METRO POLICY ADVISORY COMMITTEE MEETING RECORD
November 10, 2004 – 5:00 p.m.
Metro Regional Center, Council Chambers

Committee Members Present: Charles Becker, Nathalie Darcy, Rob Drake, Andy Duyck, Judie Hammerstad, John Hartsock, Tom Hughes, Richard Kidd, Deanna Mueller-Crispin, Doug Neeley, Wilda Parks, Ted Wheeler

Alternates Present: Larry Cooper, Jack Hoffman, Laura Hudson, Karen McKinney, David Ripma

Also Present: Bev Bookin, Columbia Corridor Association; Ron Bunch, City of Gresham; Bob Clay, City of Portland; Valerie Counts, City of Hillsboro; Danielle Cowan, City of Wilsonville; Bob Durgan, Andersen Construction; Kay Durtschi, MTAC; Meg Fernekees, DLCD; Ed Gallagher, City of Gresham; Steve Kelley, Washington County; Susie Lahsene, Port of Portland; Barb Ledbury, Damascus Councilor; Roy Ledbury, Damascus CPO; Harlan Levy, Oregon Association of Realtors; Irene Marvich, League of Women Voters; Amy Scheckla-Cox, City of Cornelius; Jonathan Schlueter, Westside Economic Alliance; Andrea Vannelli, Washington County; David Zagel, TriMet

Metro Elected Officials Present: Liaisons – Carl Hosticka, Council District 3, Susan McLain, Council District 4; David Bragdon, Council President

Metro Staff Present: Kim Bardes, Dick Benner, Dan Cooper, Andy Cotugno

1. INTRODUCTIONS

Mayor Charles Becker, MPAC Chair, called the meeting to order 5:10 p.m. Those present introduced themselves.

2. ANNOUNCEMENTS

Chair Becker asked Tom Hughes, Gene Grant, and Lisa Naito to serve on the nominating committee for the 1st and 2nd Vice Chairs for 2005.

Doug Neeley said that the election for those members nominated by the nominating committee should take place in January 2005 due to possible changes on the roster between now and then.

Chair Becker then passed out and reviewed the proposed meeting schedule for 2005 and asked the members if they would like to change the two dates right before Thanksgiving and Christmas. He proposed substitutions.

Motion:	Nathalie Darcy, Washington County Citizen, with a second from John Hartsock, Special Districts, Clackamas County, moved to adopt the 2005 MPAC meeting schedule with the change of November 23 to November 16 and December 28 to December 21.

Vote:	The motion passed unanimously.

Chair Becker reviewed the Goal 5 proposed resolution schedule for decision.

Doug Neeley said that MPAC had indicated that they would like to have the decision on December 8th.

Chair Becker announced that the Goal 5 agenda item would be deferred to the December 8th meeting for decision. He said that he had been receiving comments on global warming since the last MPAC meeting.

Andy Cotugno said that the agenda for November 17, 2004 included an item on the Governor's Task Force on Global Warming report and comments. He invited Chair Becker and the MPAC members to forward any further comments to him so that they could be included in the packet for the meeting.

3. CITIZEN COMMUNICATIONS

There were none.

4. CONSENT AGENDA

Meeting Summary for October 27, 2004.

Motion:	Rob Drake, Mayor of Beaverton, with a second from Richard Kidd, Mayor of Forest Grove, moved to adopt the consent agenda without revision.

Vote:	The motion passed unanimously.

5. COUNCIL UPDATE

Council President David Bragdon said that the Council had talked about the Housing Technical Advisory Committee in the prior week. There had been some discussion about the types of interests that should be included in that group. The focus would be more on the implementation part of things in terms of housing affordability. They had recommended not focusing so much on subsidizing. That draft would be redone and then brought back to MPAC early next year.

6. PROPOSED GOAL 14 CHANGES

Dick Benner said that he was a member of the Goal 14 Work Group. He said that a couple of years ago there was an effort at the state level to revise Goal 14. One objective had been to make the process of expanding urban growth boundaries (UGB) easier. Not, however, in the sense that the substantive criteria would be lowered, but rather some of the procedures for the expansion process would be made easier. That effort got to a certain point and was dropped towards the end of 2000. The commission took it up again, hoping to wind up the new effort in early February 2005. The agency was holding hearings across the state and would hold several more in the next two months. He reviewed the materials included in the packet, which are attached and form part of the record.

Rob Drake said that the League of Cities had sent a formal letter to the governor and a copy to Lane Shetterly, requesting that the commission stop the Goal 14 process. He wondered if the commission would continue with that rule making.

