

July 25, 2007

TO: Land Conservation and Development Commission

FROM: Bob Rindy, Policy Analyst

SUBJECT: Agenda Item 5; August 9, 2007, LCDC Meeting.

Initiation of Rulemaking Regarding Metro Urban and Rural Reserves

This agenda item is intended for initiation of an effort to draft and ultimately adopt new land use rules for urban reserves and rural reserves in the Metro region. Rules on these topics are required by new legislation: Senate Bill 1011 enacted by the 2007 legislature (see Attachment A). Under this item, the Commission will also appoint a Rulemaking Workgroup to assist the Commission and the department in drafting the required rules. The department has included a list of individuals recommended for the Commission's consideration. Also under this item, the Commission will hear testimony from the public on topics related to the rulemaking and SB 1011, including testimony concerning workgroup membership.

This item is preceded by Item 4 on the Commission's August meeting agenda. That item is a report from Metro describing issues and concerns leading to this legislation. Metro may also report on issues identified by an ad hoc committee on the rulemaking that will have met twice since the passage of the bill. That committee, or Metro, based on the suggestions of the committee, may eventually provide LCDC's work group with suggested draft rules to implement the legislation.

For additional information on this item, please contact Bob Rindy at 503-373-0050 ext. 229, or by email bob.rindy@state.or.us.

Background

Senate Bill 1011, enacted by the 2007 legislature, authorizes Metro area counties and the Metropolitan service districts to designate rural reserves not included in urban growth boundaries or rural communities. Under the statute, rural reserves cannot be included within an UGB or re-designated as urban reserve for a period of 40 – 50 years following designation. The bill also provides a process for designation of urban reserves in the Metro area, but the urban reserve process for Metro is different than that provided under LCDC rules at OAR 660, division 21 (see Attachment B).

The "preamble" to the bill provides the reasons and general policy direction of this statute. It declares 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, the legislation directs that “The Land Conservation and Development Commission shall adopt the goals or rules required by section 3 of this 2007 Act and by the amendments to ORS 195.145 by section 6 of this 2007 Act not later than January 31, 2008.” Those sections of the act require LCDC rules regarding Metro are urban reserves and rural reserves.¹

Section 3 of the legislation provides that the decision to designate urban and rural reserves is not mandatory, i.e., Metro and a metro area county government would choose whether or not to declare these reserves. However, if reserves are designated, a county and Metro must consider the designation and establishment of rural and urban reserves simultaneously. The reserves must be designated by an agreement, 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.”

Currently, LCDC must approve the designation of urban reserves (i.e., urban reserves are not subject to the standard post-acknowledgement plan amendment process, including appeal to LUBA. SB 1011 amends that statute (ORS 197.626), such that a “metropolitan service district that ... amends the district’s regional framework plan or land use regulations implementing the plan to establish urban reserves ... or a county that amends the county’s comprehensive plan or land use regulations implementing the plan to establish rural reserves ... shall submit the amendment or designation to the Land Conservation and Development Commission in the manner provided for periodic review ...”. This anticipates that LCDC would review Metro’s urban reserves and counties’ rural reserves in the same periodic preview process.

Finally, the statute provides that designation and protection of rural reserves or urban reserves pursuant 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 ... and does not impair the rights and immunities provided under ORS 30.930 to 30.947.”

Urban Reserves: LCDC rules adopted in 1993, and state laws enacted subsequent to LCDC rules, provide for urban reserve areas statewide, including procedures and

¹ However, it should be noted that other sections of this statute may also suggest the need for LCDC rule amendments, such as amendments to urban reserve rules applicable to other areas outside of Metro. If so, the department does not interpret the statute to limit the Commission’s rulemaking authority should the workgroup or the department decide there is a need to propose such rules.

standards for designating urban reserve areas. SB 1011 leaves this current process in place, but establishes a new alternative for the metropolitan region. The statute requires new LCDC rules in order to describe a different process and a different set of factors under which the Metro region may designate urban reserves. “Urban reserves” are defined in SB 1011 as “lands outside an urban growth boundary that will provide for (a) future expansion over a long-term period; and (b) [T]he cost-effective provision of public facilities and services within the area when the lands are included within the urban growth boundary.”

Urban reserves designated by Metro and a Metro area county “must be planned to accommodate population and employment growth for at least 20 years, and not more than 30 years, after the 20-year period for the Metro UGB determined at the next mandated update (2009 as a result of the two-year extension granted in HB 2051). The designation of urban reserves must be based upon “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.”

