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Memorandum

To: **Land Conservation and Development Commission**

From: **Bob Cortright, Transportation Planning Specialist**
Richard Whitman, Director DLCD

Re: **Applicability of TPR Metropolitan Planning Requirements**

Date: **April 20, 2010**

This memorandum responds to an April 12, 2010 letter from the City of Bend regarding the applicability of portions of the Transportation Planning Rule (TPR; OAR Division 660-012) to the city's urban growth boundary (UGB) decision. A copy of the letter is attached to this memo.

The city argues that because the TPR (OAR 660, Division 012) does not specifically direct the city to address certain TPR requirements at the time it amends the UGB, that the city may defer these requirements to a later time. As described below, we believe this reading is inconsistent with relevant case law, a plain reading of the applicable rules, and the city's findings and actions on this UGB amendment.

1. Case law makes it clear that absent authorization in the TPR to defer application of a rule requirement, local government is not authorized to do so

Case law regarding a local government's authority to defer TPR requirements is clear. Last November, the Court of Appeals ruled on a similar question about local government's authority to defer requirements in TPR Section 0060. In *Willamette Oaks v. City of Eugene*, 232 Or App 29 (2009) the court held that unless a rule clearly allows a rule requirement to be deferred, a local government is not authorized to do so:

> OAR 660-012-0060(1) requires that an assessment of whether a "plan or land use regulation significantly affects a transportation facility" be made at the time of the adoption of the amendment. In contrast, OAR 660-012-0025, which applies to local governments' preparation of transportation system plans, specifically provides that "[a] local government * * * may defer decisions" on certain issues if it makes findings pursuant to the terms of that rule. In other words, although other rules may provide for deferral of certain land use decisions by local governments, OAR 660-012-0060(1) makes no provision for a deferral of the decision required by its provisions.

The city identifies *Volny v. City of Bend*, 168 Or App 516, 4 P3d 768 (2000) as raising a similar question. *Volny* concerned whether a city may amend a transportation provision of its comprehensive plan when it does not have a transportation system plan (TSP) adopted by the deadline established by division 12. The city correctly states that the court held that the absence of a TSP does not preclude a comprehensive plan amendment; however, the court went on to hold that in the absence of an approved TSP, the amendment was subject to review for compliance with the rule:

> "Accordingly, under both the general statute [ORS 197.646(3)] and the specific provision of the TPR [OAR 660-012-0055(4)(b)], the failure of a locality to timely adopt provisions that are required by LCDC's rules does not preclude the local government from enacting local legislation that pertains to the same subject as the rules; rather, it makes their enactment subject to review for direct compliance with the 'unimplemented' rules." *Volny v. City of Bend*, 168 Or App at 521.

2. Division 024 governs the applicability of the TPR to UGB amendments, and it does not authorize deferral of the metropolitan planning requirements

The applicability of the TPR to UGB decisions is governed by Division 024. The express terms of Division 024 require that the city address and comply with all of the statewide planning goals and rules. Notably, Division 024 includes a specific exemption providing that one section of the TPR does not apply to a UGB amendment. Specifically, section 0040 of Division 024 allows local governments to defer provisions of TPR section 0060 (which requires local government to adopt measures to mitigate the impacts of certain land use actions if they have a significant effect on an existing or planned transportation facility) to a subsequent plan or land use regulation amendment:

> (1) All statewide goals and related administrative rules are applicable when establishing or amending a UGB, except as follows:
>
> ***
>
> (d) The transportation planning rule requirements under OAR 660-12-0060 need not be applied to a UGB amendment....

Because Division 024 addresses applicability of goals and rules, and allows deferral of the application of one section of the rules, but does not allow for deferring the metropolitan planning requirements in TPR section 0035, the city is not authorized to defer those requirements.

Division 024 governs the applicability of Division 012 to UGB amendments. It is worth noting that adoption of Division 024 and amendments to Division 012 were under consideration by LCDC at the same time in 2006. By addressing applicability of TPR to UGB amendments in Division 024 and not in Division 012, it is clear that the commission intended that it was Division 024 that should govern which TPR requirements apply to UGB amendments and which may be deferred. Both rules were before the commission at the same time. Had the commission intended that the TPR include additional provisions to allow UGB amendments to defer certain TPR requirements, it could and would have added specific language to that effect. It did not.

