A TIMELY, ORDERLY, AND EFFICIENT ARRANGEMENT OF PUBLIC FACILITIES AND SERVICES—THE OREGON APPROACH

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I. INTRODUCTION

The provision of public facilities and services is not an exciting planning topic because it deals with the details of supply, rather than the grander issues of economics, social equity and policy. Yet these details occupy an inordinate amount of time and attention by planners, elected officials, and other policy-makers, and account for a substantial share of unresolved issues in planning law.

This Article sets out the rise of infrastructure planning policy in Oregon under a statewide land use planning system that began in 1973.[1] In Part I, we give a brief history and description of the structure of that system, followed by a discussion of the evolution of state infrastructure policy under Statewide Planning Goal 11, Public Facilities and Services, and its implementing rules. Following this background, this Article will examine the application of that policy, particularly with respect to the mechanics (Part II) and financing (Part III) of infrastructure planning and its role in the reinforcement of the separation of urban and rural uses (Part IV).

A. Land Use Planning in Oregon

In 1973, then-Governor Tom McCall made his famous speech to the Oregon legislature decrying the fact that "[s]agebrush subdivisions, 'coastal condomania,' and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon's status as the environmental model for the [n]ation."[2] The concomitant need to use urban lands efficiently arose from this desire to preserve resource land, so that urban uses would not sprawl onto farm and forest lands. The need for efficiency resulted in policies for thoughtful use of public services and facilities.

Then-Governor McCall's efforts culminated in the passage of Senate Bill 100—a piece of complex legislation that created a new model for land use planning.[3] Senate Bill 100 reasserted state-level

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1. Act of May 29, 1973, ch. 80, vol. 1 1973 Or. Laws 127 (commonly referred to as "S.B. 100").

2. H. Journal, 57th Leg., Reg. Sess., at 310–15 (Or. 1973) (Governor Tom McCall's Legislative Message to a Joint Session of the Oregon Legislature on January 8, 1973); *see also* BRENT WALTH, FIRE AT EDEN'S GATE: TOM MCCALL & THE OREGON STORY 242–52, 351–61 (1994) (presenting a detailed discussion of Governor McCall's strong support for land use planning).

3. For good summaries of the genesis of the Oregon land use system, see Hector Macpherson & Norma Paulus, *Senate Bill 100: The Oregon Land Conservation and Development Act*, 10 WILLAMETTE L.J. 414 (1974); CHARLES E. LITTLE, THE NEW OREGON

authority over land use policy and zoning that the state legislature had previously delegated to local governments—cities in 1919,[4] and counties in 1947.[5] Among other things, Senate Bill 100 established the Land Conservation and Development Commission (LCDC) composed of seven members appointed to staggered, four-year terms by the Governor and confirmed by the Senate to supervise the Department of Land Conservation and Development (DLCD).[6] The agency was tasked with developing Statewide Planning Goals—i.e., policies that would direct the preparation of comprehensive plans, zoning and implementing land use regulations.[7] These goals may be broken into several categories:

- Process Goals—Citizen Involvement and Planning generally (Goals 1 and 2)

- Resource-Related Goals—Agricultural, Forest, and other Natural Resources (Goals 3–5)

- Goals Relating to Human Interaction with Land—Air, Land and Water Quality, Natural Disasters and Hazards, Recreation and Energy (Goals 6–8 and 13)

- Urban-Oriented Goals—Economy of the State, Housing, Public Facilities and Services, Transportation and Urbanization (Goals 9–12 and 14)

- Goals Relating to Special Areas—The Willamette River Greenway and the Oregon Coast (Goals 15–19)

TRAIL: AN ACCOUNT OF THE DEVELOPMENT AND PASSAGE OF STATE LAND-USE LEGISLATION IN OREGON (1974); Carl Abbot & Deborah Howe, *The Politics of Land-Use Law in Oregon: SB 100, Twenty Years After*, 94 OR. HIST. Q. 4 (1993).

4. Act of March 4, 1919, ch. 300, 1919 Or. Laws 539; Edward J. Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLAMETTE L.J. 358 (1974) (providing a more complete history of Oregon land use law).

5. Act of April 19, 1947, ch. 537, 1947 Or. Laws 948; Act of April 21, 1947, ch. 558, 1947 Or. Laws 1029.

6. Act of May 29, 1973, ch. 80, vol. 1 1973 Or. Laws 129 §§ 4, 5. Senate Bill 100 also established the Joint Legislative Committee on Land Use (JLCLU) to oversee the activities of LCDC which it did effectively until the legislative leadership refused to make appointments in the mid-1990s. Ultimately, the Committee was abolished. Section 197.080 of the Oregon Revised Statutes was repealed. Act of June 13, 2007, ch. 354, vol. 1 2007 Or. Laws 972 § 1.

7. Macpherson & Paulus, *supra* note 3, at 418–19.

Within one year of the adoption of the goals, every city and county was required to prepare and adopt a comprehensive plan and implement zoning and other land use measures in compliance with the goals.[8] Some local governments resisted this and other state planning requirements,[9] and the one year limitation ultimately proved unrealistic. DLCD's plan review and field staff was tasked with reviewing local plans and regulations for compliance with the goals, after which LCDC would consider "acknowledgement" of plan and ordinance compliance with the goals.[10] Most plans and regulations were completed and acknowledged compliant by 1986.[11] To develop and update these required plans, Oregon has provided well over $25 million in direct grants to local governments since 1973.[12]

B. The Drafting and Adoption of the Infrastructure Goal

As with other goals, Goal 11—relating to public facilities and services—went through an extended process to develop its terms and

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8. Act of May 29, 1973, ch. 80, vol. 1 1973 Or. Laws 127, §§ 17, 18, 32. 137.

9. *See generally* Mayea v. Land Conservation & Dev. Comm'n, 635 P.2d 400 (Or. Ct. App. 1981); Tillamook Cnty. v. Land Conservation & Dev. Comm'n, 642 P.2d 691 (Or. 1981). Between 1975 and 1986, LCDC issued enforcement orders under section 197.320 of the Oregon Revised Statutes for eleven counties in order to gain compliance with Statewide Goal 3. Copies of these orders are available from DLCD files in Salem.

10. Acknowledgment was a process where LCDC reviewed locally developed plans and implementing regulations for compliance with the statewide goals. It was important to local governments because, until acknowledged, they were required to make land use decisions under their plans and regulations, as well as the Statewide Planning Goals. Once acknowledged the goals were deemed incorporated in the plans and regulations and were not required to be addressed separately. OR. REV. STAT. § 197.251 (2011); OR. ADMIN. R. 660-003-0010 & -0025 (2010) (current). [Editor's note: because this article will cite to various years for different Oregon Administrative Rules, the first time that the current version of a rule is cited, a parenthetical note will be included so that the reader is aware that the citation is to the current version of the rule as of the time of publication.]

11. *See* DEP'T OF LAND CONSERVATION AND DEV., ACKNOWLEDGEMENT SCOREBOARD, (1993) (on file with authors) [hereinafter DLCD SCOREBOARD]. LCDC acknowledgment decisions were appealable to the Oregon Court of Appeals and Oregon Supreme Court under section 197.650 of the Oregon Revised Statutes. The Oregon appellate courts have provided the most authoritative interpretations of the goals in this context.

12. Grant amount provided by DLCD. *See* Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 J. MARSHALL L. REV. 357, 376, n.124 (2012) [hereinafter *Quiet Revolution*]. The 1981 and 1983 Oregon legislatures extended the scope of S.B. 100 and the responsibilities of LCDC to include the review of amendments to completed plans and ordinances to ensure continued compliance with the Statewide Planning Goals. *See* OR. REV. STAT. §§ 197.610–.625 (2011) (provisions related to post-acknowledgment procedures); OR. REV. STAT. §§ 197.628–.644 (2011) (provisions related to periodic review).

provisions.[13] The legislature instructed LCDC to adopt its initial goals before the end of 1974.[14] The process began with a series of public workshops in September and October of that year, including one on "Urbanization and Urban Development."[15] The first draft for an overall goal used the following language:

> Urbanization shall be managed to control the direction, extent, rate and type of urban development; comprehensive plans shall identify the land suitable and necessary for urban development and identify the methods for directing development to these areas.[16]

During development of an urbanization policy, the LCDC found it necessary to provide a separate goal relating to infrastructure, Goal 6, which was set out in close to final form by the LCDC in the draft dated October 24, 1974 for public circulation:

> A timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development shall be planned and developed.
>
> Urban and rural development shall be guided and supported by

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13. *See* Edward J. Sullivan & Alexi Solomou, *"Preserving Forest Lands for Forest Uses"—Land Use Policies for Oregon Forest Lands*, 26 J. ENVTL. L. & LITIG. 179, 186–93 (2011).

14. Act of May 29, 1973, ch. 80, vol. 1 1973 Or. Laws 127, § 32 (codified at OR. REV. STAT. § 197.250 (2011)).

15. LAND CONSERVATION & DEV. COMM'N, "PEOPLE AND THE LAND" PUBLIC WORKSHOPS, CITIZENS WORKBOOK, (1974) (on file with the authors).

16. *Id.* (language contained in the original draft for Statewide Planning Goal 6, later renumbered as Statewide Planning Goal 11). The coordination of urbanization was justified as follows:

> In Oregon, unchecked urban development threatens valuable natural resources and consumes lands that should not be used for urbanization. Yet, in attempting to reduce urban sprawl and direct growth to suitable areas, several important problems and issues must be addressed, including:
>
> - Insufficient land use controls to direct development to suitable areas
> - Continuing population growth in urban areas
> - Personal preference for single-family homes in the suburbs and for use of the automobile
> - Transportation systems, urban services and facilities are not coordinated with desired land use patterns
> - Property tax and assessment policies encourage scattered development
> - Scattered development results in expensive and inefficient urban services

Id.

> types of public facilities and levels of service appropriate to the needs and requirements of the persons who will reside in urban and rural areas, with particular emphasis on low and moderate income housing needs.[17]

While proposed Goal 6 did not get the attention that some other goals received, there were some thoughtful comments. For example, the Oregon Department of Environmental Quality, the state agency charged with setting and enforcing rules on air, land and water quality, commented as follows:

> This goal seems particularly responsive to the *Ramapo* decision.[18] However, it is not clear to what extent there is implied a timetable established by the county or municipality, and to what extent the person undertaking "development" is obligated to provide information. Is the county obligated to address all available alternatives for siting of all forms of development, or is a party proposing development obligated to consider alternative sites?
>
> There is some question whether the "rural" and "urban" categories are mutually exclusive or exhaustive. Where do sub-urban and ex-urban areas fall in this categorization? Where do unincorporated towns fall? The wording in the definition of "urban," particularly toward the end is confusing.[19]

At the public hearing preceding adoption on November 25, 1974, the LCDC received much testimony on the goals in general and on the public facilities and services goal in particular. Several of those concerns were fiscal in nature—how are the facilities to be paid for?[20] Another set of comments suggested that the issue of housing types be

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17. LAND CONSERVATION & DEV. COMM'N, GOAL 6 PUBLIC HEARING DRAFT (Oct. 24, 1974). The Goal was accompanied by a series of definitions and (non-binding) guidelines.

18. The reference is to *Matter of Golden v. Planning Board of Town of Ramapo,* 285 N.E.2d 291, *appeal dismissed,* 409 U.S. 1003 (1972). This case affirmed a growth management plan based on tiered service arrangements made in the Town's comprehensive plan and its capital improvement plans.

19. Letter from the Oregon Department of Environmental Quality to the Oregon Land Conservation & Development Commission (Nov. 20, 1974) (on file with authors). The letter had additional comments on the non-binding guidelines as well.

20. Comments from the City of Hillsboro and the Oregon Association of Realtors, LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 25, 1974).

divorced from that of public facilities and services.[21] Others were concerned over whether Goal 11 could or would require "phasing" of public improvements.[22] Still others were concerned about local control[23] and the inclusion or exclusion of various public facilities and services.[24]

In response to these public comments, the LCDC proposed goal revisions on November 30, 1974.[25] Among the changes was a requirement that each local plan provide for certain "key facilities."[26] There were fewer comments on these revisions, but those received were more focused. Both the Association of Oregon Counties and the Oregon Association of Realtors advocated requiring a shorter list of "key facilities," and preserving more local government discretion.[27] The Oregon State Home Builders Association stressed the need for a guideline related to inter-regional facilities—contending that certain facilities, such as sewer lines, may need to be greater than necessary in the service area due to a regional need for such services.[28] Another commentator, ESCO Corporation, wanted more attention given to solid waste facilities.[29] Mortgage Bancorporation found the whole notion of infrastructure regulation acted as a "growth restriction."[30]

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21. Comments from Tillamook County Board of Realtors, Hood River County Planning Commission, and Douglas County Planning Department, LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 25, 1974).

22. Comments from Tillamook County Board of Realtors, Association of Oregon Counties and Hood River County Planning Commission, LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 25, 1974).

23. Comments from Western Environmental Trade Association, LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 25, 1974).

24. Comments from Oregon Association of Realtors and League of Oregon Cities, LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 25, 1974).

25. LAND CONSERVATION & DEV. COMM'N, REVISED GOALS (Nov. 30, 1974) (on file with authors).

26. LAND CONSERVATION & DEV. COMM'N, STATE-WIDE PLANNING GOALS AND GUIDELINES: DEFINITIONS (adopted Dec. 27, 1974, eff. Jan. 1, 1978) (defining "key facilities").

27. Comments from Association of Oregon Counties and Oregon Association of Realtors, LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 30, 1974). The Association was concerned by the continued reference to "public" facilities and services because public services, such as the provision of water or sewer supply, in rural areas may be better provided by privately owned community systems, or individual systems.

28. Comments from the Oregon State Home Builders Association, LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 30, 1974).

29. Comments from ESCO Corp., LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 30, 1974).

30. Comments from Mortgage Bank Corp., LAND CONSERVATION & DEV. COMM'N, HEARING RECORD (Nov. 30, 1974).

The first fourteen planning goals were adopted on time.[31] The former Goal 6 was revised and renumbered as Goal 11, which provides:

> To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.
>
> Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable and rural areas to be served. A provision for key facilities shall be included in each plan. To meet current and long-range needs, a provision for solid waste disposal sites, including sites for inert waste, shall be included in each plan.[32]

The more difficult question of interpretation lay ahead. While the goal established infrastructure planning as a priority, it dealt with neither the levels of service to be provided for various uses, nor the timing of infrastructure with regard to development.[33] Decisions on these issues ultimately evolved from the LCDC, the Land Use Board of Appeals (LUBA), and court decisions applying the goal and the LCDC responses in revising the goal and adopting administrative rules to implement the goal.

C. Early Application of the Goal

When Goal 11 became effective in 1975[34] it was broadly worded and there was no administrative precedent or case law to define its parameters.

One of the more interesting questions in the early years of Goal 11 was whether schools constitute a "key facility." On April 19, 1978, then-Attorney General James A. Redden issued an opinion to respond to the following question from DLCD:

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31. *See* LAND CONSERVATION & DEV. COMM'N, ORDER NO. 1, shttp://www.oregon.gov/LCD/docs/history/original_goals_012575.pdf.

32. *Id.*

33. GERRIT KNAAP & ARTHUR C. NELSON, THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON 104 (1992).

34. OR. ADMIN. R. 660-011-0000 to -0065 (1975).

> In determining whether to approve a subdivision for a particular area, must the county governing body consider among other factors, the availability of public school facilities to meet the increased need posed by the new subdivision?[35]

The question arose from concerns about overcrowding of school facilities, particularly in Marion County, coupled with the continued approval of new subdivisions by local governments, resulting in increased school populations.[36] Marion County was on a compliance schedule to make its comprehensive plan and ordinances consistent with the Statewide Planning Goals, and one of its deficiencies was the lack of a key facilities provision linking the planning and siting of public schools with increases in student population.[37]

The Attorney General's Opinion discussed the whether Goal 11, in conjunction with Oregon land use legislation, "impose[d] any restrictions or duties on the county governing body in considering new subdivisions."[38] According to the Attorney General, Goal 11 "requires a plan or system that coordinates the delivery of urban facilities and services, including public schools."[39] Moreover, such a plan or system must take into account the nature of the required facilities to determine the need for and timing of their development.[40] Where there are significant public health concerns, such as those that arise from a lack of adequate sewage disposal, Goal 11 will not tolerate delay in the provision of facilities and services.[41] But because a lack of adequate school facilities would not likely cause a public health threat, a temporary delay in the construction of additional school facilities for a new subdivision may be permitted, especially if there is some capacity for additional use in the existing facilities.[42]

Linking Goal 11 and Oregon planning statutes, the Opinion states that the Legislature's basic intent in enacting Senate Bill 100 and related land use provisions "is to promote orderly development by

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35. 38 Op. Att'y Gen. Or. 1956 (1978).