Rural Reserves: There is no precedent for local governments to designate long-term rural reserves under the Oregon land use program. Throughout the history of the program, urban growth boundaries (UGBs) were the primary tool to protect farm and forest land, and to separate urban and rural land. UGBs, in conjunction with Goals 3 and 4, protect farm and forest land, but it has been clear that UGB expansion will, over time, consume a certain amount of such land, especially in the Metro regions. 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.” The statute clearly indicates that “rural reserves” are intended “to provide long-term protection of the agricultural industry.”

SB 1011 requires that land designated as a rural reserve may be designated (i.e., it is not necessarily mandated) through an intergovernmental agreement between a county and Metro. However, as indicated above, the statute requires that rural reserve land: (a) must be outside an urban growth boundary; (b) may not be designated as an urban reserve during the planning period for urban reserves (see above); and (c) cannot be included within an urban growth boundary during the planning period for urban reserves. In other words, urban reserves are anticipated to protect the farm and forest land inside the reserve

for at least 40 to 50 years. When designating rural reserves, a county and Metro are required to select land based on consideration of “factors” in the statute, including, but not limited to, 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.

These factors derive from work done for local governments in the region by the Oregon Department of Agriculture.

Rulemaking Schedule

SB 1011 takes effect immediately, and requires LCDC to adopt administrative rules for urban and rural reserves by January 31, 2008. The department recommends that LCDC hold its first hearing on the proposed rules at its November 28-30 meeting (in Corvallis). The Commission should schedule the adoption of the proposed rules at a meeting prior to January 31, 2008 (at the time of this report, LCDC has not determined its 2008 meeting schedule). The department also recommends that the Commission be prepared to discuss the progress of the rulemaking at its October meeting (in Enterprise). Finally, the department recommends that the Commission’s appointed rulemaking workgroup (see discussion below) begin work as soon as practicable, preferably in August, in order to complete the rulemaking under the proposed schedule. We note that an *ad hoc* group of interested parties has been assembled by Metro and has already begun discussion of rulemaking issues. It is anticipated that this work will accelerate the workgroup’s progress in meeting this schedule.

The Commission has 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.” With respect to scheduling of rulemaking work, 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.” However, the CIAC will not be meeting until August 16, so the department’s consultation with CIAC is not possible prior to the Commission’s action under this agenda item. The department will discuss this with the CIAC at its August meeting, and report back to the Commission as to any recommendations provided at that meeting. The CIAC has recommended that one of its members, Ann Glaze, be appointed to the workgroup.

The CIG also 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 will follow these guidelines as it proceeds with this rulemaking. A list of potentially affected parties is under development. However, at the time of this report, no detailed schedule has been determined other than the Commission’s schedule described above. The department will recommend that the workgroup determine its schedule at its first meeting. After that schedule is determined, it will be posted on the DLCD website, and DLCD will provide notice of that posting in the manner outlined by the CIG.

Appointment of Rulemaking Workgroup

The department is recommending that the Commission appoint a Rulemaking Workgroup to assist the Commission and the department in drafting the required rules. The department has included a list of individuals for the Commission’s consideration, below, including affected or interested individuals who, in the department’s estimation, represent a balance of the diverse interests in the region and have the necessary expertise to assist the department in drafting rules for the Commission’s consideration under the timelines established by the statute. The suggested individuals would represent Metro area cities, counties, and a range of other interests.

The Commission’s guidelines (the CIG) recommend that, in establishing workgroups for the development of new or amended rules the Commission may “... Appoint an advisory committee that includes citizens, local officials, tribal representatives, experts, and other affected or interested parties in order to provide advice and assistance to the Commission on a particular policy issue, prepare options or alternatives and perform other tasks as appropriate. Information about meetings and actions of the advisory committee shall be

made available in a variety of media, including the Department's website. The Commission shall indicate whether an advisory committee may make recommendations to the Commission through testimony of individual members, or make recommendations as a single body, including minority opinions."

