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Roger A. Alfred, Senior Assistant Attorney

June 23, 2017

Norman Ralston
Northwest Hillsboro Alliance
2050 NE 25th Avenue
Hillsboro, Oregon 97124

Re: Effect of HB 4078 on future reserve mapping in Washington County

Dear Mr. Ralston:

The Metro Council office forwarded me your email dated June 16, 2017 inquiring about the status of Metro's authority to map urban and rural reserves in Washington County in light of the legislature's enactment of House Bill 4078 in 2014. I have also reviewed the opinion letter from the Legislative Counsel's office dated April 18, 2016 regarding this subject. I agree with the conclusion in the Legislative Counsel opinion, but I believe that opinion is being interpreted too broadly by some stakeholders. For the reasons described below, the practical effect of HB 4078 on Metro's mapping authority in Washington County is actually fairly minimal, particularly in the next 10 to 15 years.

The Legislative Counsel opinion correctly concludes that those areas in Washington County that were specifically described and mapped by the legislature in HB 4078 may only be redesignated through future legislative action. Because those areas are now defined by statute, legislation would be required to change their status. However, that does not mean that the legislature has eliminated Metro's authority to map urban and rural reserves in Washington County. Metro still has the authority to make reserve designations on lands that are not specifically described in HB 4078, and still has the authority to expand the urban growth boundary (UGB) onto lands that are designated as urban reserve in Washington County.

The text of HB 4078 is now codified in ORS 195.144. The mapping component of the statute consists of three parts: subsection (1) adopts the Metro and county map of rural reserves, with one small change from rural to undesignated in Area 5C (affecting 28 acres) and other more extensive changes from rural to urban; subsection (2) adopts the Metro map of urban reserves, but makes changes adding some land into the UGB, changing some from urban to rural, and changing about 86 acres in Area 8B north of Hillsboro from urban to undesignated; and finally, subsection (3) adopts numerous changes of areas from undesignated to rural reserve.

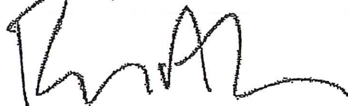
Thus, a close review of the statute reveals that only two undesignated areas are specifically mapped by HB 4078, totaling approximately 104 acres. Because those two parcels are now listed in ORS 195.144 as being undesignated, further legislation would be required to change them to urban reserve. However, HB 4078 does not affect the remaining 2,550 acres of land adjacent to the UGB in Washington County that were left undesignated by Metro and the county in the 2011 reserve decisions. Therefore, Metro's land use authority regarding the vast majority of undesignated areas is not impacted by HB 4078.

It is true that existing rural and urban reserve designations that were made by HB 4078 would require legislation authorizing any changes. However, the statute allowing the creation of rural reserves states that their purpose is to provide long-term protection for significant agricultural and natural resource areas. Under state law, rural reserves are to be protected from urbanization for at least 50 years, and any potential changes to those designations would seem highly unlikely anytime soon. It is also important to recognize that the only changes that Metro is likely to make to urban reserves in Washington County would be to include portions of those areas as part of a UGB expansion, and Metro's separate statutory authority to amend the UGB to include urban reserves is not impacted by HB 4078.

For these reasons, the primary practical effect of HB 4078 on Metro's authority is to prohibit the remapping of approximately 104 acres of undesignated land in Washington County. The intergovernmental agreement between Metro and Washington County provides that urban and rural reserve designations will be reviewed 20 years after their original adoption, which would be in 2031. If there is a need to change those 104 acres to an urban designation, or to change urban and rural designations that were adopted in HB 4078, legislation would be required.

Please let me know if I can help provide any further clarification.

Sincerely,



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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 18, 2016

Senator Betsy Johnson
900 Court Street NE S209
Salem OR 97301

Re: Methods to Change Land Use Designations Established by House Bill 4078 (2014)

Dear Senator Johnson:

You asked whether a local government can change a land use designation established in statute by the Legislative Assembly. We conclude that land use designations established by the Legislative Assembly can be changed only if the Legislative Assembly passes a subsequent bill amending the relevant statute.

In 2014, the Legislative Assembly passed House Bill 4078 (2014), sometimes referred to as the land use grand bargain, to address land use issues in Washington, Clackamas and Multnomah Counties.[1] The bill acknowledged Metro's expansion of its urban growth boundary (UGB) and land use designations, but also carved out several exceptions to Metro's land use designations and added a number of additional land use designations within the Metro area. This raises the question of whether Metro, or a county within the Metro region, has the authority to alter the land use designations set out in HB 4078.

