Housing Land Advocates

July 11, 2019

BY EMAIL AND HAND DELIVERY

Jim Rue, Director
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301

via e-mail to: jim.rue@state.or.us

Re: Exceptions to Department Report, Metro UGB Amendment

Dear Mr. Rue:

Housing Land Advocates (HLA) filed Objections to Metro's urban growth boundary amendment on January 30, 2019. On July 1, 2019, the Department distributed a Director's Report recommending that the Commission reject all of HLA's Objections. Please include these exceptions in the record. Notices related to this file can be sent to Housing Land Advocates, c/o Jennifer Bragar, 121 SW Morrison Street, Suite 1850, Portland, OR 97204; e-mail jbragar@tomasilegal.com.

While these Exceptions pertain to just some of the issues raised in HLA's Objections, HLA preserves all of its Objections moving forward. For ease of reference, HLA attaches its December 4, 2018 comment letter to Metro as Attachment 1, and its January 30, 2019 Objections as Attachment 2.

I. Summary of Exceptions

Exception One: The Department rejected HLA's Objection that Metro was required to review the application of the federal Fair Housing Act, as amended ("FHA"), to this UGB expansion decision. The Department concluded that, while ORS 197.633(3)(c) requires an analysis of whether a local government's decision complies with "applicable statutes," neither the Department, the Commission, nor the courts have ever interpreted that term to include federal law. Because the absence of precedent does not prove the inapplicability of the FHA, the Department should reevaluate its response and the Commission should sustain this Objection. In addition, the state analogue to the FHA (i.e. ORS 659A.001(9)(b) and ORS 659A.421-.425) applies to this decision.

Exception Two: The Department rejected HLA's Objection that Metro failed to conduct the analyses necessary to comply with Goal 10, the Metro Housing Rule, and the Needed Housing Statutes. The Department concluded that, because Metro submitted "a number of pertinent documents," and because of Metro's "own assumptions and evidence," including its "aggressive" calculations and "thorough," "peer review[ed]" methodology, Metro's decision complies with "the requirement to address the region's anticipated housing needs over the planning period" and gave

serious consideration to "reasonably accommodating" needed housing within the existing UGB, and therefore complies with Goal 10, Goal 14, and ORS 197.296. Because none of these assertions, if true, would demonstrate that Metro undertook the analyses and remedial measures required by the Metro Housing Rule and the Needed Housing Statutes, the Commission should remand the submittal with directions to Metro to conduct those analyses and adopt any necessary remedial measures.

Exception Three: The Department rejected HLA's Objection that Metro failed to justify the need to expand the UGB with substantial evidence in the whole record. Even if Metro's population projections are correct, those numbers do not automatically translate into justification to expand the UGB because there is additional capacity overlooked by Metro in its calculations. The Department incorrectly deferred to Metro's findings when, among other things, Metro interpreted its Charter to restrict any "increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods." Thus, Metro failed to examine whether the existing urban growth boundary can accommodate the need for additional single-family housing and it failed to address the social outcomes of the proposed UGB expansion. The Commission should sustain HLA's Objection and remand this decision for a UGB that accounts for maximum efficiency within the existing boundary.

II. Burden of Proof

Much of the Department's Report charges that HLA must make particular findings or carry the burden of proof. However, the burden of proof lies first with Metro and now with the Commission to support its decision. As a reminder, the Commission should consider the following.

Since the adoption of the goals, the Oregon Supreme Court, the Oregon Court of Appeals, and the Land Use Board of Appeals have consistently placed on local governments the burden of making the factual, legal, and analytical case to demonstrate that their legislative planning and zoning ordinances comply with state land use goals, rules, and statutes.[1] The Commission has recognized and honored this principle from the beginning as it applies to Goal 10 and the needed housing statutes. In 1977, the LCDC applied Goal 10 to set aside a City of Ashland ordinance downzoning a residential area. In so doing, LCDC articulated quite clearly the scope of review that is applicable in cases like the one before it today:

> "'Planning decisions must meet the standards set by the goals. Insofar as compliance depends upon specific, ascertainable fact, compliance must be shown by substantial evidence in the record. Insofar as compliance depends upon value judgments and policy, compliance must be shown by a coherent and defensible statement of reasons relating the policies stated or implied in the goals to the policies of the planning jurisdiction.'"[2]

[1] *See generally, 1,000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384, 752 P2d 271 (1988) (Forest Lands Goal).
[2] *See Kneebone v. Ashland*, 3 LCDC 131, 134 (1979), quoting from *Cook v. Clackamas County*, 1 LCDC 244, 261 (1977).

Because the LCDC's rules implement the goals, a violation of an applicable provision of a rule is a violation of the goal or goals that it implements, and review follows the same principles.[3]

III. Exception One: The federal Fair Housing Act, as amended and its Oregon analogue apply to this decision. Metro's failure to apply fair housing requirements and to make findings relative to the act and state statute mean HLA's Objection should be upheld.

A. Brief Summary

The Department rejected HLA's Objection that Metro was required to review the application of the FHA to this UGB expansion decision. The Department concluded that, while ORS 197.633(3)(c) requires an analysis of whether a local government's decision complies with "applicable statutes," neither the Department, the Commission, nor the courts have ever interpreted that term to include these federal or state laws. Because the absence of precedent does not mean that the FHA or its Oregon analogue is not applicable, the Department should reevaluate its response and the Commission should sustain this Objection. See 42 U.S. Code §3615 ("…any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.)

B. Background

The FHA,[4] provides in material part that it is unlawful to either "make unavailable or deny[] a dwelling to any person" or "discriminate against any person in the provision of services or facilities in connection" with the sale or rental of a dwelling "because of race, color, religion, sex, familial status, or national origin."[5] For those entities receiving federal housing funds, such as the State of Oregon, there is an additional obligation to affirmatively further fair housing; to address historical impacts of segregation and to promote inclusive housing communities that are free from discrimination.[6] Additionally, there is no question that the federal fair housing laws apply to state agencies regulating local or regional land use policies and practices.[7]

The FHA has been broadly interpreted by the courts to apply to land use regulatory powers and prohibits virtually all differences in treatment based on any of the protected characteristics, and has been interpreted to apply to differences in the impact of otherwise neutral policies and practices.[8] Citizens may bring civil rights claims against state actors "when the objective is to obtain a declaration that a rule of federal law supersedes the rules that the state actors are

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[3] *See Melton/DLCD v. City of Cottage Grove*, 28 Or LUBA 1, (1995).
[4] 42 U.S.C. §§ 3601-3619.
[5] 42 U.S.C. § 3604.
[6] 24 C.F.R. § 5.150
[7] Silverstein, Thomas (2015) "Overcoming Land Use Localism: How HUD's New Fair Housing Regulation Can Push States to Eradicate Exclusionary Zoning," University of Baltimore Journal of Land and Development: Vol. 5: Iss. 1, Article 3. Available at: http://scholarworks.law.ubalt.edu/ubjld/vol5/iss1/3 AFFH Rule Guidebook, Version 1, December 31, 2015, The US. Department of Housing and Urban Development, Preface available at https://files.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf.
[8] *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015).

implementing."[9] The Supreme Court has held that citizens have standing to bring such claims simply by "alleg[ing] a reduction in their enjoyment as a result of having fewer black neighbors."[10]

