adoption of required studies that are necessary for a successful UGB amendment.** We also encourage the Commission to direct the Committee to go through a more rigorous and lengthy vetting process of any revisions that would solicit comments from affected local governments.

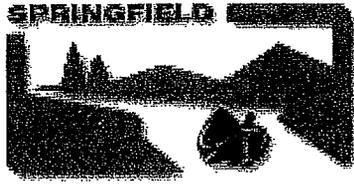
Thank you for your consideration.

Sincerely,



Robert Parker, AICP
Senior Planner

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December 3, 2008

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

Re: Agenda Item 7
Public Hearing and Possible Adoption of Proposed Administrative Rule Amendments
Regarding the Urban Growth Boundary (UGB) Amendment Process

Dear Chair Van Landingham and Members of the Commission:

As you know, the cities of Eugene and Springfield, in cooperation with Lane County, are engaged in much-needed updates of their residential lands studies, economic opportunities analyses, and commercial and industrial lands studies as part of their efforts to establish separate but coordinated urban growth boundaries pursuant to ORS 197.304 (2007 HB 3337). Because of HB 3337, it is likely that we will be among the first to experience the hoped-for benefits of the proposed amendments to the Goal 14 interpretive rule. While we welcome such benefits, we also worry about the possibility of unintended consequences such as litigation over the meaning and effect of the proposed changes.

We first learned of the Commission's consideration of amendments to the Goal 14 Rule at your June meeting and became concerned about its impact on our HB 3337 Work Plan. On June 20, 2008, Greg Mott, Springfield Planning Director offered the following suggestions to your staff on how to integrate any amendments with our ongoing effort.

Mr. Mott suggested to the Commission to add the following to 660-024-0000(3)(c):

- (c) For purposes of this rule, "initiated" means that the local government either:
 - (A) Issued the public notice specified in OAR 660-018-0020 for the proposed plan amendment concerning the evaluation or amendment of the UGB; or
 - (B) Received LCDC approval of a periodic review work program that includes a work task to evaluate the UGB land supply or amend the UGB; or
 - (C) Is subject to the provisions of ORS 197.304. (New)**

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Obviously this would require changes to the effective date of April 5, 2007 that appears in (3), (3)(a) and (3)(b) to whatever new effective date may be applied to the new rules.

Our rationale is based on ORS 197.304. This law compels Eugene and Springfield to undertake and complete the inventory, analysis and determination required under ORS 197.296(3) "within two years after the effective date of this 2007 Act [January 1, 2008]." The Cities ongoing work to comply with this obligation is at least analogous to a city that is in the process of complying with a Periodic Review work task to evaluate the UGB land supply or amend the UGB, already exempted from the new rules. Requiring Eugene and Springfield to change the course of their work mid-stream could be highly problematic in light of the deadline set by HB 3337, existing contracts, and work already completed.

Upon reviewing the Rule, we also have the following general concerns:

Complexity in general: Some of the safe harbors are complex and difficult to understand without further study and discussion. We hope that you will consider this hearing to be a first rather than a final opportunity to accept comments. We, therefore, support recommendation number 3 in the Staff Report.

Segmentation: There are obvious advantages to securing finality at each step of the process leading up to our final decision on whether and how much to expand our jurisdictional shares of the existing acknowledged Eugene-Springfield Metro UGB. However, LUBA decided otherwise in the McMinnville case, and it is very doubtful that anything short of a legislative solution could reliably change that outcome now.

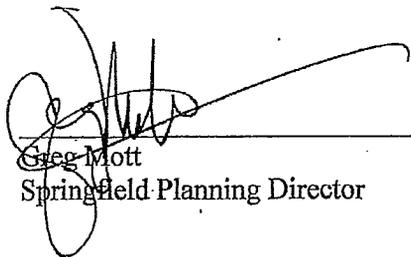
Here are a few of our concerns:

- The draft rule's segmentation and numerous safe harbor provisions are complex and difficult to understand.
- It seems highly unlikely that a court would accept rules stretching the concept of "urban growth boundary amendment" as used in ORS 197.626 to include the adoption of an economic opportunities analysis or other study that might or might not result in a UGB amendment sometime in the future. Because the issue is jurisdictional between the Commission and LUBA, affected decisions could remain open to challenge for an extended period of time.
- If interim decisions are to be final in a way that is useful to cities and counties, then those decisions must also be expeditiously appealable to the Court of Appeals. Unlike LUBA decisions on post-acknowledgement plan amendments (PAPAs), such decisions by LCDC are subject to a long, slow, and very unpredictable appeal process under the Administrative Procedures Act. As a result, the rule's proposal for creating additional opportunities for judicial review along the way to a UGB expansion is likely to risk making many UGB amendments interminable.
- We are concerned that the draft rule may create a situation where both LCDC and LUBA may have jurisdiction over the same work product, thereby unduly confusing and, potentially, significantly delaying the review process.

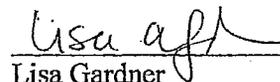
- It is difficult to tell whether the draft rule would eliminate the possibility of conducting an EOA, land inventory, or other study as a PAPA between periodic reviews and have that decision be deemed acknowledged as is currently the case when a city is not involved in a legislative review of a UGB. There are many reasons to do such studies between UGB updates, including transportation planning and reallocating lands to meet changing needs within existing UGBs.

We understand that Portland Metro has responded to the McMinnville ruling and the *Parklane/Dundee* decisions by simply "accepting" residential lands studies, EOAs, and other precursors to legislative UGB amendments as working premises, subject to adjustment, reconciliation, and adoption as part of a single UGB amendment package at the end of the process. In so doing, Metro gives up what may be an illusion of certainty along the way in return for assurance that its final product, including all of the pieces assembled along the way, will be subject to appeal only once, at a time when it is complete and most defensible. At the same time, Metro retains the flexibility to respond to new information and to assure that its plans for the next 20 years are comprehensive, coordinated, and current. Before adopting the new rules, please consider whether other jurisdictions would be better off following Metro's example. At this point in time, this is our preference. Perhaps when the Courts have addressed the issues more thoroughly in pending cases, we will be more supportive of the approach set out in the draft rules.

