

# POLICY OPTIONS FOR SITING DIFFICULT FACILITIES

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## Introduction

Proposals for siting large public facilities frequently encounter strong local opposition from residents near proposed locations. Airports, power plants, waste disposal sites, sewage treatment plants, and prisons, among others, serve regional and statewide needs, and offer significant regional and statewide benefits; but locally, they can be viewed as economic, social and environmental threats. These locally unwanted land uses (LULUS) are a national, as well as an Oregon, land use problem.

Oregon's Land Use Act of 1973 mandates local involvement in siting facilities, including those that serve a regional or statewide need. However, as in other parts of the country, it is difficult for local governments to fully consider the regional or statewide significance of these facilities. In the best of circumstances, processing local siting permits can be delayed significantly when other jurisdictions become involved in the process and when the facilities have major land use, social, and economic impacts on the local area.

Oregon's land use program includes special siting provisions for mobile home parks, needed housing, and destination resorts. Other state laws contain siting provisions for airports, energy facilities, and waste disposal sites. There are no general provisions for siting other facilities of regional or statewide need within the land use laws. Consequently, there is concern that local resistance can prevent or unreasonably delay siting of these facilities under current land use regulations and procedures.

This concern over delay, coupled with the emergency nature of the shortage in corrections facility capacity throughout the state, led to enactment of HB 3092 in 1987 to allow for supersiting of minimum security facilities, followed by HB 2713 in 1989 to allow for supersiting of a medium security facility. The emergency authority granted in 1989 expired with the final siting of the medium security facility in Ontario. What LCDC proposes in September for corrections may set the standard for siting other difficult facilities.

To deal with long-term correctional facility siting, the 1987 legislation required development of a strategic plan that recommended changes in siting procedures, including modification of procedures currently mandated by the state's land use planning program. The 1989 legislation declared that, "It is necessary to provide, in land use goals and regulations and comprehensive plans and land use regulations, for adequate opportunities for siting of prison facilities in this state." It also directed the Land Conservation and Development Commission (LCDC) to "amend the land use planning goals and rules, adopted under ORS chapter 197, to establish streamlined siting procedures for correction Facilities." Finally LCDC is to report to the Governor and Joint Legislative Committee on Land Use on its plan to meet the above requirements by September 30, 1990.

This paper identifies several options for siting facilities to minimize delays in obtaining land use approvals, protect the integrity of Oregon's state-local land use system, and avoid, to the extent possible, the use of legislative "supersiting" preemptions in the future. In producing this report, the author reviewed and incorporated the extensive and excellent work that the Bureau of Governmental Research and Service (BGRS) performed for the Governor's Task Force on Correctional Work (Task Force) over a period of several years.

The author also conducted an evaluation, through interviews and review of records, of the most recent supersiting experience in Oregon, analyzed the recommendations and case

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studies made by the City Club of Portland (City Club) in February of 1990, reviewed working papers of the Governor's original transition team and reviewed other literature on difficult siting issues. This paper, after establishing the land use framework, presents outlines of several options for siting correction facilities.

## THE OREGON LAND USE FRAMEWORK

To understand various siting options, it is useful to describe the overall land use context. The 1973 legislature created the Oregon land use structure and LCDC. LCDC was charged to "prescribe planning goals and objectives to be applied by state agencies, cities, counties, and special districts throughout the state."<sup>2</sup> The Department of Land Conservation and Development (DLCD) was created to administer the statewide goals.<sup>3</sup>

Specific planning objectives of this law are stated in the 19 goals adopted by LCDC which articulate statewide interests in such areas as housing, transportation, farmland and public facilities (Goal 11).

**Goals.** LCDC goals are mandatory requirements to which local jurisdictions must conform.<sup>4</sup> Cities and counties are to exercise their planning and zoning responsibilities in accordance with the goals, and prepare, adopt, revise and amend comprehensive plans in compliance with the goals. LCDC also issues guidelines as suggested approaches to aid in the preparation, adoption and implementation of local comprehensive plans. Cities and counties are required to enact land use regulations to implement their comprehensive plans. As to programs affecting land use, both state agencies<sup>5</sup> and special districts are required to exercise their planning duties and to take action in accordance with the goals.

**Comprehensive plans.** City and county comprehensive plans are the principal products of this process and the chief instruments for applying the statewide goals. LCDC reviews these plans for compliance with statewide goals through acknowledgement and continuance orders. The Land Use Board of Appeals (LUBA) can review LCDC decisions and the Oregon Court of Appeals has exclusive jurisdiction to review LUBA decisions. Once a local government's comprehensive plan has been acknowledged by LCDC, the state's role in local planning decreases greatly.

The main difference between the pre-acknowledgement and post-acknowledgement phase is that, before acknowledgement, each land-use decision (such as a zone change) must be reviewed against all of the statewide goals (19) as well as local plans and regulations. After acknowledgement, since the goals are embodied in each comprehensive plan, conformity with the comprehensive plans is deemed to include conformity with the state goals and the goals need not be considered separately, except when the plans are amended.

