



Oregon

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TO: Land Conservation and Development Commission
FROM: Jim Rue, Director
SUBJECT: **Agenda Item 12 May 20-21, 2015, LCDC Meeting**

DIRECTOR'S REPORT

I. INFORMATION UPDATES

A. PARTICIPATION IN APPEALS, AND RECENT LUBA AND APPELLATE COURT OPINIONS

ORS 197.090(2) requires the director of the Department of Land Conservation and Development (DLCD and/or department) to report to the Land Conservation and Development Commission (LCDC and/or commission) on each appellate case in which the department participates, and on the position taken in each such case.

ORS 197.040(c)(C) requires LCDC to review recent Land Use Board of Appeals (LUBA) and appellate court decisions to determine whether goal or rule amendments are needed.

1. Department Participation in Appeals

Between February 25, 2015 and April 6, 2015, the department received six copies of notices of appeal filed with LUBA. The department filed none of these notices, and was not named as a party in any of these notices.

2. LUBA Opinions

Between February 3, 2015 and March 17, 2015, the department received copies of 15 recently issued LUBA opinions. Of these, LUBA dismissed seven, remanded two, and affirmed six.

Three decisions concern the application or interpretation of a statewide planning goal or LCDC administrative rule:

Goal 14, OAR 660-004-0040, Application of Goal 14 to Houseboat Moorages; *Squier v. Multnomah County*, LUBA 2014-074, issued February 4, 2015. LUBA affirmed a Multnomah County hearings officer's decision interpreting the county's code in relation to Goal 14,

“Urbanization,” and OAR 660-004-0040 (the “rural residential rule”) regarding houseboat moorages along Multnomah Channel. The petitioner challenged the hearings officer’s decision that OAR 660-004-0040 does not regulate houseboat moorages, and the decision that a Goal 14 exception is not required. The hearings officer found an exception is not required because a houseboat moorage is allowed as a conditional use under the county’s comprehensive plan and code, which are acknowledged to comply with Goal 14.

LUBA first determined that Multnomah County was correct in determining that OAR 660-004-0040, which interprets Goal 14 provisions regarding rural residential development in light of the 1986 Oregon Supreme Court *Curry County* decision, does not apply to houseboat moorages, in part because the rule does not specifically mention them, and in part because the rule does not include any standards that could meaningfully be applied to determine whether and what density of houseboat moorages can be approved without an exception to Goal 14.

LUBA next determined that the county’s existing code provisions regulating houseboat moorages are acknowledged. LUBA’s determination was based upon a review of the history of the county’s houseboat moorage regulations, which were originally approved in 1982, modified in 1997 by adoption of the Sauvie Island-Multnomah Channel Rural Area Plan, and reapproved without change through county code recodifications in 2000 and 2002. Since the county’s code provisions are acknowledged, ORS 197.646(3), which requires direct application of statewide planning goals to local government decisions when a county’s provisions become unacknowledged by new goal and rule requirements adopted by LCDC, does not apply. LUBA also determined that the county’s decision to process a Goal 14 exception for expansion of a houseboat marina in 2010 did not have the effect of “de-acknowledging” the county’s houseboat moorage provisions.

Goal 3, ORS 197.770, OAR 660-033-0130(2)(c), OAR 660-033-0120 Table 1, Firearms training facilities on agricultural land; H.T. Rea Farming Corp. v. Umatilla County, LUBA 2014-077, issued February 19, 2015. LUBA remanded a decision by Umatilla County approving expansion of an existing shooting range near the city of Milton-Freewater in an exclusive farm use zone. The petitioner asserted that OAR 660-033-0130(2)(c), in conjunction with OAR 660-033-0120 Table 1, exceeded LCDC’s authority to allow expansion of existing firearms training facilities on agricultural land. The only statutory authority for such facilities is found in ORS 197.770, which allows only for continuation of operations for a firearms training facility that existed in 1995, and does not allow for expansion of such operations. LUBA did not reach an opinion on this assertion because it remanded the decision for reasons related to the county’s local code, but in a concurring opinion Board Member Ryan opined that LCDC’s rule allowing expansion of existing firearms training facilities on agricultural land exceeded any statutory authority found in ORS 197.770, because it authorized uses (expansion of a firearms training facility) not authorized by the statute.