3. The TPR provisions cited by the city do not allow the city to defer application of the TPR to its UGB expansion decision to a later time

The city's letter itemizes several TPR requirements that it believes support its position that the TPR metropolitan planning requirements do not apply to its UGB decision. The department has reviewed each, and offers the following comments.

- None of the sections cited specifically addresses UGB adoption or amendments, nor authorize the city to defer relevant TPR requirements.

- TPR Section 0035(9) allows local governments to avoid the alternatives analysis otherwise required by Section 0035 where they determine that existing or committed transportation facilities are adequate to meet expected transportation needs. This provision is intended to benefit small cities that face little growth pressure and where existing facilities are generally adequate to avoid a detailed and largely unnecessary evaluation of alternatives. That provision is not applicable here. Bend's UGB amendment will require major new transportation facilities and improvements; and the city conducted an evaluation of several alternatives.

- TPR Section 0016(2) allows the commission to grant extensions to the requirement for metropolitan local governments to amend their TSPs to be consistent with federally-required RTPs and applicable TPR provisions. While this provision might exempt or extend the timeline for compliance, the city has neither applied for nor has the commission approved a work plan that would extend the timeline for compliance. (Further, as outlined below, the city in its findings indicated that it would complete a TPR compliant TSP within the allotted time – by June 27, 2008.)

- Two of the TPR provisions the city cites as authorizing exemptions simply establish <u>additional</u> requirements to review plan amendments in situations where local governments have not otherwise completed work required by the rule:

- Section 0055(1)(d) applies to local governments that are not in compliance with the metropolitan planning requirements and establishes an additional standard for the review of plan and land use regulation amendments to assess whether those amendments are consistent with a region's adopted strategy to comply with the TPR. This is an additional requirement applicable to incremental plan and land use regulation amendments, not an exemption to the requirement to evaluate transportation alternatives.

- Section 0055(4)(b) applies to local governments that did not meet TPR requirements to amend their land use regulations by 1995 to make new developments more bike, pedestrian and transit friendly apply those requirements directly to individual land use decisions – i.e. development approvals.

4. The city's position is contrary to its finding in the record that TPR Section 0035(3) applied to its action on the UGB

The city's argument that is not subject to portions of TPR Section 0035 that apply to metropolitan areas needs to be viewed in the context of requirements of this section and the city's findings.

TPR Section 0035 guides the "Evaluation and Selection of Transportation System Alternatives." Section 0035(3) establishes a set of standards that local governments must use to judge whether their planned transportation system meets the TPR and Goal 12. Sections 035(4)-(7) describe a process for establishing standards for measuring reduced reliance on the automobile.

In short, all of the standards in 0035(3) must be applied to select a preferred alternative, including the requirements that apply to metropolitan areas:

> "(3) The following standards shall be used to evaluate and select alternatives:
>
> ***
>
> (e) The transportation system shall avoid principal reliance on any one mode of transportation by increasing transportation choices to reduce principal reliance on the automobile. In MPO areas this shall be accomplished by selecting transportation alternatives which meet the requirements in section (4) of this rule."[1]

In its findings, the city found that Section 0035(3) applied to the city's UGB decision. The record includes detailed findings explaining how the city's "UGB Expansion Transportation Analysis" conducted in 2006 and 2007 and the resulting TSP amendments adopted with the UGB amendment accomplish compliance with various provisions of Section 0035 through the evaluation multiple UGB expansion alternatives and TSP alternatives. (Record at Exhibit D, page 25-28) [2]

In short, the record shows that the city conducted a detailed evaluation of transportation alternatives and amended its transportation plan to adopt a preferred alternative, but did so without applying the standard in 0035(3)(e). The selection of a preferred alternative must meet all of the applicable standards, not just most of them. The record shows that the city considered 0035(3) as applicable to its UGB decision, but also shows that the city made this decision without complying with 0035(3)(e) and related provisions in 0035(4)-(7) which require that the evaluation and selection of a preferred alternative result in reduced reliance on the automobile.

