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# Memorandum

**From:** **Al Johnson**
**To:** **Greg Mott**
**Re:** **2030 Plan Issues:** **Plan-zone conflict resolution, TPR, and inventories**
**Site needs analysis and jobs per acre**
**Large sites and land assembly**
**Date:** **April 12, 2010**

## I. Plan/Zone Conflict Resolution, the Transportation Planning Rule, and Inventories

The draft 2030 Refinement Plan resolves about 300 of about 900 plan/zone conflicts identified by staff. The proposed changes would affect about 66 acres of vacant land. Of the 66 acres, about 41 acres involve a 25.13-acre change from Sand and Gravel to Light Medium Industrial near the former Blue Water Boats facility and a 15.73-acre change from Campus Industrial to Park and Open Space that awas approved several years ago when the Gateway sports complex was created. The change was approved at that time but was never shown on the Gateway Refinement Plan. The remaining 26 acres is comprised of "dozens of small changes, the majority of which correct the land use designation to reflect the existing zoning or which reflects a change to fit the context of the neighborhood or reality on the ground." The affected lands have not been analyzed for constraints, which could reduce the affected buildable acreage further.

Concerns have been raised that resolving these conflicts, and, possibly, meeting other requirements incident to establishment of the city's new UGB, will be made more difficult by the recent decision of the Court of Appeals in *Willamette Oaks, LLC v City of Eugene*, 232 Or App 29 (Nov. 18, 2009) may require the the city to perform a fresh "significant impact analysis" under the LCDC's Transportation Planning Rule (TPR) for every 2030 Refinement Plan change to existing plan diagrams and zoning maps. This memo addresses these concerns in general terms.

As to the 2030 Refinement Plan generally, it is my opinion that (a) the new Court of Appeals decision should generally require the city to address only the "first stage" of the Transportation

Rule and (b) the fact that the 2030 plan largely codifies and relies upon existing acknowledged comprehensive plan elements will greatly simplify that step.

As to the plan-zone conflicts, the recent decision will require only a "batched" first-stage analysis as to most, if not all of the 300 that are proposed. All conflicts that are resolved in a manner that is consistent with the Metro Plan Diagram or any acknowledged amendment to or refinement of that diagram require only a first-stage analysis under the *Mason* rule discussed below. Conflicts that are resolved in a manner that is clearly inconsistent with the current acknowledged plan designation should probably be removed from the "now" list unless they are simply "codifications" of previous post-acknowledgement plan amendments during which the TPR was or should have been applied.

The concern arises because *Willamette Oaks* holds that local governments may not defer application of Section 60 of the Transportation Planning Rule (OAR 660-012-0060) when amending a comprehensive plan or implementing regulation. In so holding, the Court of Appeals indirectly overruled a 2004 Land Use Board of Appeals decision, *Citizens for Protection of Neighborhoods v. City of Salem and Sustainable Fairview,* 47 Or LUBA 111 (2004)(*Sustainable Fairview*).

In *Sustainable Fairview*, LUBA allowed deferral if the record showed that full compliance with the TPR's substantive and procedural requirements would be required before any additional development authorized by the subject plan or zone change could take place.

Fortunately, compliance with Section 60 of the TPR is not difficult to demonstrate for lands inside the currently-acknowledged urban growth boundary. In addition the TPR grants a specific exception for lands added to that boundary if the local government keeps those lands in an appropriate holding zone pending application of the TPR and other necessary planning steps.

Inside the current UGB, with few if any exceptions, the 2030 Plan simply implements existing acknowledged comprehensive plan designations that were in in place when the region's ackowledged Transportation Systems Plan (TSP) was adopted. Refinement plan and zoning map designations interpreting and implementing those designations do not cause "significant impacts" within the meaning of the rule.

Section 60 is a two-stage regulation. The first stage is a determination whether a plan or zoning amendment will "significantly affect" a transportation facility. The second stage is the identification and implementation of one or more different kinds of "mitigation" measures to prevent the identified significant impacts or to render them no longer significant.

The applicant in *Willamette Oaks* skipped the first stage and sought deferral of both stages, relying on *Sustainable Fairview*. The court said the applicant couldn't do that. It did not, however, say there was anything wrong with other LUBA and court decisions about what is required for the first stage in different circumstances.

For example, LUBA has determined that plan and zoning amendments do not have significant impacts under Section 60 to the extent that those amendments were in place and therefore necessarily assumed by acknowledged Transportation Systems Plans.

