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Sent by e-mail

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Re: Metro UGB; Agenda Item 5, July 25-26, 2019 LCDC Meeting
Exceptions to Department's Response to Objections

1000 Friends of Oregon submitted valid Objections to Metro's decision to expand the metropolitan region urban growth boundary (UGB) by approximately 2181 acres, to provide capacity for approximately 9200 dwelling units. The expansions are adjacent to and proposed by the cities of Wilsonville, Beaverton, Hillsboro, and King City. The decision also includes various conditions to be applied to these areas.

This submittal describes several Exceptions 1000 Friends has to the Department's Response (DR). However, we preserve all our Objections, even if there is not a specific Exception to the Department's Response below. And, there are some elements of our Objections that are not addressed in the DR.

The Objections and Exceptions of 1000 Friends are focused on the obligations of the four cities, Metro, and the Department and Commission to ensure that Goal 10, Housing; the housing-related elements of Metro's Code; and the housing-related elements of statutes and administrative rules are met in this UGB decision. Goal 10 requires that land use plans provide for "the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density." Compliance is critical to meet the housing needs of all Oregonians, today and in the future. We believe this decision falls short.

The passage of HB 2001 will have a significant impact on how these four expansion areas are developed. As practical matter, HB 2001 may well resolve some of the major issues raised in our Objections. We recommend that, as part of this decision, the Department and DLCD revise the Department's Report, findings, and the Commission's decision to address the implications of HB 2001 on the comprehensive land use plans and zoning regulations that the four cities must develop for these four expansion areas, and that Metro and DLCD will be reviewing for compliance with the Metro Code and all state statutes, Goals, and rules.

Finally, the DR concludes that compliance with various legal requirements, including the Metro Housing Rule (OAR 660-007) can be met at a later date, when each city submits its land use

plans and zoning regulations as a “post-acknowledgement plan amendment” to Metro and DLCD. The DR claims:

“At that time the department will review the submittals for compliance with the MHR, provide comments to the cities on their preliminary submittals and, if the final adopted products do not comply with the MHR, recommend that the commission appeal the adoption to the Land Use Board of Appeals (LUBA). Based on this analysis, the department finds that the applicable provisions of the MHR will be met.”¹

1000 Friends makes an Exception that this is a legal basis on which the Commission may find compliance with the law:

- The proposed motion for the Commission to adopt says nothing about later enforcement of anything by Metro or the Commission.
- This language above does not commit the Commission to appeal city submittals to LUBA if they violate the law.
- We question whether future actions of the Commission could be bound in this way in any event, because appeals to LUBA depend on the department’s budget for legal assistance with a separate agency, the Oregon Department of Justice.
- This seems a very inefficient way to gain compliance – through a future legal action, after city and Metro resources have been expended and expectations developed, rather than ensuring up front that the law is complied with.

Exception to Department’s Response to 1000 Friends Objection 1 (re-labeled by DLCD as Objection 2a, on p. 31 of Department’s report)

1000 Friends objects that Metro’s decision fails to comply with the Metro Housing Rule (MHR), OAR 660-007-0030 (the “50% rule”) and -035 (the “6-8-10” rule). We start out by noting that that the Department agrees with a key aspect of this Objection: “The department concurs that the concept plans are conceptual and not sufficient to ensure compliance with the applicable metropolitan Housing Rule requirements. “However, the DR attempts to find a way around this by responding that:

- There is no obligation to show concurrent compliance with the MHR when Metro makes a UGB decision. (DR, p. 32)
- The obligation to comply with the MHR falls on the cities, not Metro. (DR p. 32)
- Metro’s only obligation is to “engage in regional coordination,” per OAR 660-007-0050. (DR, p. 32)
- Metro adopted conditions on the cities as part of the UGB expansion decision, and therefore may later enforce those conditions, when each city adopts a land use plan and zoning code for its expansion area. (DR, p. 33)

¹ DR, p. 21.

- DLCD will review and provide comments on city plan amendments and land use regulations for the expansion areas and if they do not comply with the MHR, DLCD will recommend that LCDC appeal these city decisions to LUBA. (DR, p. 34)

This response falls legally and factually short. First, the DR is a backslide from the position DLCD took in written comments DLCD made to Metro on this UGB decision. In its letter of Dec. 5, 2018, DLCD clearly stated that the obligation to ensure compliance with the MHR falls on *Metro* and on the four cities *at the time of this UGB decision* (emphasis added):

“Metro and local jurisdictions within Metro are obligated to meet the provisions of the Metropolitan Housing Rule (OAR 660-007). Most relevant to this decision, jurisdictions within Metro must satisfy the “50-percent” rule and the “6-8-10 rule.” *** Application of OAR 660-007-0030 means that *Metro* must ensure the four cities meet the following requirements. *** Application of OAR 660-007-0035 means that *Metro* must ensure the four cities meet the following requirements: ”²

The DLCD letter then goes on for a page to describe, in detail, how each city must meet these two elements of the MHR, in this decision, with these concept plans – not later when Metro reviews a city’s proposed plan and zoning for an expansion area.