Dick Benner said that he did not know. He said that there were two pieces pertaining to this: 1) the proposed changes to Goal 14 and 2) the rule. If there were any implications for local governments and the state under Measure 37 they would come from the rule and not from the goal. If there was value for local governments in the changes to Goal 14, and he said that he thought there was, then he would suggest that the agency continue with the Goal 14 work and set aside the rule work. He then reviewed the highlights of the draft amendment to Goal 14.

Doug Neeley asked if there was anything in Goal 14 that would allow or prohibit the potential of having hard edge boundaries.

Dick Benner said no. It did not change the law on hard edges.

Doug Neeley asked if the rules would affect how they looked at soil classification.

Dick Benner said no. The strongest language about soil capability classification was in the priority statute that provided that they go down the classes from 8 to 1. That had not changed, and it was also reflected in factor six (6) of the Goal 14 factors.

Tom Hughes asked if the proposed language on livability would have resulted in a different outcome on the north plains case.

Dick Benner said that he did not think so. North Plains ultimately got its UGB expansion and the state approved it, but not on the grounds of a livability need. That was the city's first proposal, but it changed as the matter went back and forth between the city and the agency. It was ultimately acknowledged by LCDC, not on the basis of livability but rather on the basis of the provision of public service facilities and how difficult it would have been to integrate the exceptions land on the other side of the highway. The result would be the same if this was adopted.

Richard Kidd said that one of the safe harbors for justifying expansion would be that they could assume a 50/50 split between multi-family and single-family units. If they had a jurisdiction that wanted to add single-family land to the UGB and there already was an existing situation of 100 multi-family units and 50 single-family units, would that be grounds to build 50 more single-family units?

Dick Benner said that in a 50/50 circumstance the obligation would be to make sure that the zoning of the residential land base (vacant land) allowed for a 50/50 split. It did not, however, require it.

Richard Kidd asked if, in converting acreage from gross to net, 25% was allowed.

Dick Benner said that as a rule of thumb he could rely on 25%.

Judie Hammerstad said that when they were looking at need, it must be shown that there were no "reasonable alternatives to accommodating the need inside the existing boundary." She wondered what "reasonable alternative" really meant? Some felt that the unused industrial land should have been counted so that it could be redeveloped, while others thought it was too expensive or there were brownfields and it should not be counted. That issue had not yet been addressed, and she wondered if it would be addressed in the Goal 14 process.

Dick Benner said it would take about a century to get people to agree on what "reasonable alternative" meant. He suggested that they should not try to define it. He said it was not completely undefined because it had been in the exceptions test since 1975 mostly as applied to things outside the UGB. Did Metro do everything it possibly could to use that land efficiently? There was not a great deal of guidance, however, LCDC had accepted that in its acknowledgement of the decisions that the Metro Council made in December of 2002, and tentatively accepted a more recent formulation of Title 4. It accepted a 29% residential refill rate, although some people contended that it could have been more. He said it was probably a good thing that "reasonable alternative" was not a specific criterion and allowed for flexibility.

Judie Hammerstad said it was bothersome that there was usable land within the boundary that wasn't being used while the boundary was being expanded.

Dick Benner said that instead of trying to define "cannot reasonably accommodate," one notion was to establish a safe harbor. The draft rule talked about residential refills and making assumptions about refill strategy, and if they did the state would not challenge it, which would make it nearly invulnerable to litigation. He said that he could see ways to take pieces of it through safe harbors and use land more efficiently.

Ted Wheeler asked what specifically was new in factor three (3).

Dick Benner said that there was nothing new but rather there was a section in Goal 14 that talked about the consequences of bringing in one type of land versus another. The focus was with the ESEE consequences of bringing land into the boundary. That was similar to one of the exceptions criteria. They were treated differently because they were slightly different in case law. By getting rid of the "tied to the exceptions process" they then would fall back on factor five (5), as it currently existed.

7. EXCEPTIONS PROCESS

Dick Benner said that the Metro Council had received its first application for exception. He reviewed the process and the role of Metro in the process. He emphasized that they would not be having a discussion about the exception, only that one had been filed and what the process entailed. He reviewed the Metro code that discussed exceptions.

Rob Drake wondered why Clackamas County did not go through MPAC on the issue.

Dick Benner said it was a choice for the county to make. The County understood that the exception process was more appropriate for a specific fact situation.

Doug Neeley asked if a request for exception had to go through the governing body before going to Metro or could county staff directly submit to Metro.

