



# Oregon

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## Department of Land Conservation and Development

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### MEMORANDUM

FROM: Richard Whitman, Steve Shipsey  
TO: LCDC Commissioners  
RE: Metro Reserves Deliberations  
DATE: October 28, 2010

This memo is intended to assist the commission in its final deliberations concerning Metro urban and rural reserves, by clarifying the department's understanding of what the commission needs to decide with regard to the three specific areas the commission indicated it wants to focus on, and what the commission's standard(s) are for making those decisions. To further assist the commission, we are providing four exhibits to this memo. Those exhibits are: (A) Three maps of the current zoning designations for Areas 7B, 7I and 8A; (B) Excerpts of the Objections and Exception relating most directly to these three areas; (C) A compilation from Washington County and Metro of the evidence in the record showing how the county and Metro considered and applied the factors to these three areas; and (D) A transcript of a portion of the final rulemaking hearing where the commission adopted its division 27 rules for urban and rural reserves. To the extent that these attachments include new evidence, we ask that the commission request these materials to assist it in its deliberations.

#### 1. What Does the Commission Need to Decide? (Scope of Review)

What the commission reviews (it's scope of review) is set in its own rule: 660-027-0080(4). That rule provides that the commission reviews the reserves decision for four basic things (the four basic things are summarized in the bracketed capitalized language):

"\* \* \* The Commission shall review the submittal for:

(a) Compliance with the applicable statewide planning goals. Under ORS 197.747 "compliance with the goals" means the submittal on the whole conforms with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature. To determine compliance with the Goal 2 requirement for an adequate factual base, the Commission shall consider whether the submittal is supported by

substantial evidence. Under ORS 183.482(8)(c), substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding [THE STATEWIDE PLANNING GOALS];

(b) Compliance with applicable administrative rules, including but not limited to the objective provided in OAR 660-027-0005(2) [e.g. a balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents] [THE BEST ACHIEVES STANDARD] and the urban and rural reserve designation standards provided in OAR 660-027-0040 [THE AMOUNT OF LAND STANDARD]; and

(c) Consideration of the factors in OAR 660-027-0050 or 660-027-0060, whichever are applicable [COMPARISON OF ALTERNATIVE AREAS BY APPLYING FACTORS]. " OAR 660-027-0080(4)

What each of these four things means, is described in more detail, below.

#### **A. Compliance with the Statewide Planning Goals**

OAR 660-027-0080(4)(a) and ORS 197.747 provide that "compliance with the goals" means the submittal on the whole conforms with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature. In addition, not all goals apply to the reserves decision. For example, in the Department's opinion, Goal 10 does not apply to the reserves decision because the designation of urban and rural reserves does not commit land to urbanization or to any particular future use (that would occur only after the land was included within an urban growth boundary and planned and zoned for urban development). Similarly, some goals may apply, but only in a limited fashion. For instance, the element of Goal 11 that requires public facility plans applies only to areas within an urban growth boundary (and so does not apply to the reserves decision). However, other elements of Goal 11 could (in theory) be implicated by the reserves decision.

The requirement to comply with the goals focuses on assuring that the underlying main purpose of the goal is met, even if there are minor deviations from the technical requirements of the goal or LCDC implementing rule. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or. 384 (Or., 1988). Thus, for example, the main purpose of Goal 3 is to preserve and maintain agricultural lands for farm use.

Goal compliance does not appear to be a major issue with regard to the three areas the commission has indicated it wants to consider more carefully, although goal compliance issues have been raised in a number of general and specific objections.

#### **B. Compliance with the Best Achieves Standard**

OAR 660-027-0005(2) states that the objective of the reserves is "a balance in the designation of urban and rural reserves that, *in its entirety*, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important

natural landscape features that define the region for its residents." (Emphasis added.) According to the records of the commission's adoption of this rule, the intent was that this standard would set a higher bar for the reserves decision than the normal requirements for locational decisions about where to expand an urban growth boundary (to consider and apply factors to alternative candidate areas – discussed below). The standard applies to the designation "in its entirety," it does not require Metro or a county to rank alternative areas. It is a standard that Metro and the counties, in the first instance, must demonstrate has been met, by explaining why in their findings.

