

LCDC January 24-25, 2008  
Metro Urban and Rural Reserves

1 2:01:28

2 **John VanLandingham** – Issue is best and balance. Dick Benner just said to us before  
3 our break that the workgroup is fine with it that's the best they can do. So, what do we  
4 think. Marilyn do you want to say something.

5 **Marilyn Worrrix** – spent a great deal of time on this. Without including best, even  
6 though there was an attempt to keep the process fluid um some people felt there just  
7 simply was not enough direction and there wasn't a measurement of any kind. While  
8 recognizing that best may be difficult to evaluate um by putting it in the objective it was  
9 intended to serve as a guidepost. You're headed toward the best overall balance of these  
10 various issues. The um we we were taught about best originally um in ah 0040(10) or  
11 (11). But we um we related it back to the objective and decided to include the word best  
12 early on as a sort of beacon this is where we are going. But it needs to be um the overall  
13 context is important because the overall objective was to create a process that was  
14 consensus building and a product that was a balance of protecting farm, forest and natural  
15 landscapes at the same time creating livable communities. And while this balancing did  
16 require some clear guidelines the path had to be well marked. The workgroup purposely  
17 avoided making this process too detailed. We wanted to acknowledge that foundation ag  
18 land is the most important for long term viability. And we wanted to say that if Metro  
19 designates land as urban reserves for example they have to explain in findings and  
20 statements of reasons why they chose it. It was anticipated that that process would end up  
21 in a series of packages of alternatives but by the time it got to the final decision making  
22 stage and at that point Metro would have to explain very clearly why they chose one  
23 package or another or possibly combinations between them. And that analysis would look  
24 at various packages or combinations um taken as a whole and would take you back to the  
25 objective and say how does this whole package achieve the best overall balance that we  
26 highlighted in the objective. I think it's important to recognize that the workgroup never  
27 saw that best requirement as being something that would require a detailed parcel to  
28 parcel type analysis. And there was real worry that it would even be construed that way  
29 because that was the opposite of the kind of fluid creative process we were hoping to be  
30 able to create. And that instead of being a process that would require exactitude found in  
31 like a parcel to parcel comparison that this best concept is supposed to focus on the  
32 collective overall regional ah process. It would be looking for the best fundamental  
33 balance between the competing areas. Um it would not require a ranking um best, second  
34 best, third best ah it's much more general than that. So we felt it was important to have  
35 that in there um it was a strong concern from the agricultural community in particular that  
36 there needed to be something that highlighted the importance of foundation land and gave  
37 them that little extra bit of scrutiny in the best solution was best was seen to be the best  
38 solution for them. So we're comfortable with it. We know that it's loose um but this  
39 process was never designed to be did you touch all the basis, did you double check all  
40 your maps, did you calculate the right area on this particular parcel. Ah everybody been  
41 there, that's not where we wanted to go. We wanted to say how about good rational  
42 thinking supported by strong findings that make a reasonable balance between the needs  
43 to protect ag, forest and the natural landscapes and the need to create livable  
44 communities. So we sort of did it purposely and while we are really open to any  
45 comments we worked a long time on this one and I was extremely pleased that not only  
46 did the workgroup feel comfortable with the language but I really think the workgroup

1 saw the language in the same context that I've just outlined and I would invite anybody  
2 from the table, because they all listened to this, if they heard anything different now  
3 would be the time to say it but that's my background.

4 **John VanLandingham** – anybody disagree with her description.

5 **Hanley Jenkins** – here here

6 **John VanLandingham** – ok thank you. Comments from commissioners.

7 **Margaret Kirkpatrick** – Well ah I really let me start out by saying I don't really think we  
8 should mess with this um I think it's such a the fact that there is consensus and I think,  
9 unless there is further discussion that evidences me otherwise that this is something we  
10 should stick with. That I would love to have because it is yesterday so unusual to have a  
11 word like best kinda out there I would love to hear Steve or Richard or any of the other  
12 very talented lawyers here just explain I mean it looks to like as I read 0040(10) when it  
13 talks about the single joint finding and statement of reasons that you're going to be  
14 discussing each of the factors in then that there is going to be a discussion about how in  
15 the aggregate these meet the best objective best unquote objective in 0005(2). So  
16 assuming that people will be coming and arguing to the commission that what Metro and  
17 the counties have done is not the best balance how do we what is our role in in that  
18 review process and how do we approach it. So that's really my question and if I can get  
19 to the point where I feel like I understand that then I'm good.

20 **Steve Shipsey** – Metro and the counties who are making the joint submittal to the  
21 commission will include that submittal under 0080(4) findings of fact and conclusions  
22 regarding how that's best. So what we will be reviewing will be whether or not there  
23 determination of this overall package of the balance is the best. Whether it's an adequate  
24 factual basis for that, whether it's touched on the goals and considered all the goals  
25 whether it has complied with the rules both procedurally and the substantive requirements  
26 but it will be a review of a presentation of what has been deemed locally the best. And  
27 you won't be I don't think you will be required by objectors to do a new analysis of  
28 whether or not this is the best. You'll be reviewing the analysis of whether it's the best to  
29 see if that analysis is supported and presented in a way that has a substantial evidence  
30 basis and the conclusions of law are consistent with the law that needed to be applied.

31 **Margaret** – So this really is a substantial evidence review that we'll be doing and if there  
32 is substantial evidence (inaudible). We are good we are not second guessing we're not  
33 getting into the details of any of this.

34 **John VanLandingham** – Steve you are shaking your head yes.

35 **Steve Shipsey** – yes

36 **John VanLandingham** – You don't foresee as Mark Greenfield worried that we're  
37 going to find ourselves picking this parcel over here and saying no it's not the best  
38 without that parcel we want to add that parcel.

39 **Steve Shipsey** – I think we will receive objections of that nature and the question will be  
40 whether those objections are if we need to sustain those objections where we conclude  
41 that Metro and the counties in the submittal showed that what they actually did met the  
42 best standard. Could something else also have met the best standard.

43 **John VanLandingham** – Richard.

44 **Richard Whitman** – So the only think I would add to what Steve said and it's really in  
45 response to the comments from Mark Greenfield yesterday is um as a policy practical  
46 matter for the department I don't think that we view this objective as creating an

1 optimization standard that there's only one best outcome. It um because best is used in  
2 the context of a balance between designation of urban and rural reserves number 1 and  
3 number 2 is as commissioner Worrix said it's a balance that in its entirety looking at the  
4 region as a whole number 2 best achieves three different things livable communities,  
5 viability and vitality of agricultural and forest industries and protection of important  
6 natural landscape features. Those three things are in some tension obviously and so the  
7 balancing in between those is going to require a fair amount of judgments. So in addition  
8 to the evidentiary issue I think there is because of the context that best is used in here  
9 there is substantial discretion initially for Metro and counties to make their decisions and  
10 then in terms of the commission's review for the commission's review of that.

11 **Female voice** – So would we also be looking at abuse of discretion potentially.

12 **Richard Whitman** – Well I don't think legally that's a standard for review um I think  
13 the standard is what's articulated here and alls I am saying is I think the words that are  
14 articulated here um it probably lead you to something like that ah in terms of how the  
15 commission would review this um so while say abuse of discretion I think functionally if  
16 there's a range of outcomes that are plausible for the commission in its review role um in  
17 effect that may be the review standard.

18 **John VanLandingham** – Do you want to say anything about abuse of discretion. Not  
19 everybody is a lawyer.

20 **Margaret Kirkpatrick** – I'll let a real lawyer talk about it. I'm not one anymore  
21 (inaudible)

22 **Richard Whitman** – Well I that's a legal standard that should be used in situations that  
23 you have a law that creates a range of possible outcomes and the question is whether the  
24 decision that was made that you're reviewing is outside that range and so I think that fits  
25 with what I just articulated which is that I think this objective creates a range of possible  
26 outcomes that Metro and the counties can come to. Ah and um for the commission and its  
27 review role I think as long as it's within that range you would ah need to uphold the  
28 decision.

29 **John VanLandingham** – Any other thoughts from commissioners. Marilyn you want to  
30 add anything to the discussion.

31 **Marilyn Worrix** – Well on that I've everybody recognizes it's a challenging word from  
32 a review perspective but I'm sure the commissioners share the thought that I have  
33 prefaced some of my previous votes on other issues by saying well it isn't a best solution  
34 but its legally correct and I'm ready to try best.

35 **Male voice** – It seems counterintuitive but I'm going to go with the attorneys.

36 **John VanLandingham** – So panel any thoughts. Anybody worried about Mark  
37 Greenfield's argument. Ok I didn't see anybody that wants to (inaudible). Ok next issue.

