



Oregon

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August 12, 2011

TO: Land Conservation and Development Commission (LCDC)

FROM: Bob Rindy and Michael Morrissey, Legislative Coordinators
Department of Land Conservation and Development (DLCD)

SUBJECT: **Agenda Item 7, August 17-19, 2011, LCDC Meeting**

Ideas for LCDC Policy Agenda for the 2011-2013 Biennium Suggested by DLCD Staff Members

I. OVERVIEW

LCDC is beginning its process to adopt a Policy Agenda for the 2011-13 biennium. DLCD staff was encouraged to provide ideas for the commission's consideration. Several ideas were suggested and are summarized below. At this point none of these ideas are recommendations by the department. The department will be recommending priorities for the policy agenda at the commission's October 5-7 meeting.

The DLCD staff suggestions for new policy efforts include:

1. Establish policies and standards for non- resource land (rulemaking);
2. Clarify Goal 4 Forest Land definition (through interpretive rules);
3. Provide a "trigger" for Goal 5 rule requirements regarding fish and wildlife resources, wetlands and riparian resources, and other rule clarifications and changes;
4. Consider new rules regarding Goal 6 relating to water quality standards (possible goal amendments);
5. Appoint a work group to clarify key requirements of Goal 7, including consideration of new rules, in order to respond to new hazards information generated by state and federal agencies, and in order to assist in climate change adaption locally;
6. Consider changes to LCDC Parks Planning rules for clarification and to address new issues and concerns.

II. SUMMARY OF SUGGESTIONS

The following summaries are based on proposals submitted by DLCD staff.

1. New rules for non-resource land rezoning

PROBLEM:¹ There are currently no statewide standards to guide counties in identifying and zoning “non-resource land” – land outside UGBs that does not meet the definition of farm or forest land and therefore is not subject to Goal 3 or Goal 4.² At least nine counties have identified non-resource land – over 86,000 acres – and rezoned it for uses other than farm or forest. Typically such land is zoned for low density residential use. Pressure to redesignate farm and forest land as non-resource land is increasing in central, eastern and southern Oregon, particularly in Crook, Deschutes, Jefferson, Klamath, Josephine and Douglas Counties. The department’s *2008-2009 Farm and Forest Report* found that about half of all rezonings from farm or forest to rural residential use in that time period were through non-resource zoning rather than through exceptions, with non-resource proposals converting significantly more acreage than exceptions. A single non-resource land rezoning in Klamath County involved 2,010 acres.

Goal 14 prohibits “urban” uses outside UGBs, but otherwise there is no state goal, rule or statute on non-resource zoning. While some counties have comprehensive plan provisions to guide rezoning from resource to non-resource, most do not. While a few counties apply 20-acre or 10-acre minimum lot sizes to such land, many counties apply a 5-acre rural residential zoning. Some (Klamath in particular) have zoned nonresource land for lot sizes less than 5 acres. In contrast, DLCD exceptions rules require a minimum lot size of at least 10 acres for new lots, based on Goal 14’s intent to prevent urbanization of rural land. While exceptions are due to a preexisting rural lot pattern, non-resource designations occur regardless of the existing and surrounding patterns and lot sizes. For example, Josephine County over the last few years has submitted a stream of PAPAs to rezone Woodland Resource 80-acre (forest) land to RR-5 non-resource land.

This continuing trend, with the potential for tens of thousands of acres of land to be rezoned RR-5 throughout the state, threatens to undermine the policies of the land use program that prevent sprawl and encourage compact, efficient growth. The trend will impair the functioning of urban growth boundaries, impact farm and forest economies, increase already unsustainable costs for rural transportation and other services, significantly add to growing wildfire risk, and increase vehicle miles traveled, transportation congestion and greenhouse gas emissions. This effort is especially needed due to impending pilot projects for HB 2229 (2009), keeping in mind proposed (unsuccessful) recent legislation on rural land rezoning (HB 3615).

PROPOSED POLICY EFFORT: The commission should adopt new rules establishing clear policies and standards for non-resource zoning. The new rules should be based on (and would interpret) Goals 3, 4, 14 and perhaps other goals. The rules would clarify and interpret current

¹ Proposal by Jon Jinings, Community Services Specialist and Katherine Daniels, Farm and Forest Land Specialist

² This is not to be confused with land in exception areas – land that does meet the definition of Goals 3 or 4 but that is not zoned for resource protection due to commitment to other (generally residential) uses or (rarely) due to certain special rural needs. There are almost a million acres of exception land statewide.

statewide goals related to farm and forest land, rural uses outside UGBs, and other goals. However, this effort should not require amendments to any statewide goals. The rules should establish land use planning requirements – including minimum lot sizes for residential use, standards for rural uses other than residential, and standards for public facilities and transportation planning in non-resource land areas. The rules should also provide procedures and standards for deciding whether land currently zoned for farm and forest use does or doesn't meet goal definitions for farm and forest land, and should ensure that this evaluation and planning considers carrying capacity, natural resources, affects on surrounding farm and forest land and local farm and forest economies of areas proposed for rezoning.