The leading case on this issue is *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005). In *Mason*, the subject decision rezoned land from low-density rural to urban low-density-residential (LDR) densities allowed under a city comprehensive plan designation that had been assumed in the city's acknowledged TSP. LUBA found that

> "[I]t was appropriate for the city to compare traffic impacts based on the . . . LDR plan designation, not the county UR zone. The general purpose of OAR 660-12-0060 is to ensure that allowed uses are consistent with the *planned* functdion, capacity and performance standards of transportation facilities. If the applicable TSP assumes greater development density for a particular property than allowed under the pre-amendment zoning district, it seems more consistent with the purpose of OAR 661-010-0060 to compare development density (and hence traffic impacts) actually assumed by the TSP with the amended zoning rather than the pre-amendment zoning." 49 Or LUBA at 218.

In contrast, a local government that does not have an acknowledged TSP or can't show consistency with plan designations previously adopted in compliance with the TPR has to make a fresh significant impact analysis. See *Just v. City of Lebanon*, 49 Or LUBA 181 (2005).

In short, elements of the 2030 Refinement Plan that reflect, interpret, or implement comprehensive plan designations and other land use measures assumed by TransPlan do not have significant impacts within the meaning of Section 60 of the TPR.

The same is true of elements of the 2030 Refinement Plan that incorporate or otherwise reflect other post-acknowledgment plan or zoning amendment decisions that have become final and no longer subject to appeal. Those decisions are deemed "acknowledged" by operation of law and are presumed to have been made in full compliance with the LCDC's transportation goal and interpretive rule. See *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350, rev. den. 323 Or 136 (1996). Examples reflected in the draft 2030 Plan include post-acknowledgment amendments relating to Riverbend, the Sports Complex, and North Gateway.

This reasoning is also maintains consistency between the TPR and potentially conflicting requirements of state land use statutes restricting collateral attacks on acknowledged plans and requiring that urban lands inventoried for needed housing and "competitive" industrial land supplies be rezoned and made available without undue regulatory burdens when needed during a planning period.

If the TPR is to remain fully applicable to future rezonings of land inventoried for "needed housing," it raises particularly serious--and not easily resolved--issues as to whether affected lands can remain in the buildable lands inventory. See Bill Kloos letter and Gloria Gardner responses.

See, for example: "competitive land supply" requirements of Goal 9 and Goal 9 Rule ; definitions of "buildable" and "available" in Goal 10 Housing Rule; 20-year residential land supply requirements of ORS 197.296; regulatory constraint statute at ORS 197.296(4), requiring cities over 25,000 to take

local, state, and federal regulatory constraints into consideration in determining whether or not to include otherwise available lands in residential lands inventories; ORS 197.831, requiring local governments to demonstrate that ordinances required to contain clear and objective standards for permits involving "needed housing" under ORS 197.307 and 227.175 are capable of being imposed only in a clear and objective manner.

**II. Site needs analysis and jobs per acre**

This section provides some additional background on the issue addressed in the following comment and response in ECONW's supplemental memo:

> **"Comment: The EOA assumes that jobs per acre density will be roughly half of that currently seen in Springfield."**
>
> **"ECONW Response:** The EOA makes no use of jobs per acre density assumptions (commonly called employees per acre) in any part of the analysis. This comment is derived from base year employment data, the building land inventory, and the site needs analysis. The consultants did not make this comparison in the report, because employment exists in many different plan designations in Springfield (see Table A-9, page 96) and the confidentiality limitations of the Quarterly Census of Employment and Wage data."
>
> "A similar issue exists in calculating "derived" jobs per acre assumptions for the 2030 forecast. In short, any jobs per acre density analysis is fundamentally flawed because of the source data and how employment will distribute itself in the future among plan designations. Such an analysis is not required by Goal 9 and was not conducted by the consultants. The EOA does comply with the Goal 9 Administrative Rule in that it identifies site needs based on the target industries identified in the City's economic development strategy."

The "site-needs" analysis described by ECONW in the above comments and detailed in the EOA is a permissible method of determining Goal 9 land needs and is consistent with available guidance from DLCD and the courts.

It is expected that additional guidance will be provided before final adoption of the 2030 Plan. An appeal of LCDC's 2007 approval of Woodburn's 2006 UGB expansion, involving similar issues, is pending at the Court of Appeals. Pending the Court's decision in the Woodburn appeal (now in its third year because appeals of LCDC decisions are not on the same expedited schedule as appeals of LUBA decisions), the city is relying on LCDC's decision and the state's brief in that case.

The Attorney General's brief defending LCDC's Woodburn UGB decision explains that Woodburn properly "determined its industrial land need based on a 'site-needs' approach to attract targeted industries" to meet identified needs. LCDC brief at p. 16 The brief points out that "A site-needs analysis focuses on the type of sites the industries require, not the amount of area that employees have been shown to use. " and that a local government "is not required" by state land use statutes,

goals, or rules "to use the medium growth rate or a strict employee-per-acre methodology based on the population projection." LCDC brief at pp 16, 20. In fact, the brief states, "The city was not required by statute, goal, or rule to prepare a job growth projection." LCDC brief at p. 22. Therefore, even though it did prepare a job growth project, the City of Woodburn "was not required to tie its 20-year land need to that job growth projection." LCDC Brief at p. 22.