38 **Margaret Kirkpatrick** – Can I just say one more thing.

39 **John VanLandingham** – Yes

40 **Margaret Kirkpatrick** – Um is there a way to make sure that the legislative history of  
41 this rulemaking includes the discussion there's some guidance for future commissions.

42 **John VanLandingham** – Um well I think that <interrupted>

43 **Margaret Kirkpatrick** – Actually see but maybe I didn't.

44 **John VanLandingham** - Bob is there some in the report isn't there.

45 **Bob Rindy** – There's a legislative history of the statute.

46 **Margaret Kirkpatrick** – That's different.

1 **Bob Rindy** – That um these minutes will be in the history and we have the staff report ah  
2 the comments that were made now you could specify that your minutes go into more  
3 detail than might typically occur to record those.

4 **John VanLandingham** – That would be good. So let's make sure especially make sure  
5 that Marilyn's comments are included and I see that at the bottom of page nine of the  
6 staff report there's some of that also saying that the first, second, third best in its entirety.  
7 Dick

8 **Dick Benner** – Dick Benner for Metro, on the legislative history question speaking for  
9 myself and we'll see if everybody agrees but I think we do. When we heard Richard,  
10 commissioner Worrix and Steve talk about this I thought to myself yes this is the way we  
11 understand this test. And I would suggest that if the commission feels that the way they  
12 described it is the way you would like it to be understood that you say so um don't  
13 necessarily have to have a vote but then I think its more clearly legislative history.

14 **Margaret Kirkpatrick** – Yeah if there would be some way actually to almost transcribe  
15 the statements of commissioner Worrix, Steve, Richard maybe what Dick just said and  
16 have us kinda validate that's our understanding then that would provide the kind of  
17 guidance to future commissions that I'm thinking of.

18 **Male voice** – (inaudible)

19 **Margaret Kirkpatrick** – I think we just did it.

20 **John VanLandingham** – Yeah I mean does anybody disagree with that. So that's our  
21 understanding we adopt that. So I'm saying that all seven six commissioners agree with  
22 that as our interpretation. Ok. Next issue.

23 2:17:32  
24 ##end##

January 11, 2008

**TO:** Land Conservation and Development Commission

**FROM:** Bob Rindy, Policy Analyst

**SUBJECT:** Agenda Items 1 and 6; January 23-25, 2008, LCDC Meeting.

**Public Hearing, Work Session, and Possible Adoption of  
Proposed New and Amended Administrative Rules Regarding  
Metro Area Urban and Rural Reserves**

This report pertains to two agenda items: Item 1 is intended for public comment on proposed administrative rules establishing a process and criteria for designation of urban and rural reserves in the Portland Metro region, and Item 6 is intended for the Land Conservation and Development Commission (LCDC) to consider and possibly adopt the proposed new and amended administrative rules. The proposed new rules are Attachment A to this report, and the proposed conforming amendments (and related “housekeeping” amendments”) to other existing LCDC rules are Attachment B to this report.

Senate Bill 1011, enacted by the 2007 legislature (see Attachment C, especially sections 3, 6, and 11) requires that LCDC adopt rules to establish a process and criteria for designating Metro area urban and rural reserves. SB 1011, codified as Oregon Laws 2007, chapter 723, took effect immediately upon the Governor’s signature last July, and specifies that LCDC must adopt the implementing administrative rules by January 31, 2008.

Under item 1 (scheduled for 1:30 PM on January 23<sup>rd</sup>) the Commission will receive public testimony regarding the proposed new and amended rules, and may close or continue the public hearing at the conclusion of testimony. Under agenda item 6, scheduled for January 24<sup>th</sup> (and, if necessary, January 25<sup>th</sup>), LCDC will consider the oral and written testimony and other information received, deliberate regarding the proposed new and amended rules, and may formally adopt the proposed new and amended rules. If adopted, the new and amended rules will take affect upon filing with the Secretary of State’s office.

For additional information on these agenda items, please contact Bob Rindy at 503-373-0050 ext. 229, or by email [bob.rindy@state.or.us](mailto:bob.rindy@state.or.us). Information on these items, including background materials, rule notices, and agendas and minutes from the rulemaking workgroup meetings, are also posted on DLCD’s website at [http://www.lcd.state.or.us/LCD/metro\\_urban\\_and\\_rural\\_reserves.shtml](http://www.lcd.state.or.us/LCD/metro_urban_and_rural_reserves.shtml).

### **Advisory Rulemaking Workgroup**

LCDC appointed a rule advisory workgroup in August 2007 to assist the department and the Commission in drafting the proposed rules (see Attachment D regarding the membership of the workgroup). The workgroup has met seven times since it was appointed by LCDC in August 2007, including two meetings subsequent to LCDC's first public hearing on the draft rules last November 29, 2007. The workgroup has reached a consensus in recommending the revised draft rules attached for the Commission's consideration. However, it is understood that not all workgroup members necessarily favor all the provisions in these rule proposals, and the workgroup members have been invited to submit testimony to the Commission about the rules.

### **Background**

Urban Reserve Areas were a relatively late addition to the Oregon Land Use Program. This planning tool was created in 1992 through LCDC rules (OAR 660, division 21), several years after the state's initial acknowledgement of all land use plans and urban growth boundaries (UGBs) under the statewide planning goals. Unlike UGBs, designation of urban reserves is optional for local governments.<sup>1</sup>

An "Urban Reserve Area" (SB 1011 shortened this term to "Urban Reserve") is land outside of – but contiguous to – an existing urban growth boundary; it must be shown on a city and county comprehensive plan map and is designated for ultimate urbanization as the city (or region) expands its urban area. LCDC's division 21 rules specified that urban reserves must "include an amount of land estimated to be at least a 10-year supply and no more than a 30-year supply of developable land beyond the 20-year time frame used to establish the urban growth boundary."<sup>2</sup> In other words, by adopting an urban reserve area in conjunction with the 20-year UGB, local governments (including Metro) may designate and plan for a 50-year supply of land for urbanization. However, it is important to note that land in an urban reserve is outside the UGB, and must remain planned and zoned as "rural land" under farm, forest or other rural zoning requirements until such time as it is brought in to the UGB. The designation of urban reserves does not change the rules for UGB expansion except on one vital point: Urban reserves are defined (by statute) as the highest priority for inclusion in the urban growth boundary when the boundary is expanded, regardless of whether the land in the urban reserve is farm or forest resource land.

LCDC authorized local governments to plan for urban reserves for several reasons. First, cities expressed a wish to plan for a longer-term horizon than the 20-year period provided inside a UGB, in part because many public facilities and transportation facilities are typically designed and built to last significantly longer than 20 years. By designating urban reserves, a city gains more certainty with regard to the direction of long-term growth and, for example, may therefore size and position sewer and water lines to ultimately serve a 50-

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<sup>1</sup> LCDC's 1992 urban reserve rules authorized LCDC to require some local governments to adopt urban reserves. After modification of the rules by subsequent legislation, only the cities of Sandy and Newberg were required to designate reserves.

<sup>2</sup> Rather than a 10-30 year horizon, SB 1011 specifies a 20-30 year urban reserve horizon.

year growth area beyond the UGB. Second, urban reserves are intended as a tool to manage the parcelization of residential “exception areas” adjacent to many UGBs, areas that would be anticipated to be high priority for eventual expansion of the UGB. The piecemeal division of this potentially urbanizable land would impede efficient urbanization and, in many cases, prevent efficient provision of roads and other facilities within and beyond these areas. The original urban reserve rules required some cities to adopt reserves because of a substantial amount of exception areas surrounding those UGBs.<sup>3</sup> Finally, designation of urban reserves streamlines UGB expansion, since it identifies areas that must be first priority for UGB expansion, and as such may save time and costs for local governments performing the “locational” analysis required for UGB expansion.

As a side note, LCDC’s urban reserve rules provided a “hierarchy” for choosing land for the reserves, in order to ensure that non-resource land, exception land and the “least-important” farm or forest resource land is considered first in designating reserves. Shortly after the adoption of these rules, the legislature “barrowed” the hierarchy (almost word-for-word, but not exactly) and placed it in legislation (ORS 197.298) so as to require the hierarchy to UGB amendments, with one significant change: the legislation specifies that the highest priority land (i.e., first considered) for UGB expansion must be land designated as urban reserves. At the same time, the legislature enacted new urban reserve provisions in statute (ORS 195.145) in order to modify LCDC’s urban reserve rules (especially to reduce the number of cities required to adopt urban reserves; however, having urban reserves specified in legislation provides a more solid foundation for these rules). As one probably unintended consequence of the new UGB hierarchy, urban reserves include farm and forest land and provide a method to more easily include that land in a UGB. This land might otherwise be unavailable under the statutory UGB hierarchy.