As a regional metropolitan area, we have worked hard to develop a constructive dialogue with our counterparts at Lane County and DLCDC as we have worked through many issues involved in meeting our obligations under HB 3337. We are looking forward to continuing this dialogue. Reluctantly, we have concluded that while it would be nice to restructure the process so that local governments can know what the Commission, the courts, and LUBA will have to say about individual steps in a legislative review of a UGB, it may be best for all concerned to wait for the additional (and forthcoming) guidance from the Courts as to how such restructuring should take place. We believe it may be better to address the Courts' concerns by clarifying the applicable statutes instead of stretching LCDC's rulemaking authority to a point that is likely to subject our actions to legal challenge. Thank you for the opportunity to comment on the proposed amendments to your Urban Growth Boundary Interpretive Rule.



Greg Mott
Springfield Planning Director



Lisa Gardner
Eugene Planning Director



December 1, 2008

John Van Landingham, Chair
Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem, OR 97301

Chair Van Landingham and Commission Members:

Thank you for the opportunity to participate in Phase 2 of the Urban Growth Boundary (UGB) administrative rulemaking project. There certainly were a diverse array of groups and interests represented in the work group, and the discussions were quite in-depth. A great deal of progress has been made in the work group; however, with a little more time, I feel the recommendations and proposals sent to the Commission would be even more refined.

I apologize for being unable to attend your meeting in Tillamook, but would respectfully ask that any consideration of the proposed new and amended rules on urban growth boundaries be carried over to your next regularly scheduled meeting. The Phase 2 workgroup has a final meeting scheduled for next week (December 10), which will allow a more thorough examination of all of the proposed changes by the entire group.

Should you choose to move forward on the proposed new and amended rules, I would respectfully submit the following comments:

1. Housing "Density" and "Mix"- A great deal of time was spent determining how best to provide guidance to local governments in determination of projected density and housing mix. While the proposal calls for the safe harbors in proposed 660-024-0040(8)(e)-(h) to be linked, each was considered separately on their merits, and stands up to scrutiny individually. In order to best accommodate efficient local government planning, a local government should be allowed to use either of the density safe harbors or either of the mix safe harbors independently.
2. Housing Mix- The percentage increase found in proposed 660-024-0040(8)(h) was proposed in order to reflect upon the existing character and makeup of communities. The 15% in attached housing is substantial, and should represent an increase in the overall percentage of attached housing units in the estimated 20-year housing need.
3. Land Exchange Rules-As noted in the draft proposed new and amended rules, the work group did not discuss this proposal, and I would welcome the opportunity to examine this proposal with the confines of the December 10th meeting.
4. LCDC Review Required for UGB Amendments-The proposed changes to 660-024-0080 were merely in their infancy in the work group process. While some members agreed in principal to certain elements of the proposal, there is still substantial disagreement over this proposed change taken as a whole. The proposed language has not been thoroughly vetted by the work group, and there did not appear to be support for the proposition to further restrict the ability of local governments to responsibly use post-acknowledgement plan amendments.

Again, thank you for the opportunity to provide these comments and to participate in the work group process.

Sincerely,

Shaun Jillions
Legislative Policy Director



Date: December 3, 2008

To: Chair VanLandingham and Members of the Commission

From: Linda Ludwig, Deputy Legislative Director

Re: Agenda Item 7- Proposed Amendments to Division 24

Thank you for the opportunity to provide comments concerning the proposed rule amendments regarding the urban growth boundary amendment process.

Our members- all 242 cities in the state of Oregon- believe that any rule changes relating to UGB amendments should be undertaken with a view toward making it easier for cities to accomplish them procedurally, given the already high bar set by the standards for actually being able to prove and approve an amendment. This has been a compelling and consistent comment from elected officials, city attorneys and city planners alike.

Although the proposed rules contain some good ideas, we do not believe that they are ready for adoption- there are technical errors, policy problems and legal problems- which would have significant detrimental impacts on cities if adopted. We urge the Commission to defer any action at today's meeting and ask the work group and perhaps other interested parties for continued input to investigate options and work to further develop legislative and/or rule amendments.

Our priority concerns are two related legal issues:

1. There are several areas in the rule draft that city attorneys believe greatly overstep statutory provisions, primarily in ORS 197.626. This occurs throughout the draft, most notably in sections:
 - a. Regional EOA proposal- page 6, line 21; page 9, lines 24 & 33;
 - b. UGB adjustments- page 14, line 8;
 - c. LCDC review- page 14, line 17.
 - d. We believe additional time is need to determine whether or not the density safe harbor/ mix safe harbor – pages 7-9, conflict with the less-aspirational provisions of ORS 197.296, for cities over 25,000.

2. It appears that the rule attempts to divest LUBA of jurisdiction in matters that are otherwise under LUBA's jurisdiction. This is concerning because jurisdictional status between LCDC and LUBA cannot be changed or established through rulemaking, and if adopted would likely create a situation of dual jurisdiction- where cities would still have to go through a LUBA process, as well as LCDC review. Our city attorneys maintain that changing jurisdictional status would require careful amendment to state statute, not by rulemaking.

Both of these legal issues, left unresolved would be extremely costly to cities, both in terms of time and money, and would be inconsistent with the Commission's intent in promulgating this second round of Goal 14 rule-making.