The Supremacy Clause of the U.S. Constitution[11] gives federal laws, such as the FHA, precedence over conflicting state and local laws.[12] Consequently, the FHA prohibits state, local, and regional governments from enacting discriminatory land use and zoning laws, policies, and practices that make unavailable or deny housing—including vacant land that could be developed into residences—because of a characteristic protected under the FHA.[13]

Liability under the FHA may be established by showing intentional discrimination or by showing that a defendant's acts have a significant discriminatory effect.[14] Discriminatory effect may be proven by showing either (1) adverse impact on a particular minority group or (2) harm to the community generally by the perpetuation of segregation.[15] The U.S. Department of Housing and Urban Development's (HUD) final rule on disparate impact explains that a discriminatory housing practice is broadly construed to include "any facially neutral actions, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria."[16]

State law also prohibits discrimination in land use policies and practices selling, renting, or leasing property and provides that a "facially neutral housing policy" may be a violation if it is found to have a greater adverse impact on members of a protected class than on persons generally.[17]

In addition, under HUD's Affirmatively Furthering Fair Housing (AFFH) rule,[18] recipients of Community Planning and Development grants are obligated to *affirmatively further* fair

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[9] *New West, L.P. v. City of Joliet*, 491 F.3d 717, 719 (2007); *see also* 42 U.S.C. § 1983.
[10] *See New West, L.P.*, 491 F.3d at 721 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S. Ct. 1601 (1979)).
[11] *See* U.S. Const. art. VI, cl. 2.
[12] *Armstrong v. Exceptional Child Ctr.,* 135 S. Ct. 1378, 1383 (2015) ("It is apparent that this Clause creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws."); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–374, 120 S. Ct. 2288, 2293–2294 (2000).
[13] *See id.* ("[The Court] will find preemption where . . . 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67, 61 S. Ct. 399 (1941). *See also* Dep't of Hous. & Urban Dev. & Dep't of Justice, *State and Local Land Use Laws and Practices and the Fair Housing Act* (2018), http://bit.ly/2emU4kE (last visited July 8, 2019).
[14] *See Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. 2507.
[15] Distribution patterns of housing by type, tenure, and cost determine the degree to which a municipality is either integrated or segregated. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995) (zoning restrictions may constitute discriminatory housing practice); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 936–938 (2d Cir. 1988) (zoning that restricts multi-family housing to certain geographical areas adversely affects minorities and perpetuates segregation), *aff'd*, 488 U.S. 15, 109 S. Ct. 276 (1988) (per curium); *see also Summerchase Ltd. Partnership I v. City of Gonzales*, 970 F. Supp. 522, 527–28 (M.D.La. 1997).
[16] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).
[17] *See* Or. Rev. Stat. § 659A.001(9)(b), .421–.425.
[18] *See* 24 C.F.R. § 5.150–.168.

housing. Specifically, funding recipients are required to assess their jurisdictions and regions for fair housing issues including segregation and disproportionate housing needs.[19] While the application of this rule is currently under litigation, HLA believes it to be applicable to this proceeding.

C. HLA's Objection

In HLA's Objection 1, HLA explained that Metro has obligations under its own code as well as state and federal law to affirmatively further fair housing and otherwise meet the requirements of the FHA.

Because both the State of Oregon and Metro receive federal funds, they must ensure that all of their activities affecting housing affirmatively further fair housing.[20] These activities include the Department's policies and actions, as well as land use plans and regulations which, while enacted and implemented by local governments, are subject to state supervision under ORS Chapter 197.

The Metro Charter requires that Metro address growth management and regional land use planning matters. As such, its actions and decisions impact the density and distribution of housing, including affordable housing and the housing patterns of protected class households within the metropolitan area. Thus, while Metro does not directly engage in local zoning of land in that it does not adopt zoning ordinances affecting land within its member jurisdictions, its actions and decisions have the same effect as local zoning decisions and must similarly comply with the FHA. In short, a lack of express zoning authority does not insulate Metro from its obligations under the FHA.

Finally, even if Metro were not bound by the FHA, the Department is bound. As an agency of the State of Oregon, the Department was required to review Metro's decision for compliance with the FHA—especially in light of its own *2016–2020 Analysis of Impediments to Fair Housing Choice*.

D. Department Response

The Department notes that ORS 197.633(3) contains the standard of review for this UGB expansion decision. Regarding compliance with applicable laws, that standard is "whether the

[19] *See* Congressional Research Service, *The Fair Housing Act: HUD Oversight, Programs, and Activities* (2018), https://www.everycrsreport.com/reports/R44557.html.

[20] The State of Oregon has acknowledged this obligation:

> "For all of these reasons, it is important that state governments review their zoning, subdivision and land development authorizing legislation to ensure that they do not create unnecessary barriers to private production of affordable housing. It is also important that states take reasonable steps to ensure that state grants of power to regulate housing or to address affordable housing needs do not unintentionally create barriers to fair housing choice."

State of Oregon, *2016–2020 Analysis of Impediments to Fair Housing* app. A, at 5, § II, at 1 (2015). The State describes this report as a "HUD-required assessment of barriers to fair housing choice" and notes that it is required to conduct this analysis every five years "as a condition of receiving federal block grants funds for housing and community development." *Id.* § ES, at 1.

local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the RFP, the functional plan and land use regulations."[21] HLA agrees with the Department that the item in this list, which includes the FHA is the term "applicable statutes."

The Department's position is that, because there is "no history of the department or commission interpreting the term 'applicable statutes' to include anything other than [state] statutes[,]" and because there is "no precedential case law that would include compliance with the FHA as being a standard for a decision . . . on a local government plan amendment or periodic review[,]" the FHA applies to neither Metro in making its decision nor the Department in reviewing it. And while the Department recognizes that Oregon law imposes substantially the same requirements as the FHA, it concludes we have not established that this UGB expansion decision violates state law by either discriminating against or having disproportionate adverse impacts on a protected class.

E. HLA's Exception

1. Applicability

The absence of precedent applying the FHA and the state statutory analogue to UGB expansion decisions is not a bar to their consideration by the Commission for the first time now given the uniqueness of Oregon's system of land use laws and regulations. The Department claims that, because there is no case law interpreting "applicable statutes" in ORS 197.633(3)(c) to include federal law, the FHA does not apply. ORS Chapter 197 includes numerous references to "applicable" laws. In various sections, it singles out "federal law,"[22] "state law,"[23] "federal statute,"[24] and "state statute."[25] The Legislature knows how to distinguish between laws adopted by the Oregon State Legislature and those adopted by Congress. The fact that there is no qualifying phrase preceding "statutes" in ORS 197.633(3)(c) means that the Legislature did not intend to limit the Department and Commission's scope of review in a such a fashion. Although HLA believes the Department was obligated to review this UGB expansion decision for compliance with the FHA regardless of express legislative authorization to do so, that authorization did in fact already exist by virtue of ORS 197.633(3)(c).

