



Oregon

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TO: Land Conservation and Development Commission

FROM: Jim Rue, Director

SUBJECT: **Agenda Item 3, July 25-26, 2013, 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 (the department or DLCD) to report to the Land Conservation and Development Commission (the commission or LCDC) 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 April 25, 2013 and June 12, 2013, the department received copies of 18 notices of appeal filed with LUBA. The department filed one of these notices, but upon the Commission's decision not to pursue the appeal, it was dismissed by LUBA.

2. LUBA Opinions

Between May 1, 2013 and June 30, 2013, the department received copies of 21 recently issued LUBA opinions. Of these, LUBA dismissed twelve, remanded four, reversed none, affirmed five, remanded in part and transferred none, invalidated none, and transferred no petitions to circuit court.

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

Goal 3, ORS 215.283(2)(d), ORS 215.296 Public Parks on Farm Land: Hood River Valley Parks and Recreation District v. Hood River County, LUBA No. 2012-073, issued May 14, 2013. LUBA remanded the county's denial of a conditional use permit on a 31-acre parcel zoned exclusive farm use/high value farmland.

The county denied the conditional use permit based upon a provision in ORS 215.296 that conditional uses in farm zones may be approved only when the local governing body finds "that the use will not force a significant change in accepted farm and forest practices on surrounding lands devoted to farm or forest use." The county determined that 1) the "significant change" standard applied to farm land within the entire county, not just land adjacent to the subject property; 2) the "significant change" standard applied also to the subject property itself; and 3) the specific area to which the "significant change" standard was applied in the application was not properly defined.

LUBA determined that the county had erred on all three determinations. ORS 215.296(1) is not particularly concerned with generalized impacts to the local farm economy that is implied by applying the "significant change" standard to all farm land within the county. The language of ORS 215.296(1)(a) limits the scope of analysis to "surrounding lands," which does not include the actual subject property upon which the conditional use is to be located, unless that use occupies only a portion of the property, with the remainder to continue in farm use. And ORS 215.296(1) does not require that the precise extent or outer boundaries of an agricultural impact study area be defined if the surrounding agricultural area is homogenous, and the record reflects this fact.

Goal 3, ORS 215.283(1)(o) and OAR 660-033-0130(23): Greenfield v. Bella Organics LUBA No. 2012-102 and Bella Organics v. Greenfield LUBA No. 2012-103, issued June 19, 2013. LUBA remanded the county's approval of modifications to a previously-approved permit for a farm stand on EFU-zoned land on Sauvie Island, Multnomah County.

In these consolidated appeals, petitioner Greenfield alleged that the county erred in interpreting statutory and rule provisions for farm stands to allow "farm-to-plate dinners," "food carts" and "fee-based small gatherings such as birthday parties, picnics and similar activities." LUBA found that the rule's prohibition on structures for banquets precludes the local approval of farm-to-plate dinners at farm stands. LUBA further found that, while large gatherings such as corporate retreats, family reunions, weddings and concerts would not be permissible because they inherently lack a sufficient connection with agriculture, small-scale gatherings could be permissible if they promote the sale of farm crops or livestock. Finally, LUBA concluded that one food cart or a limited number of food carts that generate incidental retail sales at special events could be permissible, but not an unlimited number of food carts.

In a challenge raised by Bella Organics, LUBA determined that no other structures besides the farm stand itself are authorized under the farm stand rule. LUBA further held that wholesale farm product sales may not be included in farm stand retail sale figures, as this would inflate permissible incidental sales at the farm stand beyond the permitted 25% limit. Finally, LUBA

concluded that the county has the authority to require the applicant to prepare an annual accounting report to verify incidental and retail farm stand sales.

The significance of this case is that it provides additional interpretation of statutory and rule provisions that apply to a variety of uses and activities that are becoming increasingly contentious at growing numbers of farm stands. However, LUBA pointed out that the term “farm stand” itself and the type and scale of permissible farm stand activities remain undefined in rule.

Neither of these decisions requires goal or rule amendments.

3. Appellate Court Opinions

None.

4. Other Opinions of Interest

None

5. Appeal Notices of Interest

Water facility master plan for City of Bend: *Central Oregon Landwatch v. City of Bend*, LUBA 2013-37, filed April 26, 2013. An appeal of a decision by the City of Bend to adopt a revised water facility master plan, in response to an earlier LUBA remand.