Goal 3, ORS 215.306, Onsite filming on agricultural land; *Smalley v. Benton County*, LUBA 2014-110, issued March 17, 2015. LUBA affirmed a Benton County decision determining that the petitioner's event facility did not qualify as "on-site filming and events accessory to on-site filming" allowed conditionally on agricultural lands pursuant to ORS 215.306(3)(a). LUBA agreed with the county's determination that, because the statute allowed "on-site filming and activities accessory to on-site filming, that "on-site filming" itself must be the primary use. Since the filming that occurred on the petitioners' property was incidental to the primary events such as weddings, it did not qualify under the statute. LUBA also reviewed the 1995 legislative history regarding the adoption of ORS 215.306 and found no evidence that the legislature intended to classify events that happened to be filmed for personal use as "on-site filming" authorized by the statute.

LUBA's decision in *H.T. Rea Farming Corp. v. Umatilla County*, particularly the concurring opinion from Board Member Ryan, raises a question as to whether OAR 660-033-0120 and 0130, in authorizing some expansion of existing firearms training facilities on agricultural land, exceed the scope of legislative authority granted by ORS 197.770. However, LUBA remanded the county's decision on other grounds, so the Commission does not need to authorize corrective rulemaking at this time.

3. Appellate Court Opinions

Between February 4, 2015 and April 1, 2015, the Oregon Court of Appeals issued five decisions reviewing LUBA decisions. The Court of Appeals affirmed three decisions, one without opinion, and reversed two opinions. Two of these decisions are of note:

Lake Oswego Preservation Society v. City of Lake Oswego, 268 Or App 811 (2015). The Court of Appeals reversed a LUBA decision reversing a City of Lake Oswego decision to remove a historic designation from property (applied pursuant to Goal 5, "Natural Resources, Scenic and Historic Areas, and Open Spaces") within the city pursuant to an interpretation of ORS 197.772(3). LUBA had determined, after review of the 1995 legislative history regarding passage of ORS 197.772, that the legislature had not intended to allow a successor property owner, who did not own the property at the time it was initially designated as historic, to compel the city to remove the designation. In its review of the same legislative history, the Court of Appeals differed with LUBA's interpretation, and determined that the legislature had intended to allow successor property owners to compel removal of an unwanted historic designation. This case has been appealed to the Oregon Supreme Court, which has accepted review.

Ooten v. Clackamas County, 270 Or App. 214 (2015). The Court of Appeals affirmed a LUBA decision remanding Clackamas County's approval of an application for a comprehensive plan amendment and zone change from Rural Residential to Rural Industrial. In approving the plan amendment and zone change the county had determined that, since the property had received an exception to Goal 3, "Agricultural Land," and Goal 4, "Forest Land," in 1980 when it was designated as rural residential, no new goal exception was necessary to redesignate and rezone the property to rural industrial. The Court of Appeals affirmed LUBA's opinion that the county was required to make findings under OAR 660-004-0018 as to whether the plan change and

rezone required new exceptions to Goals 3 and 4, because the plain terms of OAR 660-004-0018 state that exceptions to goals operate to authorize only uses, services, activities, densities and facilities that are “recognized or justified by the applicable exception,” and do not categorically exempt the property covered by the exception from the application of statewide planning goals under a subsequent plan amendment and rezone. The Court of Appeals also affirmed LUBA’s conclusion that the county must demonstrate that all requirements of OAR 660-004-0018(2) are satisfied in order to avoid the need to take a reasons exception to Goals 3 and 4.

4. Other Opinions of Interest

None.

5. Appeal Notices of Interest

Surface Mining in Deschutes County: Walker v. Deschutes County, LUBA 215-012, filed February 25, 2015. Appeal of a decision by Deschutes County rezoning 365 acres from Exclusive Farm Use to Surface Mining.

6. Measure 37/49

None.

B. GRANTS, INTERGOVERNMENTAL AGREEMENTS, AND CONTRACTS

See “General Fund Grants Program” in subsection II.E, Community Services.

II. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES

A. OREGON COASTAL MANAGEMENT PROGRAM (OCMP)

Most of the OCMP staff participated in Coastal Planner Network meetings on the south and north coast in April. The agenda covered a number of issues including federal consistency, the new ocean shores data viewer and updates on recently completed coastal resiliency projects.