2. Clarify Forest Lands Definition

PROBLEM:³ The term “forest land” is defined in Goal 4 only in very general terms, especially the definition applicable when a county amends its plan in response to a PAPA. Statutes and the Goal 4 rules (OAR 660, division 6) do not give enough clarity to this definition in light of a growing number of land owner proposals to rezone individual properties from forest use to residential use contending that the land does not meet the definition of forest land. When interpreting that definition, there is no objective threshold to help decide whether land is “suitable for commercial forest uses” (for example, which if any forest cubic-foot-site-class range should be applied) and no guidance on how to identify other land needed for related purposes, the other two prongs in the goal definition. Contrast this to Goal 3, where there is a much clearer four-prong definition of agricultural land, especially in rules under OAR 660, division 33.

The courts have shed some light on the forest definition, but in general two of the three prongs in the definition have been accorded little weight, in large part due to the lack of interpretive detail by the commission. And new and novel reasons are constantly advanced as to why land should not qualify as forest land under the first prong regarding suitability for forest uses (e.g., “it’s too windy to grow trees”). As counties increasingly rezone land to non-resource zones (see proposal #1 above), the department is called on to provide more a more objective and detailed forest land definition. This issue will become even more pressing as counties use the process under 2009 legislation - HB 2229 - to determine “mapping errors” for a particular county’s forest land.

PROPOSED POLICY EFFORT: Amend OAR 660, division 6, to provide a more concise definition of the key terms that must be considered when a county proposes to amend forest land zoning in response to claims that particular land does not meet the goal definition of forest land. These terms comprise the three prongs of the current Goal 4 definition: “lands suitable for commercial forest uses,” “nearby lands necessary to permit forest operations or practices,” and “other forested land that maintains soil, air, water and fish and wildlife resources.” Fleshing out the meaning and intent of these terms could be done in conjunction with the project described in proposal #1 in this report (see above), or as a stand-alone project. This is necessary regardless of related county efforts to apply HB 2229, due to the increasing numbers of individual property rezoning requests for non-resource zoning on a case by case basis.

³ Proposal by Katherine Daniels, DLCD Farm and Forest Lands Specialist

3. Natural Resource Planning Process Improvements (Goal 5)

PROBLEM:⁴ LCDC's 1995 Goal 5 rules (OAR 660, division 23) require local governments to re-engage, during periodic review, in inventorying certain categories of significant resources and adopting resource protection strategies for those resources (for example, wildlife resources listed under the federal Endangered Species Act or for water quality limited streams identified by DEQ). However, the Goal 5 rules are no longer applied at periodic review (when it occurs) and are "triggered" only during certain plan amendments. Even then, they apply only to new or amended inventories typically initiated voluntarily by local governments, or for new areas added to UGBs or where rezoning or plan amendment proposals affect resources already inventoried.

History: When most local plans were adopted applying the statewide goals in the late 1970's and early 1980's, the requirements of Goal 5 were vague and resource inventory information was sparse or non-existent. As a result, many local governments did little to inventory or protect natural resources. Recognizing this problem, and as a core principle in adopting new more specific Goal 5 rules in 1995, LCDC intended the "new" Goal 5 inventory and protection planning requirements to apply when local governments updated plans through periodic review. Indeed, for a few years after the rules were adopted many jurisdictions used periodic review grants to fund new inventories, although many local protection efforts for newly inventoried resources stalled, in part due to the controversy around Measures 7 and 37.

In 2001 and 2003 the legislature amended the law to end mandatory periodic review for a majority of local governments and thus remove that "trigger" for division 23 in local land use planning. Thus most of the provisions in the Goal 5 rules rarely take affect. Today, despite 35 years of statewide land use planning in Oregon, local government inventories of riparian areas, wetlands, and wildlife habitat – and local efforts to conserve such resources – are inadequate or nonexistent in a large number of cities and counties. Even where ODFW has adopted and updated maps of critical wildlife habitat statewide, for the most part these maps are not reflected by local plans and ordinances and thus are not used in local review of development applications.

