

# SUPPLEMENTAL MATERIAL

W.8.b.

## MEMORANDUM

 LANE COUNTY  
OFFICE OF LEGAL COUNSEL

To: Board of Commissioners  
From: Marc Kardell                      Extension: 3301  
Date: 17 May 2011  
Re: SMART agenda item, May 18, 2011

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The Board has requested legal review of the SMART Communities LCOG project. Between the direct project documents and the Federal laws referenced as one moves from one document to the next, there were in the neighborhood of 200 pages to be reviewed for this report back to the Board. Given the 1-week turnaround, this memo will attempt to follow the questions raised by the Board last week, but will not be a comprehensive review of the various requirements this agreement imposes.

### A.

The first legal issue raised has to do with the match requirements of this Intergovernmental Agreement (IGA). The IGA addresses this at paragraph 3, entitled "Compensation." It is likely that this paragraph can be constructed, by slight modification of the language, to be acceptable to both Lane County and to HUD.

You have a current copy of the language in the materials provided you by LCOG. The following language may satisfy the needs of the various parties:

#### 3. Compensation.

The total project cost shall be \$126,000.00, of which LCOG will reimburse Lane County an amount not to exceed \$40,000.00 and Lane County shall provide, at a minimum, leveraged resources equal to \$86,000.00, to be comprised of in-kind County resources including staff and Board time from February 1, 2011, and consisting of work items that County departments, such as the County Economic Development Division or the Public Works Department, would otherwise anticipate accomplishing during the term of the grant.

In addition to specifying the amounts of money and resources involved, this changes the contract term of a "match" requirement to instead require "leveraged resources." Federal law restricts matching to generally exclude other Federal funding sources. This grant program specifies that "Matching funds are not required. However, applicants must provide 20 percent of the requested funding amount in leveraged resources in the form of cash and/or verified in-kind contributions... In-kind contributions may be in the form of staff time, donated materials, or services..... (Leveraged) resources may be provided by

May 17, 2011

governmental entities.... Applicants that obtain leveraged resources from other HUD programs, Sustainability Partnership agencies, and other federal agencies will receive a greater rating."

Therefore, by agreeing to provide leveraged resources, what Lane County is to provide as part of this IGA is broader and more easily attainable than a traditional "match." Changing this contract provision substantially as suggested above would allow the County to participate in the consortium without any use of County funds, and our share of the work could be provided from a variety of County resources.

**B.**

The second issue addressed here is the meaning of "*due consideration*," which is a term found throughout the Lane Livability Consortium Memorandum of Understanding.

Black's Law Dictionary defines the term to be:

To give such weight or significance to a particular factor as under the circumstances it seems to merit, and this involves discretion.

Similarly, in *Finley v. National Endowment For The Arts*, 100 F.3d 671, 689 (9<sup>th</sup> Cir. 1996), the Court described these words in the following paragraph:

The words "take into consideration" mean take into consideration, no more, no less. The word "consider" in its ordinary usage means "to reflect on" or "think about with a degree of care or caution." See Webster's Third New International Dictionary 483 (1981). In deciding whether to buy a new car, one takes into consideration the expense, but that does not mean one always decides against buying a new car. A requirement that "due consideration and weight shall be given" to something does not make the thing an absolute requirement. See *Heirens v. Mizell*, 729 F.2d 449, 460 (7<sup>th</sup> Cir. 1984) (parole board had to consider a prisoner's record but could decide against parole despite a good record). A court of appeals appoints a federal public defender "after considering recommendations from the district court." 18 U.S.C. § 3006A(g)(2)(A). That means that we must give serious thought to the district court's recommendations, but we are not required to follow them.

Based on the foregoing, recommendations of the consortia, if the County were to be a member, should be given serious thought. This might require some reasoning in open session about why a recommendation would not be followed. But, the Board would remain free to decide any issue under this "due consideration" standard as it reasonably believes would be best.

C.

The last issue to be addressed in this memo deals with the Prohibited Use of Funds provision, at (c) restricting "(d)developing plans that would assist business or industry to relocate to an area to the detriment of communities where the business or industry is currently located."