Marine Issues: The Ocean Policy Advisory Council (OPAC) is scheduled to hold a meeting on May 8th in Bandon. Aside from electing new officers and getting updates on activities and programs, OPAC will discuss the National Oceanic and Atmospheric Administration (NOAA) Marine Sanctuary Program. That federal program will be the subject of a special forum held in Bandon the day prior to the OPAC meeting. Experts and officials from NOAA and existing sanctuaries in other states will attend to address the forum. The forum was prompted by the possibility that a local group was preparing to submit a proposal to NOAA that would begin the process to create a marine sanctuary near Cape Blanco. That group has since announced they will not be submitting a request to NOAA, and there are currently no other groups developing a proposal for a marine sanctuary in Oregon. The Oregon Department of Fish and Wildlife will provide an update on the state’s Marine Reserve System implementation to OPAC.

The Northwest National Marine Renewable Energy Center (NNMREC) Pacific Marine Renewable Energy Center (PMEC) Collaborative Workgroup held its quarterly meeting on April 23rd in Portland. The workgroup reviewed and discussed the draft Environmental Assessment that will be used by the Federal Energy Regulatory Commission (FERC) in the licensing application, and by the Bureau of Ocean Energy Management (BOEM) for lease processes for the South Energy Test Site off of Newport. PMEC has selected a route for the cable to shore which will extend the cable to south of Seal Rock near Driftwood State Park, and possibly shift the location of the facility within the BOEM lease block. The primary focus has been on the extension of the regulatory timeline and the completion of the best management practices, monitoring plans and adaptive management framework that will be included in the FERC license agreement.

The Principle Power Windfloat Project BOEM lease application process, for five wind turbine platforms in federal waters 17 miles off Coos Bay, is progressing but behind schedule. Principle Power has formed a partnership agreement with Deepwater Wind of Providence, RI, to build the turbines platforms. Deepwater is an offshore wind and transmission developer, actively developing projects off both the East and West Coasts. The companies are currently attempting to reach a power purchase agreement with regional power companies. This is one of the benchmark requirements that the company must achieve in order to continue to receive the \$47 million grant from the U.S. Department of Energy. The deadline for obtaining the purchase agreement is approaching and no agreement is near as of this time.

The Governor's Office convened a work group of marine scientists and state agency managers on the potential impacts of ocean acidification on Oregon resources. The meeting, on April 30th, drew upon the findings of the West Coast Ocean Acidification and Hypoxia Science Panel. The Governor's Natural Resources Office, Oregon Department of Fish and Wildlife and the Institute for Natural Resources conducted the meeting, which was described as "An Oregon Update and Next Steps: Moving forward the Efforts of the West Coast Ocean Acidification and Hypoxia Science Panel".

Coastal Hazards and Climate Change: As the department reported in the prior director's report, Tillamook County Board of Commissioners unanimously adopted the Neskowin Coastal Hazards Adaptation Plan and associated land use amendments. The amendments were appealed to LUBA, and DLCD intervened in the case. LUBA upheld most of the county's decision but remanded a housing issue to the county for additional findings. The department continues to believe that the amendments will be an important model to assist other coastal communities address increasing coastal erosion.

OCMP staff is finishing work with a NOAA coastal fellow who is studying an array of issues associated with beachfront protection and the related Goal 18 beachfront protective structure eligibility inventory. This information should assist in future policy discussions with applicable agencies and local governments. The NOAA coastal fellow and Coastal Shores Specialist have continued to work with coastal local governments to use and adopt the new Goal 18 beachfront protective structure inventories which provide benefits including simplified eligibility

determinations, greater consistency, and enhanced public awareness. Our current two-year NOAA Coastal Fellow is completing her fellowship and will be presenting her fellowship results in Agenda Item 8, “Shoreline Armoring Analysis.”

OCMP staff continues to provide tsunami land use assistance and otherwise participate and support hazard planning efforts in a number of communities. With funds from the OCMP, Clatsop County has started work to address tsunami hazards in their plan. The OCMP just released an updated chapter to the tsunami land use guidance document which includes detailed guidance related to tsunami evacuation facilities improvement planning. This added tool should further the productivity of the overall tsunami land use guide by providing significant assistance to local governments as they develop important financial and development code evacuation financing strategies and options. It should also facilitate more productive OCMP staff assistance to local communities in the future.