Very few local governments have designated urban reserves. Newberg and Sandy successfully completed this task in the mid-1990’s.<sup>4</sup> Metro designated urban reserves about 1998, but these were struck down on appeal (LCDC and ODOT joined in bringing that appeal, arguing that the designation was not in accord with the urban reserve rules). Following that, there was little interest in designating urban reserves statewide, and local governments frequently suggested that LCDC revisit and modify these requirements. However, there has been a recent resurgence in local interest in urban reserves; Redmond, Ontario and Pendleton recently designated reserves<sup>5</sup> and other cities are underway with urban reserve planning, including Newberg (a revision of their current reserve) and all the Rogue Valley RPS jurisdictions.

### **Senate Bill 1011**

Senate Bill 1011, enacted by the 2007 legislature (codified as Chapter 723, Oregon Laws

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<sup>3</sup> Some of the proposed amendments to current rules under OAR 660, division 21 (see Attachment B) propose that the Commission repeal provisions that were intended only for cities required to designate urban reserves – because these cities have completed that task and the requirements are no longer pertinent.

<sup>4</sup> Also, some cities (Bend, Eugene, Salem-Keizer) designated “priority expansion areas beyond the UGB” prior to LCDC’s urban reserve rules, but these areas are not “acknowledged” as urban reserves, even though they may function as such, and may not be valid since they probably violate the ORS 107.298 hierarchy.

<sup>5</sup> Redmond officials have praised this process and suggest that other local governments take this step.

2007), authorizes Metro and Metro area counties to designate urban and rural reserves through a new process and criteria to be established by LCDC rules. SB 1011 was supported by a broad coalition of interests in the region, and was based on research conducted under Metro's 2007 "Shape of the Region" study (see Attachment E). Metro joined with Washington, Multnomah, and Clackamas counties, DLCD and the Oregon Department of Agriculture (ODA), to conduct the "Shape of the Region" study "in order to better inform the region's approach to growth management and future urban expansion." The study examined land outside Metro's UGB and asked three broad questions:

- What lands are functionally critical to the region's agricultural economy?
- What natural landscape features are important in terms of ecological function and defining a sense of place for residents of the region?
- What attributes allow lands to most efficiently and effectively be integrated into the urban fabric of the region to create sustainable and complete communities?

The "Shape of the Region" report, "symposium" and related studies are available on Metro's website at the following link:

<http://www.metro-region.org/index.cfm/go/by.web/id=25147>

A section-by section explanation or "legislative history" of Senate Bill 1011 is provided in Attachment C to this report. In summary, the bill establishes a system under which the region may designate lands outside the regional UGB on which urban expansion will and will not occur over a 40-50-year period. The bill has three main elements:

- Section 3 authorizes the establishment of rural reserves that will be off-limits to urban expansion during the 40-50-year planning period. These lands would be selected based upon their importance to the agriculture and forestry industries and for the protection of natural systems and landscape features.
- Section 6 provides a new pathway for the creation of urban reserves – areas that would be first in line for addition to the UGB – in the Portland metropolitan area. This new pathway would authorize the designation of urban reserves that, in conjunction with land already in the UGB, would provide 40-50 years of "capacity" for urban growth. Designation of these areas would be based upon a set of "factors" that emphasizes suitability for urban development (more explanation of "factors" is provided later in this report).
- Because it is important that urban and rural reserves be addressed as part of an integrated planning process, Section 4 of the statute stipulates that they must be considered concurrently and may be designated only through "intergovernmental agreements" between Metro and participating counties.

There are two fundamental principles regarding the new process for designation of urban and rural reserves: (1) Intergovernmental agreements are a prerequisite to formal designation, and (2) the identification and selection of reserves is requires the consideration of "factors." These issues are discussed in more detail below, in the description of the proposed rules.

Urban reserves authorized under SB 1011 will have the same effect as urban reserves authorized by current LCDC rules at OAR 660, div 21, adopted in 1992 (See attachment F). Urban reserves are also authorized by previous statutes (ORS 195.145 enacted in 1993 and amended by SB 1011). Urban reserves are defined in this statute (the definition was also amended by SB 1011) as “lands outside an urban growth boundary that will provide for (a) future expansion over a long-term period; and (b) the cost-effective provision of public facilities and service within the area when the lands are included within the urban growth boundary.” As mentioned above, urban reserves are also declared to be “the highest priority for inclusion in the urban growth boundary when the boundary is expanded.” It is important to note that the new SB 1011 urban reserve designation process for Metro is intended as an alternative to the urban reserve designation process provided under current LCDC rules at OAR 660, division 21. However, once designated, urban reserves for Metro designated through division 27 would be functionally equivalent to urban reserves designated under division 21.

SB 1011 provides “factors”<sup>6</sup> for determining urban reserves as follows:

“... a county and a metropolitan service district shall base the designation on consideration of factors, including, but not limited to, whether land proposed for designation as urban reserves, alone or in conjunction with land inside the urban growth boundary:

- (a) Can be developed at urban densities in a way that makes efficient use of existing and future public infrastructure investments;
- (a) Includes sufficient development capacity to support a healthy urban economy;
- (b) Can be served by public schools and other urban-level public facilities and services efficiently and cost-effectively by appropriate and financially capable service providers;
- (c) Can be designed to be walkable and served by a well-connected system of streets by appropriate service providers;
- (d) Can be designed to preserve and enhance natural ecological systems; and
- (e) Includes sufficient land suitable for a range of housing types.”

These statutory factors for urban reserves are not a closed list; the statute indicates the factors “include, but are not limited to” those specified above. Based on this, the workgroup has recommended that that the rules include additional factors.

Rural reserves authorized under SB 1011 are a new category of rural lands not previously mentioned or authorized in Oregon land use laws. Rural reserves are “rural land” that, once designated, cannot be included within a UGB or re-designated as urban reserves for a period of at least 20 years, but not more than 30 years, beyond “the 20-year period for which the district has demonstrated a buildable land supply in the most recent inventory, determination and analysis” for the Metro UGB. In other words, once designated, rural reserves are required to remain designated as rural reserves for a 40 to 50 year time period. The zoning of land in rural reserves would remain rural; designation of rural reserves does

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<sup>6</sup> See pages 15 and 16 of this report for a detailed discussion of factors.

not require a rezoning of the land in the reserves, and prevents the rezoning of such land for certain uses. Also, the statute specifies that designation as rural reserves “does not impair the rights and immunities provided under ORS 30.930 to 30.947” (Oregon’s “right to farm” laws).

The statute also provides that designation and protection of these reserves is not a basis for a claim for compensation under Measure 37 “unless the designation and protection of rural reserves or urban reserves imposes a new restriction on the use of private real property.” As there would be no change in the zoning of rural reserves, it does not appear that their designation would trigger Measure 49 claims.

Throughout the history of the statewide land use program, Goals 3 and 4 and urban growth boundaries (UGBs) have been the primary tool to protect farm and forest land. UGB expansion, over time, generally consumes (i.e., leads to development of) farm and forest land, especially in the Metro region where, over the next 20 to 30 years, Metro has few options for UGB expansion that would not encroach on farm land. Rural reserves therefore represent an improved farm and forest land protection mechanism, and also protect other natural features. Under SB 1011, “Rural reserves” are defined as “land reserved to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”

SB 1011 provides that rural reserves may be designated (i.e., reserves are not required) through an intergovernmental agreement between a county and Metro. However, as indicated above, if Metro and counties agree to designate urban reserves under the new statute, those counties must also agree to designate rural reserves. At the same time, although not explicitly stated, the statute appears to allow a county to designate rural reserves even if no urban reserves are designated in that county. The statute provides that “A county and a metropolitan service district may not enter into an intergovernmental agreement to designate urban reserves in the county ... unless the county and the district also agree to designate rural reserves in the county.” However, the statute does not include the converse of this requirement.

When designating rural reserves, a county and Metro are required to select land based on consideration of “factors.” For rural reserves for the purpose of protecting the agricultural industry, the statutory factors include:

- “...whether land proposed for rural reserves is:
- (a) Land situated in an area that is “potentially subject to urbanization” during the urban reserve planning period described above, as indicated by proximity to the urban growth boundary, and as indicated by proximity to “properties with fair market values that significantly exceed agricultural values;”
  - (b) Land “capable of sustaining long-term agricultural operations;”
  - (c) Land that “has suitable soils and available water where needed to sustain long-term agricultural operations;”
  - (d) Land suitable to sustain long-term agricultural operations, taking into account:

- The existence of a large block of agricultural or other resource land with a concentration or cluster of farms;
- The adjacent land use pattern, including its location in relation to adjacent nonfarm uses and the existence of buffers between agricultural operations and nonfarm uses;
- The agricultural land use pattern, including parcelization, tenure and ownership patterns; and
- The sufficiency of agricultural infrastructure in the area.”