Concerns over siting of regional and state facilities needs to find expression in the local plans in order to be effectively addressed within the existing land use framework. Inclusion in a comprehensive plan creates a basis for site specific decisions to provide for state facilities or to mitigate their effects through zoning, subdivision and partitioning approvals or site reviews. Conditions governing the siting and character of state facilities can be

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<sup>2</sup> ORS 197.005

<sup>3</sup> Mitch Rohse, Land-Use Planning in Oregon, Oregon State University Press 1987, p 3.

<sup>4</sup> ORS 197.015 (8)

<sup>5</sup> ORS 197.180 (1)

explicitly built into zoning regulations.

**Enforcement.** LCDC has the power to enforce compliance with the statewide planning goals.<sup>6</sup> It may issue an order requiring a local government to take whatever action is necessary to bring its plan, land use regulation or decisions into conformity with statewide planning goals. The enforcement process is flexible, so that LCDC may limit or prohibit land use actions to the areas where problems exist. LCDC is also required to find that continued activity would aggravate a violation and an enforcement order is necessary to correct the same.

**LUBA.** In most cases LUBA has exclusive jurisdiction to review land use decisions of local governments, special districts, and state agencies. The petitioner must exhaust all remedies that are available by right, before LUBA can accept jurisdiction. All final LUBA decisions are subject to review by the Court of Appeals. There are time lines for issuing decisions, which can be waived by parties and which, as a matter of practice, are routinely extended at LUBA's own request.<sup>7</sup>

**Postacknowledgment.** After plans have been acknowledged they can be amended on a case by case basis or as part of periodic review process. Local governments must give the DLCD director 45 days' notice of the adoption of plan or land use regulation amendments, unless the local government determines the goals do not apply.<sup>8</sup> DLCD then can comment on whether it finds the proposed action to be consistent with the Goals. If DLCD finds no problem, the local government can proceed with its action. If the local government proceeds in face of DLCD's objection, DLCD can appeal that action to LUBA. If factors or changed circumstances unrelated to the amendment process affect unamended plan provisions, LCDC's periodic review is the only way to correct goal noncompliance resulting from changed circumstances after acknowledgement.<sup>9</sup>

The first periodic review by LCDC of a local comprehensive plan occurs two to five years after acknowledgement. Subsequent review occurs four to seven years after the previous review.<sup>10</sup> The Department must give local government at least 180 days' notice of the deadline for adoption of a periodic review order. Such notice is accompanied by a DLCD memo in which it identifies legal and regulatory changes which need to be addressed in periodic review. The locality then conducts a review of its plan and regulations in accordance with the factors listed in ORS 197.640(4) and adopts a periodic review order.

City or County must review its plan against four periodic review factors. In effect it must ask four questions:

- 1) Has there been a "substantial change of circumstances" since

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<sup>6</sup> ORS 197.320

<sup>7</sup> Among matters that LUBA does not have jurisdiction over are:

1. Matters over which DLCD has review authority;
2. State agency land use decisions in contested cases - these go to the Court of Appeals;
3. Ministerial matters over which the circuit courts retain jurisdiction to grant declaratory, injunctive, or mandatory relief;
4. Rules, programs, decisions, determinations, or activities carried out under the Forest Practices Act;
5. Decisions reviewable by the Columbia River Gorge Commission;

<sup>8</sup> ORS 197.610

<sup>9</sup> Urquhart v Lane Council of Governments, 80 Or App 176, 721 P2d 870 (1980)

<sup>10</sup> ORS 197.640

acknowledgement? (example: Prison overcrowding or a court order)

2) Have any new goals or state planning policies been adopted? (Proposals to amend Goal 11 would trigger this provision)

3) Have any state agencies adopted new programs that affect land use? (Adoption of an agency facility masterplan for statewide or regional facilities would be such a program)

4) Are there any tasks that remain uncompleted since acknowledgement?<sup>11</sup>

These criteria are important because they provide a way to have local comprehensive plans respond to new needs to site difficult state facilities. If the answer to any of the above questions is yes, then the city or county will have to amend their plans accordingly. DLCD then will review the local government's findings and will evaluate the amendments. If the local government or someone appeals, or DLCD is not satisfied, the matters goes to the LCDC. LCDC reviews the actions and makes a decision.

**Coordination.** As it occurs in the Oregon statutes and planning literature, this word means specifically the coordination that occurs among local governments and other agencies (federal, state, and local bodies and special districts).<sup>12</sup> ORS 197.015(5) declares that 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." Goal 1 states: "Federal, state and regional agencies and special purpose districts shall coordinate their planning efforts with the affected bodies and make use of existing local citizen involvement programs established by counties and cities." Goal 2 requires that: "each plan and related implementation measure shall be coordinated with the plans of affected governmental units."

There are two main components in coordination. One is state agency coordination (SAC), a program administered by DLCD. DLCD reviews the rules and programs of other state agencies to ensure that they are "in compliance with the goals and compatible with acknowledged comprehensive plans." (ORS 197.180(7)). Formal approval by LCDC of such rules and programs is called certification. The other component is local coordination among cities, counties and special districts. Certification in the case of a state agency results in a coordination agreement.