OCMP staff has completed work with project co-leads Oregon Sea Grant and the Oregon Partnership for Disaster Resilience and other project partners in south Clatsop County under the NOAA-funded “Coastal Community Resilience Networks Pilot Project” to finalize guidance for resilience planning at the community level.

In a complementary project that involves a broader area, the OCMP and project partner Oregon Sea Grant completed work on a project to ‘align’ agency climate adaptation priorities in Clatsop and Tillamook Counties. The project is designed to bring all agencies and parties involved in climate change adaptation planning together to collaboratively identify priority climate risks and measures to address those risks. The results of the project will be presented under agenda item 7, “Regional Framework for Climate Adaptation for Clatsop and Tillamook Counties.”

Estuary Updates: The OCMP received notice that funding has been allocated under the NOAA Section 309 Project of Special Merit competition to continue the working on Phase II of the Estuary Habitat Atlas project. This project seeks to extend the methods developed during the previous project of special merit work to incorporate additional high-value estuarine data sets that are not coast-wide. Our new work will result in a second generation Oregon Estuaries Coastal and Marine Ecological Classification System product that utilizes the best available modern data for all estuaries encompassed by the previous project of special merit , and at a spatial scale that is highly relevant for effective resource management practices. Funding for this project is expected to start in October of 2015.

Also of note, the OCMP was selected to match for a NOAA Coastal Fellow for 2015-2017. The project the fellow will work is titled “Shorelands at Risk: Building an Inventory of Vulnerable Estuarine Resources.” We will report on the results of the matching workshop in the next Director’s Report.

Federal Consistency

Routine Program Changes

Through the Routine Program Change (RPC) process discussed in previous reports, the division is continuing to make progress identifying specific “enforceable policies” within the local comprehensive plans and networked state statutes that comprise the OCMP.

Routine program changes in progress:

- City of Tillamook City
- City of Brookings
- City of Bandon

Since last reporting, the following routine program changes have been submitted to NOAA for review:

- City of Newport
- City of Toledo
- City of Lincoln City

Since last reporting, the following routine program change components were approved:

- Comprehensive Statutory Update (November 2014)
- City of Astoria (August 2014)
- City of Warrenton (August 2014)

The plan for moving forward includes contracting out several local jurisdiction RPCs to a consultant. This will allow DLCD to focus its efforts on other important RPC components, including the completion of statutory RPCs, completion of the required necessary data and information lists, and the list of federal license and permits that are subject to consistency review.

Major Consistency Reviews

The department received a consistency certification and associated materials from the Jordan Cove Energy Project and Pacific Connector Gas Pipeline on August 1, 2014. Staff began reviewing the proposed project for consistency with the Oregon Coastal Management Program, and issued a joint public notice with the U.S. Army Corps of Engineers and the Oregon Department of Environmental Quality (DEQ) in fall 2014. The notice was extended into April to coincide with DEQ’s public notice extension. The review will take longer than the federally-mandated six-month review period, and DLCD signed a stay agreement with the applicants in early 2015. The consistency decision is due July 30, 2015.

Oregon LNG (OLNG) consistency review began on July 3, 2013. Six stay agreements have been signed. The last stay agreement was signed on April 15th, expiring on July 12th. Without another stay agreement, the decision on OLNG will be due July 26th.

Database

The division is updating the federal consistency database. The update will result in a streamlined tracking and review process for routine federal actions, which will minimize duplication and increase staff efficiency. The update is part of the department's Information Management Modernization Initiative. The Federal Consistency Database is now live. The division is working on inputting a backlog of permits that were left between the last and current coordinators. While the database is live and usable, inputting the backlog of permits has brought some quirks of the database to light. The coordinator is working with technical staff to address these quirks to make the database more efficient for the department. Currently, the database allows users to track which permits are currently in review and to actively search for permits based on specific search criteria. Further, the database allows permit records to be linked to permit documents within the network.

B. DIRECTOR'S OFFICE

An oral update will be provided.

C. ADMINISTRATIVE SERVICES

Fiscal (Budget, Accounting, and Procurement): The fiscal team continues to work with the director's office and division managers on a monthly basis to ensure accuracy in financial reporting, and timely expenditure projections for 2013-15 while also developing the 2015-17 budget. The department continues to work with the Water Resources Department in providing procurement services.