The Land Use Planning Process

The Department of Land Conservation and Development (DLCD) is charged with developing and adopting statewide land use planning goals.[2] Local governments then exercise their planning authority to prepare and adopt comprehensive plans or, in the case of Metro, a regional framework plan; local governments also make land use decisions and limited land use decisions, including the designation of urban reserves and rural reserves, in compliance with statewide land use planning goals.[3]

In 1973, the Legislative Assembly statutorily authorized local governments to exercise land use planning responsibilities to establish, modify and enforce comprehensive plans or regional framework plans that comply with Oregon's statewide land use planning goals.[4] ORS chapter 197 requires each city and metropolitan service district to establish a UGB around its perimeter to maintain sufficient development capacity for a 20-year period and to protect areas outside its boundaries from urban development and urban sprawl.[5] A local government may also

[1] Enrolled House Bill 4078 (2014) became chapter 92, Oregon Laws 2014. Section 3 was codified at ORS 195.144.
[2] ORS 197.225, 197.230, 197.235.
[3] ORS 197.175, 197.274, 268.380, 195.025 (1), 197.250.
[4] Chapter 80, Oregon Laws 1973; ORS 197.175.
[5] ORS 197.005, 197.010, 197.012, 197.295 to 197.314; *see also* OAR 660-024-0000 to 660-024-0080.

designate lands outside its UGB as urban reserves, rural reserves or exception areas, according to a statutory system that prioritizes land for future development and potential UGB expansion.[6] Urban reserves are lands outside the current UGB that are designated as preferred areas for future UGB absorption.[7] Rural reserves are areas of land designated for long-term protection from the UGB in order to safeguard agriculture, forestry or important natural areas from urban development.[8] Exception areas are rural lands for which an exception to statewide planning goals has been acknowledged.[9] A local government must coordinate the designation of urban reserves, rural reserves and exception areas throughout the land use planning process so that its land use designations are balanced in compliance with statewide land use planning goals.[10]

Local governments make land use designations in a variety of ways, depending on the type of designation and the level of local government making the designation. Rural reserve designations must occur via an intergovernmental agreement between affected local governments.[11] Urban reserve designations may be achieved via cooperation between local governments or through an agreement in writing between one or more counties and a metropolitan service district; alternatively, the Land Conservation and Development Commission (LCDC) can compel a local government to designate an urban reserve.[12] Like cities and counties, Metro must adhere to ORS 197.610 to 197.651 when adopting and amending its urban reserve and rural reserve designations, but Metro is also empowered to change its own jurisdictional boundary in accordance with self-established criteria and procedures.[13] Metro has special jurisdiction over boundary changes within the Metro region as well as within any territory designated by Metro as an urban reserve under ORS 195.137 to 195.145.[14] Because the UGB is the boundary of the district, when Metro expands its UGB, any territory previously outside the Metro district boundary that is included within the expanded Metro UGB is simultaneously included within the district boundary.[15]

Each local government is required to submit its respective comprehensive plan, and Metro is required to submit its regional framework plan, to the DLCD for review and acknowledgment that the plan complies with statewide land use planning goals.[16] In addition, Metro and the applicable county must report jointly to the LCDC the adoption or amendment of urban reserve or rural reserve designations. The LCDC then reviews the designations to ensure that the designations "conform with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature."[17]

To change an acknowledged comprehensive plan or land use regulation, a local government must first submit the proposed changes to the DLCD for the agency to determine whether the proposed change complies with land use statutes and statewide land use planning goals under a statutory process called post-acknowledgement procedures.[18] Alternatively, Metro

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[6] ORS 195.137 to 195.145; ORS 197.298 prioritizes the inclusion of urban reserves in the UGB first, then grants second priority to exception areas and nonresource land, and finally to marginal land and agricultural or forestry land.
[7] ORS 195.137 (2), 195.145.
[8] ORS 195.137 (1), 195.141.
[9] OAR 660-021-0010 (4).
[10] ORS 195.143, 195.144, 197.175.
[11] ORS 195.141.
[12] ORS 195.141, 195.145.
[13] ORS 268.354; OAR 660-024-0060, 660-027-0020, 660-027-0070, 660-027-0080 (1).
[14] ORS 268.347 (1), 268.354; *see* OAR 660-027-0050, 660-027-0060.
[15] ORS 268.390 (3)(b).
[16] ORS 197.251, 197.274.
[17] ORS 197.747; *see* ORS 197.628 to 197.651; *see also* OAR 660-027-0080 (2), (4)(a).
[18] ORS 197.610 to 197.625; OAR 660-018-0005 to OAR 660-018-0150.