This question was raised below and in HLA's Objections to Metro's decision, and it is properly before both the Department and the Commission. The Department's decision to read out both their and Metro's requirement to ensure compliance with the FHA – indeed, its failure to even respond to HLA's assertions – should not be deferred to in this instance because to do so would be to avoid addressing the tough reality that Metro, like so many other jurisdictions around the country, has perpetuated exclusionary practices. In other words, LCDC cannot make a decision with a basis for understanding whether the UGB expansion will perpetuate historic patterns of

[21] Or. Rev. Stat. § 197.633(3)(c)
[22] *See* Or. Rev. Stat. § 197.012; 197.180(2)(a), (3).
[23] *See* Or. Rev. Stat. § 197.012; 197.180(3); 197.296(4)(b)(A).
[24] *See* Or. Rev. Stat. § 197.296(4)(b)(A).
[25] *See* Or. Rev. Stat. § 197.180(2)(a); 197.829(1)(d).

segregation. The application of the FHA and the state statutory analogue depend neither on the existence of case law or precedent, nor on legislative authorization to consider it.

2. Violation

The Department responds with a concession that Oregon's version of the FHA applies, "Metro has provided a robust record of the decision process, including documentation of their process for making population projections and determining future housing needs for all future residents, *regardless of race, color, religion, sex, familial status, or national origin*" and that, as a result, "the objection does not establish that the submittal has resulted in discrimination against a protected class."[26] The Department's response reveals its shortcomings – it conflates fair housing compliance with the required consideration of various growth factors. The Department completely ignores the question of its own obligation to avoid the perpetuation of historic patterns of segregation – one of the fundamental purposes of the FHA, and perhaps the most important as applied to land use. It does this notwithstanding that the Portland metropolitan area has a documented history of discrimination against minorities that has resulted in unequal access to both housing and locations as well as segregated housing patterns within the jurisdiction.[27]

LCDC cannot make this decision without adequate FHA and state law analysis, it should at a minimum remand to Metro to respond to the following:

1. Where in the record does Metro or DCLD say the UGB expansion decision evaluated housing needs for protected class households?

   HLA believes, based on the quote above, that future housing needs were measured without regard to the housing needs of protected class status, that this evaluation did not occur.

2. Did Metro look at incomes for protected classes and the need for single family homes and multi-family homes that met the price points that were affordable for lower income households? Was the process just a matter of totaling up numbers of households and number of units needed? Without considering the potential price points of housing that is likely to be built in the expansion areas, Metro cannot say the expansion is necessary to address the regional housing needs.

   HLA's read of the decision is that Metro only said the decision would increase the number of units, not that the cost would decrease.[28] This does nothing to end the perpetuation of segregation throughout the region.

3. If cost of housing would decrease with the boundary expansion, will that create more housing for lower-income protected class households in expansion areas or across the

[26] Department Report at 43 (emphasis added).
[27] *See*, *The Racist History of Portland*, by Alana Semuels, Business Section, The Atlantic Magazine, JUL 22, 2016 https://www.theatlantic.com/business/archive/2016/07/racist-history-portland/492035/.
[28] *See also* discussion of the ESEE analysis in Section V.E.4, *infra*.

region? Will expansion of the boundary increase or decrease segregation within the close in neighborhoods?

It is the answer to questions like these that adequate findings responsive to HLA's comments first to Metro, its objections to DLCD, and its exceptions here to LCDC seek to have answered in adequate findings for the public, and the state to ensure that the FHA is complied with.

As HLA's Objection pointed out, this means that Metro must analyze the proposed UGB expansion utilizing data that is available from HUD, census information, and its GIS mapping capability, in conjunction with data from member cities and counties, to prepare an assessment of fair housing on a regional basis and determine whether housing policies do in fact affirmatively further fair housing. Metro must at the very least undertake the foregoing analysis so that it and LCDC can make an informed UGB expansion decision that does not lead to the perpetuation of the historical patterns of segregation within the region.[29] Moreover, if Metro can direct local jurisdictions to develop a certain percentage of housing for one class of housing, it can be rightly said that its decision is affecting the availability of housing and residential housing patterns, directly implicating the FHA and state analogue.

The absence of overt discrimination in Metro's decision does not necessitate the conclusion that it complies with fair housing legislation. In light of DLCD's own fair housing obligation, accepting Metro's decision at face value does not comply with the State's obligation to overcome historic patterns of segregation or promote fair housing choice. The record below is substantial. While there is no evidence of overt racial discrimination in Metro's decision, the record lacks any evidence that the facially neutral policy will not have an adverse impact on housing opportunities for protected class households. Rather, HLA's objection is that compliance with the FHA and its state analogue are not possible without considering protected class households.[30] It is this failure in analysis that perpetuates the exact kind of exclusion that HLA is so concerned about in this UGB expansion decision.

Moreover, the Department's statement that "no legal barriers exist that would prevent the development of subsidized housing" is not a sufficient response. There is no evidence establishing that the existence of subsidized housing would provide for the current and anticipated housing needs of protected class households or that it would be built at any point in the future. Reliance on subsidized housing does not fulfill either Metro's or the Department's obligation under the fair housing laws and the State's obligation to affirmatively further fair housing. Instead, it kicks the can down the road. Housing Needs Analyses and Buildable Lands Inventories are the stages of the planning process when housing for all income levels is provided for, including affordable housing. That is where Metro finds itself, and that is where HLA must insist that federal and state fair housing legislation is applied so as to ensure the ability of protected classes to live in all neighborhoods.

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[29] *See* note 28, *supra*.

[30] Affordable housing is a critical issue in the metropolitan region not only in terms of supply but also in terms of cost and an equitable distribution across the region. Disparities in wealth, home ownership, income, employment and education are all factors that impact minority households' ability to access housing based on cost alone. Piecemeal decisions regarding the expansion of the UGB will not address the need and legal obligation for integrated residential housing patterns in the region.

Metro acknowledges the problem of exclusion. To hold that it need not be a part of the solution in this UGB expansion decision would be absurd. Yet the Department's Report appears to embrace Metro's self-fulfilling prophecy that only those cities that applied for UGB expansion – i.e., the four cities implicated in this decision – will be asked to provide adequate housing for all people, to the exclusion of those – like Sherwood – that were on the brink of submitting an application but pulled back when it became clear that affordable housing was going to be a focus.[31]

Ultimately, however, Metro never asserts that its decision complies with either the FHA or Oregon's analogue. Instead, its sole response, without any analysis, to HLA's Objection has been that neither law applies to this UGB expansion decision. As a result, it never engaged in an analysis of fair housing compliance—even though HLA raised the issue. As explained above, the FHA does apply. In addition, the Department itself has acknowledged that similar Oregon law applies. Thus, Metro was required to adopt adequate findings of compliance – and was in a much better position to determine that compliance than the Department. Because Metro failed to enter such findings, the decision should be remanded for it to do so.

IV. Exception Two: Metro's failure to show compliance with Goal 10, the Metro Housing Rule, and the Needed Housing Statutes means that the Commission should sustain HLA's Objection and remand the submittal to Metro.