The accounting team has begun efforts in biennium year-end statewide financial reporting and will continue working to meet state deadlines.

Information Technology: The network administrator continues to provide all IT services for the department and is continuing to work with department management in evaluating and determining current and future technology needs for the department and the commission. For example, Commissioner McArthur is test piloting a tablet and will have results to report out to the commission at a later date. The department continues to recruit for the Information Support Specialist 4 with duties focusing on end user support and SharePoint assistance.

D. PLANNING SERVICES

Transportation: The Transportation and Growth Management (TGM) Program received over 70 pre-applications. Staff at the Oregon Department of Transportation (ODOT) and DLCD are contacting every local government and tribe that submitted a pre-application to help them with the full application, or advise them that their proposal would not be eligible. The application packet was distributed on April 10, and will be due on June 13.

The Federal Highway Administration has selected the Oregon Sustainable Transportation Initiative (OSTI) to receive a 2015 Environmental Excellence Award. The award honors outstanding initiatives and partnerships across the United States that incorporate environmental stewardship into planning and project development, and recognizes exemplary achievements in air quality improvement and climate change.

OSTI is a partnership between ODOT and DLCD. The award recognizes work with the Corvallis Area Metropolitan Planning Organization (CAMPO). Working together, ODOT, DLCD, and CAMPO used the Regional Strategic Planning Model to assess how existing land use and transportation plans could reduce greenhouse gas emissions and improve air quality. The assessment also demonstrated how initiatives such as pricing and promoting eco-driving could further reduce GHG emissions, and CAMPO has already started exploring these options. Further information about the assessment is available on the CAMPO website:

<http://www.corvallisareampo.org/Page.asp?NavID=64>.

OSTI is currently working with the Rogue Valley Metropolitan Planning Organization to prepare a similar assessment for the Rogue Valley metropolitan area. The results of the assessment will be presented to the commission at the November meeting in Medford.

Natural Hazards: NOAA Fisheries Service has not yet publicly released the next version of the “reasonable and prudent alternatives” regarding how the National Flood Insurance Program should be revised to prevent it from jeopardizing threatened salmon. When it is published, we will comment on it and help local governments understand the potential impact to their floodplain management programs.

Measure 49: The recently adopted rules for transfer of development credits had a final legal review and have been filed with the Secretary of State and legislative counsel. Staff is working with interested counties. Several vested rights cases have been active recently, and staff is working with our attorney at the Department of Justice to ensure that counties comply with the law on vested rights determinations.

E. COMMUNITY SERVICES

General Fund Grants Program: The Grants Advisory Committee met on April 29th to complete its recommendation to the commission on 2015-2017 Grants Allocation Plan. See agenda item 14 for the committee’s recommendation.

The 2013-2015 grant period is drawing to a close, so payment and amendment activity is beginning to accelerate. Three of 22 technical assistance grants and one of three periodic review grants are closed. Fewer amendments have been requested than in most biennia, suggesting grantees and grant managers did a good job refining scopes of work at the beginning of the grant period.

Urban Growth Boundaries: Since the last director's report, the department approved two UGB amendments:

1. City of Grants Pass [823-acre expansion](#) to accommodate land for 20 years of projected growth. The city and county also established urban reserves. The department received two objections to the submittal and found that one of the objections did not comply with applicable administrative rule requirements; it was therefore deemed invalid. The director rejected the valid objection and approved the amendment and reserves establishment. The appeal period has expired and the UGB expansion and urban reserves designations are deemed acknowledged.
2. City of Prineville 114-acre expansion for industrial use. The department received no objections to the submittal and the director approved the amendment.

Periodic Review: In the March director's report, we reported that the department had received periodic review task submittals from Florence, Hermiston, and Troutdale. The department received no objections to any of the submittals. Hermiston's submittal, regarding its transportation system plan, was approved. Troutdale's submittal, which included tasks to update the public facilities and transportation systems plans, was approved and that city has completed periodic review. Florence's submittal updating its coastal element was found incomplete because Lane County had not co-adopted the plan amendments needed to complete the task. No additional task submittals have been received.