Although the standard applies to the designation[s] in its entirety, the department believes that the commission could find that the standard is not met as a result of concerns about one or more areas (e.g., the designation[s] in its entirety could fail to meet this standard because of problems with one or more particular areas).

In addition, the department believes that there is a relation between the "factors" that Metro and the counties must consider for urban reserves (under 027-0050) and rural reserves (under 027-0060), and the overall objective in 0005(2). The relation is that the way that Metro and the counties explain how the overall objective is met is through their findings applying the urban and rural reserve factors to decide which alternative areas to designate as urban and rural reserves.

The meaning of the "best achieves" standard is best described in the transcript of the commission's January 2008 rulemaking hearing, attached as Exhibit D to this memo.

### **C. Compliance with the Amount of Land Standard**

This standard has already been addressed in the proceedings, and is not directly relevant to the Commission's remaining deliberations. In brief, the statute and rules provide a fair degree of discretion to Metro concerning: (a) the time period that the urban reserves are planned to accommodate population and employment growth for; and (b) the methods and policy considerations that Metro uses to project future population and employment. The statute and rules also provide Metro significant discretion in determining how to apply its overall regional projections to parts of the region (counties).

If the commission were to remand one or more urban reserve areas, with direction to evaluate the area(s) in a particular way under the commission's rules and/or to drop the area from designation, it should also indicate whether Metro and the county(ies) involved would be required to replace any lands removed as a result of the remand. The department believes that, because Metro based its determination of need on a range forecast and made a policy choice to plan for the upper end of the middle third of its projection, Metro could remove some lands without adding other lands by either altering its policy choice (to, for example, plan for the middle of the middle third) or by shortening the number of years that the reserves are planned for. Alternatively, the department believes that Metro and the county(ies), could chose to leave the decisions concerning the amount of land unchanged, and add other lands as an urban reserve.

#### **D. Comparing Alternative Areas by Applying Factors**

OAR 660-027-0040(10) and (11), together with OAR 660-027-0050 (urban) and 0060 (rural), require the commission to consider *and apply* the factors for urban and rural reserves. If the lands in question are foundation farm land (as is the case for all three of the areas the commission has focused on) OAR 660-027-0040(11) requires the commission to consider and apply *both* the urban reserve factors and the rural reserve factors. The rule provisions raise at least two basic questions that the commission should decide: (a) what does it mean for Metro and the counties to consider and apply the factors; and (b) does the rule require Metro and the counties to consider and apply the factors to each area, to the region as a whole, or to each county?

##### **a. What Does it Mean to Consider and Apply the Factors?**

The department believes that the commission's rule requires Metro and the county(ies) to evaluate alternative areas in terms of each of the factors, and to then explain why it selected a particular area as an urban reserve or a rural reserve. For areas containing Foundation Agricultural Land that are considered as urban reserves, the rules require this evaluation to be done in terms of both the urban and rural factors.

It is important to note that this does *not* require a ranking, nor (under Goal 14 (as opposed to Metro's Code) does it require that the "*best*" suited lands be included) but it does require the county and Metro to show that they evaluated alternative areas in terms of each of the factors, (*Ryland Homes*, at 154), and that their findings explain why each area is appropriate as an urban or rural reserve. Finally, "[n]o single factor is of such importance as to be determinative in an UGB amendment proceeding, nor are the individual factors necessarily thresholds that must be met." *Citizens Against Irrespons. Growth v. Metro*, 38 P.3d 956, 179 Or. App. 12 (Or. App., 2002). In other words, any one area does not have to comply with or meet every factor. The factors are considered together, and weighed and balanced as a whole.