36. *Id.*

37. *Id.* at 1957.

38. *Id.*

39. *Id.* at 1959.

40. *Id.*

41. *Id.*

42. *Id.* at 1960. As demonstrated in Part II.C.3 below, planning for school facilities remained controversial and was the subject of legislative initiatives concerning the need for public school sites.

providing for the coordinated use of lands within the state."[43] The Attorney General opined that uncoordinated development might impair a county's ability to effect a plan that provides for the development of a "timely, orderly and efficient arrangement of public facilities and services."[44]

Later that year, LCDC circulated a policy memo addressing the provisions for public facilities and services.[45] Because Goal 11 states that providing key facilities is a prerequisite to providing housing, local governments were uncertain about financing those key facilities with public revenue. At a December 1, 1978 LCDC meeting, the Commission discussed the intent of Goal 11 in light of housing (Goal 10), and the growing concern about a locality's ability to provide facilities and services.[46] LCDC concluded that, as a matter of policy, "[t]he Commission does not require public facility planning to the level of engineering drawings or designs as a part of the comprehensive plan for acknowledgment."[47]

Also in 1978, DLCD issued a "common questions" memo addressing many of the principal concerns local governments expressed about Goal 11, and urban development generally—whether capital improvements programs are required; the meaning of the terms "provision for Key Facilities;" the role of public facilities and services in the adoption of urban growth boundaries and conversions of urbanizable land to urban uses; and whether solid waste sites were required.[48]

First, DLCD explained that Goal 11 had no specific implementing measures, and thus, compliance did not depend on the adoption of any such measures.[49] Oregon state law, however, requires local governments to "[e]nact zoning, subdivision, and other ordinances or regulations to implement comprehensive plans."[50] Implicit in this obligation is the requirement that regulatory

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43. *Id.*; *see also* OR. REV. STAT. § 197.005(1) (2011).

44. 38 Op. Att'y Gen. Or. 1962 (1978).

45. Land Conservation & Dev. Comm'n, Policy Paper, "Implementation Provisions for Public Facilities & Services," (December 1, 1978).

46. *See id.*

47. *Id.*

48. DEP'T OF LAND CONSERVATION & DEV., COMMON QUESTIONS ON URBAN DEVELOPMENT (1978) [hereinafter COMMON QUESTIONS 1978].

49. *Id.*

50. Act of May 29, 1973, ch. 80, vol. 1 1973 Or. Laws 127 § 21 (codified as amended at OR. REV. STAT. §197.175(2)(b) (1973)); COMMON QUESTIONS 1978, *supra* note 48, at 6.

ordinances provide standards for adequate public facilities and services at levels that support proposed development under the plan.[51]

In the memo DLCD noted the definition of "key facilities" provided by the goals: "Key facilities are basic facilities that are planned for by local government but which also may be provided by private enterprise. Key facilities are essential to the support of more intensive development and include such facilities as public schools, transportation, water supply, sewage and solid waste disposal."[52]

In advice to local governments,[53] DLCD also addressed the possibility of a capital improvement program, which it stated was not required in order for it to acknowledge a local plan.[54] The plan must simply provide for the delivery of the required public facilities and services—i.e., the plan must provide for key facilities within the financial capabilities of the jurisdiction.[55] This plan must explain how, when, and by whom the necessary facilities and services will be provided.[56] In providing for services, the locality must assess both the alternative methods available to finance the needed facilities, as well as the locality's ability to provide for this financing.[57] With respect to the timing of the services, DLCD recommended a specific time schedule or capital improvement program.[58] Otherwise, the policies must ensure that public facilities are provided in a coordinated manner and be sufficient to meet the locality's need for buildable land.[59] Finally, in identifying the service provider, the locality must identify service purveyors, and assess the ability of those purveyors to provide adequate levels of service for the planning period.[60]

Because Goal 14 requires a locality to consider the orderly and economic provision of public facilities and services in establishing an

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51. COMMON QUESTIONS 1978, *supra* note 48, at 6.

52. *Id.*

53. This advice was often termed "Common Questions" relating to various Goals and preceded the adoption of administrative rules to implement the goals. Their advantage was that they were non-binding and the advice could change with experience. *See* Sullivan & Solomou, *supra* note 13, at 192–221.

54. COMMON QUESTIONS 1978, *supra* note 48, at 6–7.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

Urban Growth Boundary (UGB) and converting urbanizable land to urban uses, that locality must assess whether necessary urban facilities can be provided. To convert urbanizable land to urban uses, extension of public facilities and services will be necessary. Service extensions are one of the first steps to developing more intense urban areas, and serve as method by which growth occurs in a timely and orderly fashion. When service extensions are coupled with capital improvements, public and private development decisions are made with added certainty because land owners know when and how much development may occur, and local officials can prepare budgets that anticipate levels of other support services.[61]

Recalling that certain organizations and corporations were concerned about the need for solid waste sites, DLCD asserted that localities are not required to provide solid waste sites but must inventory solid waste sites and include identified sites in its plan, and existing and future sites must be shown on the plan map. Further, the plan must contain policies that insure future needs are met and that sites will be identified at plan updates, if future sites are needed but not yet identified.[62]

The difficulty with the "Common Questions" papers, such as the one dealing with Goal 11, was that they were not binding and provided no concrete direction for local governments in the interpretation of the goals, most of which were broadly-worded. Ultimately the Oregon Court of Appeals demonstrated the uselessness of the Policy Papers,[63] and the legislature commanded that policy interpretations of goals were to be done by formal rulemaking.[64] Much of this difficulty over informal establishment of policy arose in the context of natural resource lands;[65] however, the need for certainty was also felt within urban growth boundaries.[66] As noted by one critic:

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61. *Id.* at 6–8.

62. *Id.*

63. Marion Cnty. v. Fed'n for Sound Planning, 668 P.2d 406, 410–11 (Or. 1983).

64. OR. REV. STAT. §§ 197.040(1)(b), (c) (2011).

65. *See, e.g.*, Sullivan & Solomou, *supra* note 13, at 207 n.112; Edward J. Sullivan & Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon, 1961–2009*, 18 SAN JOAQUIN AGRIC. L. REV. 1, 15 (2009).

66. For example, in *Dickas v. City of Beaverton*, 757 P.2d 451 (Or. 1988), city approval of an urban residential development was remanded because there were inadequate findings to respond to opponents' allegations that the local schools lacked capacity to accommodate new students.

> Although local governments had to demonstrate that public services were available or would soon be provided to existing urban areas, public facilities planning for future urban development received little attention in the early years of the process. Plans approved prior to 1985 were not required to include public facility plans to accommodate anticipated growth. Local governments were also not required to demonstrate financial capacity to pay for needed facilities. Although a proposal during the initial hearings on establishing planning goals during 1974 by the LCDC's first vice-chairman, Steven R. Schell, would have required capital improvement plans with financial components to assure provision of facilities within urban growth boundaries, the proposal was not adopted. Not until the acknowledgment phase was nearly over were local governments explicitly required to demonstrate that they would make public facilities available to accommodate future development within [urban growth boundaries].[67]

Clearly, it was necessary to bring more certainty to urban land development in lieu of the broad words of the Public Services and Facilities Goal.

D. Amendments to Goal 11

Goal 11 has been amended four times since its adoption in 1974, in each case to meet particular concerns.[68] In most of these cases, LCDC also adopted at the same time implementing administrative rules to provide detail for its new directions; those rules are discussed in detail below. The following general outline of those changes assists the reader in understanding those general directions.

1. The 1988 Goal Amendments

In 1988, LCDC responded to certain 1983 legislation requiring local governments to provide public facilities plans to support future economic opportunities for business in the state.[69] Under that legislation, LCDC was required to adopt new goals or rules or interpret present goals or rules to provide for certain economic

67. Knaap & Nelson, *supra* note 33, at 104–05.

68. *See infra* Parts I.D.1–3.

69. OR. REV. STAT. §§ 197.707, .712, .717 (2011).

opportunities.[70] LCDC adopted administrative rules to meet these mandates in 1984.[71] The 1988 amendments reflected a strategy of meeting these mandates by amending the goal to require public facilities plans,[72] in addition to the previously adopted rules.

2. The 1994 and 1998 Goal Amendments

The 1994 amendments, on the other hand, established a new

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70. *Id.* These LCDC actions mandated the following:

(a) Comprehensive plans shall include an analysis of the community's economic patterns, potentialities, strengths and deficiencies as they relate to state and national trends.

(b) Comprehensive plans shall contain policies concerning the economic development opportunities in the community.

(c) Comprehensive plans and land use regulations shall provide for at least an adequate supply of sites of suitable sizes, types, locations and service levels for industrial and commercial uses consistent with plan policies.

(d) Comprehensive plans and land use regulations shall provide for compatible uses on or near sites zoned for specific industrial and commercial uses.

(e) A city or county shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons. The public facility plan shall include rough cost estimates for public projects needed to provide sewer, water and transportation for the land uses contemplated in the comprehensive plan and land use regulations. Project timing and financing provisions of public facility plans shall not be considered land use decisions.

(f) In accordance with ORS 197.180, state agencies that provide funding for transportation, water supply, sewage and solid waste facilities shall identify in their coordination programs how they will coordinate that funding with other state agencies and with the public facility plans of cities and counties. In addition, state agencies that issue permits affecting land use shall identify in their coordination programs how they will coordinate permit issuance with other state agencies and cities and counties.

(g) Local governments shall provide:

(A) Reasonable opportunities to satisfy local and rural needs for residential and industrial development and other economic activities on appropriate lands outside urban growth boundaries, in a manner consistent with conservation of the state's agricultural and forest land base; and

(B) Reasonable opportunities for urban residential, commercial and industrial needs over time through changes to urban growth boundaries.

OR. REV. STAT. § 197.712(2) (2011).

71. OR. ADMIN. R. 660-011-0000 to -0050 (1984).

72. OR. ADMIN. R. 660-015-0000(11) (1988) (Statewide Planning Goal 11) (amended to add the following language: "[a] provision for key facilities shall be included in each plan. Cities or counties shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons."). [Editor's note: OR. ADMIN. R. 660-015-0000 refers to a list of publications that set out the individual Statewide Planning Goals. Those publications are available from the DLCD archives in Salem, and current versions are available online.]

policy to restrict the establishment or extension of the key facilities of sewer and water outside urban growth boundaries. The 1994 version of the goal dealt with sewer and water systems as follows:

> Counties shall not allow the establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries, or allow new extensions of sewer lines from within urban growth boundaries, or allow new extensions of sewer lines from within urban growth boundaries or unincorporated community boundaries to land outside those boundaries.[73]

In adopting the new language in Goal 11, LCDC heard little dissent about the proposition that sewer systems, in general, were an "urban" service and that, if allowed to be established everywhere, would contribute to or even induce urban levels of development in rural areas. As to water services, the amended goal provided:

> For land that is outside urban growth boundaries and unincorporated community boundaries, county land use regulations shall not rely upon the establishment or extension of a water system to authorize higher residential density than would be authorized without a water system.[74]

These amendments dealing with water and sewer facilities outside urban growth boundaries were broadly worded and gave rise to litigation. In *DLCD v. Lincoln County*, the Court of Appeals reversed a LUBA decision sustaining an objection to a rural residential subdivision based on the 1994 goal amendment.[75] In that case, there was an existing water system within an area where the subdivision was proposed and required only service connections to individual lots, which did not violate the amended goal.[76] As

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73. OR. ADMIN. R. 660-015-0000(11) (1994).

74. *Id.*

75. Dep't of Land Conservation & Dev. v. Lincoln Cnty., 925 P.2d 135 (Or. 1996). In the meantime there were three other cases, all named *DeShazer v. Columbia County*, which dealt with the same issue of water being provided within an existing service area. In the first two of those cases, *DeShazer v. Columbia County*, 31 Or. LUBA 300 (1996) and *DeShazer v. Columbia County*, 34 Or. LUBA 416 (1998), LUBA rejected the relief on the basis of the goal or because the County did not respond appropriately to the *Lincoln County* case. Finally in *DeShazer v. Columbia County*, 35 Or. LUBA 689 (1999), LUBA found that a water association providing service to the area met the goal requirements.

76. *Lincoln Cnty.*, 925 P.2d at 138–41. LUBA found that providing service connections

discussed below, these problems were first met with the adoption of new administrative rules, along with modest goal amendments, in 1998.[77]

3. The 2005 Goal Amendments

Goal 11 was last revised in 2005. The revised goal includes four new definitions related to public facilities and services. First, a "Public Facilities Plan," requires description of certain facilities needed to support plan designations in certain urban areas.[78] Second, a "Community Public Facilities Plan" describes services and facilities for the land use designations in plans for the unincorporated communities outside urban growth boundaries.[79] Third, "Water Systems" are broadly defined to include most public systems.[80] Finally, the goal was amended to allow LCDC more flexibility in dealing with "extension" of sewer or water lines.[81]

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to an existing service area within a water district was not forbidden by the goal, which prohibited establishment of new water districts or extensions of their services. However, in *Gisler v. Deschutes County*, 945 P.2d 1051 (Or. 1997), the Court of Appeals upheld a LUBA determination that where there was no water entity that encompassed the area that included the proposed development, the County was not required to permit individual septic systems, and could reject the proposed development.

77. *See infra* Part I.E.2.

78. OR. ADMIN. R. 660-011-0005 (1984) (current), *available at* http://www.oregon.gov/lcd/docs/goals/goal11.pdf. This plan is defined as follows:

> Public Facilities Plan – A public facility plan is a support document or documents to a comprehensive plan. The facility plan describes the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plan or plans within an urban growth boundary containing a population greater than 2,500.

Id.

79. *Id.* This plan is described as follows:

> Community Public Facilities Plan – A support document or documents to a comprehensive plan applicable to specific unincorporated communities outside urban growth boundaries. The community public facility plan describes the water and sewer services and facilities which are to support the land uses designated in the plan for the unincorporated community.

Id.

80. *Id.* The term is defined as follows: "Water system – means a system for the provision of piped water for human consumption subject to regulation under ORS 448.119 to 448.285." *Id.*

81. *Id.* The definition of extension is as follows: "Extension of a sewer or water system – means the extension of a pipe, conduit, pipeline, main, or other physical component from or to an existing sewer or water system, as defined by Commission rules." *Id.* As noted below, the revised goal shifts coverage of extensions to administrative rulemaking, in lieu of dealing the subject in the goal itself. *Id.*

4. Summary—The Evolution of Goal 11

The revisions to Goal 11 reveal a more sophisticated understanding of public facilities and services, and suggest an evolution in Oregonian growth management during the thirty years that elapsed between the initial goal and the 2005 revision.

The revised Goal 11 is better tailored to meet these objectives, and focuses particularly on the issues of water service, waste disposal and sewer systems.[82] As revised, the goal provides that "urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served."[83]

The goal requires a provision for key facilities.[84] The goal divides public facilities into two categories.[85] The first category, "Public Facilities Plans," applies to cities with a population greater than 2,500 persons that have urban growth boundaries or to counties having unincorporated areas within urban growth boundaries of greater than 2,500 persons.[86] These localities are required to develop public facilities plans for areas within their urban growth boundaries.[87] To meet current and long-range needs, the plans should include "a provision for solid waste disposal sites, including sites for inert waste."[88] The second category, "Community Public Facility Plan," applies to unincorporated communities.[89] These plans are intended to regulate "facilities and services for certain unincorporated communities outside urban growth boundaries as specified by Commission rules."[90] Cities with urban growth boundaries having fewer than 2,500 persons or counties with unincorporated communities defined by an urban growth boundary with fewer than 2,500 persons are not required to prepare either a public facilities plan or a community facilities plan.[91] However, counties are required to

82. OR. ADMIN. R. 660-015-0000(11) (2005).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. OR. ADMIN. R. 660-015-0000(11) (2005).
90. *Id.*
91. *Id.*

prepare a community facilities plan for certain unincorporated communities, regardless of population, that do not have an urban growth boundary.[92]

Goal 11 also focuses on essential aspects of public facilities and services, such as waste disposal, and more specifically, sewer systems. The revised goal explains that local governments may not permit "the establishment or extension of sewer systems outside urban growth boundaries or unincorporated community boundaries," or "extensions of sewer lines from within urban growth boundaries or unincorporated community boundaries to serve land outside those boundaries except where the new or extended system is the only practicable alternative to mitigate a public health hazard and will not adversely affect farm or forest land."[93] Local governments may, however, allow "residential uses located on certain rural residential lots or parcels inside existing sewer district or sanitary authority boundaries to connect to an existing sewer line under the terms and conditions specified by Commission rules."[94] But local governments may not rely "upon the presence, establishment, or extension of a water or sewer system to allow residential development of land outside urban growth boundaries or unincorporated community boundaries at a density higher than authorized without service from such a system."[95] In accordance with Oregon law, "state agencies that provide funding for transportation, water supply, sewage and solid waste facilities shall identify in their coordination programs how they will coordinate that funding with other state agencies and with the public facility plans of cities and counties."[96]

While the focus of the planning guidelines of the earlier versions of Goal 11 was on "recreation needs" and "recreation opportunities,"[97] the 2005 version emphasizes the distinction between "urban," "rural," and "urbanizable" areas, and provides for appropriate responses for each category.[98]

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. OR. REV. STAT. § 197.712(2)(f); *see also* OR. REV. STAT. § 197.180 (codifying Statewide Planning Goal 2).