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In addition, there are other policy concerns, most of which are outlined in other testimony. Briefly, there are several I'd like to highlight from cities' perspective:

1. Safe harbors
 - a. The required linking of the housing density safe harbor and the housing mix safe harbor is unwarranted. In order to accommodate the variety of existing housing patterns while still incenting greater-than-current densities and mix, a city should be allowed to use either of the density safe harbors or either of the mix safe harbors independently.
2. EOA proposal
 - a. The concept of a regional EOA would better reside within the Goal 9 rule, not Goal 14, page 6, sub 6.
 - b. Cities vehemently object to the safe harbor provisions as written that would put counties in the role of allocating employment land need to cities, page 6, sub 6 and page 9, sub 9 (c).
 - c. The language that describes the defined region within the safe harbor could include large areas of unincorporated land and small areas wholly within or partly within a city- another set of artificial boundaries makes no sense to cities that want to see employment land allocated within city limits, page 6, sub 6.
 - d. Incentives should be the basis for consideration of safe harbors for employment land and/or regional EOAs.
3. UGB adjustments
 - a. Language as proposed would substantially limit, or virtually make non-existent land exchanges as land outside the UGB is rarely if ever zoned with the same type and density inside and outside the UGB (residential) or rarely zoned for industrial use outside the UGB, page 13, sub 3 (a)&(b). This proposal was not vetted by the work group and cities would oppose as written.
4. LCDC review
 - a. Currently there are adequate safeguards in existence that would allow DLCD/LCDC to monitor and appeal a city's decision as a post-acknowledgement plan amendment if there are concerns.
 - b. This approach creates resource problems for cities- individual cities may not have the budgetary resources to prepare and bundle all the studies and plan amendments.
 - c. This approach creates timing problems for cities- the LCDC process (in the manner of periodic review) takes longer than the LUBA process (PAPA). And an appeal of an LCDC decision to the Oregon Court of Appeals takes longer than an appeal of a LUBA decision. This is in addition to the problem of dual jurisdiction- then this concern becomes virtually doubled.
 - d. As drafted, two years after acknowledgment is entirely too short; two years after all appeals are exhausted is more realistic, page 15, line 38.
 - e. The League is awaiting the decision from the Court of Appeals in the *GMK Developments, LLC v. City of Madras*; the court decision will be forthcoming and likely informative.



Marion County OREGON

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November 28, 2008

John H. VanLandingham, Chair
Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, Oregon 97301-2540

Re: Consideration of Administrative Rules regarding Urban Growth Boundaries

Chair VanLandingham and Commissioners:

Marion County Planning staff appreciates the notification of and opportunity to provide comments on the proposed administrative rules regarding the UGB amendment process. Having been involved in the Phase 1 UGB Workgroup discussions and rule amendments, I have been remiss in my participation in the recent Phase 2 UGB Workgroup discussions of further rule amendments to assist local governments with the UGB amendment process. Nonetheless, I would like to provide the Commission with some comments and thoughts on the proposed amendments under consideration.

In 2002 Marion County adopted an Urban Growth Management Framework as part of the Urbanization Element of our Comprehensive Plan. The Framework is the County's coordination strategy for addressing growth and comprehensive planning issues with the 20 cities within our boundaries. The Framework also sets forth voluntary guidelines in the areas of housing, economic development, transportation and environment to assist cities with plan updates or UGB amendments and the County review process. Since the adoption of the Framework, the County has processed seven (7) UGB amendments for six (6) cities with several other city UGB amendment proposals forthcoming. The County is also coordinating once again, the adoption of new population forecasts for the cities and the unincorporated area based on a study prepared by the Portland State University Population Research Center for the County. I mention these items as reference since the comments being provided have foundation in the County's experiences with these related planning activities.

For ease of review and comment, the following is a page by page look at the November 16, 2008 Draft of proposed new and amended rules:

Page 2 under the Definitions section, items (3) and (5) both define "detached single family housing" and should be combined under item (3). If the definition list is alphabetical, then item (6) should follow item (3).

Page 4, Lines 20-27 under the Population Forecasts section: Allowing for a determination of compliance of a forecast under the rule provides flexibility and a reasonable approach toward a decision, without being held up due to a technical or minor requirement inconsistency that has no effect on the size of the UGB amendment proposal. This would allow the process to move forward based on the relevant requirements. A potential issue may be in how technical or minor is defined in order to avoid challenges to decisions of judgement under this provision.

Page 4, item 3 under the Population Forecasts section: Though this item on population forecast safe harbor is not proposed for amendment, item (3)(b) could use clarification as to what "using the same growth trend" means and/or the application of such a trend. The issue has come up in the County's discussion with various cities on the application of this safe harbor. Generally, this provision is implemented by utilizing the adopted average annual growth rate and extending the rate out over the additional years to be covered by the forecast or plan. This may be a reasonable application if the existing population trend is in line with the previously adopted growth rate. In situations where the growth either exceeds or is below the rate, rather than extend the adopted rate, it may be more practical or reasonable to establish the current population estimate as the base year and apply the growth trend/rate to that year as the starting point for the forecast. However, using this approach also has its shortcomings in the development of a reasonable forecast. As population studies provide better data to support forecasts and are able to provide more detailed forecasts that break the forecasts out into five-year segments with growth rates for the various segments of a forecast, it is typical of long-term forecasts that the growth trend/rate of the forecast actually varies over the forecast period. Typically, a higher growth rate is forecast over the initial segment of the forecast with a declining rate over the later years in the forecast (in part due to an increasing base population number) that are combined into an average growth rate for the forecast period. It may be a more reasonable safe harbor approach to extend the lower growth rate applied to the later years in the forecast rather than apply the average growth rate for the entire adopted forecast in order to coordinate a reasonable forecast for a jurisdiction under this provision of the rule. Allowing for flexibility in this safe harbor would eliminate different interpretations as to how this safe harbor is applied or should be applied.

Page 6, item 6 under the Land Need section: Allowing for a regional EOA to be conducted involving several jurisdictions is an approach that makes good planning sense when addressing employment and land needs for economic development. Too often, the County is seeing individual city EOAs being conducted that contain the same information and strategies focused on similar target industries (often aspirational) and land needs in competition with each other. As the economic development and employment markets change, the approach as to how these market components are determined need to change to benefit local jurisdictions. A single EOA involving several cities within an area/subarea of the county is a good approach and allows cities to pool resources, work together, and develop a strategy tailored to the assets of the area. Regional or area chambers of commerce and economic development groups are already structured in this manner and EOAs should be conducted in a similar manner.