Outdoor Mass Gathering on Forest Land: *Thomas v. Wasco County*, LUBA 2013-44 filed May 23, 2013. An appeal of a decision approving alterations to forest land in connection with an outdoor mass gathering.

Large apartment building in City of Portland: *Sellwood-Moreland Improvement League v. City of Portland*, LUBA No. 2013-52 filed June 12, 2013. An appeal of a decision by the City of Portland to approve a 68-unit apartment building near a future light-rail station in the Sellwood-Westmoreland neighborhood of Portland.

II. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES

A. COASTAL MANAGEMENT PROGRAM

Ocean and Coastal Services Division (OCSD) staff are involved with a number of coastal and ocean issues.

Marine Issues: Staff is in the initial stages of preparing the Geographic Location Description (GLD) that will be submitted to NOAA. The GLD will encompass a specific area within the Oregon Ocean Stewardship area as defined by Goal 19. It will list specific federal activities related to the development of marine renewable energy projects that will be subject to automatic

review under the Coastal Zone Management Act (CZMA) federal consistency rule standards. Once submitted and approved, listed federal activities within the GLD will act as an automatic trigger for the CZMA federal consistency review process. The GLD is based on an analysis demonstrating foreseeable impacts of the listed actions on the state's coastal zone resources. Staff is collaborating with ODFW Marine Division on the compilation of the analysis. The target completion date for submittal to NOAA is the summer of 2014. The submittal is a technical mapping and analysis project that will be submitted to NOAA as a routine program change which does not require OPAC review or approval, or LCDC approval. OCSA anticipates briefing the Commission as the project progresses.

Staff continues to collaborate with other state agencies as members of the Coordination Committee for the Ocean Power Technologies (OPT) Reedsport marine renewable energy project pursuant to a settlement agreement. The state agencies, coordinated by the Governor's office, have responded to the OPT request to the Federal Energy Regulatory Commission (FERC) to amend its license agreement subsequent to the failed deployment of the buoy as planned during the summer of 2012. A letter was sent by DSL to OPT on behalf of the state agencies, outlining the state's response to the FERC request and calling on OPT to remove the derelict anchor, buoy float and cables from the seafloor at the site. OPT has recently had some staff management turnover, and will be reconvening the coordination committee in June to discuss changes to the settlement agreement study and monitoring plans and execution dates pursuant to their request to amend the license terms.

Staff, along with other state and federal agencies, continues to participate in the coordination committee for the National Northwest Marine Renewable Energy Center (NNMREC). The committee is assisting NNMREC in navigating the siting, permitting and leasing process for the area in federal waters south of Newport that has now been designation as the South Energy Test Site. This area, along with the North Energy Test Site, located within the state waters off of Yaquina Head, and the Pacific Marine Energy Center (PMEC) engineering facilities located onshore in Newport, are all subsets of NNMREC.

We have worked with NOAA and Bureau of Ocean Energy Management staff to conduct a series of workshops in early June to collect data for the Pacific Regional Ocean Users Atlas (PROUA), a multi-year regional GIS mapping project. The workshops, held in Portland, Coos Bay and Newport, involved representatives of user communities including commercial and recreational fishing, scientific research, navigation and boating, recreation, military, trans-ocean cable companies and others. The spatial data will be combined with other data sets and information to assist BOEM in future leasing decisions.

Staff continues to monitor the remaining ocean-related bills that are in the final stages of legislative approval.

Coastal Hazards: Several staff is involved with coastal hazards. Staff is working closely with Tillamook County, providing much needed technical assistance to the Neskowin Coastal Hazards Committee. Staff is working on tsunami planning guidance for local governments and providing technical assistance to local governments interested in UGB plan amendments in response to

tsunami hazards. OCSD is working with a consultant to assist with development of a tsunami planning handbook. Staff is working with several local governments to better define their coastal shorelands boundary.

Staff has started a two-year pilot project using a \$100,000 grant from NOAA's "Coastal Community Resilience Networks" program. The pilot project is a joint effort of the Oregon Coastal Management Program, Oregon Sea Grant and the Oregon Partnership for Disaster Resilience. The grant is being used 1) to develop a template for, and examples of, local *community resilience plans*; and 2) to establish an interdisciplinary network of agencies, experts and communities that have a role in planning for community resilience to natural hazards. This pilot involves Clatsop County and the cities of Seaside, Gearhart, and Cannon Beach. The scope of the project is intended to include both climate-related "chronic" hazards including sea level rise, flooding, and drought, and "catastrophic" hazards related to tectonics, such as earthquakes and tsunamis.