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[1] Section 0035(4) requires that regional and local TSPs "be designed to achieve adopted standards for increasing transportation choices and reducing reliance on the automobile."

[2] While the city found that Section 0035(3) applied, it argued that it was not obligated to address 0035(5) because the city was not an MPO in 2000 at the time it adopted its prior TSP. This issue is addressed in detail in the Director's Report and explains that the city is subject to 0035(5). (Director's Report page 95-97)

5. Timing of Metropolitan Planning Requirements

One of the city's arguments against applying TPR metropolitan requirements now is that the time required to complete this work would create an unreasonable delay in city's UGB decision process. The city's argument suggests that the schedule for complying with this portion of the TPR was unclear or that the city was not aware of the work required. The text of the relevant portions of the TPR and the city's findings make it clear that metropolitan requirements are applicable and that the city expected to comply with them in close coordination with its action on the UGB.

The TPR was originally adopted in 1991. The rule anticipated that additional metropolitan areas would be designated and directed that such areas would adopt updated plans that address metropolitan area requirements within one year of completion of a regional transportation plan. (TPR Section 0055(1)(b)). In 2006, the commission adopted amendments to the TPR which provide additional direction for coordinating preparation of TPR required TSPs in metropolitan areas with federally-required regional transportation plans. The provisions of Section 0016 of the TPR direct that metropolitan TSPs be prepared through a single coordinated process that addresses state and federal requirements, and also requires TSPs address TPR requirements within one year of adoption of the federally-required plan. (TPR Section 0016(1) and (2)).

The City of Bend was aware of its pending MPO status when it prepared its previous TSP in 2000. That plan anticipated that the city would have to address the requirements, and considered an alternative that would move in the direction of addressing TPR requirements. In 2002, Bend was designated as an MPO, and adopted a federally-required regional transportation plan in June 2007. Accordingly, the city was required to adopt a TPR-compliant TSP within one year - by June 2008. (Directors Report at 97)

The record is clear that the city was aware of and anticipated complying with the relevant TPR requirements. The department identified the outstanding TPR metropolitan planning requirements as an important and relevant issue in its comments in 2007 and 2008. In response, the city advised that it expected to be fully in compliance with the applicable TPR requirements in much less time than it now estimates:

In its 2007 Findings, the city estimated it would comply with the TPR metropolitan requirements by December 2007.

> "OAR 660-012-0035(5) does not apply to this application because at the time the 2000 Bend Urban Area Transportation System Plan was prepared and adopted on October 11, 2000, the city of Bend was not part of a metropolitan planning organization. The Bend MPO was created on December 18, 2002. As of the date of this response, a Bend MPO Regional Transportation Plan (RTP) has not been prepared and adopted. An RTP that meets the federal requirements is expected by the end of June 2007 and <u>an RTP that meets the requirements of this division is expected by the end of December 2007</u>." (2007 Findings, Exhibit D, page 27 of 55– emphasis added)

In its October 2008 findings – that are included in the record but not referenced in the adopting ordinances - the city advised that the TPR work would be completed by December 2009:

6. The city is past due in meeting TPR Metropolitan Planning requirements and those obligations are integral to justifying a UGB decision

A major point of city's letter is that compliance with TPR requirements will delay consideration of UGB amendments for three years or more and that this will be a hardship to the city and frustrate compliance with Goal 14.

As explained above, the city has known of these requirements since at least 2007.

Application of the Metropolitan Area planning requirements of TPR to the city's UGB expansion requires that the city demonstrate that it will reduce reliance on the automobile even after the urban area is expanded. Most directly, and unless and until the city develops alternative standards for measuring its performance, this means that the city will need to reduce per capita vehicle miles travelled (VMT) over the planning period despite increasing residential, commercial and other uses on its fringe (including a proposed new university site and a proposed new medical center). It is likely that the city will be able to accomplish this only with a significant effort to achieve redevelopment and infill along transit corridors and in mixed use centers, and through the use of other transportation demand management and land use tools. If the city is to achieve this requirement at all, it must consider the relative effects of alternative transportation and land use measures in connection with its proposed UGB amendment. Deferring this important effort until after a UGB decision is made would effectively lock the city into a particular land use planning pattern that may make it difficult or impossible to achieve the Metropolitan Area planning requirements of the TPR, and may result in long-term transportation costs for the City of Bend that are significantly higher than would otherwise be the case. As a result, the department continues to recommend that the commission deny the city's appeal on this issue, and direct that the city comply with OAR 660-012-0035 on remand.