A county concern with a coordinated regional EOA involving more than one city is the actual county involvement and role regarding such an EOA. A countywide EOA could become an

integral element of a county comprehensive plan from which to formulate policy and coordinate economic development activities with cities. With regard to regional or area EOAs involving more than one city, the question is one of what the purpose of the EOA is for. EOAs are used by cities to determine employment land needs and to justify UGB amendments for employment lands, whereas a county is not looking to expand its boundaries or develop resource lands for employment unless the two are related and of mutual benefit. Counties currently coordinate a variety of planning activities with cities and to add the EOA process and possible coordination of employment land needs and employment numbers between various cities under a regional/area EOA, thrusts the counties into another allocation battle with cities who want to be able to determine their own futures under their own terms, without county involvement as currently allowed under the provisions of Goal 9. County adoption along with coordination and implementation of a regional EOA versus simple concurrence with an approved EOA is a significant difference in how a county may choose to support this proposed provision of the rule. A further thought with regard to a regional or area EOA to consider is the inclusion of an employment center/city as part of the regional EOA or factors common to cities within the region, such as a transportation corridor, locational considerations such as canyon cities, or neighboring urban metropolitan influences.

Page 7, item 8 (e) and (f), average density safe harbor under the Land Need section: County coordination and discussion of housing density with cities is a difficult issue to navigate through. The establishment of guidelines and safe harbors with regard to density will be viewed as the minimum thresholds for compliance and tend to be looked at differently by cities. In general, the smaller cities see the safe harbors as providing guidance, while larger cities advocate for flexibility with regard to the application of any density provision. The average density safe harbors applicable to cities based on forecast population size in the proposed rule have comparative similarity to the land efficiency guidelines adopted by the County as part of its Growth Management Framework. This year, the County amended the land efficiency guidelines by modifying the city size categories and dwelling units per acre guidelines to reflect a range rather than absolute number, to provide flexibility for cities in addressing residential land efficiency.

The approach proposed for average density application in the rule is a good one as the safe harbor stipulates simply the density to be used to estimate residential land need for the planning period tied to the population forecast. The application of the safe harbor is simple and easy to calculate, rather than specifying an average density safe harbor target or guideline that cities would have to achieve to comply with the rule. That being said, the issue is whether the average density safe harbors being considered are appropriate for the city size categories set forth in the rule.

Generally, there is greater variation in the components of smaller cities than larger cities as to services provided and market influences. Consideration of an additional city size and average density category for smaller cities may be appropriate. Though the average density safe harbor applied to determine land need is clear, the average overall density and minimum average overall density safe harbor provisions for the city size categories are not as clear (defined) and may be difficult to determine, apply and review. There are many components to housing density and land efficiency and the provision for overall average and minimum density safe harbors to be allowed or adopted may be more difficult to adhere to

and apply under this section of the rule and perhaps should be a separate safe harbor item in the rule as they address a different aspect of a community's housing component.

An analysis of residential land efficiency utilized by cities in the County that have recently gone through the UGB amendment process, indicates compliance for the most part with the proposed safe harbor density provisions. The difficulty with density safe harbors under the rule is the variability of cities based on size and even with equivalent sized cities, as to location. Density is a factor that should allow for flexibility and avoid the application of set standards or an urban area model to all jurisdictions. Alternately, does close enough comply with the requirement if it is a single numerical standard or is it acceptable to round up or down to meet the average density provision.

The average density safe harbor under (8)(e) does not include a provision for local governments with a forecast of 100,000 or more. Is the assumption then that a safe harbor if any would be incrementally greater than that applied to the 25,000 to 99,999 forecast category or alternatively, just use the safe harbor under (8)(f).

The alternative average density safe harbor under 8(f) of an increase by 25% over the current average density of a city appears reasonable though it is a likely option for smaller or larger cities with low current average densities, since it would result in a larger estimated land need than applying the higher average density under 8(e).

Page 7 and 8, item 8 (e)(A) and 8 (g)(A), wording clarification: Current wording reads "2,500 people or fewer" and should be stated as "fewer than 2,500 people" as a size group for consistency with the other size groupings.

Page 8, item 8 (g) and (h), housing mix safe harbor under the Land Need section: A safe harbor for housing mix (attached housing as a percentage of total estimated housing) tied to the density safe harbor conceptually is a good fit, but in reality would be a provision that may not be that useful or helpful to local governments. The proposed housing mix percentages for the size categories are not likely to be used as cities in the County, according to recent UGB amendment analysis, do not come close (within 10%) to the proposed safe harbor percentages that appear to be scaled from a highly urbanized area model that does not apply well to smaller housing markets. Residential land efficiency is a requirement under Goal 14 and there is a need to provide for a variety of housing types, however housing mix and a safe harbor should allow for flexibility (perhaps a housing mix percentage range) rather than an absolute percentage. The proposed housing mix safe harbor is likely not to be used by local governments and if safe harbors are viewed as a minimum requirement, the proposed housing mix percentages will not be viewed as a useful tool by cities. In the alternative, most cities are likely to look at (8)(h) as a possible safe harbor or disregard this provision of the rule entirely and propose a housing mix that is closer to existing percentage mixes within their cities taking their chances in the review process.

Page 9, item 9 (c), participation in a coordinated regional EOA under the Land Need section: The concern with this provision of the proposed rule (as stated previously in this letter on the regional EOA issue) from a county standpoint is that it puts counties into a process and position of coordinating, mediating, allocating employment and land issues with

regard to city plans and needs. A county or counties may participate in a regional EOA but is not the driving force behind a regional EOA or the purposes and tasks for which the EOA is being developed for the cities involved. A county does not acknowledge, approve or adopt an EOA, therefore the county role in the regional EOA process as set forth in the proposed rule amendment would need further scrutiny and discussion.