In contrast, the DR essentially allows the obligation – of Metro and each city – to demonstrate compliance with the MHR to be kicked down the road. And, the DR shifts the obligation to demonstrate compliance from the cities and Metro, at this early and sensible *planning* stage, to Metro and DLCD, at a later, *enforcement* stage, after substantial time and investment has gone into specific land use plans and regulations.

The DR does not offer a direct explanation for this shift in DLCD’s position; however, we address the explanations given. The Department now asserts that Metro’s only legal obligation, under OAR 660-007-0050(2) of the MHR, at the time of a UGB decision is to “engage in regional coordination to ‘ensure that needed housing is provided on a regional basis through coordinated comprehensive plans’.”³

However, this explanation overlooks OAR 660-007-0050(1), which clearly states that *Metro* has a substantive obligation to determine whether the UGB meets needed housing requirements, that goes beyond mere “coordination,” and it arises at periodic review of the UGB (emphasis added):

“(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.

² Jim Rue on behalf of DLCD, letter of Dec. 5, 2018 to Metro Council, pp. 2-3.

³ DR, p. 32.

(2) Metro shall ensure that *needed housing* is provided for on a regional basis through coordinated comprehensive plans.”

This Metro decision comes before LCDC “in the manner of periodic review.”⁴ The DR claims that Metro will meet the obligation, in the future, through Condition #5 of its UGB decision, which requires:

“5. 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 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.”⁵

The DR states that this Condition “specifically addresses compliance with the Metropolitan Housing Rule.”⁶ Assuming, for the sake of argument, that compliance with the MHR can be kicked down the road, we do not see, in this Condition or Metro’s enforcement, a legal hook on which enforcement could be hung.

- Condition 5 requires mere “consultation” by cities with Metro staff and inclusion of Metro staff in advisory groups. There is no language here that is in the least bit a substantive, outcome-driven requirement. It is focused on process, not substance.
- While the DR agrees that the concept plans are “not sufficient,” it points to two enforcement provisions in Metro’s Code to cure this, but it is not clear how either would apply here.
 - MC 3.07.850(a) gives Metro the ability to take an enforcement action if a city engages in a “*pattern or practice* of decision-making that is inconsistent with the functional plan.” It is not clear to us how adoption of a plan and zoning regulations is a “*pattern or practice*.”
 - MC 3.07.1455(c) merely provides that the Metro Council may enforce a Condition of a UGB approval – in other words, Metro may enforce Condition #5. However, as explained above, Condition # 5 has no substance, so what would Metro enforce? Ensuring that its staff are invited to advisory groups?

Finally, the DR states that Condition A.2 will help ensure compliance with the MHR, OAR 660-007-0030 (the 50% rule). This Condition states (emphasis added):

⁴ DR, p. 3.

⁵ Metro Conditions of Approval, no A.5.

⁶ DR, p. 33.

“2. The four cities shall allow, at a minimum, single family attached housing, including townhomes, duplexes, triplexes, and fourplexes, in all *zones* that permit single family housing in the expansion areas.”

The reliance on A.2. is legally flawed for at least two reasons:

- OAR 660-007-0030 requires that zoning provide the opportunity for “at least 50% of new residential units to be attached single family housing or multiple family housing.” Metro’s findings do not explain how merely *allowing* attached housing in all zones would meet the 50% opportunity level. Under Condition A.2., for example, a city could allow townhomes, duplexes, triplexes, and fourplexes on corner lots within each otherwise exclusively single-family zone – which exist on all the concept maps, and that would not reach the opportunity for 50% of new residential units to be attached single family housing or multiple family housing.
- The DR describes Condition A.2. in a significantly inaccurate way. It states (emphasis added):

“Through the requirement to accommodate attached single family housing on all *lots* ‘on which single family housing is allowed,’ the condition will ensure that the “50-50 Rule” is met by requiring all single family *lots* to allow attached dwellings.”⁷

However, Condition A.2. applies to large scale *zones*, **not** to individual *lots*. This was a significant issue before the Metro Council when the UGB was being considered. 1000 Friends and others advocated that these “middle housing” types be allowed on all *lots* on which single family homes were allowed. The Council elected to not do that, and instead only require that they be allowed somewhere in the zone. Because the Department apparently mis-understood Metro’s Condition A.2. in a material way, this Condition is not a basis for finding compliance with the MHR.