97. *See* OR. ADMIN. R. 660-011-0000 to -0050 (1984).

98. OR. ADMIN. R. 660-015-0000 to -0010 (2008). The key planning guideline of Goal 11 is that "plans providing for public facilities and services should be coordinated with plans for designation of urban boundaries, urbanizable land, rural uses and for the transition of rural

E. Development of Implementing Administrative Rules

As the Oregon planning program evolved, it was apparent that broadly-worded goals and ad hoc interpretations would not be a sufficient basis to carry out state policy.[99] After 1983, LCDC took advantage of its statutory authority to adopt binding administrative rules to provide detailed policy direction in interpreting the Statewide Planning Goals.[100] Goal 11 was one of the first places to which LCDC directed its attention.

1. The 1984 Rules

In 1984, administrative rules were adopted requiring local governments to prepare, adopt, and submit public facility plans for all urban areas with populations greater than 2,500.[101] The new rules require a "public facility plan" as a support document to a local comprehensive plan that describes the water, sewer, and transportation facilities necessary to support the land uses specified in the plan.[102] The local government responsible for preparing the public facility plan must be established via an urban growth management agreement for the urban area.[103] Public facility plans must be prepared before the first periodic review[104] and contain an inventory of existing facilities, a list of proposed projects (with "rough cost estimates"), a policy statement identifying providers of every system and project, an estimate of their timing, and a discussion of funding methods and ability to cover costs of the same.[105] After

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land to urban uses." The 2005 version of Goal 11 provides an expanded set of six guidelines. Nevertheless, the common theme among the two versions relates to additional methods and devices for achieving desired types and levels of public facilities. The 1974 guidelines include fee acquisition, easements, cluster developments, preferential assessments, development rights acquisition, and subdivision parkland dedication that benefits the subdivision, tax policies, land leases, and similar programs. The 1974 and 2005 guidelines both cover tax incentives and disincentives, and fee and less-than-fee acquisition. However, the 2005 guidelines also include land use controls and ordinances, multiple use and development practices, and enforcement of local health and safety codes.

99. *See supra* notes 63–66 and accompanying text.

100. OR. REV. STAT. § 197.040(1)(c). These rules were often used, particularly in the face of legislative deadlock. Sullivan, *The Quiet Revolution*, *supra* note 12, at 374.

101. OR. ADMIN. R. 660-11-000 to -050 (1984). These rules were based on anti-recession legislation passed by the Oregon legislature in 1983. Act of August 9, 1983, ch. 827, vol. 2 1983 Or. Laws 1607 § 17(2)(e) (codified in part at OR. REV. STAT. 197.707–.717).

102. *Id.*

103. OR. ADMIN. R. 660-11-0045(1)(c) (1984).

104. OR. ADMIN. R. 660-11-0040 (1984).

105. OR. ADMIN. R. 660-011-0010 (1984) (current). The rule provides that public

the adoption of these rules in 1984, public facility planning promoted the conversion of urbanizable land into urban land.[106] These initial rules responded to the immediate concerns of the legislature, but put off a more contentious discussion over the provision of water and sewer facilities outside urban growth boundaries.

However, two issues plagued the discussion of public facilities and services: (1) concerns over regulatory takings, and (2) lack of guidance from LCDC regarding when/where to extend urban facilities and services into urbanizable areas.[107] Ultimately the first concern was dismissed as the timing of public facilities and services (as opposed to denial of all development) appeared to raise fewer concerns.[108] The failure to provide better policy guidance proved to be a more intractable issue, particularly with respect to provision of water and sewer facilities outside urban growth boundaries.

2. The 1998 Rule Amendments

In Part I.D.2 above, LCDC's attempts to restrict establishment or extension of water and sewer services by amending Goal 11 in 1994 were shown to be only partially successful. To assure that it could respond more quickly to ambiguities in its established policies, LCDC

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facility plans must include:

> (1) an inventory, describing the location, capacity, and condition of existing facilities;
>
> (2) a list of proposed projects, including type, location, and capacity;
>
> (3) rough cost estimates for proposed projects, to generally establish the fiscal requirements of the comprehensive plan's designated land uses and to assist in reviewing existing funding mechanisms;
>
> (4) policy statements, identifying the providers of every system and project;
>
> (5) estimates of the timing of each public facility project, which must be commensurate with the comprehensive plan's projected growth estimates; and
>
> (6) a discussion of the funding mechanisms for each project and their ability to cover costs.

Id.

106. Nevertheless, these rules provide no basis for review of a public facility plan, as Oregon Revised Statutes section 197.712(2)(c) specifically provides that such plans do not constitute land use decisions. Instead, challenges must await the occasion of carrying out the public facilities plan, for example, in a comprehensive plan. Home Builders Ass'n of Lane Cnty. v. City of Springfield, 129 P.3d 713 (Or. 2006); *see also* Bicycle Transp. Alliance v. Wash. Cnty., 25 Or. LUBA 798 (1993), *aff'd on other grounds*, 873 P.2d 452 (Or. Ct. App. 1994). To some extent, this deferral of challenges deprived those plans of meaning.

107. Knaap & Nelson, *supra* note 33.

108. *See, e.g.*, Golden v. Planning Bd. of the Town of Ramapo, 285 N.E. 2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972) (the seminal growth management case); Tahoe Sierra Preservation Council v. Tahoe Regional Planning Comm'n, 535 U.S. 302 (2002).

adopted administrative rules to specify when sewer and water facilities could be provided. Those new rules obviated any ambiguity over the establishment or extension of these facilities into rural areas.[109]

In *Foland v. Jackson County*, the Oregon Court of Appeals declined to limit the prohibition on extension of water services to residential uses and interpreted the goal as follows:

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109. OR. ADMIN. R. 660-11-0060 (1998). In particular, the new rules provided, with respect to sewer facilities:

> (2) Except as provided in . . . this rule, and consistent with Goal 11, a local government shall not allow:
>
> > (a) The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries;
> >
> > (b) The extension of sewer lines from within urban growth boundaries or unincorporated community boundaries in order to serve uses on land outside those boundaries;
> >
> > (c) The extension of sewer systems that currently serve land outside urban growth boundaries and unincorporated community boundaries in order to serve uses that are outside such boundaries and are not served by the system on July 28, 1998.

Id. With respect to water facilities, the new rules provided:

> (1) As used in this rule, unless the context requires otherwise:
>
> > (a) "Establishment" means the creation of a new water system and all associated physical components, including systems provided by public or private entities;
> >
> > (b) "Extension of a water system" means the extension of a pipe, conduit, pipeline, main, or other physical component from or to an existing water system in order to provide service to a use that was not served by the system on the applicable date of this rule, regardless of whether the use is inside the service boundaries of the public or private service provider.
> >
> > (c) "Water system" shall have the same meaning as provided in Goal 11, and includes all pipe, conduit, pipeline, mains, or other physical components of such a system.
>
> (2) Consistent with Goal 11, local land use regulations applicable to lands that are outside urban growth boundaries and unincorporated community boundaries shall not:
>
> > (a) Allow an increase in a base density in a residential zone due to the availability of service from a water system;
> >
> > (b) Allow a higher density for residential development served by a water system than would be authorized without such service; or
> >
> > (c) Allow an increase in the allowable density of residential development due to the presence, establishment, or extension of a water system.
>
> (3) Applicable provisions of this rule, rather than conflicting provisions of local acknowledged zoning ordinances, shall immediately apply to local land use decisions filed subsequent to the effective date of this rule.

OR. ADMIN. R. 660-11-0065 (1998).

> In short, Goal 11 concerns the provision of public facilities and services. Specifically, the goal requires an "orderly and efficient arrangement of public facilities and services" and is intended to regulate development by limiting facilities and services to "the needs and requirements of the urban, urbanizable, and rural areas to be served." In other words, by limiting facilities and services to the needs and requirements of the land to be served (i.e., urban, urbanizable, rural), Goal 11 helps prevent the proliferation of urban uses in rural areas that might otherwise result from the extension of urban-level facilities and services outside an urban growth boundary (UGB) to rural land.[110]

The court concluded that the effect of the goal and its implementing administrative rules was to prohibit extension of a city water line to serve a rest stop outside its urban growth boundary and to require that an exception be taken to that goal.[111]

3. The 2005 Rule Amendments

In 2005, the LCDC loosened slightly the restrictions on providing sewer service outside urban growth boundaries when it amended the rule that addresses sewer service to permit additional situations to qualify.[112] The slight relaxation of the policy

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110. Foland v. Jackson Cnty., 243 P.3d 830, 831 (Or. 2010). The 2005 administrative rules, discussed below, did not affect the outcome of this case.

111. *Id.* at 831.

112. OR. ADMIN. R. 660-011-0060(8) (2005). The principal changes are the references to situations that existed as of January 1, 2005:

> (8) A local government may allow a residential use to connect to an existing sewer line provided the conditions in subsections (a) through (h) of this section are met:
>
> (a) The sewer service is to a residential use located on a parcel as defined by ORS 215.010(1), or a lot created by subdivision of land as defined in ORS 92.010;
>
> (b) The parcel or lot is within a special district or sanitary authority sewer service boundary that existed on January 1, 2005, or the parcel is partially within such boundary and the sewer service provider is willing or obligated to provide service to the portion of the parcel or lot located outside that service boundary;
>
> (c) The sewer service is to connect to a residential use located within a rural residential area, as described in OAR 660-004-0040, which existed on January 1, 2005;
>
> (d) The nearest connection point from the residential parcel or lot to be served is within 300 feet of a sewer line that existed at that location on January 1, 2005;
>
> (e) It is determined by the local government to be practical to connect the

emphasized the general prohibition on allowing urban services to be provided outside urban growth boundaries and underscores one of the principal objectives of this goal—i.e., to reinforce the state policy on separation of urban and rural uses through urban growth boundaries.

II. OREGON INFRASTRUCTURE PLANNING

A. Introduction

This part of the article will focus upon the mechanics of infrastructure planning in Oregon, both through Goal 11 and its implementing administrative rules and a host of other enactments.[113] Following this introduction, infrastructure planning will be analyzed from the standpoints of economic development planning, intergovernmental coordination and other legislation affecting the provision of infrastructure.

However, one major area will not be explored in this article – transportation. Oregon has a separate goal related to transportation, Goal 12, and a separate system to deal with transportation issues under a different set of implementing administrative rules.[114] Those differences are sufficiently profound as to require separate treatment elsewhere.

> sewer service to the residential use considering geographic features or other natural or man-made constraints;
>
> (f) The sewer service authorized by this section shall be available to only those parcels and lots specified in this section, unless service to other parcels or lots is authorized under sections (4) or (9) of this rule;
>
> (g) The existing sewer line, from where the nearest connection point is determined under subsection (8)(d) of this rule, is not located within an urban growth boundary or unincorporated community boundary; and
>
> (h) The connection of the sewer service shall not be relied upon to authorize a higher density of residential development than would be authorized without the presence of the sewer service, and shall not be used as a basis for an exception to Goal 14 as required by OAR 660-004-0040(6).

Id.

113. OR. ADMIN. R. 660-015-0000(11) (2008) (current), *available at* http://www.oregon.gov/LCD/docs/goals/goal11.pdf.

114. OR. ADMIN. R. 660-015-0000(12) (2008) (Statewide Planning Goal 12), *available at* http://www.oregon.gov/LCD/docs/goals/goal12.pdf; *see also* OR. ADMIN. R. 660-011-0010 (1984). Nevertheless, a number of public facility plan procedural requirements which deal with sewer, water and other public facilities and plans also apply to transportation plans.

B. Planning for Urban Economic Development

The presence of a statewide land use program has provided the tools to enable coordination of economic development, which was recognized in the 1988 and 2005 amendments to Goal 11, as well as in the 1984 and 2005 administrative rules implementing the goal. These tools were designed to encourage planning for economic development, principally in urban areas where appropriate types and levels of infrastructure may be provided.

As originally conceived during an economic downturn in 1983, LCDC was to coordinate economic development planning. This was to be accomplished by adoption of goals, rules and a local comprehensive planning process to (1) analyze "economic patterns, potentialities, strengths and deficiencies," (2) provide economic development policies in the plan, (3) provide for "suitable sizes, types, locations and service levels for industrial and commercial uses, (4) "provide for compatible uses near those commercial and industrial sites, and (5) provide for a "public facilities plan" to deal with sewer, water and transportation issues for urban growth boundaries with a population of 2,500 or more.[115]

Moreover, state agencies providing funding for transportation, water supply, sewage, and solid waste facilities are required to work with local governments to coordinate funding and permit issuance.[116] In particular, the Oregon Business Development Department is required to provide technical assistance to local governments in planning for industrial and commercial development, streamlining permit procedures and providing data for economic development.[117] For the most part, these activities are concentrated in urban areas and seek to make enhanced use of existing planning structures.

C. Planning Coordination

Oregon is no different than other states with a diffuse mix of state and sub-state public entities given authority to deal with particular responsibilities. State agencies, a metropolitan government for the Portland urban area (Metro),[118] local governments (meaning

115. OR. ADMIN. R. 660-015-0000(9) (1984) (Statewide Planning Goal 9).

116. OR. ADMIN. R. 660-011-0015(4) (1984) (current).

117. OR. REV. STAT. § 197.638 (2011).

118. *See* Metropolitan Service District Act of 1997, OR. REV. STAT. §§ 268.010–.990 (2011); *see also* OREGON METRO, http://www.oregonmetro.gov/ (last visited Apr. 25, 2013). Metro is an elected regional government for the urban portions of the three counties that

cities and counties), and special districts that provide services such as sewer, water, fire protection, are all part of the planning process. The possibility of conflicting or cumulatively burdensome actions taken in a given case gives rise to efforts to coordinate land use planning and regulation at various levels. A plan is coordinated when "the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible."[119]

Goal 2 (Land Use Planning) requires that comprehensive plans and implementing measures "be coordinated with the plans of affected governmental units."[120] Other goals implicitly require such coordination in dealing with such diverse activities as enforcement of state environmental laws, parks planning, and transportation funding.[121]

1. State Agency Coordination

Oregon statutory law provides that state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use.[122] As a result, state agencies and local governments are required to coordinate their land use actions through an LCDC-certified land use coordination program.[123]

Specifically, state agencies with land use coordination programs must participate in local government land use hearings to be able to challenge the ultimate local decision. Similarly, state agencies are normally required to follow local comprehensive plans and land use regulations when issuing or denying agency permits. Typically, that decision is informed by a "Land Use Compatibility Statement" issued

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comprise the Oregon portion of the Portland metropolitan area. Metro's mission is to provide regional planning, policy-making and certain services to the region. Metro's responsibilities include urban growth boundary management, transportation planning and waste disposal planning, management and recycling, preservation of natural areas, habitat restoration and long-term regional planning. OREGON METRO, http://www.oregonmetro.gov/index.cfm/go/by.web/id=24270 (last visited Apr. 25, 2013).

119. OR. REV. STAT. § 197.015(5) (2011).

120. OR. ADMIN. R. 660-015-0000(2) (2008) (Statewide Planning Goal 2), *available at* http://www.oregon.gov/LCD/docs/goals/goal2.pdf.

121. *See, e.g.*, OR. ADMIN. R. 660-015-0000(14) (2008) (Statewide Planning Goal 14), *available at* www.oregon.gov/LCD/docs/goals/goal14.pdf.