Encl: Letter to LCDC from Mary A. Winters, Bend City Attorney, April 12, 2010

cc. City of Bend
Bend UGB Commentors and Objectors
Steve Shipsey
Mark Radabaugh

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April 14, 2010

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ERIC KING
City Manager

SONIA ANDREWS
Finance Director

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Police Chief

LARRY HUHN
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VIA E-MAIL &
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Land Conservation and Development Commission
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Re: Analysis of OAR 660-12-0016

Dear Commission Members:

This correspondence provides additional analysis of whether OAR 660-12-0016 requires a regional transportation system plan ("RTP") or amendments to a local transportation system plan ("TSP") as part of a UGB amendment where the local jurisdiction has not yet complied with the MPO requirements. In short, no provision of OAR 660-012 requires an MPO-related update to the TSP or a new RTP as a condition precedent to a UGB amendment.

Applicability of Rules under OAR 660-024-0020(1)

LCDC's rules on UGB amendments provide that the statewide planning goals are applicable to an UGB amendment except as specifically excluded under 660-024-0020(1). The enumerated exclusions list, among other things, OAR 660-012-0060. There is no specific exemption for OAR 660-12-0016. As a result, the MPO rules are to be applied to an UGB amendment as required under OAR 660-024-0020(1). However, not all rules that are to be applied to a UGB amendment are ultimately relevant to a UGB amendment.

For instance, taking the Department's view that all statewide planning goals are applicable to an UGB amendment unless specifically exempted, would lead to the conclusion that Goal 8 is applicable to Bend's UGB amendment. It is quite clear that Goal 8's provisions regarding the development of destination resorts do not apply as conditions precedent to a UGB expansion.

Yet Goal 8 is not specifically excluded from the list of applicable statewide planning goals under OAR 660-024-0020(1). The only reasonable way to read the applicability provision of OAR 660-024-0020 is to conclude that while a Goal may be applicable, it is not necessarily relevant or does not necessarily serve as a condition precedent to a UGB amendment.

Further, OAR 660-024-0020 does not require that a city update each element of its comprehensive plan before completing a UGB amendment. Instead, under ORS 197.626, Bend's UGB amendment is not taking place in periodic review. Rather, under ORS 197.626, it has been submitted to the Commission "in the manner provided for periodic review" under ORS 197.628 to 197.650. This is an important distinction. The aim of periodic review is to require a city or county to in fact update its land use regulations and comprehensive plan provisions to comply with state goals, rules and statutes. There is no requirement within the approval criteria for UGB amendments under OAR 660-024 that would require Bend to undergo periodic review of its entire plan and land use regulations before it could amend its UGB.

In addition to the lack of legal authority to impose such a requirement, the practical consequences would be daunting. An update of a comprehensive plan or land use regulation in periodic review could take several years for a jurisdiction to complete. If these periodic review processes could be used to delay a needed UGB expansion, a no-growth jurisdiction could serially delay a UGB amendment through a periodic review strategy.

Volny v. City of Bend, 168 Or App 516 (2000) raised a similar question. In *Volny*, Bend had not yet adopted a TSP by the date required by the TPR. The Court held that the city could adopt an amendment to the transportation element of its comprehensive plan even though it did not have a state-acknowledged TSP. The Court concluded that while the request to update the TSP before the comprehensive plan is "far from untenable as a policy matter," the policy is "not one the Legislature or LCDC has adopted."