Regional activities: In the Willamette Valley Region, the DLCD regional representatives, with assistance and input from department specialists, provide technical and grant management assistance to local communities on a wide variety local planning projects. Currently of note:

- The department is involved in mediation of urban growth boundary disputes in Woodburn and Newberg. A tentative agreement on the boundary in Woodburn has been reached pending further work by the city and Marion County to implement the changes. The Newberg city council unanimously adopted resolutions on May 4, 2015, to withdraw from mediation, withdraw the UGB amendment submittal, and schedule repeal of the UGM amendment.
- Lafayette, Springfield, Eugene, Coburg, and McMinnville are actively working on amendments to their urban growth boundaries. We anticipate a submittal from Lafayette soon. The [Springfield](#) effort is generating considerable public interest that has led to the city's further examination of options. [Eugene](#)'s work has also generated concerns in some quarters. [Coburg](#) adopted an amendment after DLCD and local advocacy groups raised concerns; Lane County opted to withhold its approval and asked the city to reconsider some of its conclusions. The McMinnville proposal is application-based and if challenged will be reviewed by LUBA, not the commission.

- Salem is working on [updates to the housing and economic development elements](#) of its comprehensive plan. Division regional and specialist staff have had an advisory role in development of the draft updates. The city has tentatively found:
 - A surplus of land for single-family housing and a deficit of land for multifamily housing. Salem's residential land base (about 1,975 acres) has capacity for about 9,000 more single-family houses than will be needed over the 20-year period and a deficit of land for about 2,900 multifamily units (about 207 acres).
 - A deficit of 271 acres of land for commercial uses. The city can address this deficit through establishing neighborhood retail nodes in or near residential areas, encouraging redevelopment of underutilized commercial areas, and targeting conversion of other lands to commercial uses.
 - A 900-acre surplus of industrial land. The city contains high-quality industrial land in areas such as the [Mill Creek Corporate Center](#). This study recommends that Salem manage its high value industrial land base to ensure future opportunities for high-wage employment growth and to protect against conversion of high-value industrial land to other uses.

The city is planning to satisfy the deficits of land for multi-family housing and commercial employment growth within the existing urban growth boundary.

- The department awarded a technical assistance grant to Lane County to complete a wastewater management feasibility study for the unincorporated community of Goshen, which contains a regionally significant industrial area. The county had adopted an exception to Goal 14 to permit urban-scale industrial uses in the community, but that approval was remanded by LUBA. Based on the feasibility study, there are three options for providing wastewater service to Goshen. The option with the least cost would be for Goshen to be served by the Eugene-Springfield Metro Wastewater District. The county is now preparing new findings for a Goal 14 exception. County counsel is confident that the study addresses issues raised in the LUBA remand.
- The department awarded a technical assistance grant to the Mid-Willamette Valley Council of Governments (COG) for collaboration with the University of Oregon's [Resource Assistance for Rural Environments](#) (RARE) program and two cities for comprehensive plan updates. The cities of Donald and Gervais, represented by the COG, partnered and applied for a grant to update their comprehensive plan housing and economic development elements. The two cities were similar enough that the planning could be done for both at the same time to save money and share resources. With department grant assistance, the cities were able to host a RARE participant to be the planner for both cities. As a result, the cities are much more competitive for attracting growth with an updated comprehensive plan and city leaders know more about their future, helping them make timely decisions that impact economic development potential. This type of resource-sharing is having tremendous impacts on small cities and we are using it as a model with other small cities in the region to apply for future technical assistance funding.

F. RETIREMENTS, NEW STAFF AND PROMOTIONS

Jeff Weber is retiring after 28 years of service to the department and the state of Oregon. Jeff's most recent work has been with climate change adaptation and resilience. He is presenting on his most recent project under agenda item 7. Meg Gardner, the current NOAA Coastal Fellow will be leaving the department for a position at the Oregon Marine Board. Lisa Corbly, natural hazards planner, left the department for a position with the Multnomah County emergency management department. Bob Rindy is stepping out of his legislative role, and will be focusing entirely on the UGB rulemaking. Bob anticipates retiring at the culmination of that rulemaking project; therefore, the department has begun recruiting for his replacement.

III. LCDC POLICY AND RULEMAKING UPDATES

Sage Grouse Conservation: See agenda item 3

Metropolitan Area Greenhouse Gas Target: See agenda item 6

Primary Processing of Forest Products: See agenda item 10.