Page 11, item 6, under the Land Inventory and Response to Deficiency section: As stated previously in this letter regarding population forecasts, to allow for a compliance determination to be made on estimated needs and the amount of land and development capacity for the UGB amendment, where the difference is minor and insignificant, allows the process to move forward based on relevant and defensible requirements. As noted before, it could be problematic depending on how and what judgement is utilized to determine what may be a minor and insignificant difference under this provision.

The County has no comments on the remainder of the proposed amendments to the rules covering UGB Adjustments or LCDC Review Required for UGB Amendments (pages 13-15 of the Draft). On page 14, item 3(d) under the UGB Adjustments section, there are extra words "type means" at the end of line 6.

Marion County would be specifically interested in the feedback and input the Commission receives from cities regarding the density and housing mix safe harbors. The County's experience in addressing these issues with cities as part of our growth management framework adoption process indicated the sensitive nature surrounding the density issue. The proposed safe harbors and amendments are intended to clarify and streamline the UGB process and reduce costs to local governments, so their input into these rule amendments is a crucial element that needs to be asked for and considered if these safe harbors are to be useful to local governments.

If I can provide further clarification on any items in this letter, please let me know. Again, thank you for the opportunity to provide the Commission with comments on the proposed rule amendments.

Respectfully,



Les Sasaki
Principal Planner
Marion County PW/Planning

2110 Mission St. SE #310
P.O. Box 351
Salem, Oregon 97308



December 1, 2008

John Van Landingham, Chair
Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem, OR 97301

Chair Van Landingham and Commission Members:

Thank you for the opportunity to participate in Phase 2 of the Urban Growth Boundary (UGB) administrative rulemaking project. There certainly were a diverse array of groups and interests represented in the work group, and the discussions were quite in-depth. A great deal of progress has been made in the work group; however, with a little more time, I feel the recommendations and proposals sent to the Commission would be even more refined.

I apologize for being unable to attend your meeting in Tillamook, but would respectfully ask that any consideration of the proposed new and amended rules on urban growth boundaries be carried over to your next regularly scheduled meeting. The Phase 2 workgroup has a final meeting scheduled for next week (December 10), which will allow a more thorough examination of all of the proposed changes by the entire group.

Should you choose to move forward on the proposed new and amended rules, I would respectfully submit the following comments:

1. Housing "Density" and "Mix"- A great deal of time was spent determining how best to provide guidance to local governments in determination of projected density and housing mix. While the proposal calls for the safe harbors in proposed 660-024-0040(8)(e)-(h) to be linked, each was considered separately on their merits, and stands up to scrutiny individually. In order to best accommodate efficient local government planning, a local government should be allowed to use either of the density safe harbors or either of the mix safe harbors independently.
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4. LCDC Review Required for UGB Amendments-The proposed changes to 660-024-0080 were merely in their infancy in the work group process. While some members agreed in principal to certain elements of the proposal, there is still substantial disagreement over this proposed change taken as a whole. The proposed language has not been thoroughly vetted by the work group, and there did not appear to be support for the proposition to further restrict the ability of local governments to responsibly use post-acknowledgement plan amendments.

Again, thank you for the opportunity to provide these comments and to participate in the work group process.

Sincerely,

Shaun Jillions
Legislative Policy Director

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Oregon

Theodore R. Kulongoski, Governor

Department of Transportation
Transportation Development Division
Mill Creek Office Building
555 13th Street NE, Suite 2
Salem, OR 97301-4178

FILE CODE:

November 28, 2008

John VanLandingham, Chair
Land Conservation and Development Commission
c/o Bryn Cruz Gonzales, DLCD
635 Capitol Street NE Suite 150
Salem, OR. 97301

NOV 28 2008

Dear Chair VanLandingham;

Having participated in the DLCD work group discussing and drafting the proposed amendments to OAR 660 Division 24 regarding Urban Growth Boundary Adoption and Amendment, I support the two proposed changes relating to additional safe harbors for housing density and housing mix (OAR 660-24-0040 (8) (e and f)). It is important for local governments to have options to efficiently plan for UGB expansions.

However, I would like to call the Commission's attention to the section of the division, 660-24-0040-(7) immediately above the proposed rule amendment, which says in part "The determination of 20 year land needs for transportation and public facilities for an urban area must comply with applicable requirements of Goals 11 and 12, rules in OAP 660 divisions 11 and 12....". The wording of the proposed amendment does not connect the proposed safe harbor for housing in 0040 (8) (e and f), back to the requirements for transportation and public facilities in 0040-(7). An analysis of how local government utilization of this new safe harbor for housing density and housing mix would affect the determination of 20-year land needs for transportation and public facilities is not included in the proposed Amendment, but is appropriate and important.

As proposed, the amendment would continue a recently adopted practice (2006) of not requiring a Transportation System Plan update nor comprehensive analysis under the requirements of the Transportation Planning Rule, see 660—24-0020 1 (d). Continued use of safe harbors for UGB expansion without full consideration of their effects on transportation systems and facilities will simply delay fruitful coordination and consultation between local governments and state agencies such as ODOT. Waiting for a rezone of land currently zoned "urbanizable" or the removal of interim zoning placed on an UGB expansion area before conducting a goal 12 analysis would be inefficient.

The Department of Transportation is beginning to review the potential of utilizing a Least Cost Planning (LCP) approach to project and/or long range planning. LCP may indicate one of the most cost effective means to meet local and state transportation goals is to address land uses, including conditioning of expansions of Urban Growth Boundaries to demonstrations of adequate coordination of transportation and land use planning.