A. Brief Summary

The Department rejected HLA's Objection that Metro failed to conduct the analyses necessary to comply with Goal 10, the Metro Housing Rule, and the Needed Housing Statutes. The Department concluded that, because Metro submitted "a number of pertinent documents," and because of Metro's "own assumptions and evidence," including its "aggressive" calculations and "thorough," "peer review[ed]" methodology, Metro's decision complies with "the requirement to address the region's anticipated housing needs over the planning period" and gave serious consideration to "reasonably accommodating" needed housing within the existing UGB, and therefore complies with Goal 10, Goal 14, and ORS 197.296. Because none of these assertions, if true, would demonstrate that Metro undertook the analyses and remedial measures required by the Metro Housing Rule and the Needed Housing Statutes, the Commission should remand the decision with directions to Metro to conduct those analyses and adopt any necessary remedial measures.

B. Background

Metro's Regional Functional Plan Requirements, Title 1: Housing Capacity demonstrates that Metro is obligated to plan for compact urban form that ensures the provision of all housing types and needs. In light of the ongoing housing crisis and the requirements of Statewide Planning

[31] *See infra* Exception 3 and the discussion of *Seaman v. Durham,* 1 LCDC 283 (1978) ("The housing goal clearly says that municipalities are not going to be able to do what they have done in metropolitan areas in the rest of the country. They are not going to be able to pass the housing buck to their neighbors on the assumption that some other community will open wide its doors and take in the teachers, police, firemen, clerks, secretaries and other ordinary folk who can't afford homes in the towns where they work.").

Goal 10, Metro has an imperative planning obligation to review existing shortcomings throughout the Metro region relating to the provision of housing for the most vulnerable community members. Metro's code demonstrates its gatekeeper function, where, for example, it places obligations on local governments to only negligibly reduce minimum residential zoning density. Metro Code 3.07.120(E) provides:

> A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a *negligible effect* on the city's or county's overall minimum zoned residential capacity. (Emphasis added).

The context of this provision is Metro's Code chapter 3.07 as a whole, the purpose of which is set out at Metro Code 3.07.110:

> The Regional Framework Plan calls for a compact urban form and a "fair-share" approach to meeting regional housing needs. It is the purpose of Title 1 to accomplish these policies by requiring each city and county to maintain or increase its housing capacity except as provided in section 3.07.120.

Metro Code Chapter 3.07 is meant to implement ORS 197.296, especially subsection 6, which requires Metro to either require greater density on existing lands within the UGB or expand that boundary.[32]

Further, under the Metro Housing Rule, local governments are required during periodic review to "prepare findings regarding the cumulative effects of all plan and zone changes affecting residential use."[33] Metro is a "local government" under ORS 197.015(13) and the Needed Housing Statutes and thus must prepare findings of all plan and zone changes affecting residential use under the Metro Housing Rule. Additionally, Metro is required during periodic review to review all of the plans and land use regulations for the urban lands of its member jurisdictions and assure that needed housing is provided for on a regional basis.[34]

C. HLA's Objection

In HLA's Objection 2, it raised that Metro's UGB expansion must comply with *both* Goal 10 and the Metro Housing Rule because Metro's UGB expansion is the appropriate time for demonstrating compliance with both, as well as the Needed Housing Statutes.

Like the Metro Housing Rule, Goal 10 must also be interpreted under Oregon's Needed Housing Statutes. LUBA's opinion in *Housing Land Advocates v. Happy Valley* seems to carve out an exemption from Goal 10 compliance by suggesting that the more specific provisions of

[32] *See Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017) where, based on Metro Code Chapter 3.07, HLA challenged the designation of a parcel that effectively eliminated the possibility of developing multifamily housing in favor of a single-family subdivision.
[33] Or. Admin. R. 660-007-0060. Metro is a "local government" under Or. Rev. Stat. § 197.015(13) and the Needed Housing Statutes, and is therefore subject to this requirement. The Department itself recognizes as much. *See* Department Report at 46 ("Metro and *other* local governments . . . ." (emphasis added)).
[34] *See* Or. Admin. R. 660-007-0050.

ORS 197.296 somehow overcome ORS 197.307 and Goal 10. As HLA argued before LUBA and reasserted in its Objection, LUBA's conclusion is incorrect even where only one of Metro's member jurisdictions adopts a zone change. However, even if it were correct on its facts, it would only apply to zone changes in individual jurisdictions. Because these proceedings implicate Metro itself, LUBA's decision is not binding on Metro, the Department, nor the Commission, and there is no justification for such a reading of ORS 197.307 here. Instead, HLA argues that ORS 197.296, 197.299 to 197.302, and 197.307 must be harmonized with each other and with Goals 10 and 14.[35]

Assuming that Metro has made the case on need and capacity, it could entertain expansion of the UGB.[36] As stated, LUBA concluded in *Housing Land Advocates v. Happy Valley* that the Metro Housing Rule did not require reassessment of housing types and densities except at periodic review. Whenever Metro adds more than 100 acres to the UGB, however, it must do so in the manner provided for periodic review.[37] HLA therefore argues that, under OAR 660-007-0050 and 0060, Metro was required during these proceedings to prepare findings of all plan and zone changes affecting residential use, and to assure that needed housing is provided for on a regional basis. Because Metro failed to prepare such findings, and because it instead focused on four discrete areas using existing plan and zoning designations as an unexamined baseline, it has not complied with the Metro Housing Rule.

Under ORS 197.296, Metro is also obligated to ensure that required housing types and densities will not slip away between periodic reviews by adopting adequate measures to that end.[38] The only provision that Metro has adopted in this respect is Metro Code 3.07.120(E), which provides that "[a] city or county may reduce the minimum zoned capacity of a single lot or parcel

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[35] *See, e.g.*, *1000 Friends of Oregon v. Land Conservation & Dev. Com'n*, 244 Or. App. 239, 259 P.3d 1021 (2011) ("We are constrained to construe ORS 197.298 in a way that gives effect to all of its terms. 'As a general rule, we assume that the legislature did not intend any portions of its enactments to be meaningless surplusage.' *State v. Stamper*, 197 Or. App. 413, 417, 106 P.3d 172, *rev. den.*, 339 Or. 230, 119 P.3d 790 (2005); *see also* Or. Rev. Stat. § 174.010 ('In the construction of a statute, . . . where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.'.").

[36] HLA only assumes these things for purposes of discussion and has challenged elsewhere in its Objections and these Exceptions the choice to expand the UGB over increasing density therein. Under Goal 14, "[p]rior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary." The Department itself acknowledged in its December 5, 2018, letter to Metro that the regional government was required to demonstrate that other portions of the region cannot reasonably accommodate identified needs and that all cities have adopted measures to accommodate those needs as much as feasible. HLA does not believe either of these showings has been made. As noted in HLA's second and third objections and the herein, Metro has not shown that those portions of the Metro Housing Rule (i.e., the 6-8-10 rule under OAR 660-007-0035 and the 50/50 rule under OAR 660-007-0030) have been met before considering additional lands for the UGB, and the Department compounds that error by saying this is a local government function. If no showing of compliance with existing density and housing type requirements is made, how is a UGB expansion justified?

[37] *See* Or. Rev. Stat. § 197.626.