Here, DLCD seems to be making a similar claim; that the city cannot adopt an amendment to its UGB and comprehensive plan until it updates its TSP with the MPO rules. While the Department's desire to force the City to hasten metropolitan transportation planning efforts is understandable given the Department's responsibility in the area of transportation planning, the Commission should look carefully at the legal requirements and reject the Department's position. The UGB approval criteria do not require a periodic review update to conform to the TPR before a UGB amendment is complete. Neither the Legislature nor LCDC has adopted such a link nor would such a link be consistent with the distinctions between a UGB amendment (which is not completed in periodic review) and amendments to a city's plan and regulations to conform to new rules (which are completed in periodic review).

<u>Specific Provisions Re Applicability of Transportation Planning Rule Provisions Applicable to Cities within Metropolitan Areas</u>

OAR 660-012-0055 expressly addresses requirements for code amendments (such as UGB amendments) for jurisdictions in metropolitan areas that have not yet fully implemented the

OAR 660-012-0035. This rule provides that local governments that are not currently in compliance with the MPO rules must adopt findings with any plan amendment demonstrating that the proposed amendment "supports implementation of the region's adopted vision, strategy, policies or plans to increase transportation choices and reduce reliance on the automobile." OAR 660-012-0055(1)(d). This rule therefore expressly provides the standards for plan amendment and those standards require only specific findings, not implementation of all portions of the transportation planning rule applicable to jurisdiction in metropolitan areas. This provision would be rendered meaningless if full compliance with all aspects of the transportation planning rule were required.

The rule provides that a local government can show that a new amendment supports implementation of a "regional strategy, policy or plan if it achieves the following as applicable:

(A) Implements the strategy or plan through adoption of specific plans or zoning that authorizes uses or densities that achieved desired land use patterns;

(B) Allows uses in designated centers or neighborhoods that accomplish the adopted regional vision, strategy, plan or policies; and

(C) Allows uses outside of designated centers or neighborhoods that either support or do not detract from implementation of desired development within nearby centers."

This section is definitive on the lack of a requirement to condition a UGB decision on adoption of an MPO-RTP and amended TSP. Here the rule plainly states that for cities that are not in current compliance with the MPO rules and standards and are adopting an amendment to plan documents, as here in Bend, there are 3 approval criteria "as applicable." These approval criteria do not include any reference or cross-reference to any section containing MPO standards or planning. Rather, the City must still comply with OAR 660-012-0016 and -0035 but it is not required to do so before it adopts a UGB amendment as made clear by OAR 660-012-0055(1)(d). The City acknowledges that findings addressing these criteria will need to be provided on remand, but that is all the City is required to do relating to metropolitan transportation planning as a prerequisite to adopted a new UGB.[1]

Further, Subsection (3) of OAR 660-012-0055 provides that affected cities and counties within MPO areas which do not have acknowledged land use regulations addressing the requirements of -0055 by the deadline, must apply OAR 660-012-0045(3), (4)(a)-(g) and (5)(e) directly to all land use decisions. This would include UGB amendments as a recognized land use decision. None of those standards incorporate the MPO process or standards. Because the MPO standards are excluded from the list of applicable standards

[1] The City acknowledges that is also required to comply with transportation analyses as required in the Goal 14 rules.

for non-compliant cities and counties, LCDC must conclude that the MPO standards are not applicable during Bend's UGB amendment. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 859 P2d 1143 (1993) (PGE), as modified by, *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

OAR 660-012-0055(4)(b) again confirms the distinction between "applicable" and "relevant." There the rules state that affected cities that do not have acknowledged plans and land use regulations consistent with the MPO rules "shall apply relevant sections of this rule to land use decisions and limited land use decisions until land use regulations complying with this amended rule have been adopted." The rule then makes clear that for cities that are not yet in conformance with the new MPO rules, those relevant approval criteria are found in OAR 660-012-0055(1)(d) and OAR 660-012-0045(3), (4)(a)-(g) and (5)(e). See OAR 660-012-0055(3).