122. OR. REV. STAT. § 197.180(1) (2011).

123. *See* OR. ADMIN. R. 660-030-0000 to -0095.

by the local government.[124]

Moreover, in cooperation with local governments and state agencies whose rules, plans or programs affect land use, DLCD will periodically "identify aspects of coordination related to uses that require the issuance of multiple permits," and "update and improve rules regulating the effectiveness and efficiency of state agency coordination programs."[125] These programs must be submitted to DLCD for review and certification.[126] Upon certification, a state agency may participate in local government proceedings to advance those agency interests identified in its certified program.[127] Generally however, state agencies may not take actions inconsistent with local plans.[128]

2. Coordination by Metro or Counties

Oregon has designated its counties as the planning coordinators for other local governments in the state, with the exception of Metro, which is the regional planning agency for the urban portions of the region. As coordinator, a county or Metro has significant power to deal with provision of infrastructure, especially outside cities.[129] One of the other functions of the coordinator is to deal with the results of the 10-year federal census and allocate the population among the cities and the unincorporated areas of the region.[130]

Oregon law requires coordination of city and county land use plans with the plans and activities of special districts. Coordinators may also determine whether the plans and actions of such districts conform to the goals. If those plans or provisions are inconsistent with the goals or acknowledged comprehensive plans and regulations, they may be overturned.[131]

Another function of the coordinator is to convene a meeting of urban service providers within an urban area for the purpose of reaching agreement on which agency provides the urban service.[132]

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124. *See* OR. ADMIN. R. 660-031-0026 (1984) (current).
125. OR. REV. STAT. §§ 197.180(14)(a), (b) (2011).
126. OR. REV. STAT. § 197.180(4) (2011).
127. *See, e.g.*, OR. REV. STAT. § 197.180(12) (2011).
128. OR. REV. STAT. § 197.180(1) (2011).
129. OR. REV. STAT. § 195.020 (2011).
130. OR. REV. STAT. § 195.034 (2011).
131. OR. REV. STAT. § 195.020 (2011).
132. OR. REV. STAT. § 195.065(1) (2011).

According to statute, the contents of these agreements are somewhat detailed; however, neither LCDC nor local coordinators have pressed for completion of these agreements and, because there is no penalty for noncompliance, the statutes are effectively unused. If the coordinator sought to use the statutory power granted it, however, it would be significant.

3. School District Planning

Among other things, school districts in Oregon must acquire and dispose of lands for their facilities.[133] However, because schools can be either urban or rural uses, these decisions have land use implications, particularly on their effects on rural lands. These impacts moved the Oregon legislature to enact a statute to deal specifically with planning for "large school districts,"—i.e., those having an enrollment of 2,500 students or more.[134] Under the statute, the city or county having jurisdiction in most cases includes in its comprehensive plan a school facility plan prepared by the district in consultation with it, and undertakes the coordination of planning with the district as required with any special district.[135] Representatives of the school district and the city or county must meet twice a year and come up with a fairly detailed plan.[136] Districts that do not fall into the "large school district" category may, but are not required to, undertake this work.[137]

Perhaps the most controversial part of this coordination process is over the statutory delegation to each large district of the adoption of criteria by which the local government must determine whether adequate school capacity exists to accommodate future residential development. The statute is neatly balanced so that it does not have the effect of the school district declaring or imposing a moratorium on residential development and limiting the ability of a local government to deny a discretionary permit on the basis of school capacity.

133. OR. REV. STAT. § 195.110 (2011).

134. OR. REV. STAT. §§ 195.110(1)–(2) (2011).

135. *Id.*

136. OR. REV. STAT. § 195.110(4) (2011).

137. OR. REV. STAT. § 195.110(10) (2011). Metro must also consider the needs of school districts in revising the Portland metropolitan area urban growth boundary. OR. REV. STAT. § 197.299(4) (2011).

4. Parks Planning

After an apparent conflict between park agencies and local governments, the state legislature "grandfathered-in" those uses existing as of July 25, 1997, and allows for their expansion. [138] At the same time, the legislature provided for a planning process to apply to state and local parks where there are adopted parks master plans, provide for a planning process for future parks, and to adopt a dispute resolution mechanism for uses in state parks. The newly amended goal and its implementing rules give LCDC much more power to deal with local governments regulating uses on state park lands.

D. Other Legislative Directions or Limitations on Infrastructure Provision

Five other statutory provisions are of interest in dealing with infrastructure.

1. Limitation on Moratoria

Oregon law severely limits the use of moratoria on new development in land use planning.[139] The accepted view is that planning for a 20-year period should make a moratorium unnecessary, except in cases of infrastructure failure.[140] Thus, it will be difficult to enact or sustain a moratorium.

In order to enact a moratorium, a local government must give 45-day notice to DLCD (but must also accept development applications from landowners and be bound to development rules in existence at the time of those applications), hold a hearing and adopt findings to justify the moratorium.[141] If the action is based on a shortage of public facilities, the local government must make specified findings and take certain actions.[142] Moratoria may last no more than 120

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138. *See* OR. ADMIN. R. 660-034-0030(8) (1998).

139. OR. REV. STAT. § 197.520 (2011).

140. OR. REV. STAT. § 197.296(2) (2011).

141. *Id.*

142. A moratorium may be justified to prevent a shortage of public facilities by demonstrating the following:

> (a) Showing the extent of need beyond the estimated capacity of existing public facilities expected to result from new land development, including identification of any public facilities currently operating beyond capacity, and the portion of such capacity already committed to development;
>
> (b) That the moratorium is reasonably limited to those areas of the city, county or special district where a shortage of key public facilities would otherwise occur; and

days,[143] but if extended, a new hearing and findings are required (which gives interested persons another opportunity to appeal them).[144] In recent years local governments in Oregon have rarely used moratoria.

2. Availability of Urban Lands for Development

Oregon requires that lands within urban growth boundaries be available for urban development within the 20-year planning period, although those lands may be used for rural uses until they are ready for development.[145] The statute enables local governments to commit to infrastructure planning so that, at the end of the 20 year build-out period, the urban area will be developed and furnished with adequate infrastructure.[146]

3. Abandoned Mill Sites

In an effort to support employment growth in rural Oregon, areas that had once been the center of a thriving timber industry, the legislature enacted House Bill 2691 in 2003.[147] The bill provides for the industrial use of certain abandoned or diminished wood product production sites, facilitates amendments of comprehensive plans and land use regulations to that end, and allows for provision of sewer facilities.[148] The statute further provides that the governing body of a

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(c) That the housing and economic development needs of the area affected have been accommodated as much as possible in any program for allocating any remaining public facility capacity.

OR. REV. STAT. § 197.520(2) (2011).

143. OR. REV. STAT. §197.520(4) (2011).

144. *Id.* The statute requires adoption of further written findings as follows:

(a) Verify the problem giving rise to the need for a moratorium still exists;

(b) Demonstrate that reasonable progress is being made to alleviate the problem giving rise to the moratorium; and

(c) Set a specific duration for the renewal of the moratorium. No extension may be for a period longer than six months.

Id.

145. OR. REV. STAT. § 197.752 (2011). The statute likely arose from the decision in *Phillipi v. City of Sublimity*, 662 P.2d 325, 329-330 (Or. 1983) (finding the city's "agricultural retention policies" consistent with the state's urbanization goal).

146. *Id. But see* Heritage Enter. v. City of Corvallis, 708 P.2d 601, 604–05 (Or. 1985) (stating that the timing of providing such infrastructure may occur at any point in that 20-year period); Just v. City of Lebanon, 45 Or. LUBA 179 (2003).

147. OR. REV. STAT. § 197.719 (2011) (codifying H.B. 2691, 76th Leg., 1st Reg. Sess. (Or. 2011)).

148. *Id.* (The statute applies to production sites located outside an urban growth

county may amend its comprehensive plan and land use regulations to allow rezoning of an abandoned or diminished mill site for industrial use, without complying with Statewide Planning Goals relating to protection of resource lands or prevention of urbanization outside urban growth boundaries.[149] From an infrastructure standpoint, the statute permits provision or extension of sewage facilities or establishment of an onsite facility to serve the site.[150]

4. Other Industrial Lands

In 2003, the Oregon legislature enacted two statutes to allow for industrialization and the provision of sewage services to certain rural lands outside the Willamette Valley, where a great deal of prime farm and forest lands are found,[151] without requiring an exception to the Statewide Planning Goals.[152] These statutes have not been tested in an appeal and have largely not been used.

One statute lifts the requirements of the urbanization and infrastructure goals in order to provide available industrial lands and sewer service to serve those lands in rural areas.[153] However, such

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boundary, have been closed after 1980 or has been operating at less than 25% of capacity since 2003, and contain permanent buildings used in the production of wood products.).

149. OR. REV. STAT. §§ 197.719(2)–(3) (2011). (Under subsection (6), the county is also authorized to determine the boundary of the site effectively exempt from the provisions of these goals as well.).

150. OR. REV. STAT. § 197.719(4) (2011) provides:

> (4) Notwithstanding a statewide land use planning goal relating to public facilities and services or administrative rules implementing that goal, the governing body of a county or its designee may approve:
>
> > (a) The extension of sewer facilities to lands that on June 10, 2003, are zoned for industrial use and that contain an abandoned or diminished mill site. The sewer facilities may serve only industrial uses authorized for the mill site and contiguous lands zoned for industrial use.
> >
> > (b) The extension of sewer facilities to an abandoned or diminished mill site that is rezoned for industrial use under this section only as necessary to serve industrial uses authorized for the mill site.
> >
> > (c) The establishment of on-site sewer facilities to serve an area that on June 10, 2003, is zoned for industrial use and that contains an abandoned or diminished mill site or to serve an abandoned or diminished mill site that is rezoned for industrial use under this section. The sewer facilities may serve only industrial uses authorized for the mill site and contiguous lands zoned for industrial use.

151. OR. REV. STAT. § 197.713(3) (2003); OR. REV. STAT. § 215.010 (2003) (county planning, zoning, and housing codes specifically describing the Willamette Valley).

152. OR. REV. STAT. § 197.732 (2011) (describing the exceptions process).

153. *See* OR. REV. STAT. §§ 197.713(1)–(2) (2003).

lands may not be used for retail, commercial or residential purposes.[154] The other statute requires notice to cities in the case of some of these proposals, along with a process for collaboration and conflict resolution.[155]

5. Industrial Super-siting for Regionally Significant Industrial Areas

In 2011, the Oregon legislature reacted to the continuing recession by enacting Senate Bill 766.[156] It created an Economic Recovery Review Council composed of five state agency directors.[157] The Council, which will dissolve after the state unemployment rate goes under 6%,[158] has two major functions:

1. To designate by rule five to fifteen "regionally significant industrial area[s]"[159] that will be eligible for an expedited permitting process;[160] and

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154. OR. REV. STAT. § 197.713(4) (2003).

155. OR. REV. STAT. § 197.714 (2003).

156. OR. REV. STAT. §§ 197.722–.728 (2011) (codifying S.B. 766, 76th Leg., 1st Reg. Sess. (2011)).

157. Act of June 28, 2011, ch. 564, vol. 2 2011 Or. Laws 1742 § 3(1). The Council is composed of the directors of the Oregon Business Development Department, the Department of Land Conservation and Development, the Department of Transportation, the Department of Environmental Quality, and the Department of State Lands. *Id.*

158. Act of June 28, 2011, ch. 564, vol. 2 2011 Or. Laws 1742 § 13.

159. OR. REV. STAT. § 197.722(2) (2011) provides:

> Regionally significant industrial areas means an area planned and zoned for industrial use that:
>
> (a) Contains vacant sites, including brownfields, that are suitable for the location of new industrial uses or the expansion of existing industrial uses and that collectively can provide significant additional employment in the region;
>
> (b) Has site characteristics that give the area significant competitive advantages that are difficult or impossible to replicate in the region;
>
> (c) Has superior access to transportation and freight infrastructure, including, but not limited to, rail, port, airport, multimodal freight or transshipment facilities, and other major transportation facilities or routes; and
>
> (d) Is located in close proximity to major labor markets.

160. OR. REV. STAT. §§ 197.723(1), (4) (2011). (The expedited process is available only to urban industrial lands, the development of which does not require a goal exception or plan amendment or zone change. In addition, once designated, these areas are "protected" from most changes in planning or zoning designations by local governments.); OR. REV. STAT. §§ 197.726(1)–(3) (2011) (Council decisions are subject to an expedited review process with limited grounds for review.).

2. To hear and determine eligible applications for expedited state and local permits for development of industrial lands of "state significance"[161] that will all be heard in one proceeding involving application of all state and local criteria[162] and will be subject to a single appeal with limited opportunities and grounds for judicial review.[163]

As of early 2013, neither a designation of regionally significant industrial lands, nor any development permit for development of industrial lands of state significance has been tested.

III. URBAN AND RURAL LEVELS OF SERVICES AND FACILITIES

A. Relationship of Goal 11 with Goal 14 (Urbanization)—Curry County

Goal 11 provides separate obligations for the provision of services and facilities to urban and rural areas, stating:

> Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services

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161. Act of June 28, 2011, ch. 564, vol. 2 2011 Or. Laws 1742 § 1. These projects are designed to:

> (a) Create jobs with average wages above 180 percent of the minimum wage.
>
> (b) Create a large number of new jobs in relation to the economy and population of the area directly impacted by the development.
>
> (c) Create permanent jobs in industrial uses.
>
> (d) Involve a significant investment of capital in relation to the economy and population of the area directly impacted by the development.
>
> (e) Have community support, as indicated by a resolution of the governing body of the local government within whose land use jurisdiction the industrial development project would occur.
>
> (f) Do not require:
>
> > (A) An exception taken under ORS 197.732 to a statewide land use planning goal;
> >
> > (B) A change to the acknowledged comprehensive plan or land use regulations of the local government within whose land use jurisdiction the industrial development project would occur; or
> >
> > (C) A federal environmental impact statement under the National Environmental Policy Act.

Id.

162. Act of June 28, 2011, ch. 564, vol. 2 2011 Or. Laws 1742 §§ 2(e)–(6).

163. Act of June 28, 2011, ch. 564, vol. 2 2011 Or. Laws 1742 §§ 2(12), (13). The limited review is important, for the Council's decision binds both state agencies and local governments unless modified or overturned on appeal. 2011 Or. Laws 564 §§ 2(8), (9).

> appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served.[164]

The Goal thus differentiates between "rural" and "urban" facilities and services. "Rural" facilities and services simply are those facilities and services that the governing body determines to be suitable and appropriate solely for the needs of rural use.[165] On the other hand, "urban" facilities and services are described in detail.[166] The definition specifically refers to key facilities and to appropriate types and levels of at least the following services: "police protection; sanitary facilities; storm drainage facilities; planning, zoning and subdivision control; health services; recreation facilities and services; energy and communication services; and community governmental services."[167] These urban services are most often provided by cities.

For areas outside Oregon's cities, the inclination to deal with public services and facilities has been accomplished through the use of a host of service districts to provide water, sewer, drainage, fire protection and many other public facilities and services of either an urban or rural nature. Special districts may exist within cities, but are more commonly found outside them. Special districts may compete with cities to provide services, and their customers and governing body members may feel a sense of competition with cities to provide the same services.

Goal 11 provides local governments more discretion to determine what types and levels facilities and services rural areas would have, so long as they are appropriate to rural uses. As this part of the article demonstrates, one of the principal sources of planning disagreement in the state is over providing urban services in rural areas where they may be used to urbanize those areas. Such practices violate Goal 14, which provides for the orderly transition of lands from rural to urban. On the other hand, in urban areas, the goal requires specific facilities and services, and also requires coordinated planning for them.

In order to understand Goal 11 as it relates to the requirement that local governments provide for various types of public facilities and services, one must also understand the relationship of Goal 11 to

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164. OR. ADMIN. R. 660-015-0000(11) (2008).

165. *Id.*

166. *Id.*

167. *See id.* (defining "urban facilities and services").

Goal 14 (Urbanization). Goal 14 was one of the original goals, adopted in 1975 and amended in 2006.[168] The purposes of Goal 14 are to "provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities."[169] Oregon accomplishes these objectives through the establishment and change of urban growth boundaries.[170] The working theory is that urban levels of service must be planned for and provided within those boundaries, while anything beyond rural levels of service is inappropriate for lands outside these boundaries, because urban services would lead to inappropriate and premature urbanization.