This language is found in HUD's Notice of Funding Availability for this grant program. It is not defined in the notice, nor does this terminology appear elsewhere, as best as can be determined at present. Generally speaking, one would try to give a reasonable meaning to such language. It is likely that these funds could not be used to target specific business or industries to relocate from other communities, but generally creating a better business climate, process, or site would appear to be allowed. If the latter were not the case, there would be no use that could be made of these funds unless a totally new industry were targeted. Such a reading would not seem to comport to the goal of the program, to provide a way to create sustainable communities. That goal would usually require employment in or near any such project.

**Conclusion**

It is hoped that the above captures what the Board directed of County Counsel staff. LCOG, Economic Development, and County Administration will also be presenting before the Board. Should there be additional issues the Board would like to have addressed, there is an opportunity to continue this matter for an additional week.

From the perspective of this office, it does appear that, with some small modifications to the agreement, the County could proceed with the consortia project.

# Lane Livability Consortium SMART Communities Project

## RESPONSE TO QUESTIONS/COMMENTS FROM THE LANE COUNTY COMMISSIONERS BCC Meeting 5/10/2011

### GRANT PARTNERSHIPS

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*Comment: Provide information that explains how the region was successful in this grant process based on partnerships.*

#### Response

The grant application included a brief outline of consortium members' areas of expertise and contributions (summarized as follows):

- The **City of Eugene's** goals for 2010 and beyond include regional economic development, a collaborative policy regarding land supply and future growth, integrated land use and transportation planning, sustainable business initiatives, climate and energy action plan implementation, and food security and global warming reduction planning.
- The **City of Springfield's** first Strategic Plan continues the City's mission of making the city of Springfield a desirable and preferred place to live and work. The Plan's five goals include financially responsible and stable government services; community and economic development revitalization; enhanced public safety; maintained and improved infrastructure and facilities; and preservation of hometown feel, livability and environmental quality.
- **Lane County** leads a collaborative Economic Development program with regional partners and provides the leadership role in economic development.
- **St. Vincent de Paul** is Lane County's largest nonprofit human services organization and helps over 84,000 individuals and families each year. St. Vincent de Paul's core areas include affordable housing, emergency services, homeless services, recycling programs and self sufficiency programs.
- The **University of Oregon** Sustainable Cities Initiative is a cross-disciplinary effort that integrates research, education, service, and public outreach to impact the design and development of Oregon's cities. SCI addresses sustainability issues across multiple scales, from the region down to the building.
- **Lane Transit District** provides transportation services to Eugene-Springfield and our surrounding communities, and is a regional promoter of sustainability.
- The **Oregon Department of Transportation** provides a safe, efficient transportation system that supports economic opportunity and livable communities. ODOT programs relate to diverse transportation system components, including highways, roads, and bridges; railways; public transit; and transportation options. ODOT is leading the Statewide Transportation Strategy to reduce GHG emissions, having pioneered several data and

modeling tools to measure the relative impacts of various transportation and land use strategies. The **Housing and Community Services Agency of Lane County** is the public housing authority for Eugene, Springfield and Lane County; primary mission is to provide affordable, decent, safe and sanitary housing to low and moderate income families and households; administers housing programs in Lane County for low- and very low-income families.

- The **Central Lane MPO** provides a regional collaborative structure for discussion and development of recommendations, including existing public outreach programs and communication protocols. The MPO provides leadership in GHG planning by providing significant data and modeling tools, and by assisting in the implementation of scenario planning.
- **Lane Council of Governments** is the regional data collection and dissemination hub for the project and helps facilitate regional collaborative decision making. LCOG provides data, technical support and planning expertise.

## **EDUCATION PARTNERS**

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*Comment: Should education partners such as Lane Community College, the three school districts and Lane Education Service District be a part of the Consortium?*

### **Response**

Two programs at the University of Oregon are already members, including Community Planning Workshop and Sustainable Cities Initiative. At this time, the Consortium makeup has focused on the three primary areas in which we are trying to improve integration: Housing/Economic Development/Transportation. As future phases of the project are initiated, the Consortium will seek out input and participation from a range of other community interests, including those within the education sector.