The most logical and statutorily consistent view of the RTP and TSP is that each provides a plan for how land inside a UGB is to be served once the land is included in the UGB and neither are act as a condition precedent to a UGB amendment. The Court of Appeals shared this view in *City of West Linn v. LCDC*, 201 Or App 419, 435, 119 P3d 285 (2005). There the Court found that a local government could expand a UGB to provide land to construct a new major roadway, based on a finding of need, made for the first time during the UGB expansion process. The Court of Appeals stated that "any concerns about the effect of actually constructing a road are more properly directed to the amendment of the ...transportation plan, which is the proper mechanism to ensure that the adverse effects on capacity and public safety will be addressed." The Court did not condition the UGB decision on the later TSP update to include the roadway.

Substantive Transportation Planning Rule Provisions

In addition to the clear limitations on applicability of the various transportation planning rules provided by OAR 66-012-0055, the substantive rules themselves do not support the conclusion they must be complied with prior to adoption of an amended UGB.

OAR 660-012-0016

A closer look at OAR 660-012-0016 and its related provisions demonstrates that it is not relevant to an UGB amendment and therefore cannot be applied as a condition precedent to approval of an UGB expansion. LCDC certainly has the authority to enforce the MPO rule and require the City of Bend to commence the necessary evaluation and policy work, but nothing in the rule provides LCDC the authority to delay the UGB decision until such work is complete.

Subsection (1) of the OAR 660-012-0016 provides the primary directive. It states that in metropolitan areas, local governments must:

> "Prepare, adopt, amend and update transportation system plans required by this division in coordination with regional transportation plans (RTPs) prepared by MPOs required by federal law."

The directive continues that the adoption of the RTP is not a land use decision under Oregon law.

The directive does not relate the preparation of a RTP-TSP amendment to a UGB amendment in an MPO area. Rather, it simply states that once an MPO completes an RTP, the City shall prepare, adopt or amend its TSP to coordinate with the RTP. The City acknowledges that it is required to do so, but the requirement is not linked to UGB expansion approval. OAR 660-012-0016(1) does not expressly or implicitly require this effort to be completed prior to an expansion of the UGB.

Further, requiring the City to complete metropolitan planning efforts prior to action on the UGB would violate the City's pressing obligation under OAR 660-024 to provide enough land within the UGB to accommodate its 20 year employment and residential land needs. As the Director has stated on the record of these proceedings, the City has a need for a residential UGB expansion to accommodate its 20-year growth projections. If the City is required to wait until it can complete the TSP amendments, the City will delay its expansion decision by another 3-5 years and violate OAR 660-024, requiring a 20-year supply of land.

The express language of OAR 660 012 0016(1) states that the adoption of an RTP is not a land use decision. The RTP process is not intended to include decisions about how much land is within the City limits, how land is used within Bend or how Bend's local land use regulations or comprehensive plan provisions will be interpreted or applied. Rather, it is a non-land use decision by a group other than a local government and is not a decision subject to the scrutiny of a land use proceeding appealable to LUBA and the Court of Appeals.

Conversely, the UGB process in Bend is nothing but a land use decision. It is an assessment of the 20-year residential and employment needs of the City and a decision to accommodate those needs through land use regulations and comprehensive plan provision amendments. If the RTP itself is not intended to be the kind of process or document that embodies a land use decision, it seems unreasonable to condition final approval of a UGB decision (a pure land use decision) on the adoption of the local implementation of an RTP.

<u>OAR 660-012-0016(2)</u>

OAR 660-012-0016(2) requires the City to either ensure that its TSP complies with the RTP or make any necessary plan amendments to comply with the RTP. Again, this subsection (2) provides no connection or reference to a UGB amendment. Instead it anticipates a local amendment process to a TSP, not a UGB, that follows the adoption of an RTP by the MPO. Further, this subsection provides that if an amendment to the TSP is required based on the RTP, the TSP amendment is a Post-Acknowledgement Plan Amendment as provided in

OAR 660 division 18. The identification of the PAPA process for the TSP amendments is yet another indication that the RTP/TSP is not intended to be related to a UGB amendment which is instead processed not as a PAPA but rather in the manner provided for under periodic review. After initial compliance under the PAPA procedures, any future updates occur through periodic review. OAR 660-012-055(5). Again, neither the initial compliance nor the ongoing compliance is connected in any way to a UGB amendment or the distinct process for a UGB amendment.

