



Oregon

Kate Brown, Governor

Department of Land Conservation and Development

Director's Office

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: 503-373-0050

Fax: 503-378-5518

www.oregon.gov/LCD

July 18, 2019

TO: Land Conservation and Development Commission
Metro Council
Parties of Record

FROM: Jim Rue, Director
Gordon Howard, Community Services Division Manager



SUBJECT: **Agenda Item 11, July 25-26, 2019 LCDC Meeting**

PORTLAND METRO URBAN GROWTH BOUNDARY AMENDMENT SUPPLEMENTAL REPORT RESPONDING TO EXCEPTIONS

I. AGENDA ITEM SUMMARY

A. Type of Action and Commission Role

The matter before the Land Conservation and Development Commission (LCDC, or commission) involves an amendment to the Portland Metro Urban Growth Boundary (UGB) amendment submittal. The Department of Land Conservation and Development (DLCD, or department) issued a report recommending approval of the amendment and responded to objections to the submittal on July 1, 2019. As provided in OAR 660-025-0160(4), the department provided the report to those who submitted valid objections at least 21 days before the commission hearing. OAR 660-025-0160(5) provides the objectors 10 days to submit "exceptions" to the director's report. This is an opportunity to allege errors in the director's report.

The department received six exceptions to the director's report. These are available online with links provided in Attachment B. OAR 660-025-0160(5) provides that "the department may provide the commission a response or revised report at or prior to its hearing on the referral or appeal." This report supplements the director's report with the department's response to the exceptions.

Three of those exceptions, from 1000 Friends of Oregon, Housing Land Advocates (HLA), and Michael Donoghue, require further discussion and analysis. The department does not find cause to additionally address the other exceptions received from Marion County, the City of Wilsonville, and the City of Hillsboro as the objectors did not substantially advance their previously articulated objections.

Additionally, this staff report includes, as Attachment A, a response dated March 27, 2019, from Metro to the original objections, as is authorized by OAR 660-025-0130(4), which was inadvertently omitted from the original staff report.

B. Staff Contact Information

If you have questions about this report, please contact Jennifer Donnelly, DLCD Regional Representative, at 503-725-2183, or jennifer.donnelly@state.or.us; or Anne Debbaut, DLCD Regional Representative, at 503-725-2182, or anne.debbaut@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

The department continues to recommend approval of Metro's Ordinance No.18-1427 and the associated findings of fact and conclusions of law, rejecting the seven filed objections.

III. CONSIDERATION OF EXCEPTIONS

A. 1000 Friends of Oregon

1. Compliance with the Metropolitan Housing Rule

1000 Friends of Oregon asserts that the department has changed its position on the issue of whether Metro has a legal obligation to ensure compliance with the Metropolitan Housing Rule provisions, particularly the provision requiring certain levels of residential density amongst individual cities and counties within its boundary (OAR 660-007-0035, the "6-8-10" rule).

Response:

The department acknowledges a change in its stance on this issue between the issuance of its letter to Metro in December 2018, and this staff report. The department recommended that Metro take measures to ensure that the cities proposing expansions to the Metro UGB in their regions were in compliance with OAR 660-007-0035 minimum density requirements. Metro's eventual condition of approval on this issue reads as follows:

As the four cities conduct comprehensive planning for the expansion areas, they shall regularly consult with Metro Planning and Development staff regarding compliance with these conditions, compliance with the Urban Growth Management Functional Plan, compliance with the state Metropolitan Housing Rule, and use of best practices in planning and development, and community engagement. To those ends, cities shall include Metro staff in advisory groups as appropriate.

This condition falls short of the department's recommendation in our December 2018 letter. However, in reviewing the specific language in OAR 660-007, the Metropolitan Housing Rule, the department believes that the structure of the rule places the duties of compliance with OAR 660-007-0035 upon the cities and counties of Metro, not Metro itself. Metro's duties under the Metropolitan Housing Rule, in OAR 660-007-0050, do not include an obligation to monitor and enforce city and county compliance with OAR 660-007-0035, but speak primarily to regional coordination.