It appears that the department is also recommending a safe harbor for local governments participating in a "coordinated regional Economic Opportunities Analysis" (EOA) see 660-24-0040-9 (c). A coordinated, regional EOA could be a effective tool for identifying sensible regional locations for employment centers. It could be an effective tool for identification of the financial and infrastructure needs, strategies and solutions for a region and/or corridor. It could be an effective tool for strengthening the economic resiliency of a region. Approaching employment and land needs identification from a regional and not just a local government perspective magnifies the impacts of decisions based on the analysis. Our work group sensed the complexities of such an EOA, discussed the need for defining what a competent and thorough EOA would consider, had suggestions for the types of agencies and organizations who should participate in an EOA and chose to not recommend forwarding this safe harbor to the Commission at this time. I'd encourage the Commission to continue a discussion of how to develop coordinated, regional EOAs, setting some guidelines for the discussion which would include participation by agencies such as the Department of Transportation.

If the goal of the proposed addition of 660-024-0080 regarding when LCDC review will or will not be required for UGB amendments is introducing certainty into the amendment process; I'd support that goal with one caveat. That is, each element such as housing or employment needs analysis, regional EOA, buildable lands inventory, should be developed in full consultation with agencies responsible for the provision of infrastructure such as ODOT. Each element should realistically address the financing of infrastructure to support an expanded UGB.

Thank you for the opportunity to explain a number of concerns and provide recommendations for the Administrative Rule Language.



Robert Maestre
Oregon Department of Transportation
Long Range Planning Manager
Transportation and Growth Management Program

cc:
Jerri Bohard
Oregon Department of Transportation
Transportation Development Division Administrator

Barbara Fraser
Oregon Department of Transportation
Planning Section Manager

Marilyn Worrix, Chair
LCDC Goal 14 Rulemaking 2008 Work Group



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VIA EMAIL

December 3, 2008

Chair VanLandingham and Members of the Commission
 Oregon Department of Land Conservation and Development
 Suite 150
 635 Capitol Street NE
 Salem, OR 97301-2540

Re: Proposed Amendments to Division 24

Dear Chair VanLandingham and Members of the Commission:

This letter provides comments on the proposed amendments to Division 24, submitted on behalf of the Retail Task Force (RTF), the International Council of Shopping Centers (ICSC) and an assortment of developers of commercial and industrial property who are regularly represented by this office. We are certainly in support of any proposal that would simplify the existing cumbersome process for expanding an urban growth boundary (UGB). However, our review of the amendments indicates that the proposed rule would benefit from further review and clarification by staff and counsel for the Commission.

Our primary concern relates to the section addressing "segmented" adoption of components of a UGB expansion. Specifically, under proposed section 0080, it appears that the new definitions of a "UGB amendment" could be triggered when a private applicant proposes a comprehensive plan map amendment affecting more than two acres of industrial or employment land. Under the existing Goal 9 rule, such an amendment requires the applicant to prepare an economic opportunities analysis (EOA), which must be adopted by the local government as part of its comprehensive plan. OAR 660-009-0010(4).

Our concern is that, under the language of proposed OAR 660-024-0080(3), the adoption of an EOA required by the Goal 9 rule for a quasi-judicial plan map amendment arguably fits within the definition of a "UGB amendment," which must be submitted to LCDC in the manner provided for periodic review under ORS 197.628. This is particularly the case if the EOA identifies a need for more than 50 acres of industrial or employment land. Although this may not

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Perkins Coie LLP and Affiliates

Chair VanLandingham and Commissioners

December 3, 2008

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be the intent of the drafters or the Commission, the language as proposed creates an ambiguity that could be easily exploited by opponents of a proposed development project, who would raise this jurisdictional argument in an appeal to LUBA as part of an attempt to delay or kill an otherwise approvable and beneficial project.

We request some additional time to discuss this language with staff and counsel for the Commission in order to ensure that the proposed rule does not create new and unintended problems in the name of streamlining the UGB amendment process. Thank you for your consideration of these comments.

Very truly yours,



Mark D. Whitlow

MDW:djf

cc: ICSC
Retail Task Force



December 1, 2008

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

Re: Proposed Goal 14 Rule Amendments (Agenda Item # 7)

Dear Chair VanLandingham and Members of the Commission:

As a planner with expertise in housing, economic development and growth management issues, I have participated actively over the last five years on the Goal 14 Committee. It is my understanding that Terry Moore of ECONorthwest, who also serves on the Goal 14 Committee, will be submitting a separate letter that is generally supportive of the recommendations below.

I also serve as the President of the Oregon Chapter of the American Planning Association (OAPA). The OAPA Board has reviewed and is supportive of the views expressed in this letter.

The OAPA Board, Terry Moore and I support the concept of providing residential density and housing mix "safe harbors" in the Goal 14 (Urbanization) administrative rule. Safe harbors provide an *optional* means for local governments to streamline the process of amending their respective urban growth boundaries (UGBs) while helping to achieve the affordable housing and urban efficiency objectives that are integral to Oregon's nationally recognized statewide planning program. Effective safe harbors reduce the costs to local and state governments when planning for UGB expansions, and allow all levels of government to focus on planning for livable and efficient communities within adequately-sized UGBs.

However, we have concerns with specific rule provisions. Like many legislative proposals, the specific language set forth in the draft rule was proposed late in the Committee's review process, and in some cases has not been reviewed *at all* by the Committee. We have identified a number of conflicts among definitions proposed in the Goal 14 rule and those already found in the Goal 9 and 10 rules.

Therefore, we recommend that the Commission provide direction to the Goal 14 Committee to review specific language related to housing density and mix safe harbors, the regional EOA safe harbor, and the process for sequential adoption of required studies that are necessary for a successful UGB amendment.

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Residential Density Safe Harbor

With the caveats listed below, we support the residential density safe harbors offered in draft OAR 660-024-040(e)-(f) as a means for determining the amount of land needed for a 20-year housing supply. Arguments over density assumptions often impede the timely adoption of UGB amendments, making it difficult to maintain a continuous 20-year supply of buildable land as required by state law. We have reviewed the proposed density ranges and find them to be generally consistent with density assumptions that have been acknowledged by the Commission over the years for various sized communities. We also support the minimum density provisions prescribed in the draft rule.