According to Metro and others involved in drafting the legislation, these factors derive from the “Shape of the Region” studies, including studies of agricultural land by the Oregon Department of Agriculture, which were part of the “Shape of the Region” Project (See Attachment E). As such, the rural reserve factors in the statute primarily focus on protection of the agricultural industry. However, the statute also indicates that rural reserves are intended “to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.” Also, as discussed above regarding urban reserves, this list of factors is not a “closed list” for LCDC rulemaking. Therefore, the rules recommended by the workgroup also include additional rural reserve factors, i.e., in addition to those in the statute, concerning forest land and important natural landscape features.

The overall statutory intent and general requirements regarding designation of Metro urban and rural reserves are included in this statute. The preamble to SB 1011 provides the reasons and general policy direction underlying the authorization for a new urban and rural reserve process. It declares in part that “Long-range planning for population and employment growth by local governments can offer greater certainty for ... the agricultural and forest industries, by offering long-term protection of large blocks of land with the characteristics necessary to maintain their viability; and for ... commerce, other industries, other private landowners and providers of public services, by determining the more and less likely locations of future expansion of urban growth boundaries and urban development.”

This preamble also declares that “State planning laws must support and facilitate long-range planning to provide this greater certainty.” To this end (as noted above) Section 11 of the legislation directs that the Land Conservation and Development Commission shall adopt the goals or rules required by section 3 and section 6 of the Act “not later than January 31, 2008.” Those sections of the act specifically require LCDC to adopt new goals or rules regarding the “process and criteria” for designation of Metro area urban reserves and rural reserves.

Because Section 3 of SB 1011 provides that Metro’s and counties’ designation of urban and rural reserves is not mandatory, as discussed above, Metro and Metro area county governments are authorized to choose whether or not to declare these reserves, and by implication, may also choose instead to follow the current urban reserve process in OAR 660, division 21, which does not require the simultaneous designation of rural reserves. Again, if a county and Metro choose to designate urban reserves under this statute, the

county and Metro must designate rural reserves simultaneously. The statute indicates that urban and rural reserves must be designated in accordance with an intergovernmental agreement between Metro and a county, and “such agreement must provide for a coordinated and concurrent process for adoption by the county of comprehensive plan provisions and by the district of regional framework plan provisions to implement the agreement.”

LCDC Approval and Judicial Review: The statute amends current statutory provisions under ORS 197 so as to reference the new urban and rural reserve process, and to require LCDC review and approval of a Metro amendment of “the district’s regional framework plan or land use regulations implementing the plan to establish urban reserves ...”, and simultaneous LCDC review and approval regarding “amendment of the county’s [or counties’] comprehensive plan or land use regulations implementing the plan to establish rural reserves ...”.

Related to this, the statute provides an expedited process for judicial review of a Land Conservation and Development Commission order concerning the designation of urban reserves or rural reserves under the new process provided in SB 1011. Jurisdiction for judicial review is conferred upon the Court of Appeals, notwithstanding other laws regarding LUBA review of land use decisions (ORS 197.650). SB 1011 provides timelines for LUBA and Court review, and indicates that review of the Commission’s order is confined to the record. Furthermore, the court “may not substitute its judgment for that of the Land Conservation and Development Commission as to an issue of fact.” The Court of Appeals may affirm, reverse or remand” the Commission’s order, but may reverse or remand the order only if the court finds the order is:

- “(a) Unlawful in substance or procedure. However, error in procedure is not cause for reversal or remand unless the Court of Appeals determines that substantial rights of the petitioner were prejudiced.
- (b) Unconstitutional. [or,]
- (c) Not supported by substantial evidence in the whole record as to facts found by the commission.”

Furthermore, the statute provides that “the Court of Appeals shall issue a final order on the petition for judicial review with the greatest possible expediency. ... If the order of the commission is remanded by the Court of Appeals or the Supreme Court, the commission shall respond to the court’s appellate judgment within 30 days.”

### **Summary and Explanation of Proposed Rules**

After seven meetings, the workgroup has recommended that the Commission consider the attached new rules providing criteria and procedures for adoption of both Urban Reserves and Rural Reserves (Attachment A). The new rules would be codified in OAR 660 as a new “division 27.” The department has also recommended conforming amendments and related

“housekeeping amendments” to several existing rules (Attachment B).<sup>7</sup>

The proposed new division 27 under OAR 660 is organized as nine different sets of rules, as follows:

### **660-027-0005 Purpose**

The proposed introduction to the new rules does two things. First, it generally describes the intent of the rules, not only by indicating that they implement SB 1011 (2007 Oregon Laws Chapter 723) and paraphrasing the statutory intent, but also by announcing that they prescribe “criteria and factors” that counties and Metro must apply when choosing lands for designation as urban or rural reserves. Second, the purpose section, and especially the “objective” declared at the end of section (2), anchors the “findings” that local governments must make in designating urban and rural reserves (see OAR 660-027-0080(10)). In that regard, this purpose statement also provides a yardstick that the Commission will use in evaluating the designation once it is submitted by Metro and counties for Commission review (see OAR 660-027-0080).

The proposed purpose statement clarifies that the urban reserve process described by these rules is intended to provide Metro with “an alternative process” to LCDC’s current urban reserve designation process under OAR 660, division 21. Metro and counties have the opportunity to designate urban reserves under these new rules, but may instead choose instead to designate urban reserves through the existing process under division 21, or may choose to NOT designate any reserves.

Section (2) of the purpose statement was the subject of a great deal of workgroup discussion, including a “subgroup” appointed by the workgroup after the first LCDC hearing in order to consider and propose alternative language to resolve disagreement among the workgroup. The final sentence in that section is somewhat different than the wording provided in the November 8 draft, and now indicates that “The objective of this division 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.”<sup>8</sup> The workgroup spent a substantial amount of time on this provision, since it was agreed that the words “best achieve” and “balance” are intended to “raise the bar” with respect to the rule’s standards – the required “factors” – for designating reserves. It was also agreed that the “best” standard applies to the designation “in its entirety,” rather than to individual areas or parcels. The workgroup also agreed that the addition of this objective is not intended to necessitate a numeric “ranking” of alternatives for reserve designation in order to determine the highest ranked, and therefore “the best,” alternative.

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<sup>7</sup> The department provided the proposed amendments to existing rules to the workgroup, but while there was no particular objection raised, there was little discussion of these proposals. As such, it may not be accurate to describe the amendments to other rules as “recommended by the workgroup.”

<sup>8</sup> It has been suggested that the grammar of this provision could be improved if changed to “The objective of this division is a balanced designation ...”

## 660-027-0010 Definitions

The proposal includes definitions for terms used throughout the division. Definitions currently in state land use laws (ORS 195 and 197) and definitions adopted as part of the Statewide Planning Goals also apply to terms used in the proposed new rules (there are a number of terms in the proposed new rules that are already defined by law or by the Commission, and the workgroup agreed we do not need to repeat each of these definitions for purposes of this rule. However, there are probably some terms in the proposed rules that are not defined here or elsewhere.) Also, there are some terms considered so basic to these rules that, even though they are defined elsewhere, they are also defined here in order to make the rules more user friendly (e.g., UGB). Finally, there is at least one term – “public facilities” – that is intentionally defined more narrowly than in other rules or goals. Although most of the definitions are straightforward, it may be helpful to further explain the intent of some definitions:

Definitions (1) and (2) refer to two categories of land mapped in the 2007 Department of Agriculture (ODA) report to Metro entitled “*Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands*.” That report (provided to LCDC for its November 2007 meeting) mapped land throughout the region in three categories, and was an important basis of the region’s proposal for the enactment of SB 1011. According to Metro and others who proposed SB 1011, the criteria that ODA used in mapping agricultural lands in the region are reflected in that SB 1011 “factors” for the selection of rural reserves. Two of the mapped categories of farmland are specifically mentioned in the proposed rules, as discussed below, and as such those terms are by referring to the ODA report (the ODA report itself is available online at Metro’s website and through a link on DLCD’s website). The reference in the rule intends to refer to the 2007 report; any later amendments to the report or mapping in that report would not replace the report referred to in this definition. There is more discussion about this term under rules at 0040, below.