[38] *See* Or. Rev. Stat. § 197.296(7) ("Using the analysis conducted under subsection (3)(b) of this section, the local government shall determine the overall average density and overall mix of housing types at which residential development of needed housing types must occur in order to meet housing needs over the next 20 years. *If that density is greater than the actual density of development determined under subsection (5)(a)(A) of this section, or if that mix is different from the actual mix of housing types determined under subsection (5)(a)(A) of this section, the local government, as part of its periodic review, shall adopt measures that demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years*." (emphasis added)).

so long as the reduction has a negligible effect on the city's or county's overall minimum zoned residential capacity." However, in reaching this UGB expansion decision, Metro failed to examine or quantify the results of past downzonings and has refused to give assurances that this UGB expansion will provide adequate types and densities of housing as future downzonings occur.

Metro may satisfy ORS 197.296 by imposing conditions on the granting of UGB expansions or by adopting ordinance language to ensure that the UGB does in fact include "sufficient buildable lands for the next 20 years," as required.[39] Such language is set forth in ORS 197.307 as well as Goal 10—neither of which are superseded by or inconsistent with ORS 197.296. Because Metro has provided neither of these safeguards, however, it has not met its burden under the Needed Housing Statutes. Should it be determined that no such boundary-assurance obligations are required under the Metro Housing Rule, HLA argues that either those interpretations or the rule itself is inconsistent with Goals 10 and 14 as well as the Needed Housing Statutes.

Moreover, even the conditions that Metro did impose give rise to HLA's concern that a preclusion argument will follow. The four cities might claim they are protected by this Metro Decision when their zoning and land use regulations are challenged. They can argue that their plans for the boundary expansion have been acknowledged by the proposed action now before the Commission.[40] Thus, now is the time for HLA to challenge Metro's compliance with the Metro Housing Rule, Goal 10 must also be interpreted under Oregon's Needed Housing Statutes.[41]

As indicated by the Department's December 5, 2018, letter to Metro, other provisions of the Metro Housing Rule apply here, as well. These include the "50-50 rule," which requires that at least half of all new construction *across the region* be attached single-family or multifamily housing,[42] and the "6-8-10 rule," which sets forth minimum residential densities in each city in the region.[43] Neither Metro nor the Department can "cherry pick" by reviewing only the four expansion areas for compliance. Unless Metro can show that *all* parts of the region satisfy these requirements, it cannot justify the expansions (largely for detached single-family housing) that it approved in this decision. We do not believe Metro has made this case.

In order to comply with applicable statutes, goals and rules, HLA argues Metro must reconsider both the need to expand its UGB and, by extension, its compliance with the Needed Housing Statutes, Goal 10, and the Metro Housing Rule.

D. Department Response

HLA understands the Department to respond that, because Metro's submittal includes "a number of pertinent documents," including a Residential Development Trends Document, Housing Needs Analysis, and Growth Forecast Findings, and because the Metro Housing Rule

[39] *See* Or. Rev. Stat. § 197.296(6)(a). HLA supports the position of 1000 Friends of Oregon with respect to adequacy of Metro's conditions regarding the proposed UGB expansion.
[40] *See Bicycle Transportation Alliance v. Washington County*, 127 Or App 312, 317, 873 P2d 452 (1994).
[41] *See also* Attachment 2, Objection 3 and all its subsections, as set for the in the introduction, is not waived and fully incorporated by reference here.
[42] *See* Or. Admin. R. 660-007-0030.
[43] *See* Or. Admin. R. 660-007-0035.

provides that population projections "should not be held to an unreasonably high level of precision," Metro's decision complies with "the requirement to address the region's anticipated housing needs over the planning period" and, therefore, Goal 10.

In addition, the Department notes that, under Goal 14, local governments must "give serious consideration to 'reasonably accommodating' the [residential] need . . . within the existing UGB" before seeking an expansion. It therefore asserts that "the question of compliance with ORS 197.296(6) rests on whether Metro has taken sufficient measures to provide new lands within the existing Metro UGB to meet the single-family housing deficit identified in the HNA." Because of Metro's "own assumptions and evidence", including its "aggressive" calculations and "thorough," "peer review[ed]" methodology, "as well as the fact that the preponderance of new single-family residential development within the Metro area is expected to occur within the existing Metro UGB[,]" the Department concludes that Metro has complied with Goal 14 and ORS 197.296.

E. HLA's Exception

The Department's response once again misses the point. Even if Metro were correct that some lots would redevelop and that average lot sizes in the region have decreased, and even if Metro's methodology were peer reviewed, that does not show that Metro has undertaken the analyses required under the Needed Housing Statutes and the Metro Housing Rule. Moreover, the fact that Metro submitted voluminous documentation, including a Residential Development Trends Document, Housing Needs Analysis, and Growth Forecast Findings, does not by itself justify a UGB expansion for single-family housing. HLA does not contend that the analyses contained in these documents were not accurate in their own right. Rather, HLA believes Metro did not conduct *the right* analyses—that is, the findings on plan and zone changes and the regionally-oriented inquiries that are required under OAR 660-007-0050 and 0060, as well as the measures to ensure that needed housing types and densities do not backslide between periodic reviews required under ORS 197.296(7).

Furthermore, the Department's response does not address Metro's silence with respect to LUBA's decision in *Housing Land Advocates v. City of Happy Valley*.[44] That decision found no Goal 10 violation for the downzoning of land from multifamily to single family housing under OAR 660-007-0060(2)(b), so long as the local government commits itself via the findings to complying with other provisions of the Metro Housing Rule sometime in the indefinite future. If the Metro Housing Rule does not prevent Goal 10 violations in the event of downzonings by individual jurisdictions, there must be some other way for Metro to supervise local plan amendments that, in areas outside of Metro, would violate Goal 10. *Housing Land Advocates v. Happy Valley* is a typical example of Metro failing to carry out its gatekeeping function, and HLA believes this is Metro's pattern and practice to fail to comment on downzonings that occur piecemeal throughout the region.[45]

Under ORS 268.385, Metro is the statutory planning coordinator for the region and has the

[44] *See* discussion of the non-binding nature of this decision to Metro in Section IV.C, *infra*.
[45] HLA has been part of a post-acknowledgement plan amendment ("PAPA") review project for the last three years, reviewing hundreds, including many in the Metro region. HLA is aware of no case brought by Metro to enforce Goal 10 or the Metro Housing Rule.

power to review and revise plans and regulations of its member jurisdictions. In order to expand the UGB, Metro, as a statutory "local government," must be able to ensure compliance with Goal 10, the Metro Housing Rule, and the Needed Housing Statutes. Because it lacks that ability right now, the Commission must remand this UGB expansion decision until such a mechanism is in place. Until then, Metro's Urban Growth Management Functional Plan, which both Metro and the Department correctly characterize as "meant to implement ORS 197.296," cannot be deemed satisfied because it provides no mechanism to correct the loss of housing capacity by individual local actions.[46]

V. Exception Three: Metro and the Department failed to justify the UGB expansion for failure to consider other lands and requirements that might have obviated the need to expand (HLA Objections 3(b) and 3(c) – Metro Charter and Comparative Analysis)

A. Brief Summary of Metro Charter

The Department rejected HLA's Objection that Metro has correctly construed applicable law and that Metro has justified the proposed UGB expansions with substantial evidence in the whole record and an adequate statement of reasons despite Metro's categorical refusal to consider any "increase in the density of single-family neighborhoods within the existing urban growth boundary identified in the plan solely as Inner or Outer Neighborhoods." This "finding" occurred only at the end of the process and was not the subject of any other Metro analysis in this record.