As to public facilities and services, Goal 14 articulates a "demonstrated need" standard for uses such as public facilities as a basis for the establishment and change of urban growth boundaries. The goal also provides that the location of and changes to an urban growth boundary shall be determined by evaluating, inter alia, the "[o]rderly and economic provision of public facilities and services."[171]

In the most significant case interpreting Goal 14, *1000 Friends of Oregon v. LCDC* (*Curry County*), the Oregon Supreme Court held that any comprehensive plan that converts "rural land" outside of established urban growth boundaries to "urban uses" must either show that its action complies with Goal 14, or take an "exception" to it.[172]

The Court's conclusion followed from Goal 14's express purpose "[t]o provide for an orderly and efficient transition from rural to urban land use," and its provision that "urban growth boundaries be

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168. Land Conservation & Dev. Comm'n, 1-2006 (filed and effective February, 10, 2006). Local governments that initiated an urban growth boundary (UGB) evaluation before April 28, 2005, and considered a UGB expansion based on that evaluation, may continue to apply "old" Goal 14 or opt to apply new Goal 14, regardless of the date of any UGB amendment option. *See* OR. ADMIN. R. 660-015-0000(14) (2005), (describing the applicability and transition provisions for the 2005 version of Goal 14). The substantive requirements of the "old" and "new" Goal 14 remain the same. Only elements of its implementation are now different.

169. OR. ADMIN. R. 660-015-0000(14) (2008).

170. Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 833–36 (1998).

171. OR. ADMIN. R. 660-015-0000(14) (2008).

172. 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, 724 P.2d 268, 289 (Or. 1986).

established to identify and separate urbanizable land from rural land."[173] In *Curry County*, the county had taken exceptions to Goals 3 and 4, and, relying on those exceptions, had authorized "urban" levels of residential, commercial and industrial development on those "rural" lands without also applying or taking exceptions to Goal 14.[174] The issue in the case was whether Goal 14 must be applied or an exception to Goal 14 must be taken to authorize "urban uses" on "rural land."[175] The court held that the county was required either to apply Goal 14 or take an exception to it.[176] The court encouraged the LCDC to develop consistent policies for evaluating what "urban uses" meant through either the rules or definitions.[177] However, because the LCDC had yet to define "rural" and "urban" uses (except for unincorporated communities), the delineation between the two terms remained unclear, and such determinations remained subject to LUBA and judicial analysis on a case-by-case basis for the next twenty years.[178]

Goal 14 requires the establishment, change and periodic evaluation of urban growth boundaries, which is a significant means by which these farm and forest land preservation policies as well as provision of urban services and facilities for urban areas are achieved.[179] In this part, we set out the role of Goal 11 considerations in making the distinction between lands within urban growth boundaries, which may be urbanized and provided with urban levels of public services and facilities, and rural lands, which generally must be served by rural levels of those services and facilities. However, the urban growth boundary does not always delineate between urban and rural levels of service, as will be shown below:

1. Areas both inside and outside urban growth boundaries may

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173. OR. ADMIN. R. 660-015-0000(14) (1984).

174. *1000 Friends of Or.*, 724 P.2d at 273.

175. *Id.*

176. *Id.* at 289; *see also* OR. REV. STAT. § 197.732 (2011) (goal exceptions); OR. ADMIN. R. 660-015-0000(2) (2008) (Statewide Planning Goal 2). Goal 2 is the basis for any exception to other Goals. *See* OR. ADMIN. R. 660-004-0000 to -0040 (Goal 2 implementing rules).

177. *1000 Friends of Or.*, 724 P.2d at 307–09.

178. *See, e.g.*, Hammack & Associates, Inc. v. Wash. Cnty., 16 Or. LUBA 75, 81–82, *aff'd* 747 P.3d 373 (Or. Ct. App. 1987) (finding that outdoor performing arts center fell in the category of uses requiring a case-by-case analysis).

179. OR. ADMIN. R. 660-015-0000(14) (2008).

attempt to incorporate, so as to form their own cities and, hence their own urban growth boundaries, as discussed in Section B, below.

2. The legislature has provided for certain uses in so-called "Exclusive Farm Use" (EFU) zones, notwithstanding that they may be urban in nature or that these *de facto* urban areas already exist, as discussed in Section C, below.

3. Existing cities may annex land to extend services and grow in an orderly way. This process, both before and after acknowledgment of plans and land use regulations, is discussed in Section D, below.

4. Rural areas may require services that might be deemed urban in nature, as discussed in Section E, below.

5. Oregon has attempted to coordinate provision of urban levels of services in the establishment and change of urban growth boundaries by administrative rule, as discussed in Section F, below.

Largely, these issues were not fully anticipated when the Oregon planning program began. Rather, they were a response to circumstances, and sometimes developed simultaneously in efforts to use public services and facilities as a means of enforcing the urban-rural distinction.

B. Incorporation of Cities

Only eight years after the Oregon program began, followers of an Eastern Guru, Bhagwan Shree Rajneesh, settled on a rural ranch in Eastern Oregon and sought to incorporate a portion of that ranch as the City of Rajneeshpuram to build an urban community, spreading controversy and litigation in its wake.[180] Ultimately, the Oregon Supreme Court found incorporation itself did not urbanize lands (and did not necessarily require urban levels of public facilities and services)—which limited review of the incorporation decision in that

180. Sullivan, *The Quiet Revolution*, *supra* note 12, at 380–83 (discussing the Rajneeshpuram controversy).

case.[181] For reasons unrelated to land use, the City was enjoined and passed into history.[182]

As part of the Rajneeshpuram controversy, LCDC attempted to adopt, and apply retroactively, an administrative rule that would have made all incorporations very difficult. The rule required that prospective municipal incorporators secure an exception to a number of Statewide Planning Goals, including Goals 11 and 14.[183] The Court of Appeals struck down the rule as inconsistent with the goals the rule was promulgated to implement and, in fact, amended those goals without undertaking the goal amendment process.[184] Later municipal incorporation cases did not turn on goal issues.[185]

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181. 1000 Friends of Or. v. Wasco Cnty. Court, 703 P.2d 207, 223–24 (Or. 1985) (reviewing the goal 14 definition of "urban" as requiring the presence of a city). The Court concluded that:

> [u]nder this definition, the existence of a city is a prerequisite for urban land. LCDC asserts that from this simple statement can be derived the underlying premise in its analysis: that the effect of incorporation by itself is to make available for urbanization land which would otherwise have to be rural, because where a city exists there may be urban land.
>
> LCDC's theory is seductively simple because, realistically, most incorporated cities will eventually draw urban growth boundaries and thus have some land available for future urbanization. The problem with LCDC's theory regarding the effect of incorporation is that the analysis fails to distinguish a county's participation in the incorporation process from the subsequent action of a new city exercising its planning responsibilities in accordance with ORS 197.175. The county court's decision authorized the voters in the affected area to determine by election whether to create a municipal corporation. That decision neither authorized nor accomplished any change in the classification or use of the land included within the proposed corporate boundaries.

Id. Under Goal 14, it is the establishment of the urban growth boundary, and not the city's creation, that makes land available for urbanization. OR. ADMIN. R. 660-015-0000(14) (2008). In sum, before establishment of the urban growth boundary, the land within the new city's corporate boundaries retains its previous classifications. *Id.* Until such time as the new city considers the seven establishment factors and adopts a UGB, pursuant to Goal 14, in cooperation with the affected county or counties, and until LCDC acknowledges the comprehensive plan which includes the proposed UGB, the designations in the county's comprehensive plan and ordinances will continue to apply to the land within the new city's corporate boundaries. *See* OR. REV. STAT. § 195.025 (2011); OR. REV. STAT. § 197.251 (2011).

182. *See* State of Or. v. City of Rajneeshpuram, 598 F. Supp. 1208, 1216–17 (D. Or. 1984) (holding that the relationship of the religious group and the City violated the First Amendment).

183. OR. ADMIN. R. 660-14-000 (1984).

184. McKnight v. Land Conservation & Dev. Comm'n, 704 P.2d 1153, 1154 (Or. Ct. App. 1985).

185. Aloha Inc. Advisory Comm. v. Portland Metro. Area Local Gov't Boundary Comm'n, 695 P.2d 941 (Or. Ct. App. 1985), *rev. den.* 700 P.2d 251 (Or. 1985); Mid-County

C. Permissible Urbanization in Rural Areas

1. Uses Permitted by Statute in Exclusive Farm Zones

A vexed question in the history of the Oregon land use program is whether those uses permitted by statute in an exclusive farm zone are required to operate at a rural level of use or may have urban levels of services and facilities.[186] Since 1963, the legislature has added to this list of uses, so that there are now over fifty, some (farm dwellings, harvesting of forest products, provision of rural fire protection services) compatible with rural uses, while others (major roads, power generation facilities, solid waste disposal sites) serve both urban and rural uses.

The Court of Appeals resolved the issue in *Jackson County Citizens League v. Jackson Cnty.*,[187] concluding that uses permitted by statute in an exclusive farm use zone (in this case a golf facility) are not subject to the additional requirement that they be rural or that the local government take a Goal 14 exception.[188]

2. The Conundrum of Providing Public Services and Facilities in Exclusive Farm Zones and Policies for Preservation of Resource Lands

Oregon statutory policy on farmland preservation reinforces the purposes of Goal 14. It states that "the preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state."[189] The policy further states that "[e]xpansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion."[190] Oregon has taken a similar approach to

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Future Alternatives Comm'n v. Portland Metro. Area Local Gov't Boundary Comm'n, 695 P.2d 937 (Or. Ct. App. 1985).

186. *See* OR. REV. STAT. § 215.213 (1995); OR. REV. STAT. § 215.283 (2011).

187. 15 P.3d 42 (Or. Ct. App. 2000).

188. *Id.* at 47–49.

189. OR. REV. STAT. § 215.243(2) (2011).

190. OR. REV. STAT. § 215.243(3) (2011).

preserving forest lands.[191] LUBA and the appellate courts are often called upon to harmonize these preservation policies with the statutory allowance of uses in farm zones.

The most frequent type of case involving provision of public facilities and services in rural areas involves "utility facilities necessary for public service," a use permitted outright in an exclusive farm use zone. [192]

In *McCaw Communications v. Marion County*, the Oregon Court of Appeals did not determine whether a use was urban or rural, but interpreted the term "necessary" in context with the state policy of preserving farmland.[193] The court wrote:

> We conclude that, for a "utility facility" to be permitted under section 137.020(d), the applicant must establish and the county must find that it is necessary to situate the facility in the agricultural zone in order for the service to be provided.[194]

LCDC codified the *McCaw Communications* interpretation of the phrase "utility facilities necessary for public service."[195]

In 1995, the legislature amended the statutes permitting non-farm uses in Exclusive Farm Use zones to allow "the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way."[196] Under this legislation, utility facilities so located are not otherwise subject to a "necessity" analysis under the statutes and LCDC rules, nor are they subject to any limitations under various Goal 11 administrative rules such as those applicable to sewer or water line extensions.

However, the 1999 Oregon Legislature provided for a uniform method of determining whether a public utility facility is "necessary" in an Exclusive Farm Use zone[197] to enable facility installation in those cases where non-resource or urban lands were not available to

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191. *See generally* Sullivan & Solomou, *supra* note 13.

192. *See* OR. REV. STAT. § 215.213(1)(c) (1995); OR. REV. STAT. § 215.283(1)(c) (2011).

193. 773 P.2d 779, 781 (Or. Ct. App. 1989).

194. *Id.*; *see also* Dayton Prairie Water Ass'n v. Yamhill Cnty., 11 P.3d 671, 672 (Or. Ct. App. 2000).

195. *See* OR. ADMIN. R. 660-033-0130(16) (2000).

196. OR. REV. STAT. §§ 215.213(1)(k), .283(1)(i) (1995).

197. *See* OR. REV. STAT. § 215.275 (2011).

accommodate those utility facilities.[198]

The Court of Appeals applied the new statute for the first time in *Sprint PCS v. Washington County*,[199] in which it concluded:

> What the statutory phrase "reasonable alternatives" means presents a question of statutory interpretation, and we begin with the text and context of that phrase. As noted, ORS 215.275(1) provides that a utility facility is "necessary for public service" within the meaning of ORS 215.283(1)(d) "if the facility must be sited in an

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198. OR. REV. STAT. § 215.275 (2011). The legislature provided, in relevant part:

> (1) A utility facility established under ORS 215.213 (1)(c) or 215.283 (1)(c) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
>
> (2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c) or 215.283 (1)(c) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
>
> (a) Technical and engineering feasibility;
>
> (b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
>
> (c) Lack of available urban and nonresource lands;
>
> (d) Availability of existing rights of way;
>
> (e) Public health and safety; and
>
> (f) Other requirements of state or federal agencies.
>
> (3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.

Id.

199. 63 P.3d 1261, 1265–66 (2003). The Court noted that LUBA had dealt with the interpretation matter earlier in *City of Albany v. Linn County,* 40 Or. LUBA 38, 51 (2001), and agreed with LUBA's interpretation. *Id.* at 1265. In *City of Albany v. Linn County,* the city viewed "necessary for public service" factors as applying only to the proposed Exclusive Farm Use ("EFU") location, believing that, if the factors were present, the facility could be placed on the EFU site without further analysis. 40 Or. LUBA at 51. However, LUBA explained that the primary focus of those statutory factors will often be on alternative non-EFU locations. *Id.* at 51 n.10. If those factors are present, they would often disqualify potential alternative sites. Therefore, to approve the location of a utility facility on EFU land, the county must first consider any reasonable alternatives on non-EFU lands, then determine that the proposed EFU-zoned site must be used because the non-EFU alternative sites cannot be used based on one or more of the factors articulated in section 215.275(2) of the Oregon Revised Statutes. *Id.*

> exclusive farm use zone in order to provide the service." ORS 215.275(2) sets out what an applicant must demonstrate (and what a local government may consider) in determining whether a "utility facility" is necessary. The applicant must demonstrate that "reasonable alternatives have been considered" and that, despite those possible alternatives, the facility must be sited in an EFU zone "due to one or more of the following [six] factors." ORS 215.275(2). Put another way, the factors set out in ORS 215.275(2) identify the reasons why potentially reasonable alternatives to siting the facility on EFU land may be rejected. The question, of course, remains what constitutes a "reasonable alternative" that utilities must and counties may consider.[200]

The 1999 Legislature further amended certain farm zone statutes to allow wetland waste treatment systems, but to disallow commercial facilities built for the purpose of generating electrical power, and transmission towers over 200 feet in height.[201] The legislature created the new standards for the provision of other utility facilities in farm zones, such as fire service facilities for rural fire protection, irrigation canals, utility facility service lines, structures, and accessory operation facilities.[202]

3. Unincorporated Communities

Since 1994, Oregon has recognized the existence of unincorporated communities outside cities and their urban grown boundaries. Goal 14 was revised in that year and provides for the continued existence and possible expansion of those communities outside urban growth boundaries.[203] The goal allows counties to approve, on lands outside urban growth boundaries, uses and public facilities and services that are more intensive than would be allowed by Goals 11 and 14. Counties may approve such uses either through the exception process or as provided by certain LCDC rules ensuring the more intensive uses have no adverse effect on agricultural or forest operations, nor interfere with the function of urban growth

200. *Sprint PCS*, 63 P.3d at 1265–66.

201. OR. REV. STAT. §§ 215.213(1)(c), .283(1)(c) (1999).

202. *See* Keicher v. Clackamas Cnty., 39 Or. LUBA 521, *aff'd*, 29 P.3d 1155 (Or. Ct. App. 2001).

203. *See Rural Development in Oregon*, DEP'T OF LAND CONSERVATION & DEV., http://cms.oregon.gov/LCD/pages/ruraldev.aspx.

boundaries.[204] This was a practical solution for a difficult problem pitting lawfully existing communities against a system that would not allow further expansion of those communities, thereby endangering their future. The rules allow for limited expansion and development in communities that would not otherwise have been permitted by Goals 11 and 14, and allow those activities in accordance with the classification of the community (e.g., resort, rural, rural center, urban).[205]

D. Annexations to Cities

Annexation is the process of changing municipal boundaries to bring in adjacent unincorporated areas into an existing city, typically to provide urban services not presently available.[206] Either a city or property owner may initiate such action.[207] Annexations are frequently controversial and often deal with land use criteria.

In an early case involving an annexation to the City of Klamath Falls, the Court of Appeals found that annexations of land, occurring before a local government was acknowledged to be in compliance with the Statewide Planning Goals, are a significant land use action justifying review against those goals.[208] The Court of Appeals later required that the goals be applicable to annexation proceedings and that governmental approval of annexations before acknowledgment must be shown by adequate findings.[209] From that point forward, it was clear that the goals must be applied to annexations, either directly or through acknowledged comprehensive plans.[210]

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204. OR. ADMIN. R. 660-022-0000 to -0070.

