Oregon
Kate Brown, Governor

Department of Land Conservation and Development
635 Capitol Street, Suite 150
Salem, OR 97301-2540
(503) 373-0050
Fax (503) 378-5518
Web Address: http://www.oregon.gov/LCD

DATE: February 23, 2018

TO: The Honorable Michael Dembrow, Chair
Senate Committee on the Environment and Natural Resources

FROM: Ellen Miller, Legislative Coordinator/Urban Policy Analyst
Department of Land Conservation and Development

RE: **House Bill 4031A –A22 Amendment**

Thank you for the opportunity to provide information on – A22 amendment to House Bill (HB) 4031A, which would change the designation of a tract of land located on NE Butteville Road near I-5 Exit 282. The -A22 amendments would redesignate and rezone the tract as rural industrial. The tract is currently zoned exclusive farm use (EFU) and designated as rural reserves by Clackamas County and Metro under ORS 195.141-195.143.

In January 2016 the property owner applied for a zone change from Exclusive Farm Use (EFU) to Rural Industrial (RI) for the 18.25-acre parcel through an exception process with Clackamas County. The Department of Land Conservation and Development (DLCD) was notified of the proposed comprehensive plan amendment and submitted concerns to Clackamas County, see attached letter dated January 8, 2016.

The primary concern was the applicant's reasoning for the exception. The applicant made the case that the property had been "physically developed" to the point that it is no longer available for agricultural uses. The 3.5 acres of farm stand development existing on the site was approved under the existing EFU designation, which disqualifies the development as the justification to a Goal 3 exception. The administrative rule language is clear on this point.

> *Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.(OAR 660-004-0025(2))*

This policy prevents a circumvention of the process to amend a comprehensive plan.

The department is also concerned that the –A22 amendment overrides the local process – undertaken by Clackamas, Multnomah, and Washington counties, and Metro – to designate urban and rural reserves in the region. As the Legislature determined in adopting the framework for urban and rural reserves:

> "(1) Long-range planning for population and employment growth by local governments can offer greater certainty for:
> "(a) The agricultural and forest industries, by offering long-term protection of large blocks of land with the characteristics necessary to maintain their viability; and
> "(b) Commerce, other industries, other private landowners and providers of public services, by determining the more and less likely locations of future expansion of urban growth boundaries and urban development.
> "(2) State planning laws must support and facilitate long-range planning to provide this greater certainty."
> ORS 195.139.

Before designating this area as rural reserves, Clackamas County and Metro undertook substantial analysis and led an extensive public engagement process resulting in a shared vision and certainty for commerce and other industries (including farm and forest operators), providers of public services, and land owners. We believe this consensus plan was a goal and positive outcome of the reserves process and therefore have concerns about requests to the legislature to override that decision.

Thank you for this opportunity to provide you with information about HB 4031A –A22 amendment. If committee members have questions about this testimony, I may be reached at 503-269-2040 or through email at ellen.l.miller@state.or.us.

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Department of Land Conservation and Development
Community Services Division
Portland Metro Regional Solutions Center
1600 SW Fourth Ave., Suite 109
Portland, Oregon 97201
503.725..2183
www.oregon.gov/LCD

January 8, 2016 sent via email

Martha Fritzie, Senior Planner
Clackamas County
150 Beavercreek Road
Oregon City, OR 97045

RE: Zone Change/Comprehensive Plan Amendment
Local file ZO419-15-CP & ZO420-15-ZAP; DLCD file 007-15

Dear Ms. Fritzie,

The department received notice from the county of a Post Acknowledgement Plan Amendment application for a comprehensive plan amendment from Agriculture to Rural Industrial with a zone change from Exclusive Farm Use (EFU) to Rural Industrial (RI) for an 18.25-acre parcel located on NE Butteville Road near I-5 Exit 282 and in designated rural reserves. To satisfy the criteria for this proposed comprehensive plan amendment and zone change, an exception to Statewide Planning Goal 3, Agriculture Lands, is required. As proposed, the department has a few comments on the application, specifically with meeting the exceptions criteria and with taking an exception in designated rural reserves.