HLA takes exception to the Department's recommendation that the Commission should allow such a massive categorical exclusion because it leaves a poorly-defined but definite hole in Metro's evidentiary record concerning whether the existing UGB can reasonably accommodate identified needs, including the needs for additional single-family housing used as the basis for the four expansions before the Commission in this proceeding.

The Director's Report also invites the Commission to misinterpret and misapply the statutes, goals, and rules governing urban growth boundary expansions for needed housing in ways that encourage exclusionary nullification strategies like the charter amendment in question.

HLA respectfully but urgently asks the Commission not to be a party in undermining the primacy of state land use laws affecting housing and that it not be a party to unlawfully limit the capacity of Oregon's existing urban growth boundaries.

B. HLA's Charter Amendment Objection

In HLA's Sub-Objection 3b, HLA explained that Metro's failure to analyze whether the existing UGB can reasonably accommodate identified needs, including the needs for additional single-family housing needs identified as the basis for the expansions before the Commission. At pp. 10-11 of Metro's findings, HLA points out that there is a remarkable statement that appears to exempt from consideration any changes to existing single-family neighborhoods, based on an interpretation of Metro Charter, Section 5(b).

[46] *See* Section V, *infra* for HLA's response to the Department regarding the Metro Charter limitations.

Metro determined it must expand the boundary because it couldn't consider or require additional efficiencies in single-family areas within the plans and land use regulations of cities and counties in the region and, consequently, didn't look for these efficiencies. HLA argues that Metro conducted no analysis of areas other than the four cities that requested additional urban lands through this inspection.

The issue for HLA is that the subject decision is not supported by substantial evidence or adequate findings supporting Metro's determination of need for expansion of the current UGB because Metro unlawfully excluded any consideration of existing neighborhoods.

Further, HLA mentions the findings also fail to explain why such a self-imposed charter restriction overrides state standards and procedures for establishing and enhancing existing capacity before expanding an Urban Growth Boundary. Those findings do not explain why Metro and its constituent jurisdictions are exempt from requirements imposed on Oregon's other urban areas.

Additionally and alternatively, HLA contends that: 1) The subject charter provision is preempted by the requirements of ORS 197.296, Goal 14, Goal 10, and LCDC's rules interpreting those goals and statutes; or 2) Until it repeals the subject charter language or otherwise follows state law, Metro has disabled itself from meeting the requirements of state statutes and goals for maximum efficiency of the existing UGB, a showing of an inability to accommodate estimated needs within the existing UGB and a sufficient demonstration of an existing capacity shortage and of a need to expand the Metro UGB to meet that need.

In summary, Metro may not, if it wants to expand its urban growth boundary, use its charter restriction to exclude existing neighborhoods from efficiency measures, reduced maximum lot sizes, increased density minimums, multifamily housing, accessory dwelling units, vacation rental restrictions, or other measures that implement Goal 10, the Needed Housing Statutes, and the accessibility requirements of state and federal fair housing laws.

C. Department's Response to HLA Charter Amendment Objection

The Department cites to Goal 14 and OAR section 660-024-0050(4) that, "[p]rior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB." The Department finds that because Goal 14 and OAR section 660-024-0050(4) is "…without clear guidance as to 'reasonable accommodation' it is evident that making this determination is highly discretionary." The Department concludes that for this proceeding, the Metro Charter provisions that prohibit certain actions by Metro is a reasonable consideration.

Further, the Department concludes that HLA has not provided sufficient information to demonstrate that Metro's inaction violated the FHA because "…to require increases in density within Inner or Outer Neighborhoods due to Charter Section 5(b) is immaterial to this question, as Metro has satisfactorily demonstrated that they have made efficient use of the land within the UGB without need for additional measures."

D. HLA's Exception

As the Department's Report says,

> "At issue is the requirement, found in Goal 14 and OAR section 660-024-0050(4) that, 'Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB.'"[47]

Where the Department runs off track is in failing to understand that this fundamental "requirement" underpinning the integrity of existing urban growth boundaries significantly constrains the discretion local and regional governments have under the Needed Housing Statute to choose and apply appropriate "efficiency measures" as well as whether to (a) eliminate an existing capacity deficit with efficiency measures, (b) expand an existing UGB, or (c) both.

Simply put, a proposed UGB expansion which categorically excludes the vast majority of existing lands planned and zoned for single-family residential use from any density increases to meet an identified need for more single-family housing does not "demonstrate" that those needs cannot be "reasonably accommodated" on lands "already inside the UGB."

Nothing in ORS 197.296(6) [48] says or suggests that it overrides or qualifies the requirement of Goal 14 and the urbanization rule that, before they expand their UGBs, regional and local governments must first "demonstrate" that they cannot "reasonably accommodate" identified residential land needs within their existing urban growth boundaries.

Metro's attempt to gate off its entire inventory of single-family neighborhoods is not *ipso facto* "reasonable" and its status as a charter amendment does nothing to make it so.[49] Could Eugene or Bend or Hood River do the same? Does ORS 197.296 offer a free pass on increasing

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[47] Department Report at p 48.

[48] Or. Rev. Stat. § 197.296(6) provides that

> "(6) If the housing need determined pursuant to subsection (3)(b) of this section is greater than the housing capacity determined pursuant to subsection (3)(a) of this section, the local government shall take one or more of the following actions to accommodate the additional housing need:
>
> "(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for the next 20 years. As part of this process, the local government shall consider the effects of measures taken pursuant to paragraph (b) of this subsection. . . ;
>
> "(b) Amend its comprehensive plan, regional framework plan, functional plan or land use regulations to 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 without expansion of the urban growth boundary**.** A local government or metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures; or
>
> (c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection.

[49] See *1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 396 (1988) (The "talisman of a forest management plan" is "legally inadequate" to make construction of a dwelling "automatically comply with Goal 4.")

single-family home capacity simply because it is not completely prescriptive and identifies choices local governments may make, consistent with their continuing obligation to "demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB?" Or has that obligation now become a matter of "discretion" and "local option?" Does Metro's charter amendment excuse it from demonstrating compliance with all other applicable goals, statutes, and rules, including the Urbanization Goal, the Housing Goal, the requirement of an adequate factual base, and the requirement of a reasoned analysis?[50]

The answers must be "No." And those answers cannot be found because Metro saw no need to answer them. Here, despite the huge record, there is no factual base and no such reasoned analysis connecting the evidence with the conclusions reached, either by Metro or by the Department's Report, concerning whether Metro really needs to expand its urban growth boundary.

The Department's Report doesn't fill any gaps with this rather odd comments that there are other measures (minimum densities and housing mix provisions of the Metro Housing Rule, parking reductions, ADUs) so that 97 percent of the projected housing need over the next 20 years within the existing UGB, as discussed previously, (and 93 percent of the projected single-family housing need) is met.[51] That shows the boundary is "efficient."

This is not just a *non sequitur*. It is a reverse sequitur. It connects the facts in the record with the exact opposite of the Director's conclusion: If the existing boundary can accommodate 97 percent without the additional[52] efficiency measures mentioned in ORS 197.296, then it should be easy to boost capacity by another three percent. That makes excluding single-family zones, which currently occupy most of that land, from any role in increasing capacity for the identified needed housing type – single-family homes – patently unreasonable.