It is important to understand the purpose of SAC. First, plans and actions of state agencies must be consistent with the comprehensive plans of cities and counties and with regional plans.<sup>13</sup> A plan is not viewed as coordinated unless it considers state agency plans or programs it is in the end the comprehensive plan that governs.<sup>14</sup>

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<sup>11</sup> Rohse at 7

<sup>12</sup> Rohse at 72

<sup>13</sup> Land Use (Oregon CLE) at 2-15, and OAR 660-30-070(3):

(3) In carrying out the compatibility requirements of this rule, a state agency is not compatible if it approves or implements a land use program or action that is not allowed under an acknowledged comprehensive plan. However, a state agency may apply statutes and rules which the agency is required by law to apply, to deny, condition or further restrict an action or program, provided it applies those statutes and rules to the uses planned for in the acknowledged comprehensive plan.

<sup>14</sup> **ORS 197.180 State agency planning responsibilities; certain information to be submitted to the Department; determination of compliance with goals and plans; rules.** (1) . . . 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;

**Framework Conclusions.** The supersiting legislation for corrections, 1987 and 1889, is an explicit acknowledgement that the land use legislation by, giving primacy to cities and counties in planning decisions, does not adequately address regional and state needs. There are no incentives for local governments to address issues that go beyond their local needs. As the timetable for periodic review and the administrative process outline make clear, goal amendments followed by periodic review amendments to local comprehensive plans is a lengthy process, especially if we assume that some jurisdictions will be less cooperative than others. To bring any siting program within the framework of the Oregon system, there has to be a clear functional plan for siting facilities that will fall under one of the statutory triggers provided, leading to amendments in local comprehensive plans either through periodic review or through accelerated action required by LCDC. The City Club<sup>15</sup> description of standard and supersiting processes is used in sections 1 and 2 below illustrates the difference between operating within the framework and outside it.

### 1. The Standard Siting Process

Current law establishes requirements for siting any facility that is not permitted outright by the site's zoning designation. Localities need not, and typically do not, establish zones where landfills, correctional facilities, and similar facilities are permitted outright, although they may be allowed as conditional uses in some zones. As a result, the siting agency or proponent must apply either for a variance from some development requirements of the existing zoning designation, a change in zoning designation to allow the facility outright, or a conditional use permit.

As part of the process for obtaining a variance or zone change, the proponent must develop a plan for the facility and identify suitable parcels. The proponent also submits an application, which demonstrates that the facility satisfies criteria established for the variance, zone change, or conditional use.

Submitting the application to the local government with jurisdiction over the site initiates a quasi-judicial process. The proponent submits information supporting the application. The planning staff of the local jurisdiction submits a report supporting or opposing the application. Interested citizens also may submit information that supports or opposes the application. A hearings officer or body usually reviews the submitted information and renders an initial decision.

The losing side may appeal this initial decision to the appropriate local governing body which reviews the decision and listens to testimony of the planning staff, the proponent and opponents. The losing side may then appeal the governing body's decision to the Land Use Board of Appeals. LUBA may remand the issue back to the local governing body for further proceedings, after which LUBA may again see the issue on appeal. LUBA's decision ultimately may be appealed to the Oregon Court of Appeals and the Oregon

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- (a) In compliance with goals. . . ; and
  - (b) . . . , in a manner compatible with:
    - (A) Comprehensive plans and land use regulations initially acknowledged under ORS 197. 251; and
    - (B) Amendments to acknowledged comprehensive plans or land use regulations or new land use regulations acknowledged under ORS 197. 625
  - (2) Upon request by the commission, each state agency shall submit to the Department the following information:
    - (a) Agency rules and summaries of programs affecting land use;
    - (b) A program for coordination pursuant to ORS 197. 040(2) (e);
    - (c) A program for coordination pursuant to ORS 197. 090(1) (b)
    - (d) A program for cooperation with and technical assistance to local governments.

<sup>15</sup> City Club of Portland Bulletin, SITING LOCALLY UNDESIRABLE REGIONAL FACILITIES, FEBRUARY 1990

Supreme Court.

Because of the complexity of the contested process, and the attendant delays and disruption, there is no assurance that proponents can find sites for locally undesirable facilities within a reasonable time, or at all. The City Club's case studies illustrate this.

## **2. The Supersiting Process**

The objectives of the supersiting process are to: 1) reduce the number of steps; 2) constrain the opportunity for non-specific opposition; and 3) limit the time required for each step.

The basic steps of the supersiting process are:

- o The Legislature establishes the need for a particular type of facility and the existence of an emergency. The Legislature then grants supersiting authority to an agency and in case of corrections establishes time limits.
- o An agency identifies the general area for siting the facility and as in the case of the medium security facility establishes siting criteria. In the medium security process the only geographical constraint was the proximity to the Interstate system.
- o A siting group may be selected to identify potential locations within this general area, commission technical studies, and identify the specific choices. The initiating agency holds public hearings and produces a recommendation upon which a decision is made by a siting council.
- o The final choice is made. In HB 3092 and HB 2713 final recommendations by the Emergency Siting Council was forwarded to the Governor for his decision.
- o Opponents have a single opportunity to appeal to the Oregon Supreme Court.