**III. Land Assembly, Goal Nine, and Goal 14**

This section provides some additional background on the issue addressed in the following comment and response in ECONW's supplemental memo:

> **"Comment: The EOA doesn't account for the possibility of smaller parcels being assembled into larger sites."**
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> **"ECONW Response: This issue was discussed by the Stakeholder Committee who recommended that parcelization be considered a constraint consistent with the definition of "Development Constraints" in OAR 660-009-0010(2):**
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>> "'Development Constraints" means factors that temporarily or permanently limit or prevent the use of land for economic development. Development constraints include, but are not limited to, wetlands, environmentally sensitive areas such as habitat, environmental contamination, slope, topography, cultural and archeological resources, infrastructure deficiencies, **parcel fragmentation**, or natural hazard areas.'" [emphasis added]

The implication that fragmentation is not a significant constraint runs counter to the policy and experience reflected in the Goal Nine Rule's requirement that large parcels meeting special site needs identified in a local government's EOA must be specifically "identified" and protected from fragmentation to preserve their availability and desirability as large sites. OAR 660-09-0025(8)(b) provides that

> "Policies and land use regulations for these uses must
>
>> "(a) Identify sites suitable for the proposed use; and
>>
>> "(b) Protect sites suitable for the proposed use by limiting land divisions . . ."

General assumptions that a certain percentage of small parcels will aggregate does not "identify sites suitable for the proposed use." Relying on small parcels to aggregate does not protect sites suitable by limiting land divisions because it relies on parcels that it's too late to protect.

Consistent with the rule, staff has pointed out that

> "The city currently has no basis for assuming that . . . the need for large employment sites can be accommodated through assembly of small land parcels. Such assumptions would not take into account existing life cycle value of buildings, on-site compatibility of new uses with existing uses, or the ability of all affected parties to be able to satisfy site needs at these locations." 1/19/2010 staff memo to Planning Commission, Rec. A-296.

Moreover, the city's analysis allocates small parcels elsewhere by assuming that Springfield will be able to meet its projected employment land needs for sites five acres and smaller entirely on its current supply and therefore does not need to add land to the current UGB for such sites. That assumption is only possible because it is coupled with optimistic assumptions about the potential for redevelopment and infill on those lands: "Springfield assumes that all land needs on sites smaller than five acres would be accommodated through redevelopment." Rec. A-297

As background, here is some key language relevant to the relationship between the Goal 9 and Goal 14 interpretive rules:

OAR 660-024-0040(5) provides that

> "(5) Except for a metropolitan service district described in ORS 197.015(13), **the determination of 20-year employment land need for an urban area must comply with applicable requirements of Goal 9 and OAR chapter 660, division 9, and must include a determination of the need for a short-term supply of land for employment uses consistent with OAR 660-009-0025**." (Emphasis added)

OAR 660-024-0050, Land Inventory and Response to Deficiency, provides in relevant part that

> "(1) When evaluating or amending a UGB, a local government must inventory land inside the UGB to determine whether there is adequate development capacity to accommodate 20-year needs determined in OAR 660-024-0040. For residential land, the buildable land inventory must include vacant and redevelopable land, and be conducted in accordance with OAR 660-007-0045 or 660-008-0010, whichever is applicable, and ORS 197.296 for local governments subject to that statute. **For employment land, the inventory must include suitable vacant and developed land designated for industrial or other employment use, and must be conducted in accordance with OAR 660-009-0015**." (Emphasis added)

> "(4) If the inventory demonstrates that the development capacity of land inside the UGB is inadequate to accommodate the estimated 20-year needs determined under OAR 660-024-0040, the local government must amend the plan to satisfy the need deficiency, either by increasing the development capacity of land already inside the city or by expanding the UGB, or both, and in accordance with ORS 197.296 where applicable. Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB. . . . "

OAR 660-024-0010(8) provides that:

“'Suitable vacant and developed land' describes land for employment opportunities, and has the same meaning as provided in OAR 660-009-0005 section (1) for 'developed land,' section (12) for 'suitable,' and section (14) for 'vacant land.'

LCDC’s 2009 amendments to the Goal 14/UGB rule include new cross-references to the Goal 9/Economic Development rule. DLCD explained the change as follows:

“Department staff noticed that division 24 (UGB rule) does not include a definition of ‘suitable vacant and developed land,’ a term that is used in OAR 660-024-0050(1) concerning employment and inventories, based on definitions in the Goal 9 rules. Therefore, staff proposes a definition in OAR 660-024-0010(8) that refers to definitions in Goal 9 rules.” 3/11-13/2009 LCDC Agenda Item 4 staff report, page 8.