Finally, we find the DR’s description of whether the King City/Beef Bend South proposal meets the MHR to be confusing.⁸ The DR notes that Metro Condition E.3 establishes “rather vague housing production” numbers for this 528-acre expansion area: the Condition calls for at least 3300 homes, but states that the actual number will be determined by a later market analysis of a new town center, which will evaluate whether this number is feasible. The DR then goes on to make what seem to us to be inconsistent conclusions:

- As long as the area is capable of “accommodating at least 165 dwelling units,” that is sufficient to meet the region’s need taking into account the “housing required in the other expansion areas.”

⁷ DR, p. 34.

⁸ DR, pp. 34-35.

- Yet DLCD expects the Beef Bend South area to be developed at 8 dwelling units/acre, to be consistent with OAR 660-007-0035, which could result in even more than 3300 dwelling units.

We do not understand the DR's conclusion that the Beef Bend South expansion area meets the requirements of MHR, when it is unclear how many and what type of dwelling units are likely to be built. We are also concerned that Metro's Condition E.3 and the DR's analysis seem to be allowing a housing level far under 3300 dwelling units.

Conclusion

Since the time of Metro's decision and probably the writing of the Department's report, the Legislature passed HB 2001, which will, among other things, require these four cities to allow duplexes on every lot on which a single family home is allowed, and to allow 3- and 4- plexes, cottages clusters, and townhomes somewhere in each residential zone. We recommend that prior to the Commission making a decision, that Metro and DLCD draft new findings reflecting the obligations of these four cities, Metro, and LCDC to comply with HB 2001, including timing and enforcement. While 1000 Friends does not agree that either Metro's findings or the Department's Report demonstrate that the UGB decision complies with the legal requirements of the MHR, compliance with HB 2001 could remedy some or all that as a practical matter.

Exception to Department's Response to 1000 Friends Objection 2A and 2B (re-labeled by DLCD as Objection 2b, on p. 35 of Department's report)

1000 Friends objected to Metro's decision because it fails to comply with several provisions in Metro's Code - in Titles 7 (Housing Choice), 11 (Planning for New Areas), and 14 (Urban Growth Boundary). Compliance with these Titles in Metro's Code is the basis on which Metro argues it complies with planning Goals 10 and 14.

Title 7: Housing Choice

The first sections of Title 7 (MC 3.07.710 and .720) require that local governments establish voluntary affordable housing production goals and provide detailed reports to Metro on progress towards achieving those goals. There seems to be no claim by the cities, Metro, or DLCD that the four cities have established these housing goals or reported on achievement towards them. Rather, the Department responds that this is a voluntary program and is therefore not a UGB approval criteria, and that "[n]o other standards within Title 7 are applicable to this UGB expansion decision."⁹

⁹ DR, p. 35-36.

The DR is incorrect - the requirement to report is mandatory (see MC 3.07.740).¹⁰ There seems to be no disagreement that no reports have been filed, and the DR does not directly address 3.07.740, presumably because it is a city obligation.

However, the Department and Metro seem to have overlooked Metro Code 3.07.730, which is titled "Requirements for Comprehensive Plans and Implementing Ordinance *Changes*," and requires that (emphasis added):

"Cities and counties within the Metro region shall *ensure* that their comprehensive plans and implementing ordinances: (a) Include strategies to *ensure* a diverse range of housing types within their jurisdictional boundaries. (b) Include in their plans actions and implementation measures designed to maintain the existing supply of affordable housing as well as increase the opportunities for new dispersed affordable housing within their boundaries. (c) Include plan policies, actions, and implementation measures aimed at increasing opportunities for households of all income levels to live within their individual jurisdictions in affordable housing."

This decision amends the Mero regional UGB, which is part of the region's Functional Plan and the comprehensive plan of each of the four cities. Therefore, the decision does "change" a comprehensive plan and Title 7, and in particular 3.07. 730, applies. Metro must, in this decision, show how the four cities have demonstrated compliance.