The existing supersiting authority used by the Department of Corrections has effectively ended. The problem of siting difficult facilities remains. This is how the recent City Club report evaluated this issue:

Oregon has been lauded for its pioneering efforts in land use planning and legislation. Now, continuing problems in siting controversial public facilities raise the issue of whether current state law is adequate to the task. Several recent attempts to establish landfill and correctional facilities have encountered delays, disruptions, and, all too often, defeat. These efforts to site have ignited controversy and generated fierce opposition from communities. The tack of opponents often narrows to a simple philosophical statement: "Not in My Back Yard." Complicated siting procedures and the absence of a structure to fully involve public participants are part of the problem.

## **POLICY OPTIONS**

We identify five options for a siting difficult or facilities of statewide significance in Oregon. The first four were originally authored by Peter K. Watt and were presented in a discussion draft to the Governor's Task Force on Corrections Planning<sup>16</sup> one has been recommended by the City Club of Portland in the Report previously alluded to.

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<sup>16</sup> "Policy Options for Siting Correctional Facilities", Discussion Draft, Prepared for Governor's Task Force on Corrections Planning by Peter K. Watt, Bureau of Government Research and Service, University of Oregon, February 1988.

The options offered range from no change in current procedures for siting land uses to continuation of a separate "supersiting" process similar to the one that was used for the medium security correctional facilities and finally to the creation of a state siting council.

### Option 1: Use Existing Facility Siting Procedures

#### Standard Approach

- o Requires a public information program on the need for the desired facility.
- o Agency participates in LCDC's periodic review of local comprehensive plans.
- o Agency participates in Oregon's state agency coordination program that requires compatibility between local comprehensive plans and land use programs of state agencies.
- o Provides for negotiation and mediation strategies to resolve conflicts.

#### "Entrepreneurial" Approach

- o Promotes agency facilities as economic development.
- o Agency applies for land use approvals for sites in receptive communities, as would a private developer seeking to develop real estate.

This option suggests that siting future facilities be accomplished through existing land use procedures. No changes would be made to ORS 197, the statewide planning goals, or LCDC administrative rules (chapter 660), and no special siting laws would be established elsewhere. Arguments supporting this option include the following points:

- o In Oregon, existing interorganizational linkages can facilitate state-local cooperation. Other states rely on environmental assessment processes or state authority, which places local jurisdictions in a position of reacting to siting proposals rather than being involved early in the planning process. Oregon has established a state-local planning partnership through its land use planning program, and local governments have been given a lead role in determining the appropriate use of land. This can be an advantage to facility siting. Experiences in other states indicate that successful siting can be accomplished best through early and active involvement of local communities. The Oregon land use system contains mechanisms to ensure early local involvement and coordination of state and local programs that affect land use.
- o ORS 197 and Statewide Planning Goals 2 and 11 help ensure that local jurisdictions can provide adequate plan and ordinance language to site facilities of regional or statewide importance. Goal 2 calls for land use plans that are coordinated with state programs. Goal 11 requires plan and ordinance provisions for siting needed public facilities. Administrative rules on state agency coordination and public facilities planning support these statutes and goal requirements.
- o If local jurisdictions understand the regional need for the facilities (fair-share concept), the operational concerns and criteria, and the social-economic benefits of the facilities, and if the local communities are allowed the opportunity to participate in planning, design, and location decision making, they will be less likely to oppose siting of statewide and regional facilities in their areas and may even support such action.

Although this option does not require amendments to land use laws or enactment of special siting legislation, it does not exclude improving siting capability through other administrative actions that are consistent with Oregon's land use program. In addition to developing a relatively long range facility masterplan, such as Oregon Department of Transportation or General Services Six-Year Plans, actions that could be taken by the siting agency include (1) developing procedures to inform, and work with, local communities prior to becoming involved in the land use process; (2) active participation by the agency in the state's land use planning program through periodic review of local comprehensive plans and development and certification of an agency coordination program; and (3) establishing a process for negotiating or mediating conflicts that arise during the facility siting.

Public Information. A facility masterplan, if distributed and discussed in a wide variety of public forums, can help insure that people in all areas of the state understand state and regional facility needs, siting criteria, and operational characteristics and philosophy for each type of facility. The plan can serve as a starting point for involving local governments in solving the problems of inadequate facilities. In addition to the plan, the involved agency could provide information that promotes the social and economic benefits of the facility, if any, explains the regional distribution of need and educates the public as to the real impacts of the institutions on property values, municipal services, environment, and community image. An informed public is likely to respond more positively to a siting proposal.

Periodic Review. When a facility masterplan is adopted, the agency will have a "plan relating to land use" (siting of facilities) that was not in effect at the time local government comprehensive plans were acknowledged. Cities and counties can be required by LCDC, at the time of their mandated periodic review, to make their plans and regulations consistent with such a statewide or regional facility masterplan (ORS 197. 640(3)(c)) if the agency demonstrates that the plan is mandated by statute and is consistent with the state's planning goals.