##### **b. What Lands Does Metro or a County Apply the Factors To?**

The department's report to the commission states that we believe that Metro applies the factors to *areas* (not to individual properties, and not to the entire region). The department's position is based on the fact that the reserve factors derive from the Goal 14 locational factors (this is stated clearly in the history of the commission's rulemaking for division 27, *and* in the legislative history for Senate Bill 1011). The Goal 14 locational factors are *applied* to alternative locations for expanding an urban growth boundary to decide which one(s) to select to include within the expanded UGB. *1000 Friends of Oregon v. Metro (Ryland Homes)*, 26 P.3d 151, 174 Or. App. 406 (2001). Similarly, under the Commission's other urban reserves rules, the Goal 14 factors are applied to proposed urban reserve *areas*. *D.S. Parklane v. Metro*, 35 Or LUBA 516 (1999). We believe that the legislative and commission intent is the same with regard to the role of the factors in deciding which lands to designate as urban and rural reserves – e.g., the factors are applied to alternative areas to decide which ones to include as urban reserves, and which areas to include as rural reserves.

Furthermore, because SB 1011 and the commission's reserves rules require urban and rural reserves to be decided upon jointly between Metro and a county, we believe that the factors are *applied* to alternative areas within a county to decide which ones to designate as urban or rural reserves.

OAR 660-027-0040(10) requires Metro and the counties to "adopt a single, joint set of findings of fact, statements of reasons and conclusions explaining why *areas* were chosen as urban or rural reserves, how these designations achieve the objective stated in OAR 660-027-0005(2), and the factual and policy basis for the estimated land supply determined under section (2) of this rule." (Emphasis added) In other words, the commission's rules clearly require the factors to be applied to "areas" rather than specific properties or to the region or a county as a whole. OAR 660-027-0040(11) supplements the requirements of 0040(10) by requiring additional findings if "Foundation Agricultural Land" is designated as urban reserves (that term is defined by OAR 660-027-0010(1) as the lands mapped by ODA as foundation farm lands in its 2007 assessment). The department believes that the supplemental findings required by subsection (11) for Foundation Agricultural Lands do not alter the geographic unit that Metro and the counties must adopt findings for – the findings must still be by "area" rather than on a property-by-property or region-wide basis. What this means is that if Metro designates some portion or all of an area as an urban reserve, and that area includes Foundation Agricultural Land, then the joint findings must explain why the area was selected as an urban reserve by applying *both* the urban and rural factors to that area and explaining why that area is more suitable as an urban reserve than other lands within Metro's study area that are not Foundation Agricultural Lands.

### **c. What Did Metro and the Counties Do?**

Metro adopted a single set of joint findings that explain why the region designated some areas including Foundation Agricultural Land as urban reserves. Metro Rec. at 15-19. Those findings explain why the region did not designate other (non-Foundation) lands as urban reserves, generally. The findings include some explanation of why other (non-Foundation) lands were not designated as urban reserves (instead of the Foundation lands). The findings also state: "[t]hese reasons are more fully set forth in the explanations for specific urban and rural reserves in sections VI-VIII."

Section VI contains the findings for Clackamas County, explaining why it designated Area 1F as an urban reserve (this is the only area of Foundation Agricultural Land designated as an urban reserve in Clackamas County). The findings address both the urban factors and (to at least some degree) the rural factors. Metro Rec. 25-28.

Section VII contains the findings for Multnomah County, explaining why it designated Area 1C as an urban reserve (this is the only area of Foundation Agricultural Land designated as an urban reserve in Multnomah County). The findings address, in general terms, both the urban factors and the rural factors, and explain why the county decided to designate the area as an urban reserve. Metro Rec. 48-49.

Section VIII contains the findings for Washington County. Washington County's findings address Areas 7B, 7I and 8A, individually (as well as other areas in the county), and explain why the areas were designated as urban reserves, but do not apply the rural reserve factors to the areas containing Foundation Agricultural Lands. Although the findings do not apply both sets of factors, there is evidence in the record that Washington County did so (this evidence is summarized in Exhibit C).