Title 11: Planning for New Urban Areas

Title 11 establishes the purpose and required content for the concept plans that each city submitted, and Metro approved, in this decision. In particular, the concept plans must:

"[D]escribe the goals for meeting the housing needs for the concept planning area in the context of the housing needs of the governing city, the county, and the region.... [T]he concept plan shall *identify* the general number, price, and type of market and non-market provided housing. The concept plan shall also *identify preliminary strategies*, including fee waivers, subsidies, zoning incentives and private and nonprofit partnerships, that will support the likelihood of achieving the outcomes described in...."¹¹

¹⁰ MC 3.07.740(b) (emphasis added): "Local governments *shall report* their progress on increasing the supply of affordable housing to Metro on a form provided by Metro, to be included as part of the biennial housing inventory described in subsection (a). Local governments *shall submit* their first progress reports on July 31, 2007, and by April 15 every two years following that date. *Progress reports shall include*, at least, the following information: (1) The number and types of units of affordable housing preserved and income groups served during the reporting period, as defined in Metro's form; (2) The number and types of units of affordable housing built and income groups served during the reporting period; (3) Affordable housing built and preserved in Centers and Corridors; and (4) City or county resources committed to the development of affordable housing, such as fee waivers and property tax exemptions.

¹¹ MC 3.07.1110(c)(4).

As described in our Objections, Metro did not make findings as to whether and how the concept plans conform to Title 11, although it is required to do so by Title 14.¹² It seems the extent of Metro's findings is the conclusory statement that each proposed expansion area "has been concept planned" consistent with section Title 11.¹³ That is not a factual finding.

The Department seems to implicitly concede that Metro did not make sufficient findings, because the DR attempts to make those findings for Metro, at pages 36-37, where the DR briefly summarizes each city's concept plan.¹⁴ However, the legal obligation is Metro's, not the Commission's.

As described under our first Exception, Metro might be able to show compliance with Title 11 by determining how HB 2001's requirements meet the deficiencies we identified in Metro's Conditions, including Conditions A.2 and B.5.

Title 14: Urban Growth Boundary

There is no dispute that Title 14 applies to Metro, that it applies at the time of a UGB expansion, and that compliance with it "constitute[s] compliance with ...Goal 14." MC 3.07.1425(d) sets out the "factors" that Metro must "consider" in determining which urban reserve areas "better meet the housing need."

Of particular focus in our Objections is factor 3.07.1425(d)(4), which states that Metro must consider (emphasis added):

"Whether the city responsible for preparing the concept plan has implemented *best practices* for preserving and increasing the supply and diversity of affordable housing in its *existing* urban areas."

The DR dismisses our Objection by saying that 1000 Friends "seems to assume that each of the factors to be weighed in determining which of the urban reserve areas will best meet the identified needs is an independent criterion."¹⁵ That is an inaccurate and deflectionary characterization.

Metro cannot possibly "consider" and "weigh" this factor if it has not defined "best practices" and has no information (because there has been no reporting) on whether each city has done anything towards *implementing* best practices in its existing area. The closest Metro seems to come to even "considering" this factor is to admit that "it cannot be said that all four cities have

¹² MC 3.07.1425(d)(2).

¹³ Exh. F to Ordinance 18-1427, p. 14. See also Objections, p. 6 and fn. 13.

¹⁴ The DR makes alternate argument, which is that in finding compliance with Title 11, Metro made an "interpretation" of its Code, which is due deference. However, there is no interpretation at the cited record page (record p. 1060, which is Exh. F, p.); rather, just the conclusory statement.

¹⁵ DR, pp. 37-38.

implemented 'best practices'."¹⁶ Rather, the cities have "taken...some steps towards encouraging the development of affordable housing." "Encouraging" is not "implementing" and "some steps" is not "best practices." The reality is that Metro has no factual basis on which to weigh this factor with the others in making a UGB decision, and therefore neither Title 14 nor Goal 14 is met.

1000 Friends also takes exception to the DR's conclusion that because Metro identified a need for approximately 9200 additional housing units, and that only these four proposal were made and they would meet that need, that (emphasis added): "The residential land needs identified by Metro *require* inclusion of all four of these areas within the UGB."¹⁷ The (il)logical result of this reasoning would be that it does not even matter what the concept plans say, if they produce the required number of units Metro must bring them into the UGB. This is not true, for several reasons but one fundamental one: Metro has two years to meet any identified housing need and therefore does not even need to meet it all in this UGB expansion. ORS 197.299(2)

Other Objections and Exceptions

We note that the DR did not address our Objections concerning Metro's Code 3.07.1425(d)(5) regarding its "Six Desired Outcomes." (Objections, p. 9-11)

Conclusion

We recommend that Metro work with DLCD to revise the Department's Report, findings, and recommendations, in light of the requirements of HB 2001. In particular, the recommendation and the Commission's Order should include a timeline for compliance consistent with HB 2001 and Metro Code, and mandatory review and, if necessary, enforcement by Metro and LCDC. Those revisions would then be subject to additional Objections and/or Exceptions to see if they satisfy some or all the issues raised by objecting parties.

Sincerely,



Mary Kyle McCurdy
Deputy Director

¹⁶ Exh. F to Ordinance 18-1427, p. 15.

¹⁷ DR, p. 38.