Furthermore, the CIG indicates that, when establishing a workgroup, the Commission and the department, "shall:

- Clearly define the task or role of the committee or group, including the authority of an advisory committee to provide the Commission with recommendations independent from the Department staff;
- Assure that Department staff provides adequate support, within the limitations noted below;
- Require minutes of committee meetings to be prepared and drafts of proposed goals or rules be distributed prior to subsequent committee or workgroup meetings, when timelines permit, and within the limitations noted below;
- Assure the involvement of local government staff or elected officials and affected tribes, where warranted, with notice to local elected officials that employ local staff appointed to a committee or workgroup;
- Consider geographic representation in appointing committees or workgroups;
- Provide information to members of ... workgroups, and an opportunity for discussion, to ensure that there is a common understanding about (a) how recommendations will be developed; (b) opportunities to present minority opinions and individual opinions; (c) the time commitment necessary to attend workgroup meetings and related activities and to read background materials; (d) opportunities to discuss background and technical information with department staff; and (e) any potential liability or exposure to litigation as a result of serving on a committee or workgroup.
- In evaluating the particular interests to be represented on particular advisory committees or workgroups, the commission should consider appointment of a workgroup member not affiliated with any of the groups affected by or otherwise interested in the matter at hand. This member would be charged with determining and representing the very broad interests of citizens in general, rather than the interests of any particular person or group that may otherwise advocate for or against a policy proposal."

The Commission generally appoints an LCDC member to chair workgroups. It is recommended that the Commission determine a Commissioner to chair this group.

In suggesting a workgroup membership, the department generally favors a smaller group, especially given the very short timeline for this project. That is usually difficult, because a large number of interests will no doubt be affected by rules of this magnitude. However, workgroup meetings are open to the public, so it is usual for groups to send representatives even if they are not workgroup members, and the workgroup chair generally takes time during workgroup discussions to provide an opportunity for guests to address the workgroup. The department also suggests that workgroup members should

include land use planners because of the highly technical “land use” subject area of these rules. However, other experts, including a community development expert, should also be included. The department suggests the following workgroup membership:

- A representative from Metro;
- Representatives from each of the three counties in the region;
- A representative from each of three “larger” cities in the region, including Portland and a city on both the west and the east side of the region;
- A representative of a smaller city in the region outside Metro’s UGB (e.g., Sandy, Canby, Gaston, North Plains or Banks);
- Representatives of Metro Homebuilders, Commercial interests, Environmental Interests, 1000 Friends of Oregon, and the Farm Bureau;
- State agencies, including ODOT, the Department of Agriculture, and the Department of Forestry;
- A CIAC appointed member to represent the broad interests of citizens in general, rather than the interests of any particular person or group.

Given these considerations, the department recommends the following individuals:

1. Randy Tucker, Metro
2. Brent Curtis, Washington County
3. Doug McLain, Clackamas County
4. Karen Schilling, Multnomah County
5. Pat Ribellia, City of Hillsboro
6. Jonathan Harker, City of Gresham
7. Gil Kelley, City of Portland
8. A planner for a city in the region outside Metro’s UGB²
9. Jim Johnson, Oregon Dept of Agriculture
10. Lainie Smith, ODOT Region 1
11. A Representative from the Oregon Dept of Forestry³
12. Mary Kyle McCurdy, 1000 Friends of Oregon
13. Jim McCauley, Metro Homebuilders
14. Dave Vanasche, Washington County Farm Bureau
15. Bev Bookin, CREEC (Commercial Real Estate Economic Coalition)
16. Jim Labbe, Audubon Society of Portland
17. Ann Glaze, CIAC

Rulemaking Criteria and Procedures

This item does not include formal consideration of a rule proposal. As such, formal rulemaking notice is not required at this point in the process. The department anticipates

² The department is discussing this with these cities and will recommend a name at the Commission meeting.

³ ODOF will recommend a staff member prior to or at the Commission meeting.

filing such notice prior to a hearing on proposed rules submitted for adoption by the workgroup.

The Commission's procedures for rulemaking derive from ORS Chapter 183 and are specified in 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 197.

(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.”

LCDC legal counsel, Steve Shipsey, will be present at the Commission meeting for further advice on rulemaking procedures and criteria.

Conclusion and Recommendation

The department recommends that the Commission initiate the rulemaking required by SB 1011 and appoint a workgroup to advise the department and the Commission in this rulemaking. The department recommends appointment of the workgroup members specified in this report. The department also recommends the Commission receive public testimony regarding this rulemaking and the proposed rulemaking workgroup.

Attachments

- A. Senate Bill 1011
- B. Current Urban Reserve Rules (OAR 660, division 21)
- C. LCDC Citizen Involvement Guidelines for Policy Development