Through the "periodic review notice" to local governments, the agency could require amendments to local plans and regulations to make them consistent with the master plan. The amendments could require

1. Inclusion of the masterplan facilities in the public facilities and services elements of comprehensive plans for applicable jurisdictions;
2. Adoption of plan policies that commit the jurisdiction to establish the needed facilities in the area and to coordinate with the agency in implementing its statewide or regional masterplan;
3. Addition of descriptions (definitions) of each type of needed facility and the respective siting criteria in plan and ordinance documents; and
4. Adoption of plan and zoning designations that allow the needed facilities, or identification of these facilities, as allowed or conditional uses in existing designations.

State Agency Coordination(SAC). The affected agency, prompted by the SAC requirements, will inform local governments and other state agencies about its needs with respect to siting and operating facilities. These efforts should include a description of the different types of facilities; siting criteria for each type; regional distribution of need (fair-share) for each type; social and economic benefits of the facilities; procedures the agency wants to use to coordinate with local governments, state and federal agencies, and special districts in siting facilities; technical assistance the department is prepared to offer

to promote a sound corrections system; and a preferred method for resolving land use conflicts.

In addition to the formal agency coordination program required under the SAC, the agency may consider preparing a separate document for distribution to all cities and counties. The document could include much of the information provided in the coordination program, with particular emphasis on how the department and local governments could work together to site needed facilities. Preparation of the study would also provide an opportunity to examine procedural changes local governments could make to simplify land use decisions concerning facilities under discussion. Examples of this type of document are the "Compatibility Guidelines" reports on highway and airport facilities funded by the Oregon Department of Transportation.

Conflict Resolution. There is a growing trend to institutionalize nontraditional dispute resolution processes for facility siting (Schaff and Watt, 1988). Several states have incorporated alternative forms of conflict resolution into their siting programs for hazardous waste facilities. Dispute resolution techniques such as negotiation and mediation could be applied to resolve land use conflicts related to siting correctional facilities in Oregon. The state's Model Rules of Procedure would allow any agency to attempt to resolve impasses with local governments through negotiation and mediation, instead of relying solely on legal appeals.

Entrepreneurial Variation On This Option. An agency could attempt to site the facilities identified in a statewide or regional masterplan as any other developer might attempt to site a development; that is, identify a preferred site, apply for the required land use approvals, and deal with the opposition that is likely to occur. Depending on the location of the site and the local plan and zoning provisions, required approvals could include goal exception plan amendments, annexation, other plan amendments, zoning code amendments, changes in zoning classification, conditional use permits, and variances from local development requirements. The amount of time needed to obtain land use approval would depend on the number of separate decisions required, the amount of public opposition, and the number of appeals.

The federal experience in siting the prison near Sheridan, Oregon is an example how the land use process might function using this "entrepreneurial" approach. It took a year to obtain land use approval for that facility. Although there was organized citizen opposition to the prison, the local land use decisions were not appealed. The fact that this prison was proposed by the federal government may be one reason appeals were not made. Also, the prison was supported by state and local officials, and the community had a zoning classification that allowed for correctional facilities.

To avoid opposition, the siting agency could promote facilities as a form of economic development whenever possible. For example, several states use this approach to find sites in communities that want prisons because of the anticipated economic benefits. The drawback is that sites offered by communities do not always satisfy the siting criteria and locational needs. It is particularly difficult to locate facilities in or near large population centers using this approach, because those areas tend to oppose correctional institutions and other facilities and have less need for the economic gain. To site facilities in large urban areas under a volunteer approach may require the use of incentives beyond the economic spinoffs.

Conclusion. In summary, this option for siting facilities includes (1) a process to work with local communities and build mutual trust before becoming involved in the formal land use process; (2) use of the mechanisms available in Oregon's land use system to facilitate the siting process; and (3) procedures to negotiate or mediate conflicts over mitigation of impacts or other land use issues.

Advantages. This option has the following advantages:

- o Preserves the integrity of local comprehensive plans and the state-local land use system;
- o Ensures that local government plans and land use regulations include provisions for needed facilities without amending existing state planning laws, goals, or rules;
- o Gives the affected agency the tools to work with local government on land use issues;
- o Provides for coordinated planning and development of needed facilities based on a statewide masterplan;
- o Ensures that local concerns regarding the land use impacts of the facilities will be considered; and
- o Secures local assistance to identify the best sites for the facilities and begins the site selection process before sites are urgently needed.

Disadvantages. This option has the following disadvantages:

- o Requires a long time to implement the option because periodic reviews occur every four to seven years;
- o Allows for several appeals of siting decisions, which may result in delay of a year or more to gain final land use approval; and
- o Lacks procedures to coordinate siting decisions among several jurisdictions within a region.

**Option 2: Amend Existing Planning Goals and Administrative Rules**

- o Agency develops a statewide or regional masterplan that identifies needs for facilities.
- o Adds "facilities of statewide or regional need and concern" as another type of public facility required in local government comprehensive plans and public facility plans by Goal 11 and OAR 660, Div. 11 (Public Facilities Plans).
- o Requires local comprehensive plans to provide for the facilities during the periodic review cycle.

This option also suggests that siting future facilities of statewide importance be accomplished through the state's existing land use process. However, changes would be made in existing statewide planning goals and LCDC administrative rules (chapter 660), as needed, to ensure that difficult or statewide facilities are adequately covered.