Several OCSD and other DLCD staff were involved with OSSPAC which developed a state resiliency plan and submitted it to the 2013 legislative session. OCSD's Coastal Shores Specialist and PSD's hazard planner participated in a legislative work session on the plan.

OCSD's Coastal Shores Specialist and a staff member from Oregon Parks & Recreation Department (OPRD) attended a fellowship matching workshop in April to select a Sea Grant fellow to work on coastal shoreline protection issues for the next two years. The fellow will be jointly funded by DLCD and OPRD and will start with the agency in August.

Estuary Updates: The Estuary Project of Special Merit is moving ahead on several fronts including: the translation of existing digital data into the new Coastal and Marine Ecological Classification System framework; the delineation of study area boundaries, and the compilation of existing digital datasets into a comprehensive data collection. This work is all being done in preparation for review by the technical specialist that was hired earlier in the year as a contractor for the project. All of the work being conducted now is in direct preparation for the generation of new habitat map products for each estuary along the coast. Staff conducted a workshop in mid-May, when a group of technical experts were convened to review and comment on the products being generated by the project.

Staff has just released an estuary data viewer which has been designed to help local governments use available estuary information in decision making. The viewer is being very well received by coastal planners. OCSD also has a contract with a consultant to develop a trends assessment for estuaries and is developing an estuary regulatory assessment in-house. All of these products are designed to enable future updates to estuary plans that were developed in mid-1980s.

Federal Consistency: We continue to make headway on updating and identifying specific "enforceable policies" within the local comprehensive plans and networked state statutes that comprise the OCMF. The division has worked with NOAA's Office of Ocean and Coastal Resource Management (OCRM) to streamline the process for submitting routine program changes (RPCs), and has two contracts, one for assistance preparing local comprehensive plan

RPCs, and one for preparing state statute RPCs. These two contracts will end June 30. The division plans to extend one of the contracts to address additional jurisdictions.

The RPC for Clatsop County is the most recently submitted RPC. NOAA did receive an objection to the RPC from attorneys representing Oregon Liquefied Natural Gas (OLNG). Staff and the Attorney General's office will be addressing the objection over the next 45 days.

In consistency review work, the division has seen an upswing in the number of federal permits that require consistency review. As a follow up to the U.S. Army Corps of Engineers project to rehabilitate portions of the South Jetty at the Mouth of the Columbia River reported in the May Director's Report, staff was able to work through some last minute issues and to concur with the project. The Corps was very appreciative of our quick response and thorough coordination. Both the Jordan Cove and Oregon LNG projects are moving forward in the application phase. Both have applications with FERC, although neither has filed consistency determinations with the department yet.

Members of both OCSD and CSD met with staff and management of the Corps of Engineers Regulatory Branch in June to provide training and coordination on the statewide planning program and the state's coastal management program. Staff has received a number of follow-up requests for similar training.

B. COMMUNITY SERVICES

General Fund Grant Program: Most 2011-13 Technical Assistance (TA) and Periodic Review (PR) grant agreements required that final products be submitted by the end of June 2013. The close-outs have begun arriving, so grant managers (regional representatives for most grants) are gearing up to review submittals to ensure compliance with the terms of the agreements. Among 24 TA and PR grant agreements, four have been completed and the final payment made (all were for the full amount of the grant). Another four close-outs have been submitted at the time of this report. All of the remainder should be submitted prior to the commission meeting.

Regarding Planning Assistance (also known as "small city/county") grants, all have closed out. Of 146 cities and counties that were offered the assistance, 127 signed the grant agreement, resulting in \$147,000 in payments early in the biennium. Two cities did not expend any of the funds and one expended only a portion of it, resulting in \$2,412 of reversion.

The Dispute Resolution Grants have been closed out. The grantee expended the full amount. No counties have requested final payment on a Gorge Grant at the time of this report.

Periodic Review: The department has two periodic review task submittals that will receive a decision from the director prior to the commission meeting in July. The department is reviewing several tasks submitted by Junction City that include an urban growth boundary amendment and new provisions to protect wetlands under Goal 5. Troutdale submitted a task relating economic development.

C. DIRECTOR'S OFFICE

An oral update will be provided.