Despite this lack of legal underpinning for a Metro obligation to enforce and comply with OAR 660-007-0035, the department would have been more inclined to press this issue if there were no other method available to the department for enforcing the provisions of OAR 660-007-0035 upon local jurisdictions within Metro. However, there clearly is such a method. All four cities responsible for implementation of concept plans in the UGB expansion areas will be required to adopt amendments to their comprehensive plans and land use regulations. Prior to such adoptions, those cities must submit proposed amendments to the department as comprehensive plan amendments. The department will review and provide comments on those submittals, analyzing compliance with OAR 660-007-0035, the remainder of the Metropolitan Housing Rule, and other statewide planning goals. If a city eventually adopts plan amendments that do not comply with OAR 660-007-

0035, the department could recommend that the commission authorize an appeal of that adoption to the Land Use Board of Appeals.

Additionally, the department sends notices received by local governments to interested parties that have asked to receive such notices. If these parties do not believe that the local government's adoption complies with OAR 660-007-0035, they may also raise that issue in an appeal to the Land Use Board of Appeals.

Given the lack of legal underpinning for the interpretation of the Metropolitan Housing Rule as advocated by 1000 Friends of Oregon, along with the clear availability of an alternative method for ensuring compliance with the rule, the department continues to recommend the commission reject this objection.

2. "Periodic Review"

1000 Friends of Oregon comes to an alternative reading of OAR 660-007-0050, governing Metro's regional responsibilities under the Metropolitan Housing Rule, by quoting OAR 660-007-0050(1), which reads:

(1) At each periodic review of the Metro UGB, Metro shall review the findings for the UGB. They shall determine whether the buildable land within the UGB satisfies housing needs by type and density for the region's long-range population and housing projections.

The exception asserts that, since this is a Metro periodic review of its UGB, Metro has responsibility for assuring compliance with OAR 660-007-0035.

Response:

1000 Friends of Oregon (and also Housing Land Advocates in its exception) mistakenly assert that Metro's action constitutes "periodic review" because it is being processed under ORS 197.626. ORS 197.296 requires Metro UGB amendments of greater than 100 acres to be processed "in the manner of periodic review."¹ These are not the same thing. Periodic review is a process by which a local jurisdiction works with the department to undertake a comprehensive review and update of its comprehensive plan and implement ordinances, organized as "tasks" or "sub-tasks," to account for changed circumstances and updates to the statewide planning program affecting local jurisdictions. Metro last completed a periodic review in 2011, starting in 2000, with 11 sub-tasks.

In contrast, Metro's UGB amendment is a standard post-acknowledgment plan amendment of Metro's existing UGB, and is subject to the provisions of ORS 197.615 governing the

¹ ORS 197.626 provides in part:

(1) A local government shall submit for review and the Land Conservation and Development Commission shall review the following final land use decisions in the manner provided for review of a work task under ORS 197.633

ORS 197.633 is a provision within a series of statutes governing the process of periodic review of local government comprehensive plans.

submittal of such amendments to the department for review and dissemination.² After the department receives a final notice of adoption for such amendments, it is obligated by ORS 197.626 to process it differently, requiring department or commission review and acknowledgment. This is in contrast to a standard post-acknowledgment plan amendment, which is considered acknowledged unless appealed to the Land Use Board of Appeals. Since Metro is not engaged in periodic review, the department determined that OAR 660-007-0050(1), requiring Metro to take certain actions at the time of periodic review of the Metro UGB, does not apply to this decision.

3. Mandatory Affordable Housing Reporting

1000 Friends of Oregon states that the director's report is incorrect regarding the mandatory report required by Metro Code (MC) 3.07.740 that addresses regulated affordable rental housing.

Response:

Title 7: Housing Choice in MC 3.07.740 required local governments to start reporting their progress on July 31, 2007 and then every two years after that date. Originally, each city was to report their inventory of regulated affordable rental housing every two years. In practice, this was not very effective, because each city tracked and reported this information differently, even though the cities reported on a form created by Metro. Metro eventually decided that this was no longer a city responsibility and that Metro would do the reporting every two years. The most recent report is from 2017, titled Regional Inventory of Regulated Affordable Rental Housing. While this report is not in the record, it is available on the Metro website.

The exception has not established that Metro has not fulfilled its obligation of the mandatory reporting required by MC 3.07.740.

4. Metro's "Six Desired Outcomes"

1000 Friends of Oregon notes in its exception to the director's report that the report does not address an objection concerning Metro's Code 3.07.1425(d)(5) regarding the "Six Desired Outcomes" for UGB expansions.