In HB 3092, the legislature found that "the state-wide land use planning goals do not adequately address the need to site corrections facilities." Option 2 responds to that type of finding with proposals for goal and rule amendments.

Planning Goals. Goal 11 on public facilities and services could be amended to provide specific provisions for statewide and regional facilities. The following changes are proposed:

- o Add to the goal statement: "and to provide for facilities of statewide or regional need and concern. "
- o Add a definition for these facilities such as "facilities that will serve the population of the state or of a multi- jurisdictional region within the state and that are identified as needed in a plan adopted by a state agency or regional unit of government. " Types of facilities such as correctional facilities, power generation facilities, solid waste disposal sites, highways, and airports could be listed as part of the definition.
- o Provide policy direction requiring that comprehensive plans include provisions for facilities of statewide or regional need and concern that are identified in adopted state agency masterplans.

The detail for implementing these goal changes could be provided in amendments to the administrative rule on public facilities planning (chapter 660, division 11).

Administrative Rules. The purpose of OAR 660, division 11, is to provide direction to local governments in implementing ORS 197. 712(2)(e), which requires development and adoption of public facility plans for areas within urban growth boundaries over 2,500 population. Amendments to deal with facilities of state or regional importance would constitute a significant change in the purpose of the rule. Therefore, it may be better to add an entirely new OAR that deals with siting all types of important but locally unwanted, land uses. The new rule could help implement the planning statutes changes that are discussed later in this report.

If the Public Facilities Planning rule were modified to implement the proposed amendments to Goal 11, it could assist the state in locating correctional facilities in large urban areas where siting problems are most difficult. Changes in the rule could include the following:

- o Add language to the purpose section stating that public facility plans are also to help ensure that facilities of state or regional importance that require urban locations to serve the targeted population are provided in a timely, orderly, and efficient manner;
- o Include the definition for "facilities of statewide or regional need and concern," as proposed in the goal amendment;
- o Add to OAR 660-11-010 a requirement that the facility plan also contain a list and description of facilities of state or regional importance proposed for the area and identification of the facility provider;
- o Broaden the inventory requirement in 660-11-020 and the plan adoption and amendment procedures in 660-11-045 to include facilities of state or regional need and concern; and
- o Add to 660-11-030, concerning the location of public facility projects, the requirement that the plan either identify the general location of the state or regional facilities or identify areas where the facilities could be located based on the provider's siting criteria and the local government's comprehensive plan and zoning designations.

The details of the proposed rule amendments would need to be developed further if this option were chosen.

Advantages and Disadvantages. The advantages and disadvantages of this option are the same as those listed in Option 1, but there are three additional advantages:

- o Planning requirements for facilities of state or regional importance would be clarified;
- o Additional attention would be directed to siting facilities in urban areas where difficulties often arise; and
- o Procedures to coordinate siting within urban growth boundaries would be improved.

**Option 3: Add New State Planning Laws - ORS 197**

**Siting Correctional Facilities**

- o Agency develops a statewide or regional facilities masterplan that describes types of facilities and site criteria for each.
- o Requires cities and counties to plan and zone for facilities consistent with said masterplan, by certain date.
- o Encourages regional coordination in identifying sites.
- o Allow for local siting conditions and standards that do not preclude siting the facility.
- o Exempts sites in rural areas from goal "exception" requirements.

**Developments of State or Regional Need**

- o Describes types of development of state and regional need.
- o Requires a special plan for each type of facility to identify need and identifies the "fair share" for each region.
- o Requires cities and counties to identify suitable areas and to plan and zone accordingly by specified date.
- o Requires cities and counties to balance need against potential adverse impacts and allows for reasonable conditions and mitigation actions.
- o Provides for appeal of local siting denials to LCDC, with further review limited to Oregon Supreme Court.
- o Requires LCDC to issue a siting permit if benefits outweigh adverse impacts.

There is precedent for including special siting requirements in ORS 197. As discussed earlier, the planning statutes contain siting provisions for mobile home parks and destination resorts. Similar provisions could be included to deal specifically with correctional and other difficult facilities. A broader approach would entail adding provisions for siting any type of development of statewide or regional need and concern that is unwanted locally. In both approaches, administrative rules would be adopted to detail the statutory requirements.

**Siting Facilities.** Using the siting provisions for mobile home parks and destination resorts as models, siting correctional and other facilities would be declared an issue of statewide concern, and provisions to accomplish siting would be added to ORS 197. The provisions would

- o Define different types of facilities and include site criteria for each type;

- o Require cities and counties to provide for the different types of as allowed uses in zoning ordinance and comprehensive plan designations, and apply the plan and zoning designations to areas within the jurisdiction that satisfy the siting criteria and are sufficient to meet the need for each type of facility identified in the applicable statewide masterplan;
- o Specify that the above requirement must be completed by a certain date or by the next periodic review after a certain date, whichever comes first;
- o Allow cities and counties to enter into an agreement to jointly plan for the number and type of sites needed in their region, consistent with site criteria specified in this proposed new part of ORS 197;
- o Allow cities and counties to establish clear and objective criteria and standards for the placement and design of specific statewide and regional facilities, but prohibit adoption of criteria and standards that would preclude siting and developing of these facilities;
- o Allow counties to designate rural lands as potential sites for facilities without taking an exception to statewide planning goals related to agricultural and forest lands; and
- o Identify areas where specific statewide and regional facilities may not be sited.