D. ADMINISTRATIVE SERVICES

The department's presentation to the full Ways and Means Committee occurred on June 12, 2013. The director will report results of that conversation to you at your upcoming meeting.

The fiscal team continues working with the director's office and division managers to ensure accuracy in financial reporting and timely expenditure projections for 2011-13. A department-wide model is presented at each LCDC Budget and Meeting subcommittee meeting. In addition to current financial reporting efforts, the budget officer is evaluating potential improvements for 2013-15 reports. The accounting team is starting its biennium end statewide financial reporting efforts for the Comprehensive Annual Financial Report and Schedule of Expenditure of Federal Awards. This process will conclude in late summer.

The information technology unit continues working with department management in evaluating and determining current and future technological needs for the department in relation to information modernization management efforts.

The administrative services manager and key staff of the department continue long term efforts toward better department-wide information management. The project coordinator is working with the administrative manager, the department's GIS and SharePoint workgroups and other key staff in implementing better information management and continues setting the stage for this five year effort.

E. PLANNING SERVICES

Natural Hazards: The project to update the statewide Natural Hazards Mitigation Plan is getting underway. A draft scope and schedule was presented to the Interagency Hazard Mitigation Team, and we are finalizing the statement of work with the Federal Emergency Management Agency (FEMA). A website (www.oregon.gov/LCD/HAZ/pages/NHMP.aspx) and an email list have been established. An important element of the plan will be a risk assessment and vulnerability model. This analysis combines maps of where disasters are likely to occur with maps showing population and built environment to identify the areas of greatest vulnerability. We are partnering with the InfoGraphics lab at the University of Oregon to develop the computer model.

The department has been working with Tillamook County as FEMA conducted a review of floodplain management in the county. FEMA has determined that problems exist and is requiring the county to make plans for corrective actions to remain in the National Flood Insurance Program. One of the issues is coordination between the building inspection functions and floodplain management. We are working with the Oregon Building Codes Division to try to avoid similar problems in other areas of the state.

The National Flood Insurance Program (NFIP) was significantly changed by congress last year, but changes are still being implemented, and many homeowners are not yet aware of the changes. We are working to get information to cities and make presentations to any interested audience.

Transportation: The transportation section will be reorganized in the 2013-2015 biennium. In the past, everything related to transportation has been lumped together in the Transportation and Growth Management (TGM) Program. In recent biennia, we added limited-duration positions in a separate program to reduce greenhouse gas emissions under the name Oregon Sustainable Transportation Initiative (OSTI). This continues in 2013-2015 with three positions (2.5 FTE).

In the new biennium, TGM will narrow its focus to only include projects funding local planning. Other tasks (e.g., reviewing plan amendments, participating in technical advisory committees and rulemaking) will occur in a new program called Land Use and Transportation Policy. Overall the transportation section will include 8 positions (7.2 FTE), with individuals working on projects in one or more of the three different programs. We are in the process of hiring for three positions (3.0 FTE).

TGM grant applications were due June 14, and are being scored now. Awards will be announced in October. In the OSTI program, we continue to work with local governments in metropolitan areas on scenario planning. Corvallis has decided to take the first steps and will conduct an initial assessment of greenhouse gas emissions with funding from ODOT.

Measure 49: We are in the middle of a project to move the database from server operated by an outside vendor to server operated by the department. Having our own database server will streamline the administrative processes that track ongoing development under M49 authorizations, and give us more flexibility to map the overall effects of M49.

III. DEPARTMENT ORGANIZATIONAL AND MANAGEMENT INFORMATION

A. NEW STAFF AND PROMOTIONS

There have been no new hires or promotions since May Meeting.

B. DEPARTING EMPLOYEES

None to Report.

C. RECRUITMENTS

PSD completed first round interviews for one permanent and two limited-duration planner 3 positions. These positions will be assigned work in general land use and transportation policy, the Transportation & Growth Management Program, and/or in the Oregon Sustainable Transportation Initiative Program.

IV. LCDC POLICY AND RULEMAKING UPDATES

A. LEGISLATIVE CONCEPTS

See legislative update, Agenda Item 8.

B. ONGOING RULEMAKING AND POLICY WORK

See Policy Agenda report, Agenda Item 9

B. CURRENT RULEMAKING

Two rulemaking projects are underway, regarding greenhouse gas and electronic notice for plan amendments. See Item 9, Policy Agenda Report.

C. OTHER POLICY ACTIVITIES

See Item 9, Policy Agenda report.