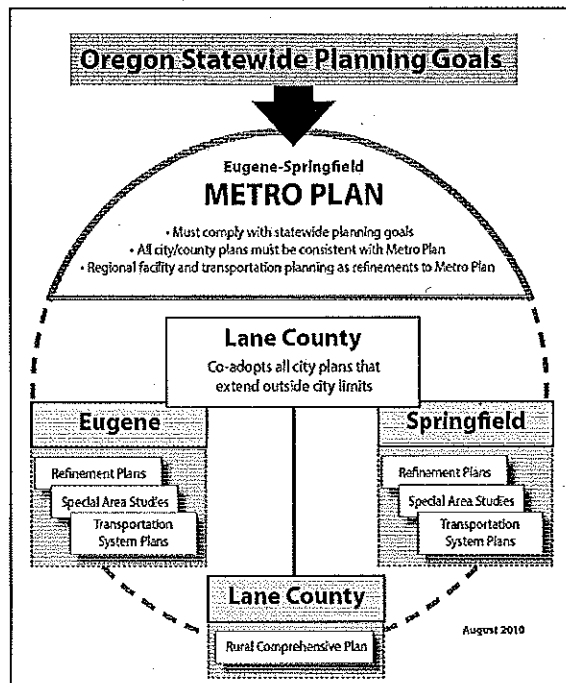
This has been a consideration from the very beginning of the project. In fact, the region's grant application states that an early step of the project will be to identify partners who wish to be involved, but who may not be able to make definite commitments of resources at the time. The grant specified that the Eugene Water & Electric Board, Lane Community College, and several other public and non-profit agencies were high priority partners. Since the grant award, EWEB has joined as a Consortium member, and Springfield Utility Board has also agreed to participate. An invitation and/or presentation to LCC leadership is anticipated to occur soon. Finally, as a Consortium member the Lane Council of Governments provides a coordinated structure for the three local school districts, Lane Education Services District, and other special districts to be informed and involved.

## FUTURE METRO PLAN CHANGES

**Comment:** Why is the grant based on the Metro Plan, which is now being "replaced" by separate Eugene and Springfield comp plans—how are we accounting for HB 3337 changes?

### Response

Historically, the Metro Plan was viewed as a general plan within which individual governments could control more local, detailed planning to suit their unique situations, attitudes and politics. Today the *Metro Plan* remains the region's guiding land use policy document, providing an overall framework supplemented by detailed refinement plans, programs, and policies (diagram below).



HB 3337 required Eugene and Springfield to create individual urban growth boundaries. Upon completion of *Springfield 2030* and *Envision Eugene*, both cities will have separate land use diagrams, and separate housing, commercial and industrial land inventories and policies. As a result of these city-specific efforts, substantial revisions to the Metro Plan are anticipated. In addition, state-mandated legislation (i.e., abolishment of the Boundary Commission), and Joint Elected Official and county interests necessitate updates to the Metro Plan text.

Planning staff in the three jurisdictions are beginning to discuss what these revisions and/or wholesale changes to the Metro Plan will look like. However, because the region is connected in fundamental and indisputable ways—infrastructure being the most prominent—the

need for some type of regional framework for coordination and efficiency remains as confirmed by the JEO Metro Plan subcommittee in June 2009. The research and analysis components of the project will be available as resources for decision-makers to consider and factored in as the Metro Plan and/or regional framework is developed and amended.

## PROJECT DELIVERABLES

*Comment: What tangible outcomes or deliverables will be produced as a result of the grant?*

### Response

The work funded by the grant will create a comprehensive set of deliverables within the following primary products:

<b>Lane Livability Consortium</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Bylaws and Organization Chart/Graphic</li><li><input type="checkbox"/> Communications Plan (Internal/External)</li><li><input type="checkbox"/> Website</li><li><input type="checkbox"/> Data Inventory and Plan</li></ul>	<b>Sustainability Plan for Regional Economic Development</b> <ul style="list-style-type: none"><li><input type="checkbox"/> GHG Reduction Policy Recommendations</li><li><input type="checkbox"/> Public Health Policy Recommendations</li><li><input type="checkbox"/> Social Equity Recommendations</li></ul>
<b>Public Engagement Assessment</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Public engagement</li><li><input type="checkbox"/> Engaging the Latino community</li></ul>	<b>Sustainability Plan Adoption Recommendations</b> <ul style="list-style-type: none"><li><input type="checkbox"/> New Planning Models</li><li><input type="checkbox"/> New Decision-Making Models</li><li><input type="checkbox"/> Performance Measures</li><li><input type="checkbox"/> Redefining the Region</li></ul>
<b>Regional Planning Assessment</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Economic Development</li><li><input type="checkbox"/> Affordable Housing</li><li><input type="checkbox"/> Transportation</li></ul>	<b>Capacity Building Training Module(s)</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Transportation</li><li><input type="checkbox"/> Land Use Planning</li><li><input type="checkbox"/> Affordable Housing</li><li><input type="checkbox"/> Economic Development</li><li><input type="checkbox"/> Organizational Development</li><li><input type="checkbox"/> Leadership</li></ul>
<b>GHG Planning Strategy</b> <ul style="list-style-type: none"><li><input type="checkbox"/> GHG Data and Modeling Plan</li><li><input type="checkbox"/> GHG Modeling and Technologies Training Program</li><li><input type="checkbox"/> Scenario Planning Methodology</li><li><input type="checkbox"/> GHG Toolkit</li><li><input type="checkbox"/> GHG Reduction Strategies</li><li><input type="checkbox"/> Regional Decision-Making</li><li><input type="checkbox"/> Public Involvement Materials</li><li><input type="checkbox"/> Project Website GHG Component</li></ul>	<b>Community Investment Strategy</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Regional Infrastructure Finance Plan</li><li><input type="checkbox"/> Regional Investment Strategy</li></ul>
<b>Triple Bottom Line Tool</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Instructions</li><li><input type="checkbox"/> Data needs</li><li><input type="checkbox"/> Training tools</li></ul>	<b>Catalytic Project Prospectus</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Project Overview</li><li><input type="checkbox"/> Concept drawing(s)</li><li><input type="checkbox"/> Project Prospectus</li><li><input type="checkbox"/> Preliminary capital and operating budget estimates</li><li><input type="checkbox"/> Implementation Agreements</li></ul>
<b>Sustainability Plan: Regional Transportation</b> <ul style="list-style-type: none"><li><input type="checkbox"/> GHG Reduction Policy Recommendations</li><li><input type="checkbox"/> Public Health Policy Recommendations</li><li><input type="checkbox"/> Social Equity Recommendations</li></ul>	<b>Final Sustainability Toolkit (Hard Copy and Web-based)</b> <ul style="list-style-type: none"><li><input type="checkbox"/> Chapter #1: Sustainability in Public Outreach</li><li><input type="checkbox"/> Chapter #2: Sustainability Assessments</li><li><input type="checkbox"/> Chapter #3: GHG Planning Toolkit</li><li><input type="checkbox"/> Chapter #4: Capacity Building</li><li><input type="checkbox"/> Chapter #5: Regional Investment Strategies</li></ul>
<b>Sustainability Plan: Affordable Housing</b> <ul style="list-style-type: none"><li><input type="checkbox"/> GHG Reduction Policy Recommendations</li><li><input type="checkbox"/> Public Health Policy Recommendations</li><li><input type="checkbox"/> Social Equity Recommendations</li></ul>	

## **PUBLIC INVOLVEMENT**

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*Comment: Why are additional funds being directed towards public involvement, given the extent of public involvement efforts we do in the community? Provide a summary of the public involvement studies conducted in the region.*

### **Response**

The region successfully meets its legally required obligations to provide public meetings, hearings, and appropriate public notice. The region's abundance of process is a testament to this effort. The work funded within this grant is aimed at measuring and improving the results of these efforts to both increase efficiency and to make sure that public input is a reliable resource for regional decision-making. In addition, a number of federal agencies that provide resources to our region are looking much more closely at the issue of fairness and representation within community processes when making funding decisions. We have a vested interest in making sure we continue to be competitive for increasingly limited funds from agencies such as HUD, FTA, FHWA and EPA.