The main advantages of this approach are that it requires cities and counties to plan and zone for needed facilities identified by a siting agency in its masterplan: short-range time for meeting the requirement; prohibits exclusion of facilities; and allows for a regional effort in designating potential sites. The disadvantages are that it overrides local discretion in planning; represents more piecemeal legislation, which undercuts the state-local planning system; and still allows for appeals that may delay a siting decision.

Developments of State or Regional Need. This broader approach, based on a Florida proposal, provides a means for the state to override local actions when they have an exclusionary effect on any developments of state or regional need and concern. It basically provides for appeal of local denials to a state appeals body. The following provisions could be included in ORS 197 to establish requirements and procedures for dealing with these types of development.

- o Define developments that are of state or regional need and concern. Certain types such as correctional facilities, solid waste disposal sites and facilities, public transportation facilities, and thermal power plants could be listed, and procedures for designating others could be specified.
- o Specify that identification of the state or regional need for the development must be included in a plan adopted by the appropriate state agency or regional unit of government (e. g. metropolitan service district, council of governments, county).
- o Specify that the state or regional plan identify the region's "fair share" of the type of development necessary to meet the regional need.
- o Require cities and counties, jointly or individually, to identify, by a certain date, suitable areas for the development consistent with the identified need and location criteria specified in the state or regional plan. Require the appropriate jurisdiction to apply plan and zone designation to the areas to allow the use.
- o Require cities and counties, when considering land use approval of the

developments, to balance the state or regional need and fair share assignment against potential local impacts of the development.

- o Allow cities and counties to set conditions or require mitigation actions, within certain specified limits, to offset local adverse impacts.
- o Allow appeal of a local decision to the Land Conservation and Development Commission if the development is denied solely on the basis of local impacts or if locally required conditions or mitigation requirements exceed established limitations.
- o Require LCDC to determine compliance with statewide planning goals and comprehensive plans, balance development benefits against detriments, establish conditions and mitigation requirements to minimize adverse impacts, and issue a siting permit if benefits outweigh adverse impacts.
- o Limit jurisdiction for review of the LCDC decision to the supreme court.
- o Allow developments covered by existing special siting laws to be sited under these provisions.

This approach provides the same siting advantages as the previous statutory option for siting statewide and regional facilities. It also limits the appeal process. The disadvantages are that, like the previous option, it limits local discretion in making planning decisions. It further limits the bases and opportunities for appeal.

**Option 4: Use Separate "Supersiting" Authority**

- o Provides for review of a proposed agency statewide or regional facilities masterplan, followed by adoption.
- o Requires cities and counties to identify suitable sites for planned facilities within a specified time.
- o Requires state siting authority to select a site if the affected local government refuses, or is unable to do so in a specified time.
- o Requires a site certificate to be issued by state authority to bind state agencies and local government to approve site.
- o Confers exclusive jurisdiction to review siting decision to Oregon Supreme Court.

In a letter to the Association of Oregon Counties, Governor Goldschmidt said "Our land use laws should be structured to permit the siting of all types of facilities, including those of special statewide or local significance, without resort to this type of legislative override." The Governor's office is working with LCDC and other interested parties to avoid use of supersiting laws in the future. Nonetheless, this option is presented for possible use in the interim while other options are pursued. If the other approaches are found to be ineffective, "supersiting" procedures may be necessary.

The approach suggested here is modeled after Florida's siting program and ORS chapter 459 which provides procedures for siting of landfill disposal sites. The key element of both of these processes is that local government is given the opportunity to site the facility before the state's override authority is exercised. The legislative concern expressed in ORS 459.017(2) provides the rationale for this approach. It states that "[supersiting] is an extraordinary measure that should be exercised only in the closest cooperation with local governmental units." Oregon's unique land use program is based on a state-local planning

partnership, which makes this "supersiting" option somewhat radical.

The provisions for a "supersiting" law could incorporate many of the elements in HB 3092, with the major addition of an opportunity for local government to act first in siting any statewide or regional facility. The basic provisions would consist of

- o Development of the agency statewide or regional masterplans for needed facilities, such as strategic corrections plan (per section 12 of HB 3092), or Transportation's Six-Year Plan;
- o Public notice of the plan and an opportunity for review and comment, followed by adoption;
- o A requirement that affected cities and counties, either individually or cooperatively identify suitable sites for the facilities within a specified time period;
- o An option for affected cities and counties to request assistance from the involved agency in finding a suitable site;
- o A requirement that the state agency select needed sites, consistent with its masterplan and site location criteria, if the affected local governments refuse or are unable to do so within the specified time period;
- o A provision for either the agency or a special site nominating committee to select the site, giving due consideration to local comprehensive plans, land use regulations, and statewide planning goals;
- o Issuance of a site certificate by the state which binds state agencies, counties, and cities to approval of the site, but permits application of appropriate standards and controls; and
- o A provision conferring exclusive jurisdiction for review of siting decisions to the Oregon Supreme Court.