Exceptions Criteria
The applicant is proposing an exception to Goal 3 pursuant to the provisions of OAR 660-004-0025.[1] This particular administrative rule allows an exception to an applicable goal in instances where the subject property has been "physically developed" to the point that it is no longer available for uses allowed under that goal. The material submitted for our review indicates that, in this case, about 3.5 acres of the subject property is occupied by pavement and four buildings,

[1] 660-004-0025 provides:
"(1) A local government may adopt an exception to a goal when the land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal. Other rules may also apply, as described in OAR 660-004-0000(1).
"(2) Whether land has been physically developed with uses not allowed by an applicable goal will depend on the situation at the site of the exception. The exact nature and extent of the areas found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception."

The application does not address section (2).

and that all of that development was approved under the county's existing EFU designation that implements Goal 3.

Our first and primary comment on the application is that it relies on uses and development that were approved under the applicable goal as "physical development" to justify an exception to that goal. Development established to conduct a farm stand in an exclusive farm use zone may not be relied on to justify an exception to Goal 3. The administrative rule language is clear on this point. Please see OAR 660-004-0025(2). See also *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995)[2] and *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).[3]

However, even if development on the subject property was *not* allowed by Goal 3, the amount of development present on the subject property is insufficient to demonstrate that it is physically developed to the extent that it is no longer available for uses allowed by the goal. Specifically, only about 20 percent of the subject property is unavailable for cultivated agriculture. As an initial matter, the applicant has not demonstrated – and likely cannot demonstrate – that the developed area is unusable for farm-related or other uses allowed in the EFU zone (such as farm stands). Second, even if the 3.5-acre portion of the property were to be determined to be "physically developed to other uses" it does not necessarily follow that the remainder of the property is so committed.

For the reasons stated above, the proposal fails to satisfy the administrative rule criteria for a "physically developed" exception.

Rural Reserves
In regards to the rural reserves designation, the application states: "Although the property was included as a Rural Reserve area when Clackamas County and Metro adopted the urban-rural reserve designations (URR) for the region in 2011, that designation is not currently in effect due to the still pending remand of the URR decision from the Oregon Court of Appeals and LCDC. Thus, standards for rural reserve areas are not applicable to the review of this application."[4]

The department disagrees with this analysis. Rural reserves have been adopted by Clackamas County via Ordinance ZDO-223 but have not yet been acknowledged because of the remand. To our knowledge Clackamas County has not repealed the ordinance adopting rural reserves; therefore, the reserves are still in place. OAR 660-027-0070(3) provides: "Counties that designate rural reserves under this division shall not amend comprehensive plan provisions or

[2] "The standards for approving a physically developed exception to Statewide Planning Goals 3 and 4 are demanding. The county must find that the property has been physically developed to such an extent that all Goal 3 or 4 resource uses are precluded. Uses established in accordance with the goals cannot be used to justify such an exception." *Sandgren v. Clackamas County*, 29 Or LUBA at 457.

[3] "A local government decision approving a physically developed exception under OAR 660-004-0025 to Goals 3 and 4 will be remanded where the findings do not establish that the property is physically developed with non-resource uses." *DLCD v. Columbia County*, 32 Or LUBA at 226.

[4] Page 8 of the application dated September 30, 2015.

land use regulations to allow uses that were not allowed, or smaller lots or parcels than were allowed, at the time of designation as rural reserves unless and until the reserves are re-designated, consistent with this division, as land other than rural reserves….” The rule goes on to list exceptions to this rule, but none of those exceptions apply in this case. Whether the reserves are acknowledged is immaterial as the county’s adopted reserve designation is still in place. The subject property is not eligible for a Goal 3 exception.

Transportation Facilities
The department has concerns regarding the proposed trip cap of 670 trips per day and whether this will satisfy the requirements of the Transportation Planning Rule (OAR chapter 660, division 12, or TPR). After discussing this issue with ODOT Region 1, the department has some reservations regarding the methodology used for the trip cap. We understand that ODOT has raised these concerns, and we agree that they would need to be addressed. Specifically, the department agrees with ODOT Region 1 that other transportation solutions may be more appropriate to address significant effects as required by OAR 660-012-0060. Should the applicant continue to use a trip cap to address the proposed traffic issue, a revised analysis and methodology to justify a reasonable trip cap number may need to be completed.

Please let me know if you have any questions about the department’s letter. Please submit this letter into the record for this case before the planning commission and any subsequent hearing on the matter.

Regards,

Jennifer Donnelly
Regional Representative/Regional Solutions

cc: DLCD staff
Steve Shipsey, Department of Justice
Gail Curtis, ODOT
Jim Johnson, Department of Agriculture
Roger Alfred, Metro Attorney
Mark Ottenad, City of Wilsonville