Dick Benner said it was an exception that Clackamas County itself wanted to take. It did have to be filed by the governing body. He said that there were two pathways that were designed for separate things. The MPAC pathway was conceived with policy making in mind. The exceptions process was conceived with very specific questions that were related to facts that did not necessarily raise a policy question.

8. BALLOT MEASURE 37

Council President David Bragdon said that in terms of the type of organization that Metro wanted to be, and the type of relationship that Metro would like to have with local governments, that Metro was not likely to be getting claims. Metro did not regulate property directly. It was clear, however, that local governments could get claims because Metro did regulate them. The threshold issue for Metro was how to work with local governments on Measure 37, and the relationship between the local governments that may be exposed to claims and those on the regional level that adopted some of the policies that may have exposed the local governments to those claims. He assured the members that Metro wanted to be there to help develop solutions. He said that there seemed to be two potential ways on how Metro might respond to claims, neither of which was acceptable to the Council. One was to waive everything and forget the

functional plan and everyone do what they want, and the other extreme would be that Metro would say the heck with the financial consequences to the local governments and ignore the fact that Measure 37 passed. The most constructive role that Metro could play would be to marshal some of the issues, and set up ways to regularize some of the procedures. The first step would be to look at the technical basis and methodology for evaluating claims. The second step would be to determine the criteria for the "pay or waive" decision that the local governments would have to make. The third step would be to establish consistency across the region. The fourth step would be to produce and define public notice requirements, which were lacking in the measure but a fundamental need in the region. They would also need to find the best means to explore the issues that Measure 37 has generated. He said that Dan Cooper had met with his colleagues, city attorneys around the region, to pull together a workgroup that would address these issues. Council President Bragdon said that it would be helpful to pull a group of the mayors together and talk about/create/provide policy guidance. He said that Metro wanted to convene anything that would be helpful in dealing with Measure 37.

Rob Drake said the City of Beaverton intended to notice the request for either waiver or payment of claim just as they would with a land use process. He said that state law required a minimum notice of 100-feet from a project, but the City of Beaverton provided notice up to 300-feet from a project. About 5 years ago Washington County had expanded that notice area to 500-feet. He said it would be costly and there was question as to whether the cities could charge fees. He said that the City of Beaverton would call for a public hearing process. The public had the right to know what was happening inside their city. He said that the City of Beaverton would include in the draft ordinance a provision for cause for claim for adjoining owners.

Andy Duyck said that there should not be a rush to respond to the measure. He said that there were 180 days until the local governments had to act on applications. He said he thought it would be good to develop a consistent plan that they could all utilize.

Judie Hammerstad asked Dan Cooper if the working group would be coming up with proposed legislation.

Dan Cooper said it was not yet clear. The initial focus would be on whether local jurisdictions would adopt claims ordinances and how to resolve claims that implicated Metro due to Metro requirements. There also was the question of finding ways to assist smaller jurisdictions with fewer resources. He agreed that if the jurisdictions did not have their process policy in place by December 2nd there would still be plenty of time and opportunity to figure out what they wanted to do.

Richard Kidd asked how they could accept a claim in a jurisdiction if they did not have a process to file. His concern was that if claims could be accepted on December 2nd then he would need to have a process to accept claims and collect fees.

Dan Cooper said that lawyers from all three counties, as well as attorneys from many of the cities, met to discuss Measure 37. That group had talked about creating a working group to represent the local governments that would start the process of thinking about the issues related to Measure 37. The measure was getting a lot of focus from the local government bar, which he considered a healthy thing. He said that the real problem was that the measure was written in a way that there were many factual situations that may or may not generate the ability to have a claim. The measure itself indicated that local governments could adopt procedures/processes for handling claims but the applicant was not required to follow them, including paying any fee. It was written in such a way that the claim did not have to come with documentation, or an appraisal. Once the claim was submitted, the jurisdiction was then on notice,

had to do the research, and if the jurisdiction did not do what the property owner wanted, then the property owner could take the city to court. That created a lot of uncertainty about how the measure would play out.

Doug Neeley said that Oregon City did not know if it would get claims or not, but it was certain to get requests for annexations. He wondered if they could condition annexations so that they met the current land use requirements.

Dan Cooper said that he believed annexations and the zone changes that came with it were increases in property value and therefore not vulnerable to claims.

Doug Neeley said that he was talking about policies in hand and not zoning. He said that certain claims could be made based upon Title 3 requirements. He wanted to know if the jurisdictions could require that the property owners recognize the current land use code of each city at the time of annexation.

Dan Cooper said that annexations required both the city and the annexed property owners to agree to the annexation. He said that there was a pretty good consensus that Measure 37 did not require any jurisdiction to provide municipal services. Therefore, if properties could not be developed because services were not available, as opposed to land use restrictions, then Measure 37 had no bearing.