As far as HLA knows, Metro's charter amendment was not promulgated as a post-acknowledgment plan amendment or zoning regulation and has never been reviewed for compliance with statewide land use statutes, goals, and rules. Metro's charter amendment could never pass such a test. For as applied here, it undermines and contravenes the Urbanization Goal and Rule with its bypass of the obligation to demonstrate inability to reasonably accommodate projected needs with existing urban growth boundaries. It exempts the vast bulk of residentially-planned and zoned lands within Oregon's largest urban growth boundary and the current residents and owners of those lands from bearing their fair share of *their* communities' obligations under Oregon's State Housing Goal 10.

Its obvious purpose is to "entrench" an exemption from state housing laws. Its obvious effect to date is a classic case of "regulatory capture." The challenge for this Commission is to free Metro and the Department, not to join them in the cage.

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[50] In acknowledging a plan or plan amendment, LCDC must "[I]nclude a clear statement of findings in support of the determinations of compliance." Or. Rev. Stat. § 197.251(5)(b). For its part, Metro must present a record to LCDC that "viewed as a whole, would permit a reasonable person to make that finding." Or. Rev. Stat. § 183.483(8)(c) and parallel Goal 2 requirement of an "adequate factual basis."

[51] Department Report at pp 48-49.

[52] The efficiency measures contemplated in Or. Rev. Stat. § 197.296 are additional measures to those already in place, which are counted toward the baseline capacity and can't be recounted towards enhanced capacity.

This Commission has a great responsibility as stewards of Oregon lands, air, and water resource and as stewards of Oregon's entire land use constitution. Where Goal 10 is concerned, what that stewardship obligation entails has long been clear. From the very beginning, the Commission has rejected attempts to reduce or to avoid increasing housing density without demonstrating compliance with the Statewide Housing Goal. As the original Commissioners, including several founding fathers and mothers of Oregon's "land use constitution," said over 40 years ago, in *Seaman v. Durham*, 1 LCDC 283, 288-290 (1978), overturning a local government's attempt to use density to exclude affordable housing,

> "The Commission finds, for the reasons set forth in this opinion, that the density reduction should be declared void as in violation of the housing goal and that the matter should be returned to the city for such action, if any, as is consistent with the Commission' s determination and this opinion.
>
> This case turns on the meaning and intent of the LCDC Housing Goal. Goal 10 is short and to the point:
>
> > 'Goal: To provide for the housing needs of citizens of the state. Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of 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.
> >
> > Buildable Lands - refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.
> >
> > Household - refers to one or more persons occupying a single housing unit.'
>
> ***
>
> [C]ities are not required to conform strictly to guidelines.
>
> ***
>
> Yet they are instructive and may validly be considered for the light they cast on the intent of the drafters of the goals. The housing guidelines reflect a great concern for variety in shelter costs, for dispersal of low-income housing throughout urban areas, and for affirmative incentives to achieve the goal, if necessary. See Guidelines A(l) and B(2) to B(5). The guidelines also contemplate the ultimate implementation of the goal to be on a regional level. Guideline B(6). Perhaps most important, the goal itself refers to the 'financial capability' not of residents of the municipality but of 'Oregon households,' strongly suggesting that towns must look beyond their borders

in assessing housing needs.

The housing goal clearly says that municipalities are not going to be able to do what they have done in metropolitan areas in the rest of the country. They are not going to be able to pass the housing buck to their neighbors on the assumption that some other community will open wide its doors and take in the teachers, police, firemen, clerks, secretaries and other ordinary folk who can't afford homes in the towns where they work.

The LCDC, in adopting Goal 10, was doing just what the courts in many urban states have been doing in recent years. The development is examined approvingly and at length in a leading planning law treatise, which introduces the topic with these observations:

> 'If anything is clear in American planning law, it is that the state courts (and some lower federal courts) have been moving rapidly towards a major reversal in the law on exclusionary zoning directed against lower-income groups. At least in several states, and probably in most states, there is a strong probability that in the near future municipal autonomy to use zoning for such purposes will be sharply reduced . . .'
>
> This change . . . is the result of several different factors. First, because of changes in the age structure of the population, this country is moving into a period when there will be heavy pressure for several types of housing, all of which are now prohibited on most of the available vacant land. Two groups in the population are now increasing rapidly - the aged ... and the young married couples.
>
> In the second place, the recent development of public policy in the other critical areas has cast considerable light on the implications of the exclusionary suburban pattern . . . (For) a decade or two now it has been apparent that, if current trends continue, there is considerable likelihood of a pattern of largely black (and poor) central cities surrounded by largely white (and middle class) suburbs - a pattern whose implications appeal to very few thoughtful people. 3 Williams, *American Land Planning,* Law Section 66.01 (1975).'

Goal 10 speaks of the housing needs of Oregon households, not the housing needs of Durham households. Its meaning is clear: planning for housing must not be parochial. Planning jurisdictions must consider the needs of the relevant region in arriving at a fair allocation of housing types. Goal 10 represents the broader interests of all Oregon households.

In this respect, Goal 10 is consistent with common sense and human nature.

> Local officials cannot be expected to concern themselves too deeply about the requirements of outsiders, especially when their constituencies have interests that conflict with those of the outsiders. It is only proper for these officials to consider their first responsibility to be their constituents.
>
> It becomes necessary, therefore, to assure that broader interests are represented in planning decisions such as housing, which have significance and impacts extending far beyond municipal borders." (Emphasis added).

The Commission's resolution of this issue has far-reaching implications. As the *Seaman* case illustrates, density restrictions can take many forms, some of which can render efficiency measures such as minimum lot sizes and added housing types ineffective. An ordinance setting a maximum density of five units per acre, for example, can limit development on a one-acre site to two duplexes and a single-family home. Strict floor-area ratios, oversized setbacks, and vaguely defined buffer areas can have the same effect.[53] Such restrictions, if tolerated because of charter amendments like Metro's, would seriously impair the effectiveness of state land use laws such as the newly-enacted House Bill 2001. The decision should be remanded so that Metro can analyze the full tool set of efficiency measures to utilize land within the existing boundary to meet housing needs.

E. Relatedly, Metro's consideration of social impacts in light of HLA's comments about exclusion and effects on low-income Oregonians is so flawed in its failure to respond that the environmental, social, energy and economics analysis ("ESEE") establishes another basis for remand.