Response:

The six desired outcomes adopted by the Metro Council are intended to be high level goals and policy statements for the region and not approval criteria. The Metro Policy Advisory Committee (MPAC) recommended to the Council that they adopt the six desired outcomes as a way to guide decision makers. The outcomes are intended to add greater flexibility to the process as well as to create an outcomes approach. The Metro Council found that each of the four cities have taken steps that advanced the six desired outcomes. Record at 1061. Assuming a situation where Metro had not addressed the six desired outcomes in their review of the concept plans, because the six desired outcomes are not goal, statute or rule

² ORS 197.615 provides in part:

(1) When a local government adopts a proposed change to an acknowledged comprehensive plan or a land use regulation, the local government shall submit the decision to the Director of the Department of Land Conservation and Development within 20 days after making the decision

under ORS 197.633(3) and OAR 660-025-0040, that lack of compliance with Metro's Code alone would not provide the commission a basis for remand.

B. Housing Land Advocates

1. Applicability of the Federal Fair Housing Act as Amended (FHAA)

Housing Land Advocates reasserts its argument that the FHAA applies to Metro's UGB decision, and Metro's failure to address the FHAA requires remand of the decision by the commission.

Response:

The Housing Land Advocates objection and exception can be divided into two basic questions. First, is Metro required to address the FHAA in its UGB analysis and is the State of Oregon required to address the FHAA in its review of Metro's UGB analysis? Second, even if the State of Oregon is not required to address the FHAA in its review of Metro's UGB analysis, does it have the option of requiring Metro to address the FHAA for reasons of sound public policy? The department concludes that Metro is not required to address the FHAA. Therefore, we do not address the second question in our review.

Regarding the first question, the department is not persuaded by HLA's additional argument on this topic. In addition, the department would note Metro's reference to its own findings on this matter, contained in its response to the original objections (Attachment A), which point out that "Metro is not a housing provider, does not zone property for housing, and does not receive Community Development Block Grants or any other federal funds for housing."

2. Flawed ESEE Analysis

HLA contends the ESEE analysis provided as part of Metro's consideration of UGB boundary locational factors is fundamentally flawed because it fails to consider social impacts on low-income Oregonians. Specifically, HLA points to the need for more affordable housing in the cities of Sherwood and Happy Valley.

Response:

The requirement for consideration of comparative environmental, social, energy, and economic consequences (ESEE analysis) of the UGB decision is found in Goal 14 itself, as one of the factors to be considered when "evaluating alternative boundary locations" consistent with ORS 197.298. In that context, the ESEE analyses are limited to a comparative evaluation of the relative benefits of including alternative expansion areas within the UGB boundary. The review does not extend to the evaluation of potential development within existing areas within the current UGB.

C. Michael Donoghue

1. Insufficient Natural Resource Protection

Mr. Donoghue contends that certain natural resources were not appropriately evaluated and protected as required by Goal 5.

Response:

Metro's analysis of environmental impacts under Goal 14, Boundary Location Factor 3, concludes that identified resources will impact and shape future development of the Cooper Mountain Area. Record at 2111. Metro's Title 11, Planning for New Urban Areas, required local jurisdictions to show water quality resource areas, flood management areas, and habitat conservation areas that will be subject to performance standards under Metro Title 3, Water Quality and Flood Management and Title 13, Nature in Neighborhoods. The planning for compliance under Titles 3 and 13 includes a methodology for evaluating, conserving and mitigating the impact of development on riparian corridors, wetlands and wildlife habitat resources.

Title 13 has been acknowledged by LCDC as sufficient for meeting Goal 5 for riparian areas and wildlife habitat. Metro Title 3 provides an approach to wetland that provides equal or greater protection for the resource category.

IV. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS

A. Recommendation

For the reasons described in this report, the department recommends that the commission approve Metro Ordinance No. 18-1427 and the findings of fact and conclusions of law, rejecting the seven filed objections. None of the objections demonstrate that the Metro UGB decision fails to rely on an adequate factual base, fails to address all applicable criteria, or is unreasonable based on the evidence in the whole record.

B. Proposed Motion

Recommended Motion: I move that the commission approve Metro's urban growth boundary amendment submittals, based on the findings and conclusions in the director's report.

C. Optional Motions

For remand: I move that the commission remand Metro's urban growth boundary amendment submittals, based on the commission's findings that: _____.

ATTACHMENTS

- A. **MARCH 12, 2019 RESPONSE FROM METRO TO THE OBJECTIONS**
- B. **EXCEPTIONS SUBMITTED**