may submit amendments to its regional framework plan in the manner prescribed by ORS 197.628 to 197.651 as part of routine periodic review. Metro also has the special authority to create a new urban reserve designation by simply amending its regional framework plan.[19] If the local government adopts the proposed change, the change is "deemed to be acknowledged when the local government has complied with the requirements of ORS 197.610 and 197.615" and either no notice of intent to appeal was filed during the appeal period or, if an appeal was timely filed, the Land Use Board of Appeals has affirmed the local decision or an appellate court has affirmed the board's decision.[20]

Metro's Local Process and the Land Use Grand Bargain

From 2010 to 2014, Metro engaged in a local process to increase development capacity within its UGB and to meet demand for housing and employment needs for the subsequent 20 years.[21] This local process included holding multiple public hearings, seeking and receiving advice from the Metro Policy Advisory Committee and establishing a list of six desired outcomes.[22] On September 30, 2011, the Metro Council reported likely effects of the proposed UGB expansion to the region's cities and counties and to households within one mile of land proposed to be included within the expanded UGB.[23] "On October 20, 2011, the Metro Council unanimously adopted Ordinance No. 11-1264B, expanding the [UGB] to fill the unmet needs for increased development capacity for housing and for industries that require large areas of developable land."[24] On May 10, 2012, the LCDC held a public hearing to consider the provisions of Ordinance No. 11-1264B. On June 14, 2012, the LCDC unanimously approved the expansion of the UGB by Ordinance No. 11-1264B.[25]

During the 2014 legislative session, the Legislative Assembly passed HB 4078, which statutorily acknowledged Metro's UGB expansion, but the Legislative Assembly also made a number of additional statutory land use decisions on behalf of Metro. The bill acknowledged Metro's rural reserve and urban reserve designations but changed several reserve areas from urban to rural, and vice versa.[26] The bill also designated previously undesignated areas as urban reserve or rural reserve areas and brought some of Metro's urban reserve designations inside Metro's newly expanded UGB.[27]

Changing a Land Use Designation Established in Statute

The Oregon Constitution vests authority for establishing state laws both in the Legislative Assembly and, through the initiative and referendum powers, in the people.[28] The Legislative Assembly may delegate, by express statutory authority, state power to subordinate agencies, including local governments acting as state agencies by implementing delegated authority.[29] The Legislative Assembly delegated land use planning and zoning responsibilities to local

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[19] OAR 660-027-0020 (1), 660-027-0050.
[20] OAR 660-018-0085 (1).
[21] Section 1 (5), chapter 92, Oregon Laws 2014; Metro Ordinance No. 10-1244B (Dec. 16, 2010).
[22] Section 1 (6) to (8) and (11), chapter 92, Oregon Laws 2014.
[23] Section 1 (9), chapter 92, Oregon Laws 2014.
[24] Section 1 (12), chapter 92, Oregon Laws 2014.
[25] Approval Order 12-UGB-001826; section 1 (15) to (17), chapter 92, Oregon Laws 2014.
[26] ORS 195.144.
[27] *Id.*
[28] Article IV, section 1, Oregon Constitution.
[29] *See Smith v. Cameron et al.*, 123 Or. 501, 504 (1928); *GTE Northwest Inc. v. Oregon Public Utility Commission*, 179 Or. App. 46, 53-60 (2002).

governments in 1973 but maintains its constitutional authority to establish land use laws.[30] While Oregon law does not specifically state whether a land use designation established in statute can be changed via post-acknowledgment procedures, ORS 197.175 suggests that local governments are bound to make all land use decisions in compliance with any land use decisions previously acknowledged by the Legislative Assembly:

> (2) Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:
>
> . . .
>
> (d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations.