205. *See* OR. ADMIN. R. 660-022-0010 (1997) (current) (articulating definitions); OR. ADMIN. R. 660-022-0030 (2005) (current), -0040 (2006) (current).

206. *See, e.g.*, *Planning and Sustainability: Annexation*, CITY OF PORTLAND, http://www.portlandoregon.gov/bps/article/363163 (last visited Apr. 25, 2013).

207. *Id.*

208. Petersen v. Mayor and Council of the City of Klamath Falls, 566 P.2d 1193, 1196–97 (Or. 1977).

209. Norvell v. Portland Metro. Area Local Gov't. Boundary Comm'n, 604 P.2d 896 (Or. Ct. App. 1979); *see also* Stewart v. City of Corvallis, 617 P.2d 921 (Or. Ct. App. 1980) (determining that, even if a proposed annexation were consistent with a local comprehensive plan, there was no basis to require that annexation occur if the City required voter approval of annexations, at least in the absence of a plan requirement to that effect).

210. OR. REV. STAT. § 197.251 (2011). After acknowledgment, the goals, as independent criteria, "drop out" of the review process. *Id.* The theory is that the goals have been incorporated in the local plan and land use regulations and it would be superfluous to review them under those standards. In a decision issued shortly after the Supreme Court decided the *Petersen* case, the Oregon Court of Appeals affirmed LCDC dismissal of

That point was revisited in *Perkins v. City of Rajneeshpuram*,[211] where it was undisputed that the city's challenged action would indeed convert rural agricultural land to "urban uses."[212] The city annexed and zoned land to "permit urban development," relying on the fact that the land was within an urban growth boundary that the city had adopted, but that LCDC had not yet acknowledged.[213] The Supreme Court held that "the city was required to comply with Goal 14 either by (1) meeting its requirements, or (2) following the exceptions procedure and adopting an exception to the goal."[214] The court noted the Goal 14 provision that once an urban growth boundary is "established," the land included within it is "urbanizable" and "available over time for urban uses."[215] It rejected the argument that the city's urban growth boundary became "established" when the city adopted it, and held that no urban growth boundary is established until LCDC has acknowledged it.[216]

Since state law requires local governments to "make land use decisions . . . in compliance with the goals" until LCDC acknowledges their comprehensive plans,[217] the city was required either to comply with each pertinent goal (including, of course, Goal 11) or adopt an exception to that goal.[218] Guided by the Goal 14 policy to provide for an orderly and efficient transition from rural to urban use, the court found that the establishment of the urban growth boundary achieves this purpose.[219] Urbanization may occur within an adopted urban growth boundary only after the local government gives consideration to the factors for establishment of that boundary set forth in Goal 14, and, subsequently, after the plan has been acknowledged by LCDC.[220] It also appears that Goal 11 directly applies before acknowledgment, and may be read as prohibiting installation or extension of urban levels of public facilities and

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objections to an annexation because the goals were not specifically addressed, finding that the applicable goals were "properly considered" in an annexation proceeding. Rivergate Residents Ass'n v. Land Conservation & Dev. Comm'n, 590 P.2d 1233, 1238 (Or. Ct. App. 1979).

211. 706 P.2d 949 (Or. 1985).

212. *Id.* at 955.

213. *Id.* at 950–52.

214. *Id.* at 956.

215. *Id.* at 953.

216. *Id.* at 953.

217. OR. REV. STAT. § 197.175 (2)(c) (2011).

218. *Perkins*, 706 P.2d at 956.

219. *Id.* at 955.

220. *Id.* at 955–56.

services before LCDC acknowledges the local plan and regulations.[221]

Following acknowledgment of all cities and counties by 1986, the focus on land use review of annexations largely shifted to applicable local planning and zoning criteria.[222] That shift is illustrated by a spate of cases challenging annexations, plan amendments, and rezoning in Lebanon, Oregon.[223] While the goals were applicable to any plan amendment and zone changes, these cases were contested and decided on non-goal grounds, such as the interpretation of applicable plan policies. The principal case, *Just v. City of Lebanon*,[224] concerned the City of Lebanon's decision to annex several parcels of property and to apply particular zoning designations to those properties. Neither Goal 11 nor Goal 14, which were applicable, was discussed.[225] Rather, LUBA remanded the city's annexation and rezoning decisions for failure to comply with its plan policies.[226] Because annexations are usually based on fidelity to plans that must have housing inventories[227] or inventories of available

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221. OR. ADMIN. R. 660-015-0000(11) (2008).

222. Following the *Petersen* decision, 566 P.2d 1193, the Oregon legislature amended section 197.175 to include annexation as a specific "planning and zoning" responsibility to which the Goals applied, either directly or through acknowledged comprehensive plans and land use regulations. *See* Act of July 1, 1977, ch. 664, 1977 Or. Laws 598 § 12.

223. *See* Barton v. City of Lebanon, 88 P.3d 323 (Or. Ct. App. 2004); Just v. City of Lebanon, 88 P.3d 307 (Or. Ct. App. 2004) [hereinafter *Just I*]; Just v. City of Lebanon, 88 P.3d 312 (Or. Ct. App. 2004) [hereinafter *Just II*]; Just v. City of Lebanon, 88 P.3d 322 (Or. Ct. App. 2004) [hereinafter *Just III*]; Just v. City of Lebanon, 88 P.3d 936 (Or. Ct. App. 2004) [hereinafter *Just IV*]; Just v. City of Lebanon, 88 P.3d 937 (Or. Ct. App. 2004) [hereinafter *Just V*]. Each of the *Just* cases begins with this paragraph:

> This judicial review is one of five concerning the City of Lebanon's decisions to annex several pieces of property and to apply particular zoning designations to those properties. James Just appealed four of the annexation and zoning decisions to the Land Use Board of Appeals (LUBA), and Friends of Linn County appealed the fifth. [the *Barton* case, above.] In each of the five cases, LUBA remanded the annexation and zoning designation because it concluded that the city had failed to meet certain annexation criteria in its comprehensive plan. Although each of the city's decisions concerned a different piece of property, the challenges to LUBA's remand in each of the five review proceedings is [sic] similar.

Just I, 88 P.3d at 308.

224. 45 Or. LUBA 179, 193, *aff'd*, 88 P.3d 312 (Or. Ct. App. 2004).

225. *Id.*

226. *Just I*, 88 P.3d at 308–12.

227. OR. ADMIN. R. 660-015-0000(10) (2008) (Statewide Planning Goal 10), *available at* http://www.oregon.gov/LCD/docs/goals/goal10.pdf (last visited Mar. 8, 2013); *see also* OR. ADMIN. R. 660-008-0000 to -0040 (interpreting Goal 10 Housing), *available at* http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_008.html. Goal 10 provides, in relevant part:

commercial and industrial lands,[228] it is more likely that case law relating to public services and facilities issues will develop from litigation over general amendments to the local comprehensive plan, rather than over individual annexations.

A final word on annexations involves limitations on the power of cities to annex land within urban growth boundaries in the face of determined opposition of residents. Thirty-one Oregon cities (about one-eighth of the total number) have adopted requirements that citizens in areas to be annexed be able to vote on that action.[229] The legislature has also intervened to impede the annexation of two urban

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> To provide for the housing needs of citizens of the state.
>
> Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

OR. ADMIN. R. 660-015-0000(10) (2008).

228. OR. ADMIN. R. 660-015-0000(9) (2008) (Statewide Planning Goal 9), *available at* http://www.oregon.gov/LCD/docs/goals/goal9.pdf (last visited Mar. 8, 2013); *see also* OR. REV. STAT. §§ 197.707–.728 (2011); OR. ADMIN. R. 660-009-0000 to -0030 (Economic Development), *available at* http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_009.html. Goal 9 provides, in relevant part:

> To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.
>
> Comprehensive plans and policies shall contribute to a stable and healthy economy in all regions of the state. Such plans shall be based on inventories of areas suitable for increased economic growth and activity after taking into consideration the health of the current economic base; materials and energy availability and cost; labor market factors; educational and technical training programs; availability of key public facilities; necessary support facilities; current market forces; location relative to markets; availability of renewable and non-renewable resources; availability of land; and pollution control requirements.
>
> Comprehensive plans for urban areas shall:
>
> 1. Include an analysis of the community's economic patterns, potentialities, strengths, and deficiencies as they relate to state and national trends;
>
> 2. Contain policies concerning the economic development opportunities in the community;
>
> 3. Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies;
>
> 4. Limit uses on or near sites zoned for specific industrial and commercial uses to those which are compatible with proposed uses.
>
> In accordance with ORS 197.180 and Goal 2, state agencies that issue permits affecting land use shall identify in their coordination programs how they will coordinate permit issuance with other state agencies, cities and counties.

OR. ADMIN. R. 660-015-0000(9) (2008).

229. *See* OCVA MEMBER CITIES, OR. COMMUNITIES FOR A VOICE IN ANNEXATION, http://www.ocva.org/annex/cities.html.

areas to their nearest cities.[230] The inability of cities to annex lands within their urban growth boundaries may significantly affect provision of services to those areas and to other areas which depend on the revenues which result from annexation.

E. Extending or Otherwise Providing Urban Services to Rural Areas

1. Formation and Operation of Service Districts

The nature and intensity of facilities and services provided by special districts is often a driving factor in determining whether the level of development in a given area is urban or rural in nature. Because the formation and operation of those districts have a direct impact on land use, these actions often will be the focus of controversy and litigation, including litigation related to competing entities providing the same service or whether service provision outside an urban growth boundary is urban in nature.

Following adoption of the Statewide Planning Goals, the formation of districts providing urban services to areas outside urban growth boundaries is effectively prohibited, absent an exception or compliance with the unincorporated communities rule, as described above. However, the formation of a new service district to serve lands already built or committed to non-resource uses under an acknowledged comprehensive plan would be permitted under the goals.[231] Thus, agreements with nearby municipalities to undertake disposal of sewage waste are similarly permitted.[232] However, these situations require exceptions and are thus not the rule for land use policy in Oregon.

2. Health Hazard Annexations or District Formations

If it be found that a danger to public health exists because of conditions on land outside an urban growth boundary that is otherwise eligible for annexation, and further that such conditions can be removed or alleviated by sanitary, water or other facilities ordinarily

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230. *See* Act of Sept. 2, 2005, ch. 844, vol. 3 2005 Or. Laws 2556; State *ex rel.* Leupold & Stevens, Inc. v. City of Beaverton, 203 P.3d 373 (Or. Ct. App. 2009); Leupold & Stevens, Inc. v. City of Beaverton, 203 P.3d 309 (Or. Ct. App. 2009); Cogan v. City of Beaverton, 203 P.3d 303 (Or. Ct. App. 2009); Act of July 15, 2005, ch. 539, vol. 2, 2005 Or. Laws 1414.

231. Dep't of Land Conservation & Dev. v. Marion Cnty., 23 Or. LUBA 619 (1992).

232. *See* Dep't of Land Conservation & Dev. v. City of Donald, 879 P.2d 229 (Or. Ct. App. 1994); Dep't Land Conservation & Dev. v. Fargo Interchange Serv. Dist., 879 P.2d 224, 129 (Or. Ct. App. 1994).

provided by incorporated cities, that territory may be annexed by passage of an ordinance without any vote in such territory, or any consent by the owners of land therein.[233]

West Side Sanitary District. v. LCDC,[234] addresses the issue of compulsory annexation of a territory to remove a danger to public health. The Oregon Supreme Court held that the determination by the Health Division on the annexation proposal was made with regard to "a fundamental concern for public safety and public health"[235] mandated by state law and, therefore, was not an action "with respect to programs affecting land use" to which Goal 11 was applicable. In short, Goal 11 does not apply to annexations that the Health Division orders for purposes of alleviating a danger to public health. The Court concluded that the legislature did not intend that the Health Division consider planning goals when it determines whether a health hazard exists.[236]

3. Legislation Requiring Financial Report for Incorporation of Cities or Formation of Special Districts

Oregon statutory law contains requirements generally applicable to all special district boundary changes.[237] A "boundary change" includes the formation, annexation, or withdrawal of territory to or from a special district, or the merger or consolidation of such territory. To form a special district, an economic feasibility statement must be completed.[238] Similarly, in the formation of a new city an economic feasibility statement is required.[239] Presumably that statement will provide decision-makers and voters with sufficient information to determine whether the city should be incorporated or the district should be formed.

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233. OR. REV. STAT. § 222.855 (2011). *See generally* OR. REV. STAT. §§ 222.840–.915 (2011).

234. W. Side Sanitary Dist. v. Land Conservation & Dev. Comm'n, 614 P.2d 1148 (Or. 1980) [hereinafter W. Side Sanitary I].

235. *Id.* at 1151; *see also* W. Side Sanitary Dist. v. Land Conservation Dev. Comm'n, 614 P.2d 1141 (Or. 1980) [hereinafter W. Side Sanitary II].

236. *W. Side Sanitary I*, 614 P.2d at 1151.

237. OR. REV. STAT. §§ 198.705–.955 (2011); OR. REV. STAT §§ 198.705(8)(a)–(d) (2011) (listing the covered districts).

238. OR. REV. STAT. § 198.749 (2011); *see also* OR. REV. STAT. §§ 199.476, .522 (2011).

239. OR. REV. STAT. §§ 221.034, .036 (2011).

4. Extensions of Services to Rural Areas

Goal 11 and its implementing administrative rule generally prohibit extending sewer lines from within urban growth boundaries to serve land outside those boundaries.[240] A sewer system may be extended outside the urban growth boundary when the local government approves a "reasons" exception to Goal 11, subject to land use regulations that "prohibit the sewer system from serving any uses or areas other than those justified in the exception."[241] The rule also provides an example of one reason that might justify an exception to Goal 11, which is to "avoid an imminent and significant public health hazard."[242] From its earliest decisions interpreting the scope of a lawful "reasons" exception, LUBA has made it clear that such a health hazard exception is a rarely recognized means by which a local government can approve an extension of sewer facilities outside an urban growth boundary.[243]

Todd v. City of Florence[244] involved an appeal of a municipal ordinance amending a comprehensive plan and adopting a Goal 11 exception in order to extend municipal sewer services outside the urban growth boundary onto tribal trust land.[245] Petitioner asserted that the city erred in considering the "proposed use" to be the sewer extension itself, rather than the casino, hotel, and other development that the sewer system would serve.[246] Petitioner's argument was that

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240. OR. ADMIN. R. 660-015-0000(11) (2008) (implementing the goal of prohibiting the extension of a sewer system outside an urban growth boundary except in limited circumstances).

> Local Governments shall not allow the establishment or extension of sewer systems outside urban growth boundaries or unincorporated community boundaries, or allow extensions of sewer lines from within urban growth boundaries or unincorporated community boundaries to serve land outside those boundaries, except where the new or extended system is the only practicable alternative to mitigate a public health hazard and will not adversely affect farm or forest land.

Id.

241. OR. ADMIN. R. 660-011-0060(9) (2008) (current).

242. OR. ADMIN. R. 660-011-0060(9)(a) (2008).

243. Baxter v. Coos Cnty., 58 Or. LUBA 624 (2009); Oregon Shores Conservation Coalition v. Coos Cnty., 55 Or. LUBA 545, 558–62 (2008); Todd v. City of Florence, 52 Or. LUBA 445, 452–58 (2006); Wood v. Crook Cnty., 49 Or. LUBA 682, 694–95 (2005); *see also* Friends of Benton Cnty. v. Benton Cnty., 12 Or. LUBA 160 (1984). These are representative cases preceding the adoption of the 2008 version of Oregon Administrative Rule 660-011-0060.

244. Todd v. City of Florence, 52 Or. LUBA 445 (2006).

245. *See* OR. ADMIN. R. 660-004-0020 (2004).

246. *Todd,* 52 Or. LUBA at 445.

the statutory requirements for a goal exception[247] directed the city to evaluate whether the development that would be served by the extended sewer system could be accommodated within the urban growth boundary or other areas not requiring an exception. The city's response was that, for purposes of a Goal 11 exception, the "proposed use" is the public facility itself, rather than any development that the facility might serve, i.e., the casino, which was on tribal land and not subject to the state's planning regime.

In remanding the city's decision, LUBA found that the city was required by statute to evaluate both the "proposed use" and any public facilities planned to serve that use.[248] The city's analysis should have included the sewer system extension and the casino, hotel, and other development to be served by that extension. LUBA reasoned that an evaluation considering only the compatibility of public facilities with adjacent uses, rather than also considering the uses to be served by those facilities, made little sense "because typically it is the land use that impacts adjacent uses, not the public facilities that may serve those uses."[249] The "proposed use" and the public facilities established or extended pursuant to a Goal 11 exception must be evaluated separately; thus, the city erred in its analysis by treating the proposed facility extension as the "proposed use."