We do, however, have two concerns with the density safe harbors – and two corresponding suggestions for improvement:

1. **Adjustments should be made for highly-parcelized exception areas.** Including exception areas within UGBs minimizes the amount of resource land that will be needed to meet long-term urban growth needs. This is a good thing. However, highly-parcelized exception areas are costly to serve, have residents who frequently oppose annexation to cities, and typically develop at lower densities than undeveloped farm and forest land. These realities create a huge disincentive for cities to include exception areas within UGBs. These realities were recognized in the Commission’s review of both the Portland Metro and Woodburn UGBs, where densities were projected in the three units per acre range for exception areas. While the density safe harbors in Section 040(e) make sense for larger parcels, they are not achievable in developed rural residential areas with parcel sizes averaging below five acres.

Recommended Change: Adjust the density safe harbor to allow local governments to have the option, when mapping exception areas with parcel

sizes of five acres or less, to assume that densities within such exception areas will occur at half the applicable “safe harbor” density. Thus, a community with a safe harbor density of six units per net buildable acre could use a safe harbor density of three units per net acre in exception areas with parcel sizes of five acres or less. We would like to underscore that the density assumption would be used for estimating capacity in exception areas, but not for limiting the planned or zoned density of those properties. In our view, if this adjustment is not made, most local governments would chose not to use the density safe harbor – because it would be unrealistically high.

2. **Adjustments should be made for high value farm land.** A similar logic applies in reverse to high-value farm land. High-value farmland is, in most cases, flat and buildable. So, it makes sense that high value farm land – if it must be included within a UGB to meet residential land needs – should be required to develop more efficiently.

Recommended Change: We recommend that the safe harbor be amended to require local governments to adopt minimum density standards for high value farm land that are equal to or higher than the overall safe harbor density applicable to the community. For example, under draft Section 040(e), a city with a safe harbor density of six units per net buildable acre would be required to adopt a minimum density of six units per net buildable acre on high-value farm land included within the UGB.

In summary, the density safe harbors would be used to estimate the amount of residential land needed for housing within a UGB. The minimum density standard for high value farmland would be a condition attached to the density safe harbor – not a separate safe harbor. So, if a city decides to use the density safe harbor, then the city must also accept two conditions: (1) adopt an overall minimum density standard of two units per acre less than the assumed base safe harbor density, and (2) adopt a minimum density standard on high value farm land that equals or exceeds the overall the safe harbor density. Using the example of a community with a base density standard of 6 units per net buildable acre, the overall minimum density would be 4 units per net buildable acre, and the minimum density applied only to high value farm land would be 6 units per net buildable acre.

Housing Mix Safe Harbor

We support the concept of housing mix safe harbors provided they are based on local government's providing the *opportunity* to achieve housing mix objectives under clear and objective zoning standards, rather than dictating market expectations. As we understand it, the purpose of the housing mix safe harbor is to allow local governments to rely on what amounts to a state-authorized housing needs analysis, and thereby reduce local costs associated with the preparation and defense of a local HNA.

The proposed rule needs refinement to accommodate all needed housing types identified by statute and rule. The Housing Rule (OAR 660-008-005) identifies three primary "needed housing types" that must be considered in the HNA and permitted under clear and objective standards by local zoning:

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Needed housing types and density are directly related. Multiple family housing (except, perhaps, duplexes) typically occurs at densities of greater than 12 units per acre. Manufactured dwelling parks are required by statute in zones that allow 6-12 units per acre. Local zoning that allows for housing development at 6-12 units per acre typically allows attached single family (rowhomes), duplexes and small lot detached single family housing.

The specific problem: the proposed rule creates two general housing types (detached single family and attached single family) and subsumes multiple family housing and manufactured dwelling parks under the general definition of "attached single family" housing. The problem with the draft housing mix safe harbor is that it does not recognize that multiple-family housing typically occurs at higher densities than attached single family housing (rowhomes) and that manufactured dwelling parks typically occur at about the same densities as attached and small lot single family (6-12 units per acre).

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Our alternative proposal: We propose a safe harbor alternative that accounts for multiple-family housing and manufactured dwelling parks by establishing three mix / density categories (a zoning structure commonly found in local codes):

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Under this proposal, a local government that chooses to implement the housing mix / density safe harbor would have demonstrated that it had zoned enough land to provide the *opportunity* for housing mix / density targets to be met under clear and objective standards. The exact designations listed above (Low, Medium and High Density) would not need to be adopted, but the local government would need to show how its unique zoning structure can accommodate the mix and density provisions of the applicable mix / density safe harbor.

Thus, the housing *density* safe harbor would be used to determine the amount of land included within the UGB to meet 20-year land needs, and the housing *mix / density* safe harbor (if selected by local government) would demonstrate that the City had zoned land so that housing affordability and efficiency objectives can be met. In the words of ORS 197.296, “land use regulations [would] include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years.”

As in the draft rule, the assigned mix / density ratios would be based on the size of the community. For example, a community with a 20-year population projection of 2,500 – 10,000 might be offered the safe harbor option of zoning land to allow the *opportunity*

for: up to 65% Low Density Residential (large lot single family, including manufactured dwellings); at least 20% Medium Density Residential (attached and small lot single family, duplexes, and manufactured dwelling parks); and at least 15% high density residential (multiple family). By zoning land in this manner, and by implementing the minimum density standard prescribed in the density safe harbor, a city will have demonstrably increased the likelihood that residential densities will be sufficient to accommodate identified housing needs.

Of equal importance, there would be a strong local incentive to adopt such measures: *if* the community designates sufficient buildable land in each of the assigned mix /density categories (under clear and objective standards) and adopts prescribed minimum density standards, *then* it will have adopted adequate “efficiency measures” to meet statutory (ORS 197.296) and Goal 10 / 14 requirements.