Definition (3) concerns the “intergovernmental agreements,” between Metro and each participating county, that are a prerequisite to adopting urban and rural reserves in the metro area. SB 1011 defines these agreements by citing some general statutes about agreements (such as the statute describing intergovernmental agreements for Regional Problem Solving). The department notes that many provisions of the particular statutes referenced in SB 1011 appear unrelated to the agreements contemplated with respect to Metro reserves. Furthermore, the statute definition for agreements does not include citizen involvement requirements for an intergovernmental agreement process. Because the agreement process is central and is the first step with regard designating urban and rural reserves, and because the agreements are expected to include maps of the reserves, the workgroup decided to add requirements that are not in statute regarding citizen involvement, discussed under Rule 0030, below. As such, the definition indicates that an agreement must also meet “requirements in this division,” in recognition that the referenced statutes referenced in SB 1011 do not include all the requirements that the workgroup believes are necessary for these particular agreements. We noted that Metro and counties have indicated they anticipate that the agreements will also include a map of the areas to be

designated as urban or rural reserves. This statutory and rule definition does not require that an intergovernmental agreement include a map of the proposed reserve areas, but it does not preclude such a map.

Definition (4) regarding “livable communities” is provided because that term is used as part of the intent statement (see discussion under Rules 0005, above). There is no precedent in LCDC rules for this term. As such, Metro proposed the definition to the workgroup and it is included in the recommended rules.

Definition (6) regarding “important natural landscape features” is provided because this term occurs in several of the proposed rules in the division; by providing a definition we avoid the statute’s expanded explanation of the term each time it is used. However, members of the workgroup discussed a preference to further expand and clarify the statutory “definition” of the term (actually, the statute does not define “important natural landscape features,” but does define “rural reserves” as “land reserved to provide long-term protection for ... important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”). The expanded definition in the rule provides that rural reserves, by “limiting”<sup>9</sup> urban development, “provide long-term protection and enhancement of the region’s natural resources, public health and safety, and unique sense of place.” This wording may also serve as an expanded “purpose statement” regarding the protection of important natural landscape features addressed later in the rule.

The expanded definition of “important natural landscape features” further provides that “these features include, but are not limited to, plant, fish and wildlife habitat; corridors important for ecological, scenic and recreational connectivity; steep slopes, floodplains and other natural hazard lands; areas critical to the region’s air and water quality; historic and cultural areas; and other geographic features that define and distinguish the region.” The individuals who proposed this definition, including at least one workgroup member (Jim Labbe), the Department of Fish and Wildlife, and other interested parties such as Audubon, based the expanded definition on the SB1011 wording and “work that was the basis of the statute itself performed by ‘The Greenspaces Policy Advisory Committee’ and an associated ‘Ecological Elements Charette’ used in developing a ‘Natural Landscape Features Inventory’ for Metro’s ‘Shape of the Region Project’.”<sup>10</sup>

The intent of the expanded definition “is to be inclusive enough in the specific examples listed to capture the component elements of the Natural Features Inventory.” (NOTE: DLCD’s website for this rulemaking includes a link to Metro’s “Shape the Region Symposium,” which links to several studies, including the “Natural Features Inventory” mentioned here. The department believes the additional words in this definition would not

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<sup>9</sup> The workgroup discussed the word “limit” and expressed some concern as to which of at least two possible meanings may have been intended by the statute. For example, the word may mean something that bounds or confines, i.e., by setting a line or boundary, but it may instead connote something that restricts or hampers development within boundaries. Discussion among staff and workgroup members seemed to conclude that the former meaning is the intent here.

<sup>10</sup> According to an October 30 email from Jim Labbe to the Department, forwarded to workgroup members.

conflict with the statute because, by prefacing the examples with the word “including,” the statute does not intend to provide a closed set of examples.

However, the department also notes that workgroup member Jim Labbe has suggested one further refinement to this definition, in an email exchange with the department and some other workgroup members after the workgroup concluded its work. Jim suggests that we simply drop the word "geographic" because “this would be more in keeping with the statute which repeatedly refers to ‘natural boundaries’ instead of specifically ‘geographic boundaries’.”

Finally, definition (12), for the term “walkable,” was suggested by staff from DLCD and ODOT’s Transportation and Growth Management Program based on several studies and sources concerning walkable neighborhoods. Staff was unable to locate a formal definition in state law or other agency rules. The term is used in Section 6(4)(d) of SB 1011, but is not defined there, and is used in 660-027-0050(1)(d) of the proposed rules.

### **660-027-0020 Authority to Designate Urban and Rural Reserves**

This section is intended to establish which entity – Metro or counties or both – has authority to designate reserves, and to make it clear that this division is “an alternative” to the authority to designate urban reserve areas granted by LCDC’s current urban reserve rules under OAR 660, division 021. As explained above, one very important difference between the SB 1011 urban reserve process and the current division 21 urban reserve process is that, under the proposed new rules, an intergovernmental agreement is a prerequisite for designating reserves.

The rules proposed under 0020 specify that Metro alone has authority to designate urban reserves provided Metro first adopts an intergovernmental agreement with each county where urban reserves are designated, and provided the agreements are implemented by amendment of the regional framework plan and the county comprehensive plan in accordance with the process and criteria in the proposed new division. The statute and proposed rule also grants counties – rather than Metro – the authority to designate rural reserves, provided there is an intergovernmental agreement concerning these reserves, between the county and metro for each county where the reserves are designated, and provided the county amends its plan and zoning to implement the agreement.

Finally, this rule makes it clear that a county and Metro may not enter into an intergovernmental agreement to designate urban reserves in the county under the SB 1011 process unless the county and Metro simultaneously agree to designate rural reserves in the county.

### **660-027-0030 Urban and Rural Reserve Intergovernmental Agreements**

This rule is intended to provide criteria for the intergovernmental agreements that are prerequisite to urban and rural reserve designation. First, this rule specifies that an intergovernmental agreement between Metro and a county to establish urban reserves and

rural reserves must provide for a “coordinated and concurrent process” for adoption (by Metro) of regional framework plan provisions and (by the county) of comprehensive plan and zoning provisions to implement the agreement. SB 1011 also requires that Metro and counties designate reserves in a manner that is “coordinated and concurrent.” It is expected that a county and Metro would do their “considering” and “evaluating” together, in the same meeting or meetings, and Metro and each county would simultaneously adopt (or sign) the agreement. The formal “designation,” however, would be the adoption of implementing plan provisions, which cannot legally or practically be done “concurrently” by a county and Metro, or by all the counties and Metro, i.e., at the identical moment in time. However, “concurrently” probably means that Metro and the local governments would schedule the formal plan and/ordinance adoptions to occur in approximately the same time frame, and in a coordinated manner. The rules under 0080 require submittal to LCDC “jointly.”

The second provision of this rule provides for citizen involvement in the development of an intergovernmental agreement. For plan amendments that implement agreements, Goal 1, the acknowledged local plans and state laws provide for broad notice and citizen involvement. However, intergovernmental agreements are not necessarily covered by these laws or local plans. Because the agreements to designate reserves will probably include maps of reserve areas, the workgroup suggested that it is very important for citizen involvement and broad notice during the development of the agreements, rather than later, after the agreements have been signed, when formal amendments are proposed to implement the agreements. As such, the proposed rules require Metro and counties to follow a coordinated citizen involvement process that provides for broad public notice and opportunities for public comment regarding lands proposed for designation as urban and rural reserves under the agreement. Furthermore, the rules require that the State Citizen Involvement Advisory Committee (CIAC) be provided an opportunity to review and comment on the proposed citizen involvement process.

Finally, the proposed rules would clarify that an intergovernmental agreement made under this division is not a final land use decision under ORS 197.015(11). The department sought DOJ legal counsel advice on this provision and it was suggested that the proposed rules should clarify that “an intergovernmental agreement made under this division shall be deemed a preliminary decision that is a prerequisite to the designation of reserves by amendments to Metro’s regional framework plan and to a county’s comprehensive plan” (emphasis added). Because an agreement is not a final land use decision, LUBA review would not be appropriate. Rather, the Commission will be required to determine whether statutory and rule requirements have been followed with respect to such agreements, since, by law, the agreements are a prerequisite to the designation of reserves. The rule provides that an intergovernmental agreement must be submitted to LCDC, along with adopted amendments to the regional framework plan and county comprehensive plans.