If "supersiting" authority for correctional facilities is extended, it should be modified to provide a siting role for local governments so that local governments can continue to be partners in the land use decision-making process.

#### **Option 5: Facility Siting Council - City Club**

City Club concluded that the solution will require changes in Oregon's land use law, in local comprehensive land use plans, and in the attitudes of Oregonians toward these facilities. The Club recommended that the Oregon Legislature:

- o Amend state land use law by directing the Land Conservation and Development Commission to amend its regulations to require localities to plan for locally undesirable facilities;
- o Establish a permanent Facility Siting Council responsible for identifying the process for siting specific facilities and resolving siting issues; and
- o Establish a process for siting these facilities that is streamlined, facilitates public involvement, enables timely siting, encourages negotiation over litigation, and limits the judicial review of siting decisions.

The City Club Concluded: "The model process recommended by your Committee will

alleviate the need to use the supersiting process, and accelerate siting procedures while protecting the rights of citizens."<sup>17</sup>

In making its recommendations City Club reviewed eight different siting experiences. The committee made following findings from these studies:

- o Citizen involvement is necessary but will not guarantee a successful siting. Despite substantial involvement by citizens and their government leaders in the Wildwood and West Side Transfer Station sitings, for example, vigorous opposition prevented the final selection of the preferred site. In the case of the West Side Transfer Station, some of those who originally supported the actions of the site selection committee ultimately opposed the selection.
- o Supersiting will not necessarily ensure a successful siting. Bacona Road, an example of the supersiting process, was unsuccessful by almost every measure. On the other hand, the three minimum security correctional facilities, which also employed a supersiting process, were successful. The mixed success rate of supersiting demonstrates that, while it offers a number of components that a model process should employ, it is not the solution.
- o Individuals and businesses affected by the proposed site are likely to participate actively in the process and most often will oppose the selection of the site. In Wildwood, Bacona Road, the Oregon City and St. Helens garbage burners, the West Side Transfer Station and the Columbia River Correctional Center on Sunderland Road, neighbors vigorously opposed the siting. This occurred despite the use of different processes: traditional land use, supersiting, and legislative siting. Even the Sheridan siting had substantial, albeit supportive, citizen participation. Participation by neighboring businesses and individuals is inevitable and appropriate and the process for siting such facilities should facilitate and channel such participation.
- o A significant correlation appears between the intensity of the opposition and the perceived fairness of the process. For example, opponents to Wildwood complained that the Metro hearings unfairly excluded their views. Similarly, the opponents to Bacona Road felt that DEQ not only changed the selection criteria in mid-process but that the whole idea of siting a landfill in a rural area for garbage from the Portland area was unfair.
- o A process characterized by an honest effort to negotiate and compromise may be more successful. The proponents of the Sheridan facility and the Restitution Center viewed the process as one of building a broad-based consensus and of responding to the opponents' concerns. The positive attributes of a strategy built around negotiation and compromise should be part of a model siting process.
- o Economic benefits of a site, whether perceived or actual and whether in the form of economic development or compensation, can be crucial to the success or failure of a site. For example, the success at Sheridan and Baker/ Powder River resulted in substantial part from the perception by most members of the community that economic benefits outweighed a prison's disadvantages. Similarly, the Multnomah County sheriff stressed economic benefits of the Restitution Center. Finally, although siting the landfill in Arlington (or Gilliam County) was not one of the case studies because it was looked at in the context of Bacona Road, the willingness of Eastern Oregon communities to accept Portland metropolitan area garbage relied in large measure on the willingness of the private developer to compensate the

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<sup>17</sup> City Club of Portland Bulletin, SITING LOCALLY UNDESIRABLE REGIONAL FACILITIES, page 169.

county through increased taxes and fees and to provide jobs. While it may be difficult to institutionalize the need to emphasize economic benefits of a facility, compensation strategies can be so institutionalized.

- o Including a private developer sector in the siting process, or at least having the proponent act as if he were a private developer, could be beneficial. As indicated above, much of the success of the siting in Arlington of a solid waste facility for the Portland metropolitan area resulted from the private developer's willingness to compensate and negotiate with affected citizens. Similarly, although the proponents in the Sheridan and Restitution Center cases were not private developers, they were willing to negotiate and compromise rather than wield the power they may have had as public bodies.
- o A strong information base is important to a successful siting. Opponents to the unsuccessful sitings repeatedly challenged technical findings and support for the site. In many cases, the proponents conceded information gaps that adversely affected their own credibility and strengthened the resolve of opponents.

In summary, the successful and unsuccessful sitings demonstrate both strengths and faults in the current siting process and the alternatives used to date. A more efficient and successful siting process would draw on these strengths and avoid the faults. There is a clear and present imperative to better address regional and statewide siting needs for needed, but often unpopular facilities. The need for additional correction facilities has brought the issues of siting these facilities to a head. Let's take advantage of the opportunity presented by these sets of problems to create a better more efficient siting system.