Under this proposal, the Commission would, for the first time, provide an objective measure of what it means to adopt adequate efficiency measures to support a UGB amendment. This approach has the advantage of encouraging local governments to zone sufficient land to accommodate “needed housing types” within a proposed UGB, while providing certainty to local governments, housing developers, the public and the state regarding expected zoning outcomes.

We are in a time of scarce state and local resources: this proposal would allow local governments to focus on planning for efficient land use within UGBs, rather than devoting limited resources to Oregon’s highly uncertain UGB amendment process.

We recommend that the housing mix safe harbors described in Section 040(g) be returned to the Goal 14 Committee for more work. We do not support the required “link” between the density and mix safe harbors as set forth in the draft rule. However, if the linkage resulted in a presumptive determination by LCDC that a local government had adopted adequate “efficiency measures” to comply with statutory (ORS 197.296) and Goal 10 and 14 rule requirements, this would provide a huge incentive for local governments to choose the option of adopting the density and mix safe harbors in tandem.

Recommendation: We recommend that the Commission send the proposed housing mix safe harbor back to the Goal 14 Committee to ensure that multiple family housing and manufactured dwelling parks are considered in the safe harbor proposal.

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We recognize that the proposed regional EOA safe harbor is optional. However, we would also like to make it useful to the cities which provide land for most of the new employment in Oregon. Therefore, we suggest that the draft language in Section 050(c)(B) and (C) be modified. The new language should state that cities *may* rely on the regional employment projection, the regional analysis of state and national trends, the regional identification of comparative advantages, the regional targeting of employment opportunities, *and/or* the regional determination of site requirements for targeted employment identified in an acknowledged regional EOA.

However, the safe harbor should not *require* the "allocation of the total regional employment forecast and employment land need among the participating urban areas." This proposal, if adopted by the Commission, would likely serve as a basis for technical assistance and periodic review grants that would squeeze cities out of the process – unless they were willing to accept a regional allocation by the county. We think this is a really bad idea. The idea of county allocation of employment land was not thoroughly vetted by the Committee; had it been, we do not believe it would be before this Commission in its current form.

Recommendation: Allow cities to rely on discrete elements of an acknowledged regional EOA, rather than placing counties in the role of allocating employment projections and land needs to constituent cities.

Sequential Review and Acknowledgment Process

The proposed rule would extend DLCDC's interpretation of the *McMinnville* decision (which is different than LUBA's) to include economic opportunities analyses as well as housing needs analyses. The proposed rule language would make it impossible for cities

to adopt an EOA, HNA or buildable lands inventory through the PAPA process – unless they were sure that these studies would not result in a UGB amendment of more than 50 acres.

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There are a few problems with this approach:

- Cities may not have the resources to prepare and bundle all of the required studies and plan amendments;
- The LCDC process takes longer than the LUBA process; and
- Appeal of an LCDC decision to the Oregon Court of Appeals takes longer than appeal of a LUBA decision.

As noted in Footnote 7, page 15 of the draft rule, almost all of the Goal 14 Committee members present voted against the inclusion of Section 080 at this time, and concurred that any rule-making on this issue should occur after the Oregon Court of Appeals has reviewed LUBA’s decision in the *Madras* case. We would add that until recently, DLCD had encouraged the sequential adoption of required studies and plan elements. We are aware of only a couple of cases where this approach has created problems for DLCD – McMinnville and Grants Pass. We are unaware of any “pattern of action” on the part of local governments to “game the system” by sequential adoption of foundational studies and plan amendments that *may* eventually result in UGB amendments.

Although it is often advisable to bundle such amendments – it is not always practical. The purpose of the Goal 14 rule amendment process was to streamline the UGB amendment process – primarily by adoption of useful safe harbors. The Section 080 proposal has strong local opposition at a time when LCDC should be building coalitions with local governments on important policy issues such as climate change, energy conservation and performance-based infrastructure financing. In our view, this is not the time to be adopting new rules that complicate, rather than simplify, the UGB adoption process.

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In closing, we would like to thank the staff and Commission for considering our comments and proposals. We urge you to provide policy direction and return the draft rule to the Goal 14 Committee. We believe that the issues raised in this letter can be resolved in a single Committee meeting, and look forward to timely adoption of rule amendments at the next Commission meeting.

Sincerely,



Greg Winterowd





December 1, 2008

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

Re: Proposed Goal 14 Rule Amendments (Agenda Item # 7)

Dear Chair VanLandingham and Members of the Commission:

As a planner with expertise in housing, economic development and growth management issues, I have participated actively over the last five years on the Goal 14 Committee. It is my understanding that Terry Moore of ECONorthwest, who also serves on the Goal 14 Committee, will be submitting a separate letter that is generally supportive of the recommendations below.

I also serve as the President of the Oregon Chapter of the American Planning Association (OAPA). The OAPA Board has reviewed and is supportive of the views expressed in this letter.

The OAPA Board, Terry Moore and I support the concept of providing residential density and housing mix "safe harbors" in the Goal 14 (Urbanization) administrative rule. Safe harbors provide an *optional* means for local governments to streamline the process of amending their respective urban growth boundaries (UGBs) while helping to achieve the affordable housing and urban efficiency objectives that are integral to Oregon's nationally recognized statewide planning program. Effective safe harbors reduce the costs to local and state governments when planning for UGB expansions, and allow all levels of government to focus on planning for livable and efficient communities within adequately-sized UGBs.

However, we have concerns with specific rule provisions. Like many legislative proposals, the specific language set forth in the draft rule was proposed late in the Committee's review process, and in some cases has not been reviewed *at all* by the Committee. We have identified a number of conflicts among definitions proposed in the Goal 14 rule and those already found in the Goal 9 and 10 rules.

Therefore, we recommend that the Commission provide direction to the Goal 14 Committee to review specific language related to housing density and mix safe harbors, the regional EOA safe harbor, and the process for sequential adoption of required studies that are necessary for a successful UGB amendment.

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