#### **660-027-0040 Designation of Urban and Rural Reserves**

The new statutes pertaining to Metro reserves specify that the reserves are “designated.” The department, on advice from legal counsel, believes the term “designate” means the formal “adoption” of the reserves by adoption or amendment of Metro framework plan

provisions for Urban Reserves, and by adoption or amendment of County land use plan and zoning provisions for Rural Reserves. The proposed rules under 0040 provide several requirements that pertain to the designation of urban and rural reserves. These include rules for designating urban reserves, as follows:

- Metro may not designate urban reserves until Metro and applicable counties have entered into an intergovernmental agreement that identifies the land to be designated by Metro as urban reserves.
- Urban reserves must be based on an amount of land estimated as necessary for urban population and employment growth in the Metro area for a 20 to 30 year period, and must be planned to accommodate urban population and employment growth for that time period. These amounts refer to the combined total of all the urban reserve land designated in the participating counties.
- Metro is required to specify the particular number of years (e.g., 25 years) for which the urban reserves are intended.
- If Metro designates urban reserves prior to December 31, 2009, the 20 to 30 year period is to begin on the year 2029.
- Metro must adopt policies to implement the reserves and must show the reserves on its regional framework plan map.
- A county in which urban reserves are designated must adopt policies to implement the reserves and show the reserves on its comprehensive plan and zone maps.
- Designation of urban reserves must be “coordinated” with the cities in any county where such reserves are considered, and with local governments, state agencies, special districts and school districts that may provide services to the urban reserves when they are added to the UGB.<sup>11</sup>

The rules under 0040 include designation requirements for Rural Reserves, as follows:

- Neither Metro nor a local government may amend a UGB to include land designated as rural reserves during the 20-30 year period described above. Since this period is in addition to the 20-year UGB period, rural reserves may not be included in any UGB (i.e., the Metro UGB as well as any other UGB in counties that have designated rural reserves) for a 40-50 year period.
- Also, Metro may not re-designate rural reserves as urban reserves, and a county may not re-designate land in rural reserves to any other land use, during the 40-50 year period.
- Metro and counties must adopt policies to implement the rural reserves. Counties must show the reserves on their comprehensive plan and zone maps, and Metro must show the reserves on its regional framework plan maps.

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<sup>11</sup> The term “coordinated” is defined in ORS 197.015(6) as “when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible.” although in that context it refers to the coordination of a comprehensive plan, that definition seems applicable to this process since the designation of reserves involves adoption of a plan.

- Designation rural reserves must be “coordinated” with the cities in any county where such reserves are considered.

Sections (9) and (10) of the proposed designation rules specify the “factors” that must be considered in the Metro and County decisions to “simultaneously identify, select and designate both urban and rural reserves.” The “factors” are specified in rules under 0050 and 0060, described below in this report, and the rule derived these factors from the factors that are included in SB 1011.

Factors: It is important to note that the intent is for the rule to include and, where necessary, clarify the factors in SB 1011, but also to expand the list of factors (as allowed by that statute) in order to address additional concerns discussed by the workgroup (see rules 0050 and 0060 below for more detailed discussion of the particular additional factors proposed as part of these rules by the workgroup).

The workgroup discussed the term “consideration of factors.” The proposed rules are based on the understanding that “factors” are a special type of “criteria” similar to the “factors” proscribed for UGB location under Goal 14. As such, a general principle for Goal 14 factors applies here: factors are not “independent criteria” – every parcel or area considered for urban or rural reserves would not be required to meet each and every factor. Instead, the factors are applied, weighed and balanced to select and evaluate areas for designation as urban or rural reserves. Metro and the counties must apply all the factors, not merely “consider” them, and must use the factors to compare alternative locations for the reserves. The group decided that the requirement to “consider” the factors in the statute is not meant to imply that any factor may be simply “considered but then disregarded” – all the factors must be considered, applied together (which also implies they must be “balanced” in the manner of Goal 14), and Metro and counties must demonstrate that they have done this.

The term “consideration of factors” was previously adopted by LCDC in specifying the evaluation and selection of land for a UGB under Goal 14. Thus, there is precedent set by both LCDC and the courts regarding the interpretation and employment of “factors.” As indicated above, there was considerable discussion of the term “factors” by the workgroup, including advice from LCDC legal counsel, and the group has concluded that “factors” under SB 1011 are intended to be employed and interpreted in the same manner as the UGB factors in Goal 14.<sup>12</sup> According to legal counsel, while the courts have not been entirely consistent in their interpretation of “factors,” some legal precedent is worth noting in order to clarify the intent of “factors” under the proposed reserve rules.

First, the courts have indicated “factors” are a type of “criteria” (this is important because the workgroup discussion revealed that many planners consider “criteria” to be something different than “factors,” since typically a set of factors are “considered” and “weighed” in arriving at a decision).

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<sup>12</sup> Much of the case law on factors discussed here is derived from Goal 14 prior to its amendment by LCDC in 2004. However, although the amended goal includes fewer factors than the original, the intent and operation of factors was not intended to change under the amended goal.

Second, a Court of Appeals interpretation of the term “factors” was paraphrased in LCDC’s 2006 UGB Amendment rules, OAR 660-24-0060(3), which state that: “The boundary location factors of Goal 14 are not independent criteria. When the factors are applied to compare alternative boundary locations and to determine the UGB location, a local government must show that all the factors were considered and balanced.” Because the intent of the rules proposed by the Metro Reserves workgroup is for “factors” to be interpreted in the same manner as UGB factors, this previous LCDC declaration about factors is important in applying the reserve factors.

Finally, some examples are provided below regarding prior legal interpretations concerning the “consideration of factors.” Although these examples concern Goal 14 factors and the selection of land for a UGB, the factors in the proposed reserve rules also concern the selection of land and use the term “consideration of factors.” As such, the following examples may further clarify the intent of the proposed rules regarding “factors”:<sup>13</sup>

- Even if one of the factors is not fully satisfied, or is less determinative, that factor must still be considered and addressed. Rosemont II, 173 Or App at 328; Baker v. Marion County, 120 Or App 50, 54, 852 P2d 254, rev den 317 Or 485 (1993).
- “Locational” factors 3 through 7 of Goal 14 are not independent approval criteria. It is not required that a designated level of satisfaction for each factor be met in order to approve a UGB amendment. Rather, a local government must show that the factors were “considered” and balanced in determining whether a UGB amendment is justified. 1000 Friends of Oregon v. Metro, 174 Or App 406, 409-10 (2001)
- The goal of the consideration under factors 3 through 7 is to determine the “best” land to add to the UGB, after considering each factor. ARLU, slip op at 13. In carrying out such consideration, each factor must be addressed. That a potential UGB expansion site failed a “test” established by the local government for compliance with one locational factor is not a sufficient basis for excluding it from consideration under the other locational factors. 1000 Friends II, 174 Or App at 414-15.

It was indicated in the department’s November 15, 2007, staff report that there was a consensus to strengthen the factors by modifying 0040 (10) to require findings and a statement of reasons that explain how the adopted reserves **BEST** achieve the objectives set forth in the purpose statement. Alternatively, it was proposed that the purpose statement itself be modified to explain how the designation of urban and rural reserves **BEST** ensure livable communities, the viability and vitality of the agricultural and forest industries and protection of the natural landscape features that define the region for its residents. While there was a strong workgroup consensus to add the word “best” in one of the two places listed above, there was no consensus as to WHICH of these two places should include that word. In the November hearing it was recommended that LCDC provide further direction to the workgroup regarding whether to add the term “best” to the findings requirements, as described above, and if so, where should the term be added in the rules. LCDC did not

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<sup>13</sup> These examples are cited in a paper provided to LCDC’s 2006 UGB workgroup titled: “Urban Growth Boundary Amendments and Goal 14 – A Legal Perspective”, by Corinne C. Sherton, Johnson & Sherton PC.

direct the group regarding this term, but suggested that the workgroup continue with its deliberation and attempt to resolve this issue prior to the January hearing.

As discussed under the explanation of rules under 0050, above, the workgroup did eventually agree to add the term “best” to the purpose statement under OAR 660-027-0005(2). Also, subsequent to the Commission’s November hearing on these proposed rules, the wording in (10) was amended; that proposed rule now requires that Metro and participating counties shall identify, consider, evaluate and designate proposed urban and rural reserves “concurrently and in coordination with one another,” and adopt a single, joint set of “findings and statement of reasons” that demonstrates how they applied the factors. Finally, “the findings and statement of reasons shall explain why the local governments selected the areas designated as urban and rural reserves and how the designated reserves achieve the objective set forth in OAR 660-027-0005(2).”