PROPOSED POLICY EFFORT: Consider changes to the Goal 5 rules (OAR 660, division 23) in order to advance efforts to inventory key resources (habitat, wetlands, riparian areas) and protect significant resources through comprehensive planning and zoning, and/or through development review. This could be through a work group that should:

- Determine ways to trigger the applicability of the 1995 rules, such as deadlines for local compliance on resource inventories and programs to protect inventoried resources;
- Consider ways to apply the rules to individual development projects that are above a specified size threshold;
- Consider amendments to address a number of issues with the Goal 5 "safe harbor provisions" to correct problems, for example, to make sure all riparian wetlands are identified as significant riparian resources under that applicable safe harbor even if a jurisdiction had not completed a DSL compliant local wetlands inventory.

⁴ Proposal by Amanda Punton, DLCDC Natural Resource/Aggregate Specialist

4. Water Quality Requirements under Goal 6

PROBLEM:⁵ The Clean Water Act generally requires that water quality standards be maintained, but in practice the state (especially DEQ) has very limited ability to remedy water quality problems caused by development in those urban areas less than 50,000 in population. Certain low-impact development strategies to address this have gained recognition nation wide but are not described under Goal 6. Where these strategies are used, they typically recognize the connection between urban land use practices and water quality. While existing Goal 6 language connects to and relies to a large degree on DEQ rules, those rules have limited effect in influencing development patterns or practices that minimize impacts to water quality.

PROPOSED POLICY EFFORT: Goal 6 was written thirty five years ago when there was less understanding of non point pollution. The goal language parallels that of the national Clean Water Act, referring to “waste and process discharges.” This language could be changed to recognize the impacts of urban development on storm water discharges and on the natural systems that serve to maintain water quality. Or at least, new rules interpreting the goal should be considered to foster easier integration of water quality protection strategies into local comprehensive plans and implementing ordinances, and to better support DEQ efforts to reduce pollutant load from urban areas into water quality limited streams.

5. Effort to Update and Improve Hazard Mitigation through Goal 7⁶

PROBLEM: Goal 7 was revised in 2001 to require that LCDC notify local governments about new hazard information generated by the state or federal government “if the new hazard information requires a local response.” Local governments must respond to this information within three years of being notified. The amended goal is vague as to the quality and level of detail that must be in the information to trigger such department notice, especially as to when “local response” is “required.” It is by no means clear WHO decides whether new information triggers the notification under Goal 7. (Note: the goal does not prescribe how local governments must respond – it merely sets a deadline for when local governments must respond and some factors they need to consider in their response.) The goal does not specify consequences for a non response, and to date no DLCD notices of have been sent. The department has no statewide mechanism to identify, receive, catalog and assess new hazard information and determine whether it requires notification of local governments. Further, we have no formal process – except with regard to flood hazards with respect to the National Flood Insurance Program (NFIP) – for notifying local governments if we were to decide new hazard information requires a local response.

This lack of specificity is not only troubling to state and federal agencies with hazard responsibilities; it is also disconcerting to local governments and other stakeholders. A recent federal court case in the State of Washington suggests that implementation of FEMA’s flood

⁵ Suggested by Amanda Punton, DLCD Natural Resources/Aggregate Specialist

⁶ Suggested by Chris Shirley, Natural Hazards and Flood Plain Specialist; Jeff Weber, Coastal Conservation Coordinator; and Steve Lucker, Floodplain/Natural Hazards Mapping Specialist

plain management program must be adjusted to address the endangered species act (ESA), and this again raises the question as to when and how Goal 7 applies to new hazard information.

Goal 7 requires local governments to evaluate the risk to people and property based on new inventory information and take action to avoid development in hazard areas. However, there is no agreed standard methodology for evaluating risk and, in fact, no agreed upon understanding of the terms “risk” and “hazard area.” Finally, it is important to note that LCDC’s Interim Climate Change Strategy included a recommendation that LCDC consider adoption of rules to implement Goal 7, including model ordinances. Since 2001, it has become increasingly clear that planning for natural hazards will be an important element in local climate change adaptation efforts. Predicted future climate conditions likely represent increased risk from natural hazards.

PROPOSED POLICY EFFORT: The department and the commission in coordination with other agencies should initiate a process to clarify when new hazard information requires a local response, “who” decides that, and what exactly constitutes a notification process. This could be done through a work group that reports to LCDC and other boards and commissions with recommendations. The group should consider whether these questions require Goal 7 amendments or new administrative rules. This group should also consider ways to improve local preparedness for the predicted increase in climate-related natural hazards. The group should especially consider various agencies’ roles, responsibilities, and practices related to natural hazards, and should identify areas where agency practices could be revised to improve local planning. The group should develop a systematic hazards assessment process deriving from Goal 7, possibly established through Goal 7 implementing rules.