1. Brief Summary Of Comparative Analysis

Metro must evaluate and apply the locational factors when there is a need to amend the UGB under MC 3.07.1440(b). This section's cross-reference to 3.07.1425(c)(3) requires ESEE findings:

> "(c) If the Council determines there is a need to amend the UGB, the Council shall evaluate areas designated urban reserve for possible addition to the UGB and shall determine which areas better meet the need considering the following factors:
>
> * * *
>
> (3) Comparative environmental, energy, economic and social consequences;"

2. HLA's Objection

HLA raised significant social concerns in its comments to Metro. HLA specifically pointed to the cities of Sherwood and Happy Valley, the cities with the highest median incomes in their

[53] See *Homebuilders et al. v. City of Eugene*, 41Or LUBA 370, 446 (2002), finding that petitioners had made a "facially plausible showing" that city code provisions establishing buffers around some 200,000 "significant trees" dispersed across the city "are likely to reduce the supply of buildable lands," and that the city had failed to "quantify how much land, if any, may be rendered unbuildable."

respective counties (Washington and Clackamas). Unsurprisingly, the Clackamas County Consolidated Plan shows that Happy Valley's population grew by 208% between 2000-2010, and in 2010, 76% of its population was white.[54] In addition, poverty has increased in the County by 10.4% between 2000 and 2010 and in nearly half of female householders with young children under five (a protected class) lived in poverty.[55] Yet, Metro's decision did not include an analysis of whether Happy Valley has exclusionary zoning practices and/or results. Similarly, while the City of Sherwood has the highest median income in Washington County, and an identified need to expand its UGB, it neither applied for an expansion nor was required to do so.[56] The City Council did not want to be tethered to affordable housing requirements that Metro identified as a linchpin to successful applications.[57]

These concern were raised under the Goal 10 heading, but HLA's footnote 41 in its December 4, 2018 letter tied the issue back to Metro Code 3.07.1425(c)(3). However, Metro's decision and the DLCD Report make no reference to this important criticism and omission. Instead, the Director's Report embraces Metro's self-fulfilling prophecy that the only boundary expansion necessary to consider were from those member cities who applied. This is contrary to *Seaman v. Durham,* which stands for the greater regional planning goal - the very reason Metro exists.[58]

3. Department Response

The Department claims that "HLA seems to misunderstand the purpose of the boundary location factors analysis required by Goal 14. HLA asserts that Metro must analyze the social consequences of UGB expansion upon residents of the existing UGB. As a matter of law, the social consequences required to be measured under Goal 14 as part of factor 3 cited above are a comparative analysis of different proposed UGB expansion areas – a local government completes this analysis after it has determined the amount or capacity of the land need to be satisfied with a UGB expansion, not before." The Department claims that "HLA's concerns regarding locational preferences and potential displacement are addressed by Metro's HNA and buildable lands inventory, completed in an earlier phase of the analysis."

The Department further claims that, "[A]s part of the required consideration of Goal 14 Boundary Locational Factors (Goal 14, Boundary Location) Metro completed a comparative analysis of the ESEE Factors identified in Goal 14. The complete analysis of locational factors may be found on pages 1985–1994 of the Record. Metro completed detailed analyses of the Goal 14 Locational Factors for all 32 of the urban reserve areas under consideration for expansion. Record at 1998. The department finds that Metro has adequately considered the boundary locational factors of Goal 14, and recommends that the commission reject this sub-objection."

[54] See HLA's December 4, 2018 letter to Metro attached here as Attachment 1.
[55] *See id.*
[56] *See id.*
[57] *See id.*
[58] This is true despite Metro's emphasis on the long-term planning for the zoo and now as a grant agency that will support housing in only those member cities that qualify for community development block grants, not those cities that are too small, and as the trajectory of this decision shows, will be insulated from consequences for their exclusionary practices.

4. HLA's Exception

The Director's Report cites to the ESEE analysis that was prepared by Metro at Record 1985-1994. But, that was done without reference to HLA's social concerns. An ESEE analysis requires a comparison of the social impacts for both the proposed expansion area and for the alternative sites.[59] Metro has an obligation to consider each of the locational factors and to articulate its thinking regarding the factor and the role that each factor played in its balancing of all the factors.[60] But, it cannot avoid uncomfortable social facts in its analysis, and it does so by completely avoiding the absence of the City of Sherwood in this expansion request.[61] Thus, the analysis of social consequences does not allow for a meaningful review.

Metro's findings fail to address the social consequences and the impact on housing opportunities. Rather, the ESEE's social consequences are limited to displacement of existing homes in the contemplated expansion areas. It is apparent that there is a statewide crisis with the lack of affordable housing across Oregon. HLA offered empirical data that Sherwood provides nearly the least amount of affordable housing in Washington County, while having the highest income, and the highest median rents.[62] Livability, which is a social consequence, is a more pressing social matter than the Director's Report credits. Instead, the Director's Report sanctions Metro's blinders to the problems throughout its region and allows Metro to limit the focus only on the four cities that applied for an expansion. This is the kind of reasoning that raises the specter of exclusion. The social impact may result in a reduction of housing equity, loss of a vibrant community, diminished quality of life, and less housing opportunities for current and future citizens. These points were echoed in HLA's Objection, at pp. 18-19.

Similarly, gentrification is not discussed at all in the ESEE as a social impact. If, as is true, persons of color are displaced by gentrification in Albina and North Portland or are required by economics to live in East Portland, how does expanding single-family housing in King City, where transportation is inadequate, not a consideration in a boundary expansion? [63] Without specifying key social impacts, the ESEE analysis is incomplete.

Taken together 1) the smokescreen of the Metro Charter, and the unexamined conclusion that the existing UGB cannot be used to meet the 3% need for additional single-family dwellings because increased density cannot be required, and 2) the failure to address the social outcomes, results in exclusion and allows patterns of segregation to continue throughout the region. Metro

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[59] *See 1000 Friends of Oregon v. Metro*, 38 Or LUBA 565, 595 (2000), *aff. in part* 174 Or App 406 (2001) (*Ryland Homes)*.
[60] *See Ryland Homes*, 174 Or. App. 406.
[61] *See Eckis v. Linn County,* 22 Or LUBA 27, 47 (1991), *aff'd* 110 Or App 309 (1991) (livability is a social consequence and must be addressed).
[62] *See* Attachment 1, Exhibit 2.
[63] Moreover, Goal 14's need requirements also include consideration of similar factors when it provides: "Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary." Similarly, as noted in HLA's third objection, if persons of color are displaced by gentrification in Albina and North Portland or are required by economics to live in East Portland, how does expanding single-family housing in King City, where transportation is inadequate, not a consideration in a boundary expansion? The lower or middle-income Latino pushed out of North Portland is not likely to be accommodated by a $500,000 dwelling in the expansion area of King City.

cannot be let off the hook this easily, and on remand, in order to make adequate findings addressing this issue, it should reopen the record. At that time, Metro should start in the City of Happy Valley to determine whether there are buildable lands that could increase density to allow dwellings. Then, it should go down the line of member cities to Sherwood and other high-priced exclusive cities within the Metro region to determine where the need can be met. Only then, will Metro start to lead us out of exclusion to the equity goal it has set as an aspiration.

CONCLUSION

HLA has witnessed Metro's conversations around equity, but "conversations" do not replace the hard planning work necessary to end exclusionary zoning practices. The years between UGB expansions should be spent less on toolkits and more on identifying and leading member cities to expansion proposals that aim to end exclusion, gentrification, and to stanch the forces that push marginalized communities to the edge of the boundary. The equity-based issues that HLA's all volunteer-board argues in this UGB exception, provides LCDC the support it needs to make the right decision here – to send Metro back to the drawing board and turn its "conversations" about equity into practice in housing supply solutions.

Sincerely,

Jennifer Bragar
President, Housing Land Advocates

Attachments:

Attachment 1: Housing Land Advocates' December 14, 2018 Letter to Metro
Attachment 2: Housing Land Advocates' January 30, 2019 Objection to DLCD

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