Staff involved in this aspect of the grant have significant experience in conducting successful public involvement efforts throughout Oregon. To our knowledge, few local or regional studies have looked at how to improve public outreach in the region although recent efforts such as Envision Eugene and the Lane County Forum to Create an Area Commission on Transportation used new techniques to reach consensus on challenging issues. Funding under the HUD grant provides a unique opportunity to address gaps in our standard approach to public engagement. One important component of this work program is teaming with the University of Oregon's Professor Gerardo Sandoval to outreach to local small Latino owned businesses, community based organizations, social services agencies, and other stakeholders involved with the Latino community to develop new channels and mechanisms for engaging the Latino community in local and regional planning issues. This work provides a unique opportunity to outreach to this growing community within our region and provides a template for future similar processes that could be undertaken to other traditionally underrepresented populations. The University of Oregon's Sustainable Cities Initiative has requested \$52,800 to conduct this effort.

Other grant-supported work would focus on effectively engaging regional stakeholders by connecting to networks that already exist in order to relay information and solicit input as efficiently and effectively as possible.



## OVERALL PROJECT BENEFITS

*Comment: What are the overall benefits of the livability partnership and what is the value of this grant to our community?*

### Response

The HUD Sustainable Communities Grant Program is part of a new federal interagency Partnership for Sustainable Communities launched by the following federal agencies:

- Department of Housing and Urban Development (HUD);
- Department of Transportation (DOT); and
- Environmental Protection Agency (EPA).

The partnership is looking to shift the way the federal government structures its spending, policies and programs as they relate to transportation, housing and the environment. Through the Partnership and guided by the six livability principles (see box), HUD, DOT, and EPA are working to coordinate investments and align federal policies to support communities that want to provide more housing choices, make transportation systems more efficient and reliable, reinforce existing investments, and support vibrant and healthy neighborhoods that attract businesses. Each agency is working to incorporate the principles into its funding programs, policies, and future legislative proposals. The Partnership is also expanding its reach throughout agencies in the federal government, who are realizing the value of this new model of collaboration, including the Department of Agriculture, the Department of Education, and the Department of Energy.

#### The Six Principles of Livability

1. Provide more transportation choices.
2. Promote equitable, affordable housing.
3. Enhance economic competitiveness.
4. Support existing communities.
5. Coordinate policies and leverage investment.
6. Value communities and neighborhoods.

That is one critical reason why our early involvement in this partnership is so important: the programs and strategies that we develop as part of the HUD grant will better position this region to compete for future funding, technical assistance and to collaborate on future legislative proposals.

As an example, there are changes underway to the Federal Transit Administration's New Starts and Small Starts Programs, which funds locally planned, implemented, and operated rail and bus projects. In January, 2010, DOT changed a rule that had required the programs to consider cost-effectiveness above all other factors when selecting major transit projects to support. Building on the livability principles, FTA is developing new ways to define and measure the statutory program criteria to evaluate major transit project proposals. The new funding guidelines would be based on new livability issues such as economic development opportunities and environmental benefits, in addition to cost and time saved. Our region's ability to effectively adapt to these new funding priorities is critical to attracting the type of federal investments that will be needed to realize our long-term goals. This grant provides the foundation for our region to adapt and succeed under this new model of federal leadership.

In addition, the partnership formed to implement this grant will work to break down the traditional silos of housing, transportation and economics to consider how these issues are linked. Increasingly, regional leaders see the need to coordinate between jurisdictions and within departments to more fully consider the impacts of land use, transportation and economic development choices in order to ensure that our plans and programs are effective, minimize costs, and are consistent. This approach will enable our region to use taxpayer money more efficiently and with improved benefits. The economic benefits of sustainable communities include:

- Reduced infrastructure costs
- Energy and water cost savings
- Attraction of local economic development
- Reduced health care costs
- Better connection of workers to education and job opportunities
- Reduced household expenditures

It should also be noted that with this successful grant application, the Lane Council of Governments has qualified the region for Preferred Sustainability Status. This acknowledgement from the federal Livability Partnership signifies that the region is ready to advance planning that incorporates sustainability as a core outcome of community development. As a result, the region now qualifies for a broader spectrum of benefits, such as access to capacity building resources, and has secured additional scoring points that may be applied in a number of funding opportunities managed by federal agencies such as HUD, DOT and EPA.

*LCOG: \\Clsv111.lcog1.net\lgs\Sustainable Communities\Task 1\_LLC\Task 1.2\_Organizational Structure\Consortium Agreements\County review of MOU\response to bccquestions\_final.doc  
Last Saved: Tuesday, May 17, 2011*