## **2. What Standard Does the Commission Use to Decide Each of the Things That it is Required to Decide? (Standard of Review)**

The Oregon Court of Appeals addressed LCDC's standard of review in a UGB amendment decision at length in *City of West Linn v. LCDC*, 119 P.3d 285, 201 Or. App. 419 (2005). While that case provides some useful guidance, it is important to note that the standard of review for the court is different from the standard for LCDC, and that the standard of judicial review in the event the commission's decision in this matter is appealed is controlled by a slightly different statute than the one that applied in *City of West Linn* (ORS 197.651, not ORS 197.650).

In this proceeding, the commission reviews Metro and the county findings to determine whether they provide an adequate explanation of why each area was designated as an urban or rural reserve (using the factors). The commission reviews any factual questions to determine whether there is substantial evidence in the record as a whole to support Metro and the county's decision. And, the commission reviews any legal questions to determine whether Metro correctly decided the question.

### **A. Adequacy of Findings**

The commission's own rules require findings that explain why Metro and the counties made the decisions that they did. OAR 660-027-0040(10) provides that: Metro \* \* \* [and the county(ies)] shall adopt a single, joint set of findings of fact, statements of reasons and conclusions explaining why areas were chosen as urban or rural reserves, how these designations achieve the objective stated in OAR 660-027-0005(2), and the factual and policy basis for the estimated land supply determined under section (2) of this rule." OAR 660-027-0040(11) requires that " \* \* \* if Metro designates [Foundation Agricultural Land] as urban reserves, the findings and statement of reasons shall explain, by reference to the factors in OAR 660-027-0050 and 660-027-0060(2), why Metro chose the Foundation Agricultural Land for designation as urban reserves rather than other land considered under this division." And, OAR 660-027-0080(4) requires that: "(4) The joint and concurrent submittal to the Commission shall include findings of fact and conclusions of law that demonstrate that the adopted or amended plans, policies and other implementing measures to designate urban and rural reserves comply with this division, the applicable statewide planning goals, and other applicable administrative rules."

The requirement for findings is not simply a technicality, its purpose is to assure that the commission can perform its review function, and that it does not substitute its judgment for that of Metro and the counties. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16, 38 P3d 956 (2002); *Naumes Properties v. City of Central Point*, LUBA No. 2003-107 (Or. LUBA 1/21/2004).

In a recent decision on the City of Bend proposed urban growth boundary, the commission decided that where local findings are inadequate, it may still affirm the local decision if the local government identifies evidence in the record that "clearly supports" its decision. This is analogous to express statutory authority for the Land Use Board of Appeals to affirm local land use decisions in these circumstances (the commission indicated that it was adopting the same approach). In the LUBA cases applying its express authority to affirm decisions where the findings are inadequate but the evidence clearly supports the local government's decision, LUBA distinguishes between cases where the inadequacy in findings concerns a pure question of fact and cases where the inadequacy is in a local government's explanation of its policy choice – why it made a particular decision.

" LUBA has narrowly interpreted the term "clearly supports" in ORS 197.835(11)(b) to mean "makes obvious" or "makes inevitable." Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122 (1995). ORS 197.835(11)(b) authorizes LUBA to remedy minor oversights and imperfections in local government land use decisions, but does not allow LUBA to assume the responsibilities assigned to local governments, such as the weighing of evidence." *Salo v. Oregon City*, LUBA No. 98-173 (Or. LUBA 7/14/1999).

As indicated in its report in this matter, the department believes that if the commission determines that the Metro/county findings are inadequate, it then should decide whether or not the record "clearly supports" the local decision and, if so, whether this is an appropriate case to apply this practice. That decision could depend on both how clear the evidence is, and how much policy judgment (if any) is involved in resolving the underlying question.

## **B. Factual Questions**

The commission's rules clearly provide that it reviews Metro and the counties' factual determinations for substantial evidence in the record as a whole. OAR 660-027-0080(4)(a).

## **C. Compliance with Legal Standards**

The commission reviews Metro and the counties' resolution of any legal questions de novo, to determine whether they correctly applied the law. There do not appear to be any pure legal questions concerning the three remaining areas that the commission will deliberate on.