OAR 660-012-0035

OAR 660-012-0035 sets out the requirements for the City's TSP and integrates the MPO requirements and standards that must be incorporated in an amended TSP.

There are several relevant sections in -0035 that demonstrate an RTP and RTP-amended TSP are not conditions precedent to a final UGB decision.

First, under subsection (1) a TSP is based on an evaluation of the potential impacts of system alternatives. Subsection (9) provides:

> "Where existing and committed transportation facilities and services have adequate capacity to support the land uses in the acknowledged comprehensive plan, the local government shall not be required to evaluate alternatives as provided in this rule."

The reference in Subsection (9) refers to alternatives required both in MPO and non-MPO jurisdictions. Accordingly, the rule itself shows that the MPO requirements are not relevant to a local government if that government can show adequate capacity to serve the land needs in the acknowledged comprehensive plan. Thus, the rule establishes adequate capacity as the condition precedent to application of the MPO rules and not whether a City is engaged in a UGB process. If the Commission intended to make UGB amendments conditioned on completeness of a city's obligations under OAR 660-012-0035, the Commission could have added a subsection to OAR 660-012-0035 that stated:

> "A local government within a metropolitan planning area shall be required to demonstrate implementation of this regulation prior to final action on expansion of its urban growth boundary."

Of course this language is not in the rule and therefore cannot be written in to the rule on a case-by-case basis. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 859 P2d 1143 (1993) (PGE), as modified by, *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The rule establishes "adequate capacity" as the threshold for whether the alternatives and standards must be evaluated. UGB amendments are not listed as a similar trigger for compliance with the rule.

Even if the rule applied as a condition precedent in the UGB process, the rule only requires an MPO to adopt standards to "demonstrate progress towards increasing transportation

choices and reducing automobile reliance as provided in this rule." OAR 660-012-0035(5). The rule then establishes an on-going and continuous conformance regime that is not measured at any one point in time, such as the date a UGB is adopted. The intent of the rule is to establish standards that will be implemented over time to reach conformance with the goals of the rule. These standards and objectives can be adopted and enforced in a process that is not contemporaneous with the UGB amendment process. In other words, the fact that the MPO rule compliance is not a condition precedent to a UGB amendment does not mean that the City cannot commence work metropolitan transportation planning work and use the results of that process to increase the likelihood that the City's adopted UGB related efficiency measures will be successful. The question is not whether the City will comply with the MPO rules. The question is whether the rules themselves allow LCDC to require the City to complete the MPO process, including TSP amendments, before amending its UGB. Such a ruling is not supported by the language of the rule. In Bend's case, the MPO requirement would delay the UGB amendment by at least 3 to 5 years, putting the City out of conformance with its statutory obligation to provide a 20-year supply of residential and employment land.

One example from the MPO rule illustrates this point. If the evaluation in Bend shows any increase in VMT per capita, then pursuant to OAR 660-012-0035(5)(c), the cities and the counties in the metro area must adopt an integrated land use and transportation plan in coordination with an MPO within 3 years of the approval of the standard. If the results were any increase in VMT per capita, the city would then need to adopt not just an amended TSP but an integrated land use and transportation plan and prepare it in coordination with the MPO within 3 years of approval of the standard. If this process is made contingent on the UGB decision, Bend will be required to delay its UGB amendment by at least 5 years to incorporate the RTP and TSP findings.

This is a drastic result that if intended by the MPO rule would certainly have been addressed by the MPO rule. Instead the rule makes no such connection between a UGB and the MPO and TSP processes.

Conclusion

Based on this analysis, we can find nothing in OAR 660-012 that allows LCDC to condition a UGB amendment on completion of the MPO planning work. In fact, the rule seems to support the opposite conclusion. Where cities are not yet compliant with the MPO standards planning or implementation, they are required to apply the approval criteria of OAR 660-012-055(1)(d) and OAR 660-012-0045 (3), (4)(a)-(g) and (5)(e). None of these listed approval criteria contain the MPO standards.

Thank you for your consideration of this additional legal analysis.

Sincerely,

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MAW/nf

cc: Steve Shipsey
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