In this context, all requirements that a county make land use decisions and limited land use decisions in compliance with existing acknowledged plans apply equally to Metro:

> In addition to being subject to the provisions of ORS chapters 195, 196 and 197 with respect to city or special district boundary changes, as defined by ORS 197.175 (1), the governing body of the metropolitan service district shall be considered the county review, advisory and coordinative body for Multnomah, Clackamas and Washington Counties for the areas within that district.[31]

The implications of ORS 197.175 notwithstanding, an examination of the bill draft history of HB 4078 illustrates a legislative intent to eliminate Metro's authority to change the bill's land use designations through its local process. When faced with statutory ambiguity, courts often determine legislative intent by examining the history of bill drafts, from the introduced version, through committee hearings and amendments, to final enactment, to analyze the various options the Legislative Assembly considered and either adopted or discarded along the way. For example, in *Owens v. Maass*, the court traced the history of a bill from its origin, focusing on statements made by legislators and the Office of the Legislative Counsel in various committees and subcommittees.[32] The history of various versions of the bill was especially persuasive because it demonstrated consistent views regarding the retroactive effect of the amendments as the bill evolved through both the House of Representatives and the Senate.[33]

The historical context of HB 4078 also helps clarify the Legislative Assembly's intent with respect to the bill's final version.[34] Prior versions of the land use grand bargain included provisions that preserved Metro's authority to make future amendments to the land use decisions included in Metro Ordinance No. 11-1264B and Approval Order 12-UGB-001826. Significantly, however, the Legislative Assembly chose to adopt amendments to the introduced bill that eliminated that provision prior to the bill's passage, indicating that the Legislative Assembly intended to eliminate Metro's authority to make further changes to Metro's own land use designations affected by the bill.[35]

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[30] Chapter 80, Oregon Laws 1973.
[31] ORS 195.025 (1).
[32] *Owens v. Maass*, 323 Or. 430 (1996).
[33] *Id.* at 442-446.
[34] *State v. Perry*, 336 Or. 49, 55-56 (2003).
[35] *See State v. Branam*, 220 Or. App. 255, 262, rev. denied, 345 Or. 301 (2008).

Moreover, any attempt by a local government to change a statutorily established land use designation would be incompatible with statute, and therefore preempted by state law. In *La Grande/Astoria v. PERB*,[36] the Supreme Court articulated the framework under which we evaluate state preemption of local regulation. The question here is "whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive."[37] The Legislative Assembly set the policy for those lands impacted by HB 4078. Therefore, any local government land use decisions must be compatible with that policy. Without an express and otherwise clear manifestation of preemption, the court examines whether the ordinances "cannot operate concurrently" with state law.[38] "The relevant question is whether the ordinances 'conflict' with state law, i.e., that the local legislation prohibits what the state legislation permits or permits what the state legislation prohibits."[39] There is little question that a local land use designation would not be able to operate concurrently with a statute that designates the same land for a different use, and would therefore be incompatible with the statute and preempted by state law.

Conclusion

In 1973, the Legislative Assembly delegated to local governments the authority and responsibility to establish, modify and enforce regulations in compliance with statewide land use planning goals. However, the Legislative Assembly maintains the power to statutorily acknowledge and modify land use decisions made by local governments. It is an open question whether a land use designation established in statute by the Legislative Assembly can be changed via a local government's local process. However, ORS 197.175 indicates that a local government may continue to make land use decisions in regard to lands affected by statutorily acknowledged land use regulations only if those local decisions comply with the statute. Moreover, if a local government attempts to change a land use designation established in statute in a way that is incompatible with the policy set by the Legislative Assembly, the local change would be preempted by the statutory designation. More specific to the land use grand bargain, an examination of the draft history of HB 4078 suggests that the Legislative Assembly intended to eliminate Metro's authority to change those land use designations contained in the bill. Therefore, the only certain method to change such a designation is to pass a bill amending the applicable statute, especially in cases like HB 4078 where the Legislative Assembly intentionally did not preserve the local government's authority to further modify the land use designations in question.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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[36] *La Grande/Astoria v. PERB*, 281 Or. 137 (1978); *see also Beiswenger v. Psychiatric Sec. Review Bd.*, 192 Or. App. 38 (2004) and *Tharp v. Psychiatric Sec. Review Bd.*, 338 Or. 413 (2005).

[37] *La Grande/Astoria*, 281 Or. at 148.

[38] *Id.*

[39] *Ashland Drilling, Inc. v. Jackson County*, 168 Or. App. 624, 635 (2000) (footnotes omitted).

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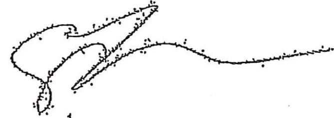

By
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