Todd also addresses the sufficiency of the city's Goal 11 "reasons" exceptions for extending the municipal sewer system. Petitioner challenged the city's findings that there was a "demonstrated need for the proposed use or activity," and that the "proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."[250] Among the reasons set out in the city's findings were the expense of upgrading the existing sewer system and the potential for "health hazards" resulting from having two independent sewer systems. LUBA agreed with Petitioner that cost-effectiveness alone was insufficient to justify a Goal 11 exception.[251] Indeed, LUBA stated its belief that, while the "imminent health hazard" reason set out in the

247. *See* OR. ADMIN. R. 660-004-0020(2)(b)–(d) (2004).

248. *Todd,* 52 Or. LUBA at 455; *see also* OR. ADMIN. R. 660-004-0020(2)(b)(B)(iv) (2004).

249. *Todd*, 52 Or. LUBA at 452–57.

250. *Id.* at 458; *see also* OR. ADMIN. R. 660-004-0022(1)(a), (c) (2004).

251. *Todd,* 52 Or. LUBA at 463.

statute is non-exclusive,[252] LCDC intended that other "reasons" exceptions to Goal 11 be similarly dire.

LUBA found that the city's findings for the necessity of an extension of its sewer system to reduce health hazards were not supported by substantial evidence; however, other unique factors present in the case, specifically the property owners' legal right and practical ability to develop the tribal lands with urban uses served by urban-level facilities without obtaining local land use approval, constituted a sufficient "reason" under the rule to justify a Goal 11 exception.[253] LUBA found that Goal 11's underlying policy was not compromised by the city allowing a single sewer system to serve two adjoining areas where both areas had the right and ability to develop urban-level uses and services, notwithstanding that one area was within an urban growth boundary and the other was outside it.[254] Because the property owners had those rights and abilities (and, in fact, had already done so), "the evil that the Goal 11 prohibition is intended to prevent—proliferation of urban uses in rural areas caused by the availability of urban-level services extended from urban growth boundaries—is not implicated."[255]

In 2003, LUBA again addressed the sufficiency of findings to support a "reasons" exception to Goals 11 (and 14), this time in the context of a proposed destination speedway use in Eastern Oregon.[256] LUBA first determined that the applicable administrative rules[257] are

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252. *Id.* at 563; *see also* OR. ADMIN. R. 660-011-0060(9)(a) (2005).

253. *Todd,* 52 Or. LUBA at 466–67.

254. *Id.* at 467.

255. *Id.*

256. Doherty v. Morrow Cnty., 44 Or. LUBA 141 (2003).

257. *Id.* at 153; *see also* OR. ADMIN. R. 660-014-0040(2), (3) (2005) (current), *available at* http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_014.html. The rule provides, in part:

> (2) A county can justify an exception to Goal 14 to allow establishment of new urban development on undeveloped rural land. Reasons that can justify why the policies in Goals 3, 4, 11 and 14 should not apply can include but are not limited to findings that an urban population and urban levels of facilities and services are necessary to support an economic activity that is dependent upon an adjacent or nearby natural resource.
>
> (3) To approve an exception under section (2) of this rule, a county must also show:
>
> (a) That Goal 2, Part II (c)(1) and (c)(2) are met by showing that the proposed urban development cannot be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development in existing rural communities;
>
> (b) That Goal 2, Part II (c)(3) is met by showing that the long-term

essentially the relevant criteria for a Goal 11 exception to allow urban-level uses and public facilities on rural agricultural lands.[258] LUBA then noted that, by providing only one non-exclusive example of a justifiable exception (i.e., "findings that an urban population and urban levels of facilities and services are necessary to support an economic activity that is dependent upon an adjacent or nearby natural resource"), the rule did not place any clear limits on the scope of other reasons that a local government may rely on to justify the exception.[259] Indeed, all of the reasons cited by the county in its decision to justify the goal exceptions, then, were at least potentially valid under the rule.[260]

LUBA held that findings establishing that the proposed speedway must be located centrally in its market area, that it would create significant economic benefits for the area, and that the speedway has characteristics that make locating it within the urban growth boundary an unreasonable alternative are sufficient reasons to

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> environmental, economic, social and energy consequences resulting from urban development at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on other undeveloped rural lands, considering:
>
> (A) Whether the amount of land included within the boundaries of the proposed urban development is appropriate, and
>
> (B) Whether urban development is limited by the air, water, energy and land resources at or available to the proposed site, and whether urban development at the proposed site will adversely affect the air, water, energy and land resources of the surrounding area.
>
> (c) That Goal 2, Part II (c)(4) is met by showing that the proposed urban uses are compatible with adjacent uses or will be so rendered through measures designed to reduce adverse impacts considering:
>
> (A) Whether urban development at the proposed site detracts from the ability of existing cities and service districts to provide services; and
>
> (B) Whether the potential for continued resource management of land at present levels surrounding and nearby the site proposed for urban development is assured.
>
> (d) That an appropriate level of public facilities and services are likely to be provided in a timely and efficient manner; and
>
> (e) That establishment of an urban growth boundary for a newly incorporated city or establishment of new urban development on undeveloped rural land is coordinated with comprehensive plans of affected jurisdictions and consistent with plans that control the area proposed for new urban development.

OR. ADMIN. R. 660-014-0040(2), (3) (2005) (current).

258. *Doherty,* 44 Or. LUBA at 153.

259. *Id.* at 154.

260. *Id.*

allow a Goal 11 exception.[261] However, the county conceded error on its failure to provide findings adequate to justify siting the speedway lodgings on the property, and the case was remanded for further proceedings.[262] Because the legislature intervened and enacted special legislation to provide for the speedway, the Goal 11 issues were never fully explored.[263]

When a local government adopts a Goal 11 exception to extend a sewer system outside an urban growth boundary, LCDC requires that it also adopt land use regulations that prohibit the proposed sewer system from serving other uses or areas outside those justified in the exception.[264] To meet this requirement, DLCD recommends that the exception statement: (1) "be tied to a map that is referenced in the plan," (2) "be clear as to the types of uses or activities that will be served by urban services," and (3) be clear about how these services will be limited.[265] Furthermore, the exception statement "could be linked to a land use or master plan" that identifies uses to be served by the city's services.[266] In *Todd*, petitioner argued that the city's plan amendment did not limit the uses or types of uses on the property only to those justified in exception. Nor was it linked to a land use or master plan, as DLCD recommended. Petitioner contended (and LUBA agreed) that, regardless of whether the city was able to impose land use regulations over the tribal property, the rule required the city to adopt necessary measures to prohibit the extended sewer system from serving uses or areas that were not justified in the exception.[267]

In addition to rules governing extensions of sewer systems, there is a specific administrative rule to govern extensions of water lines to rural lands.[268] Despite an extension of water service to rural lands, a Goal 11 challenge will not be sustained under the rule if the extension does not allow for more increased density than would otherwise exist. In *Holloway v. Clatsop County*,[269] LUBA considered whether a county decision to change its comprehensive plan and zoning map designations for an unincorporated area outside an urban growth

261. *Id.* at 170.
262. *Id.* at 171.
263. *See* OR. REV. STAT. §§ 197.430–.434 (2003).
264. OR. ADMIN. R. 660-011-0060(9) (2008).
265. *Todd*, 52 Or. LUBA at 467.
266. *Id.* (internal quotations omitted).
267. *Id.* at 468–69.
268. *See* OR. ADMIN. R. 660-011-0065 (1998) (current).
269. 52 Or. LUBA 644 (2006), *aff'd without opinion* 151 P.3d 960 (Or. Ct. App. 2007).

boundary to allow residential development with a two-acre minimum lot size violated Goal 11's prohibition against local governments allowing increased residential development density outside an urban growth boundary on the basis that a community water system is present. LUBA held that the goal was not violated because the lot size change was not the result of a community water system being available, and the same number of lots would be available whether those lots were served by the community water system or individual wells.[270] The water system selected to serve those properties would have no impact on the density of the development—the same number of lots would be permitted in either case.

Similarly, the Court of Appeals in *DLCD v. Lincoln County*[271] held that local governments may approve development projects that allow greater density so long as the increased density is not the result of the establishment or extension of a water system, and, instead, is based on already existing water systems or connections to those systems.[272] In *Lincoln County*, DLCD challenged the county's approval of a 113-lot Planned Unit Development on land in a rural residential zone, contending that the approval violated Goal 11's prohibition on higher residential densities resulting from new or extended water systems.[273] In its decision to approve the development, the county concluded that the greater densities under the ordinance, which were required by the proposed development, were permissible because the subject property was located in, and could be served by, the existing water district's system.[274]

The court in *Lincoln County* evaluated the meaning of the terms "establishment" and "extension" as those terms are used in the goal. DLCD argued that "establishment" includes already existing water systems, while the county asserted that the term refers only to the creation of new systems.[275] Additionally, the parties disagreed over the meaning of the term "extension." DLCD contended that the term "extension" includes connections to individual lots within the existing service area.[276] However, the county asserted that the term refers only

270. *Holloway,* 52 Or. LUBA at 651–52.
271. 925 P.2d 135 (Or. Ct. App. 1996).
272. *Id.* at 139–40.
273. *Id.* at 136.
274. *Id.* at 138.
275. *Id.* at 138.
276. *Id.*

to physical expansions of the service areas or major facilities of existing systems.[277] The court agreed with the county's interpretation of both terms.[278] Thus, because the density of the proposed development did not result from the "establishment or extension of a water system," the county's decision did not violate the 1994 amendment to Goal 11 regarding extension of sewer and water facilities outside urban growth boundaries.

In 1998, DLCD promulgated two rules implementing the specific goal provisions concerning sewer and water systems. With regard to sewer systems, the text of the goal and the first rule prohibit the establishment or extension of a sewer system to serve land outside of an urban growth boundary, unless there is an exception to Goal 11.[279] With regard to water systems, the 1994 revisions to the goal and the pertinent rule[280] do not categorically prohibit the

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277. *Id.*

278. *Id.* at 139; *see also* DeShazer v. Columbia Cnty., 34 Or. LUBA 416, 421–22 (1998).

279. OR. ADMIN. R. 660-011-0060 (2008). As relevant, subsection (2) of this rule provides:

> Except as provided in sections (3), (4), (8), and (9) of this rule, and consistent with Goal 11, a local government shall not allow:
>
> (a) The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries;
>
> (b) The extension of sewer lines from within urban growth boundaries or unincorporated community boundaries in order to serve uses on land outside those boundaries;
>
> (c) The extension of sewer systems that currently serve land outside urban growth boundaries and unincorporated community boundaries in order to serve uses that are outside such boundaries and are not served by the system on July 28, 1998.

280. OR. ADMIN. R. 660-015-0000(11) (1994). The 1994 amendment, among other things, added the following paragraph and definition to the goal: "For land that is outside urban growth boundaries and unincorporated community boundaries, county land use regulations shall not rely upon the establishment or extension of a water system to authorize a higher residential density than would be authorized without a water system." *Id.*; *see also* OR. ADMIN. R. 660-011-0065(2) (1998) (current). Subsection (2) of that rule provides, in relevant part:

> Consistent with Goal 11, local land use regulations applicable to lands that are outside urban growth boundaries and unincorporated community boundaries shall not:
>
> (a) Allow an increase in a base density in a residential zone due to the availability of service from a water system;
>
> (b) Allow a higher density for residential development served by a water system than would be authorized without such service; or
>
> (c) Allow an increase in the allowable density of residential development due to the presence, establishment, or extension of a water system.

establishment or extension of water systems to serve land outside of an urban growth boundary.[281]

In *Foland v. Jackson County*,[282] the Court of Appeals held that Goal 11's prohibition on the extension of city water services to serve an urban use on rural land without an exception required ODOT to obtain an exception before extending water services to an interstate highway rest area on land that was zoned for Exclusive Farm Use.[283] In its discussion of the policies and provisions of Goal 11, the court distinguished between "sewer system" and "water system." The court saw Goal 11 as expressly contemplating the regulation of two distinct types of public facilities and services: sewer systems and water systems. In this case an exception to both Goals 11 and 14 was necessary to extend the water line to a highway rest stop.[284]

As opposed to annexations, extensions of service issues more often arise with individual land use actions than in policy amendments to public facility or comprehensive plans. As such, they will come before LUBA more frequently. Decisions in these higher visibility cases will assist planners and practitioners in providing guidance to policy makers.

F. The Goal 14 Administrative Rule and Provision of Public Services and Facilities

In 2006, LCDC adopted administrative rules to deal with establishment and change of urban growth boundaries.[285] The rules resolved some outstanding issues as to the role of public facilities and services in amending urban growth boundaries (in that all such

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281. *See Lincoln Cnty.*, 925 P.2d at 139–40. The Court of Appeals relied on that goal amendment and new rule language to determine the outcome of *Lincoln County*.

282. 243 P.3d 830 (Or. Ct. App. 2010).

283. *Id.* at 830–31.

284. *Id.* The Court concluded by quoting favorably from LUBA's decision:

> [W]here an exception to Goal 14 is required in order to site an urban use on rural land, a corresponding exception to Goal 11 will be required where the intensity of urban use of land requires the provision of public sewage facilities and services for health and safety reasons. In that circumstance, it may well be that the same factors that justify an exception for extending the city's sewer system onto the subject property, or the same factors that justify the Goal 14 exception to site the urban use on rural land, could serve as justification for extending water service onto the property. However, an exception to Goal 11 to extend water service is still required.

Id. at 835–36.

285. OR. ADMIN. R. 660-014-0000 (2006) (current).

boundaries have been established since at least 1986[286]) to assure that those changes are consistent with Goal 11,[287] and the adequacy of new and existing facilities is required in justifying those amendments. The rules thus assure adequate consideration of public facility and service issues in dealing with urbanization.

Thus, if a rural development were not pre-existing and, thus, eligible for a "developed" or "committed" lands exception,[288] or not a designated urban unincorporated community,[289] the only alternative for a local government is to adopt a "reasons" exception to a goal requirement or prohibition. Based on the consideration of four standards, the local government must identify reasons that "justify why the state policy embodied in the applicable goals should not apply."[290]

In this context, the exceptions process deals not only with prohibiting most urban uses on rural lands implemented through an administrative rule that also prohibits allowing "public facilities or services not allowed by the applicable goal" unless a valid exception be taken.[291] The administrative rule also sets out the four factors that

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286. DLCD SCOREBOARD, *supra* note 11. No new cities outside of existing urban growth boundaries have been established since that time.

287. OR. ADMIN. R. 660-024-0040(1), (7), (10) (2012) (current). The last subsection sets out a "safe harbor" by which 25% of residential land needs are presumed to be used for public facilities and services.

288. *See* OR. REV. STAT. §§ 197.732(2)(a), (b) (2011); OR. ADMIN. R. 660-004-0018 (2011) (current).

289. OR. ADMIN. R. 660-024-0000 (2009) (current).

290. *See* Goal 2, Part II(c), *available at* www.oregon.gov/LCD/docs/goals/goal2.pdf; OR. REV. STAT. § 197.732(2) (2011). The four standards provided in the statute are:

> (A) Reasons justify why the state policy embodied in the applicable goals should not apply;
>
> (B) Areas that do not require a new exception cannot reasonably accommodate the use;
>
> (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
>
> (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

OR. REV. STAT. § 197.732(2)(c) (2011).

291. OR. ADMIN. R. 660-004-0020(1) (2011) (current) (referencing Oregon Administrative Rule 660-004-0022(1) (2011) (current), which provides a catch-all provision that applies to uses not specifically provided for in subsequent sections of the rule, Oregon Administrative Rule 660-012-0070 (2006) (current) and Oregon Administrative Rule 660-014-0000 (2006)). This provision includes a non-exhaustive list of reasons why the applicable

must be addressed, each one requiring analysis of the use or proposed use.[292] Among the questions that arise in showing why the proposed use could not reasonably be accommodated in other areas is whether the proposed use can be reasonably accommodated without the provision of a proposed public facility or service.[293] The very posing of such questions underscores the role of infrastructure in land use planning.