In a related matter, there was further discussion in the workgroup and at the November Commission hearing as to whether the proposed factors set a sufficiently “high bar” for determination of rural reserves with regard to protection of the most important agricultural land. Workgroup members, including members representing various agricultural land interests, ODA, the Oregon Association of Nurseries, the City of Portland, and 1000 Friends of Oregon, urged that the proposed rules should provide stronger assurance that the most important farmland will be designated as rural reserves. Several ideas to strengthen the factors were proposed, including adding additional factors, criteria, or other measures, as follows:

- Providing a “safe harbor” that deems Foundation Agricultural Land or Important Agricultural Land (mapped in the ODA report to Metro) as qualifying for designation as rural reserves under the factors without further explanation. (see discussion under 0060, below).
- Adding an additional factor that refers to the ODA mapped lands, especially the two categories Foundation Agricultural Land and Important Agricultural Land.
- Adding additional criteria that require counties to designate, as rural reserves, Foundation Agricultural Land, and possibly Important Agricultural Land also, unless the land is demonstrated to be needed for special mixed-use transit-connected development in the Metro area.
- Requiring that Metro cannot include Foundation Agricultural Land or Important Agricultural Land in urban reserves unless it demonstrates that it has first evaluated all other lands and demonstrate that these other lands are unable to serve particular purposes for urban reserves.

In all the proposals above, ODA suggested that the new criteria should refer to Foundation Agricultural Land and Important Agricultural Land within three miles of a UGB.

In discussing the above proposals, the workgroup initially agreed only to add the first bullet, the “safe harbor” (see section 0060(4)); this was provided in the November 8 draft. Subsequent to the LCDC public hearing on that draft, and in response to the testimony on this topic, the workgroup appointed a “subgroup” to propose wording for resolution of this

issue. In response, the subgroup proposed, and the workgroup agreed to, the following new section (11) under 0040:

(11) Because the January 2007 Oregon Department of Agriculture report entitled “*Identification and Assessment of the Long-Term Commercial viability of Metro Region Agricultural Lands*” indicates that Foundation Agricultural Land is the most important land for the viability and vitality of the agricultural industry, if Metro designates such 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 rule.”

The workgroup chair, Commissioner Worrix, attended the subgroup meeting and may further discuss the intent of the above wording at the Commission’s January meeting.

#### **660-027-0050 Identification, Selection and Designation of Lands for Urban Reserves**

While the rules under 0040 provide a set of general rules for designation of both urban and rural reserves, the rules under 0050 provide the factors for determining which land to designate as urban reserves. According to Metro, these factors are derived from the “great communities” factors developed as part of Metro’s agriculture/urban study (that study is linked to DLCD’s website on this rulemaking, at <http://www.metro-region.org/index.cfm/go/by.web/id=25147>).

Metro’s “*ad hoc* group” that met in the summer of 2007 recommended some modifications to these factors, and the Commission’s workgroup also agreed to some modifications. In general, these modifications are minor edits to statute factors and additional factors not in the statute, such as factors (g) and (h).

The term “walkable” was not defined by the statute; as noted above, the department has proposed a definition. Also, “a well-connected system of streets” is not defined currently by Goal 12 or related rules. A definition of this phrase has not been provided for these rules. Metro’s *ad hoc* group suggested the language referring to “pedestrian and bicycle facilities,” and suggested that it be phrased consistent with the Transportation Planning rule.

Again, SB 1011 provided that the factors for urban reserves listed in that bill were “not limited to” those listed. As discussed previously, the workgroup agreed that this provision should be interpreted to mean that LCDC may add additional factors, through this rule, but that this language does not authorize Metro to add factors to those listed in the rule.

#### **660-027-0060 Identification, Selection and Designation of Lands for Rural Reserves**

These proposed rules provide factors that would be applied to designate rural reserves in order to protect farm land, forest land, and natural landscape features. The statute (SB 1011) provided only one set of factors – for farm land. However, the statute is also clear that “rural reserve” means “land reserved to provide long-term protection for

agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains.”

As such, the workgroup agreed to add additional factors for those rural reserves that are designated to protect forest land and natural landscape features. The factors proposed to determine whether rural reserves should be designated to protect natural features are significantly different than those in the statute for farm land, and therefore the rules provide these factors as a separate rule section (section 3). The factors for forest land are woven into the factors for farm land.

Because rural reserves are likely to be designated for all three of the purposes described above, section (1) indicates that metro shall specify which areas designated for rural reserves are intended for which purpose. This will determine which factors to apply. However, it is conceivable that some areas will be included in rural reserves for a combination of “purposes,” rather than for farm, forest or natural features alone. We also note that the factors do not specifically describe how to treat land that is both farm and forest land. The workgroup had noted this, but did not provide further discussion or recommendation.

As was noted in the November report, subsection (2)(a) changes the word “and” in the statute to “or”. The workgroup believes the intent of this requirement in the statute is to consider proximity to a UGB or proximity to land with fair market values that significantly exceed agricultural values – but it is not necessary that a particular property must be considered with regard to both.

Finally, subsequent to LCDC’s November hearing on the proposed rules, the workgroup agreed to modify 0060(3) as follows:

(3) When identifying and selecting land for designation as rural reserves intended to protect important natural landscape features, a county must **consider those areas identified in Metro’s February 2007 “Natural Landscape Features Inventory,” and other pertinent information, and shall** base its decision on ... [the factors for natural landscape features].”

This wording was added in recognition that, similar to agricultural lands discussed above, Metro had also mapped natural landscape features, and the rules should reference those maps to ensure attention to this mapping. The department also notes that the Department of Forestry has completed mapping of significant forest lands. However, this mapping was not provided to the workgroup until its final meeting, and the Department of Forestry did not suggest that the rules reference the mapping.

### **660-027-0070 Planning of Urban and Rural Reserves**

This set of rules begins by describing one of the most significant planning ramifications in designating urban reserves: such areas are the highest priority for inclusion in the urban

growth boundary when the boundary is expanded, as specified in Goal 14, OAR 660, division 24, and ORS 197.298. That fact is not mentioned in SB 1011, but was certainly well-understood by the various interests that drafted the legislation. It should be noted that urban reserves calculated to provide a 20-30 year supply of land in the Metro area are likely to include farmland, forest land, exception areas, and other features. There are no rules or statutes that require Metro to indicate **which** land in urban reserves might be the first or highest priority land considered when the UGB is expanded. However, ORS 197.298 may bear on this question.

The second section of the 0070 rules ensures that land in urban reserves is maintained in larger parcel sizes (unless it was previously parcelized), so as to preserve opportunities for orderly and efficient development of urban uses and provision of urban services when urban reserves are added to the UGB.

The proposed rules also direct counties to maintain the zoning for uses on rural reserves allowed at the time they were designated, and to not allow smaller lots or parcels on land designated as rural reserves. This provision was recommended by Metro's *ad hoc* group that met in the Summer of 2007 prior to LCDC's workgroup meetings, but was embraced by the workgroup. It provides a powerful protection for rural reserves that is in addition to other protection already provided in statute and in 660-027-0040 (4) and (5). These provisions together carry out the primary directive of SB 1011, that rural reserves are intended to "provide long-term protection for agriculture, forestry or important natural landscape features." (Emphasis added).

Finally, the proposed urban reserve "planning" rules provide that "counties, cities and Metro may adopt conceptual plans for the eventual urbanization of urban reserves designated under this division, including plans for eventual provision of public facilities and services for these lands, and may enter into urban service agreements among cities, counties and special districts serving or projected to serve the designated urban reserve area." Part of this provision was recommended by Metro's *ad hoc* group, but was embraced by the workgroup, and augmented by the department, to include some of the provisions currently in rules for urban reserves under OAR 660, division 21, that clarify the ability to plan for services in urban reserves.

#### **660-027-0080 Adoption and LCDC Review of Urban and Rural Reserves**

While these proposed rules repeat statutory requirements for LCDC review of reserves, it is important to note that those requirements have been augmented. Furthermore, this section has been further amended since the Commission's November hearing, at the recommendation of the workgroup and on advice of legal counsel (Section (4) is the additional language added since the November 8 draft).

Section (1) makes it clear that plan amendments and other land use actions to implement the designation of urban reserves must be in accordance with current laws for plan amendments (ORS 197.610 to 197.650). This assures public notice requirements, among other things, and makes sure that statewide planning goals apply.

Section (3) was suggested by DOJ rather than the workgroup. This provision anticipates that the submittal to LCDC will very likely be large and complex, and will be subject to multiple comments based on LCDC's previous experience with UGB decisions in the Metro area. Furthermore, while appeals may not necessarily occur, they are a possibility, and section (3) will facilitate the department's required "records" work in responding to an appeal.

The new section (4) is intended to specify the Commission's scope and standard of review, specifically referencing the rule's purpose statement and designation standards.

### **Suggested Amendments to Current Rules in Other Divisions under OAR 660**

The department has proposed "conforming amendments" and other "housekeeping amendments" to other LCDC rules related to urban reserves, including the repeal of some existing rules. The proposed amendments are Attachment B to this report.