Rob Drake asked Mr. Cooper if he had heard of a watchdog group that would sue a city for waiving.

Dan Cooper said that after Measure 7 passed such suites had occured. He said that Measure 37 did discuss waivers, so the issue was different. He said he thought this was why most governments would institute some sort of claim procedure. Most governments would probably require evidence to support the claim because it would be to their benefit to create the record.

Rob Drake asked how a large retailer who wanted to build a store outside of the UGB where the city didn't have to supply the infrastructure, would proceed.

Dan Cooper said the measure explicitly exempted health, safety, building codes, sanitation codes, etc. from triggering the measure. He said that just because a business was willing to pay for the water main, or for building a road, or whatever services they wanted, it did not mean that the jurisdictions were required to supply it.

John Hartsock asked about keeping the work product done on each claim and not giving it to the claimant in case of a lawsuit down the road.

Dan Cooper said that there was discussion as to whether once a jurisdiction received a claim they could start taking depositions and treating it as if they were on notice of possible litigation. The jurisdiction would then be in an attorney-client confidentiality situation, and preparation for litigation would provide an exemption under the public records act subject to the discovery rules. He cautioned that that would put them in a posture that once they passed the 180-day time period, and if it was later determined that it was a valid claim, then the jurisdiction would be exposed to attorney fees. He said that people would have to discuss the pros and cons of which posture to take.

Susan McLain asked Mr. Cooper to explain the relationship to federal regulations such as the clean water act.

Dan Cooper said the measure exempted regulations required by federal law. The question was – when was that triggered? He said that there was and would continue to be a lot of sharing of information and research from around the state that was being put together on the local government websites. Therefore they would all benefit from a compilation of work on Measure 37.

David Ripma asked if there was any speculation about Measure 37 suffering the same fate as Measure 7?

Dan Cooper said it could not be challenged on the same basis as Measure 7 because it was not a constitutional amendment. He said so far as he knew nobody had identified any possible attempts to block the effect of Measure 37. Therefore, nobody was anticipating that it would not go into effect on December 2nd.

Meg Fernekees said that the state was working towards a process for receiving, evaluating, responding, and processing claims. They hoped to have that in place by December 2nd. The urban studies department of PSU had offered their services to set up a central database for incoming claims. All the state agencies would be using it and it would be made available to local jurisdictions should they wish to participate. This would allow them to track certain types of claims and responses to them. The department of justice was working on a series of opinions. The first opinion would be a procedural one, as opposed to an interpretive one. There would not be a special legislative session to deal with Measure 37. The government would oppose any efforts to waive in a blanket way Measure 37. The state would also work on how to deal with the issue of state requirements and how they impact local regulations. She asked the jurisdictions that were preparing local processes/ordinances to share those with her so that she could carry them to the state for informational purposes.

Dan Cooper said that those preparing ordinances would share them through the League of Oregon Cities website. He suggested to Ms. Fernekees that she check with Linda Ludwig at the League because she was trying to make sure that information was being shared.

Tom Hughes said that from his local standpoint he had concerns about attempts to create consistency in criteria. The decision to pay or waive on a case-by-case basis was really a question of public policy that was up to local jurisdiction. There might be claims that they chose to pay one year and waive the next year. He said that he felt they should leave as much flexibility in the process as they could because it had huge potential impact on resources and land use planning implementation.

Dan Cooper said that the discussion had mostly focused on the criteria to use and the decision process regarding whether a claim created a valid need to decide whether to pay or waive.

Tom Hughes said it would be valuable to have criteria for reaching the threshold evaluation. He added that they did not want to be in the position of being caught between the claimant and Metro.

Dan Cooper said that he was not suggesting that Metro would give the jurisdictions criteria that they would have to follow except on claims related to Metro requirements, but rather that it would be useful for the jurisdictions to get together and talk through what the measure meant and what the associated risks would be so that they all had a common knowledge and understanding. He emphasized that it would be good to share information among the jurisdictions.

There being no further business, Chair Becker adjourned the meeting at 6:46 p.m.

Respectfully submitted,

Kim Bardes
MPAC Coordinator

ATTACHMENTS TO THE RECORD FOR NOVEMBER 10, 2004

The following have been included as part of the official public record:

AGENDA ITEM	DOCUMENT DATE	DOCUMENT DESCRIPTION	DOCUMENT NO.
#2 Announcements	November 2004	Metro Policy Advisory Committee Meeting Schedule for 2005	111004-MPAC-01