IV. INFRASTRUCTURE FINANCING IN OREGON

A. Introduction—Oregon State and Local Government Finance

The State of Oregon does not have a sales tax and relies primarily on personal income taxes (ranging from 5–11% of adjusted gross income), corporate income taxes (ranging from 6.6 –7.9% of taxable business income), property taxes and gasoline taxes.[294] The principal source of revenue for local governments is the property tax.[295] In 2011–12, 1300 public school entities, cities, counties and special districts collected $5.1 billion in property taxes to finance local construction, maintenance, and program operations.[296] In this Part, we limit our discussion to local government financing of infrastructure that, in the frequent absence of federal or state participation, is the chief means of providing infrastructure funding in Oregon. Omitted as well is a discussion of other methods of raising revenue at the local level that are not related specifically to infrastructure.[297] Local governments may fund infrastructure from

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goals should not apply, including that there is a "demonstrated need" for the proposed use. *Id.*

292. OR. ADMIN. R. 660-004-0020(2) (2011).

293. OR. ADMIN. R. 660-004-0020(2)(b)(B)(iv) (2011).

294. *Oregon's Economy: Revenue and Taxes*, OREGON BLUE BOOK, http://bluebook.state.or.us/facts/economy/revenue.htm.

295. OR. LEGISLATIVE POL'Y & RESEARCH OFFICE, BASICS ABOUT LOCAL IMPROVEMENT DISTRICTS, 3 (1997), *available at* http://www.leg.state.or.us/comm/commsrvs/district.pdf.

296. *Oregon Property Tax Statistics: Fiscal Year 2011–2012*, OREGON DEPARTMENT OF REVENUE 4–5 (2012), http://www.oregon.gov/dor/STATS/docs/303-405-12/property-tax-stats_303-405_2011-12.pdf. The Department reported that school districts composed 42% of the property tax revenue raised, as opposed to community colleges (4%), counties (19%), cities (22%) and special districts (13%). Of these totals, 77% were permanent levies (i.e., authorized, with limited growth, on a permanent basis), while 14% were for bonds for capital improvements, 6% were for "local option levies" (authorized by voters to exceed usual property tax limitations) and 4% was for urban renewal funding. *Id.*

297. Also omitted is a discussion of non-monetary real property exactions which are limited by *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City*

local property taxes; however, demands for other governmental services and state constitutional limits on property taxes[298] frequently require these governments to look for other sources for such funding.

B. Other Methods of Financing Local Infrastructure

In the absence of an adequate revenue stream from the property tax to finance infrastructure capital costs, local governments have turned to other financing alternatives.

1. Bonds

As with most states, Oregon allows local governments to use their borrowing power to raise revenue for capital projects. Cities and counties may issue general obligation bonds (i.e., backed by the full faith and credit of the issuing local government) to fund projects, if the voters approve the bond.[299] Assuming compliance with statutes and a willing electorate, general obligation bonds provide a viable basis for infrastructure funding.

A related alternative is the revenue bond, where repayment comes from a dedicated revenue stream from the facility financed[300] (and is thus dependent on the continuation of that stream, which may involve some amount of risk and uncertainty reflected in the cost of those bonds to local governments).[301] Unless required by a local charter, revenue bonds are not subject to voter approval.

2. Local Improvement Districts

Public improvements may also be financed by those benefitting from those improvements in a specific area, often called a "local

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of Tigard, 512 U.S. 374 (1994).

298. *A Brief History of Oregon Property Taxation*, OREGON DEPARTMENT OF REVENUE 2–4 (2009), www.oregon.gov/dor/stats/docs/303-405-1.pdf. Under Measure 5 (passed in 1990) and Measure 50 (passed in 1997), continuing levies of property taxes were reduced and thereafter limited to $15 per thousand dollars of assessed valuation. *Id.* Growth in assessments was ordinarily limited to 3% per year. *Id.* For many local governments, these revenues were insufficient to maintain public services.

299. OR. REV. STAT. §§ 287A.050–.140 (2008). These statutes limit the amount of such funding to 3% of the value of real property in cities and 2% for counties. *Id.*

300. OR. REV. STAT. §§ 287A.150 (2008).

301. *See The Oregon Transportation Investment Act—How Revenue Bonds Work*, OREGON DEPARTMENT OF TRANSPORTATION, http://www.oregon.gov/ODOT/HWY/OTIA/pages/bonds.aspx.

improvement district."[302] These districts, and the improvements to be financed, may be initiated by petition of property owners or by resolution the local governing body to call for a hearing at which the improvements are specified, an estimate provided, and a proposed assessment against each of the benefitted properties provided.[303] Upon completion of the improvement and transmittal of a second notice, the final costs are assessed against each benefitted property and become a lien on that property.[304] Assuming the governing body meets the procedural standards and has the political will to make the improvement and impose the assessment, the local improvement district is an effective means for providing infrastructure.

3. Systems Development Charges

Another source of infrastructure funding is the statutorily authorized systems development charge ("SDC")[305] to recover some of the capital costs of certain new infrastructure, *viz.* water supply, treatment and distribution, wastewater collection, transmission, treatment and disposal, drainage and flood control, transportation, and parks and recreation.[306] The statutes set parameters for a public process to adopt those charges, including credits for infrastructure provided in excess of that required[307] and prohibit expenditures of the revenues for unauthorized infrastructure or maintenance of authorized

302. OR. REV. STAT. §§ 223.387–.401 (2011).

303. OR. REV. STAT. § 223.389 (2003).

304. OR. REV. STAT. §§ 223.391, .393 (2003); OR REV. STAT. §§ 34.010–.100 (authorizing appeal by writ of review). However, there is a presumption of correctness in favor of the local government, which the petitioner must overcome. *See* Chrysler Corp. v. City of Beaverton, 549 P.2d 678, 680–81 (Or. Ct. App. 1976) (citing W. Amusement v. City of Springfield, 545 P.2d 692 (Or. 1976)).

305. OR. REV. STAT. §§ 223.297–.314 (2003) (allowing SDCs to be charged at whatever amount can be justified by a methodology in a study or report which can support it). The 2012 Portland, Oregon charges are eye-watering. *See System Development Charges*, CITY OF PORTLAND OREGON DEVELOPMENT SERVICES CENTER, http://www.portlandonline.com/bds/index.cfm?c=36542&a=166412. However, methodologies based on the number of workers are prohibited. OR. REV. STAT. § 223.301 (2003).

306. OR. REV. STAT. § 223.299 (2003). Before the preemptive legislation, local governments had much more leeway in establishing and collecting such charges, and those exercises were normally upheld by the courts. Robert Randall Co. v. City of Beaverton, 682 P.2d 818, 819–20 (Or. Ct. App. 1984); Or. State Homebuilders v. City of Tigard, 604 P.2d 886 (Or. Ct. App. 1979), *rev. den.* 288 Or. 527 (1980).

307. OR. REV. STAT. § 223.304 (2003). However, that statute also limits to 60 days the opportunity to challenge a SDC methodology. Rogers Machinery, Inc. v. City of Tigard, 45 P.3d 966, 971 (Or. Ct. App. 2002).

infrastructure.[308] Moreover, the Oregon Supreme Court has determined that legislatively set fees and charges that involve only money are not subject to the heightened scrutiny given exactions of land under *Dolan v. City of Tigard*[309] but given deference by the courts.[310]

Oregon has made it more difficult to challenge systems development charges because their establishment is excluded from the category of "land use decisions" that may more easily be challenged at LUBA.[311] Unless the charge is not part of a previously adopted schedule of charges, it will likely be challengeable only by a circuit court action.

4. Construction Excise Taxes for Schools

In 2007, the Oregon legislature authorized local governments to collect an excise tax on construction to provide funds for school districts.[312] Under the legislation, the tax is not to exceed $1.00 per square foot of residential construction and $.50 per square foot of nonresidential construction (but not more than $25,000 per permit or structure, whichever is less).[313] The net revenues to the school districts are to be used only for specified "capital costs"[314] and must

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308. OR. REV. STAT. §§ 223.297, .302, .307 (2003).

309. 512 U.S. 374 (1994).

310. *Rogers Machinery*, 45 P.3d at 978–82.

311. OR. REV. STAT. §§ 223.314 (2003). The Oregon Court of Appeals had previously determined that such actions were "fiscal decisions," exempt from LUBA review; however, the Oregon Supreme Court took review and dismissed, declining to give its views in light of a changed appellate system. State Hous. Council v. City of Lake Oswego, 617 P.2d 655 (Or. Ct. App. 1980), *pet. for rev. den.* 635 P.2d 647 (Or. 1981).

312. OR. REV. STAT. §§ 320.170–.189 (2007).

313. OR. REV. STAT. §§ 320.176(1), (2) (2007). Subsection (3) allows for increase in the rates in accordance with a construction price index.

314. OR. REV. STAT. § 320.176(1) (2007). "Capital improvements" do not include routine maintenance costs, but may include:

> (A) The acquisition of land;
>
> (B) The construction, reconstruction or improvement of school facilities;
>
> (C) The acquisition or installation of equipment, furnishings or other tangible property;
>
> (D) The expenditure of funds for architectural, engineering, legal or similar costs related to capital improvements and any other expenditures for assets that have a useful life of more than one year; or
>
> (E) The payment of obligations and related costs of issuance that are issued to finance or refinance capital improvements.

OR. REV. STAT. § 320.183(3) (2007).

be based on a capital improvements plan.[315]

5. Urban Renewal Funding

Subject to its own statutory peculiarities, urban renewal funding in Oregon works as it would in other states. An urban renewal agency may be authorized by the governing body of a city or county to meet the problems of "blighted areas."[316] Once created, Oregon requires these agencies to undertake planning for the area, including land acquisitions, infrastructure provision and project development.[317] The discussion of urban renewal in this context is limited to that involving "tax increment financing," a process which allows for urban renewal bonds to be issued for agency obligations and repaid through a division of property taxes.[318]

Under the "tax increment financing" system, property taxes do not increase with respect to increases in property value presumably caused by the urban renewal improvements; instead the increment over the values as existed when the plan was adopted and bonds were authorized "freezes" for purposes of inclusion in all property taxes, so that other taxable properties must make a higher contribution.[319] But those properties within the urban renewal area do pay property taxes based on their increased value—it's just that the increment of property taxes reflecting that increase are placed in a special fund to pay off the bonds.[320] Given a long period for the urban renewal plan to be realized and the value of improvements to increase, the amounts available for infrastructure are significant.[321]

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315. OR. REV. STAT. § 320.176(2) (2007). Payment of the tax is due when the construction is authorized. OR. REV. STAT. § 320.189 (2009).

316. OR. REV. STAT. §§ 457.010–.320 (2011). The definition of "blighted areas" is complex and courts typically give deference to local government determinations of blight. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).

317. OR. REV. STAT. §§ 457.085–.170 (2011).

318. *Urban Renewal*, OREGON.GOV, http://www.oregon.gov/dor/ptd/Pages/ic_504_623.aspx.

319. *Id.*

320. *Id.*

321. *Adopted Budget: FY2012–2013*, PORTLAND DEVELOPMENT COMMISSION, http://www.pdc.us/Libraries/Budget/PDC_-_Adopted_Budget_-_FY_2012-13_pdf.sflb.ashx. In 2012 for example, the Portland Development Commission, the urban renewal agency for the City of Portland, is projected to raise over $85 million in tax increment, 39% of its budget. $27 million of those funds are allocated to infrastructure. *Id.*

6. Infrastructure-Related Conditions of Approval

Most legal professionals involved in development know that there are constitutional limitations on ad hoc conditions of approval in a quasi-judicial setting. *Dolan v. City of Tigard*[322] requires that those conditions involving real property must be related and "roughly proportional" to the anticipated impacts of the development.[323] As of early 2013, *Dolan* has not been extended to fees or improvement requirements;[324] however, the prospect of such extension is certainly possible.[325] Oregon has also provided a method for challenging any condition of approval on statutory or constitutional grounds, and allows for a successful claimant to receive an award of attorney fees.[326] Even if most applicants do not formally challenge ad hoc conditions, *Dolan* counsels caution in their imposition.

V. CONCLUSION

For forty years, Oregon has combined land use planning with the provision of infrastructure, through the adoption of Statewide Planning Goal 11 and its implementing rules, and through a host of other statutes, goals and rules all tending to assure that the land uses desired by citizens of the state are supported by necessary infrastructure. That relationship is important—development does not follow from public improvement decisions; instead, public improvements follow from, and reinforce, the decisions to plan for land uses. The types and levels of infrastructure also reinforce the division between urban and rural areas, so that public dollars may be spent more wisely. Moreover, the coordination of the plans and actions of those public agencies responsible for supplying infrastructure allow the state to be more competitive in attracting commerce, industry and employment.

Nevertheless, there are a number of troubling aspects regarding the manner in which Oregon handles infrastructure needs:

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322. 512 U.S. 374 (1994).

323. *Id.* at 375.

324. West Linn Corporate Park v. City of West Linn, 240 P.3d 29 (Or. 2010).

325. Koontz v. St. John's Water Mgmt. Dist., 657 F.3d 1341 (Fed. Cir. 2011), *cert. granted*, 133 S. Ct. 420 (2012).

326. OR. REV. STAT. §197.796 (1999). The statute requires that a local government announce the right of a developer to challenge the condition and requires the developer to raise the issue at all levels of a local proceeding.

1. The principal utility of a public facilities plan would normally be in providing for funding and timing of capital improvement projects, both of which are expressly exempt from challenge as "land use decisions,"[327] even though these aspects are critical to realization of any plan, especially in providing services and facilities to urban areas. This lack of review allows state and local decision-makers to avoid responsibility for infrastructure funding decisions.

2. Notwithstanding the financing tools available to local governments, their use may be frustrated in particular circumstances—voters may decline to authorize bonds, landowners may not want a local improvement district, funds may be dedicated to specific uses, a developer may contest infrastructure-related conditions of approval, the electorate may enact local provisions to require a vote before financing is authorized, and the like. This uncertainty is what led to the legislature and LCDC not requiring binding financial commitments for capital improvements; however, the ability to realize the public policy objectives stated in plans is significantly impeded.

3. In most cases, LCDC does not require periodic review of local plans and regulations, despite its stated policy to the contrary.[328] Neither the funding nor the stomach for such review exists, so

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327. *See, e.g.*, Home Builders Ass'n v City of Springfield, 129 P.3d 713 (Or. Ct. App. 2006). The public facilities plan can get some respect, however, if it is the predicate for one or more systems development charges under section 223.309 of the Oregon Revised Statutes. However, a capital improvement or "other comparable plan" may also serve that purpose. Nevertheless, the extensive statements of what is required in a capital facility plan in Oregon Administrative Rule 660-011-0010(1) (1984) are belied by the exemption given in section 197.712(2)(e) of the Oregon Revised Statutes, which provides that "Project timing and financing provisions of public facility plans shall not be considered land use decisions." OR. REV. STAT. § 197.712(2)(e) (2011).

328. OR. REV. STAT. §197.628(1) (2005). This statute provides:

> It is the policy of the State of Oregon to require the periodic review of comprehensive plans and land use regulations in order to respond to changes in local, regional and state conditions to ensure that the plans and regulations remain in compliance with the Statewide Planning Goals adopted pursuant to ORS 197.230, and to ensure that the plans and regulations make adequate provision for economic development, needed housing, transportation, public facilities and services and urbanization.

Id.

that most plans outside the Willamette Valley are outdated and not responsive to infrastructure analysis or provision. Ad hoc legislative measures, including those set out in Part II.D.3–5 above, are no substitute for real infrastructure plans and responsiveness of local governments to commercial and industrial employment concerns.

4. Coordination among state agencies, "coordinators" (i.e., Metro or counties), and those public entities purportedly coordinated leaves a lot to be desired. For the most part, LCDC has not done much to review state agency plans and programs after their initial certification and lacks the will to make or enforce coordination requirements at the local levels. Cities bridle against county supervision of their land use plans and activities. Elected special district governing bodies are reluctant to see their functions (or their corporate lives) superseded by cities. Thus, very little coordination actually occurs.

5. Annexation of urban areas to cities should be encouraged, as cities are the preferred providers of urban services. While it is more convenient to turn a blind eye to the problem as Oregon has done, urban growth boundaries exist to provide urban services in a cost-efficient manner for the annexed areas and those dependent on those annexations to fund infrastructure plans.

Both planning and infrastructure provision in Oregon is still done mostly at the local level, with the state providing policy guidance and, occasionally, funding. In working with a state economic development strategy, local governments must be focused on their plans and regulations so as to be ready to attract economic opportunities and make use of limited local public funds to that end. By taking to heart the words of Goal 11 in the provision of a "timely, orderly and efficient arrangement" of public services and facilities, Oregon can meet its economic development objectives and achieve prosperity in a changing world.