#### **Amendments to OAR 660, division 4**

Only some sections of rules under OAR 660-004-0040 are proposed for amendment. These are rules adopted by LCDC in 2000 in response to the 1986 Supreme Court decision regarding 1000 Friends of Oregon v. LCDC et al. 301 Or. 447 (1986). Those rules established minimum lot sizes in rural areas that ensured rural lands did not authorize "urban uses" outside UGBs.

First, the version of the rules currently on file with the Secretary of State italicizes the words "minimum lot size" under section (7)(e)(F). This may emphasize these words, but there appears to be no reason to emphasize these words, and as such, this is probably a formatting error in the filing of a previous amendment of this rule. The amended rule would eliminate the italics.

The proposed amendment to Section (8)(b)(B) is also non-substantive; it is suggested that the word "reserve" be preceded by the word "urban", since the intent here is to refer to an urban reserve. A correction to sentence structure (adding the word "or") at the end of that paragraph is for grammatical purposes and for clarity.

Proposed amendments to subsection (8)(d) and (e) are both for clarity and substance. First, Metro's legal counsel suggested that "Metro" should be substituted for "the Portland metropolitan service district" because "Metro is a term that is defined and is more widely understood in the region." Substantively, this subsection should be amended to also reference the new division 27 urban reserve process, in addition to the division 21 process. Also, section (d) refers to a Metro "urban reserve ordinance." Metro's regional framework plan (RFP) does not apply outside the UGB, so this section should instead refer to county comprehensive plan and zoning provisions adopted to implement the reserves. The remaining proposed amendments to that subsection are for clarity and to recognize the new

statutory term “urban reserve” rather than “urban reserve area”.

Proposed amendments to subsection (7)(f) are at the suggestion of Metro’s legal counsel, Dick Benner, who indicated to the department that “there is no such thing as ‘the Metro 2040 Plan’ – there is a ‘2040 Growth Concept’ which is not regulatory. It recommends densities for specific land use designations, but they have no legal effect. I recommend that the rule say **10 units per net developable acre** because Metro’s code says that is the lowest density that can be assigned to any land inside the UGB zoned to allow residential use. It is a good minimum criterion for determining whether an area is suitable for urbanization.”

Finally, amendments to paragraph (G) of subsection (7)(g) would ensure that, on land designated as urban reserve under the new division 27 rules, new parcels less than the minimums established by these rules cannot be created without a goal exception. As noted above in describing the purpose for urban reserves, parcelization of these lands would impede efficient provision of urban services and urban scale development.

#### Amendments to OAR 660, division 11

The department is recommending changes to rules under OAR 660-011-0060, specifically paragraph (C) of subsection (4)(b). These amendments are non-substantive and pertain to conditions under which sewer systems may be provided outside UGBs without an exception, for health hazard areas. This rule currently references urban reserves under division 21 – the proposed amendment would reference urban reserves established under the new rules in division 27 as well. The proposed amendments also intend to clarify what is meant by the current provision of that rule in limiting the “capacity” of a sewer system designed for a health hazard area. The clarifying language does not change the current intent; it clarifies that in urban reserve areas, the capacity of a sewer system could be designed to provide for the projected future level of service planned for an area within the boundaries of an urban reserve.

#### Amendments to OAR 660, division 21

These amendments conform division 21 urban reserve rules to the statutes for urban reserves (ORS 195,) amended by SB 1011, including:

- An amended definition to conform to the amended statutory definition
- Authorization for Metro to designate urban reserves for the Portland Metropolitan area urban growth boundary under OAR 660, division 027.
- Removal of the word “area” after “urban reserve” throughout the division.
- Correction of the word “rule” in 0020(1): this should refer to the “division” rather than the “rule.”
- Elimination of “applicability provisions” that refer to previous urban reserve designations by Metro which were remanded by the courts and were not re-adopted by Metro.

Finally, as described at the beginning of this report, urban reserve rules under division 21

initially mandated that certain jurisdictions adopt urban reserves. These cities long ago completed this requirement. As such, it is suggested that the Commission repeal rules under OAR 660-021-0090 and OAR 660-021-0100 that establish specific urban reserve requirements and deadlines for these local governments to follow in meeting this mandate.

Amendments to OAR 660, division 25

The proposed amendments to the rules under OAR 660-025-0040 are in recognition of the Commission's exclusive authority to review urban reserves designated under OAR 660, division 27, in addition to reserves designated under OAR 660, division 21.

**Required LCDC Rulemaking Criteria and Procedures**

The Commission's procedures for rulemaking derive from ORS Chapter 183 and are specified in LCDC's procedural rules at OAR 660-001-0000. In general, prior to adoption of a rule, the Commission must hold a public hearing and provide an opportunity for interested parties to testify on the proposed rule. The Commission must deliberate in public and, if the commission makes a decision to adopt any or all of the proposals, a majority of the commission must affirm the motion to adopt.

The Commission is also guided by ORS 197.040, as follows:

***"197.040 Duties of commission; rules.***

*(1) The Land Conservation and Development Commission shall:*

*....*

*(b) In accordance with the provisions of ORS 183.310 to 183.550, adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197. Except as provided in subsection (3) of this section, in designing its administrative requirements, the commission shall:*

*(A) Allow for the diverse administrative and planning capabilities of local governments;*

*(B) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;*

*(C) Assess the likely degree of economic impact on identified property and economic interests; and*

*(D) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.*

*(c)(A) Adopt by rule in accordance with ORS 183.310 to 183.550 or by goal under ORS chapters 195, 196 and 197 any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 19, [and]*

*(B) Adopt by rule in accordance with ORS 183.310 to 183.550 any procedures necessary to carry out ORS 215.402 (4)(b) and 227.160 (2)(b). . .*

*...*

*(3) The requirements of subsection (1)(b) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule."*

The department issued formal rulemaking notice for publication in the November 2007 Secretary of State's Bulletin, and again in the January 2008 Secretary of State's Bulletin and has mailed notices to interested parties, including legislators (See Attachment G).

The Commission has also adopted "Citizen Involvement Guidelines for Policy Development" (the "CIG") in order "... *to provide and promote clear procedures for public involvement in the development of Commission policy on land use,*" which LCDC has committed to follow "*to the extent practicable in the development of new or amended statewide planning goals and related administrative rules.*" CIAC member Ann Glaze was appointed as a member of the Metro Reserves workgroup.

The CIG recommends that the Commission "*consult with the CIAC on the scope of the proposed process or procedure to be followed in the development of any new or amended goal, rule or policy.*" On October 11, 2007, workgroup member Ann Glaze gave the CIAC a general overview of the process and progress of, and handed out a paragraph of the draft rule that spoke to citizen involvement. According to the minutes of that meeting, "CIAC was pleased with the inclusion of 'citizen involvement' requirements in the rules."

The CIG recommends that, as part of a rulemaking process, the department "*shall, to the extent practicable:*

- *Prepare a schedule that clearly indicates opportunities for citizen involvement and comment, including tentative dates of meetings, public hearings and other time-related information;*
- *Post the schedule, and any subsequent meeting or notice announcements of public participation opportunities on the Department's website, and provide copies via paper mail upon request; and*
- *Send notice of the website posting via an e-mail list of interested or potentially affected parties and media outlets statewide, and via paper mail upon request;*
- *Provide background information on the policy issues under discussion via posting on the Department's website and, upon request, via paper mail. Such information may, as appropriate, include staff reports, an issue summary, statutory references, administrative rules, case law, or articles of interest relevant to the policy issue."*

The department has followed these guidelines with regard to this rulemaking. The workgroup determined its schedule at its first meeting, and announced revisions to the schedule, and the department established a website and a list of interested parties to receive notices of this workgroup, in the manner outlined by the CIG. The website includes agendas and minutes for each workgroup meeting, background information, draft rules under consideration by the workgroup, and copies of formal notices. The department has sent notice of meetings to the public and interested parties, including notice of the LCDC hearings, by electronic and regular mail.

### **Conclusion and Recommendation**

The department recommends that the Commission receive public testimony on the proposed new and amended rules. Following testimony, the department recommends that the commission close the public hearing, consider the testimony and other information provided, and adopt the proposed new and amended rules.

### **Attachments**

- A. Proposed new rules for Urban and Rural Reserves
- B. Proposed conforming amendments to other existing LCDC rules
  - OAR 660, division 4
  - OAR 660, division 11
  - OAR 660, division 21
  - OAR 660, division 25
- C. Senate Bill 1011, including legislative history
- D. Appointed rulemaking advisory workgroup
- E. The "Shape of the Region" summary report
- F. Urban Reserve Rules under OAR 660, division 21
- G. Rulemaking notices
- H. Written Comments received by DLCD prior to mailing of this report