Also with respect to Goal 7 and hazard planning, there is a need to:

- Clarify statutory and strategic roles of DOGAMI and other agencies;
- Suggest consistent methodology for planners and policy makers;
- Identify the real-world needs of communities and determine where DLCD can provide assistance (including new tools and model ordinances);
- Build in and take advantage of new federal agency programs;
- Require that hazard mitigation plans required by FEMA be adopted into local comprehensive plans; and
- Consider the state’s climate change policy recommendations.

6. Need for Clarity regarding Local Park Planning in EFU⁷

PROBLEM: Historically local parks outside UGBs – both public and private – have consisted of relatively small-scale sites intended for passive or low-intensity recreational pursuits. Increasingly new parks are proposed that are large, intensive in nature, and established for special purposes with intent to generate revenue. Parks are often proposed just outside UGBs but intended to serve the nearby urban population. Proposed park uses include large-scale developed recreational facilities such as athletic field complexes, ATV parks, RV campgrounds, paint ball

⁷ Proposal by Katherine Daniels, DLCD Farm and Forest Land Specialist

parks and other similar facilities. Some “parks” have been established for the sole or primary purpose of providing revenue-generating entertainment, such as concerts, festivals, weddings, reunions, food service and other regular event venues. Such parks take agricultural land out of production and have the potential to impact nearby agricultural and forest operations. Cumulatively, or even in individual cases, these uses require higher service levels to rural areas (roads, police, fire) and foster additional requests for non-farm uses in the area. Many of these “park uses” should instead be located inside UGBs, others should be subject to the new “event” provisions of SB 960, and others would be more appropriate in rural commercial zones rather than on farm land. An example is a proposed 249-acre park on high value farmland (in crops and orchards) just outside the Grants Pass UGB, proposed for multiple athletic fields and other uses.

Current statutes and rules provide insufficient guidance as to types, scale and intensity of uses that are appropriate in local parks proposed in EFU and forest zones. Several LUBA cases have noted this fact. While LCDC parks rules at OAR 660, division 34, provide adequate guidance for state park planning, guidance for local parks planning needs attention: although existing rules list permissible local park uses, it is unclear as to which of the listed uses require an exception or park master plan. Similarly, other than for campgrounds, there is no guidance at all for “private parks” authorized in statutes and farmland rules. Successive LUBA cases have ruled that the lack of any specific language in statute or rule implies an open-ended permission for such uses.

This policy issue is recurring and important. The State Parks and Recreation Department (OPRD) has funded park projects on EFU and forest land in instances where the department opposed the projects. OPRD is proposing to hold a “land use forum” with other affected state agencies to try to resolve these issues. However, DLCD should be prepared to respond with adjustments to its policies and rules in response to issues.

PROPOSED POLICY EFFORT: DLCD should participate in the OPRD land use forum, but should be prepared to follow up with rulemaking to address the issues from the forum and the issues described above. It is likely that the OPRD forum will clarify policy on all of these concerns, and it would not be surprising if various stakeholders recommend changes in LCDC rules concerning parks planning. DLCD needs to be at the table as discussion of the state’s role in local park planning occurs. It is likely rulemaking will be recommended to clarify rules, including rules for issues described above and possibly new issues. But even if the forum does not result in agreements or recommendations on these issues, DLCD will increasingly be called upon to interpret state requirements and to participate if these issues are litigated.



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August 15, 2011

TO: Land Conservation and Development Commission

FROM: Bob Rindy and Michael Morrissey, Legislative Coordinators
Department of Land Conservation and Development

SUBJECT: **Agenda Item 7, August 17-19, 2011, LCDC Meeting**

Ideas from DLCD Staff for LCDC Policy Agenda (cont.)

As an addendum to the August 12, 2011 department memo to the commission, staff proposes one additional idea for policy change as described below.

7. Expanded provisions for dog training on farmland

PROBLEM: There is growing pressure to allow dog training facilities on farmland. In the 2011 Legislative session, House Bill 3047 would have expanded the definition of “farm use” to include facilities for breeding, raising and training dogs in canine skills on EFU land, including dog shows and perhaps other similar uses. Neither this department nor the Oregon Department of Agriculture considers dogs to be livestock. Only in the narrowest sense could aspects of this proposed use be considered a “farm use,” such as when dogs are used in herding. Nevertheless, HB 3047 came very close to passing.

Dog kennels are currently a conditional use in statute in EFU zones, although the term is not defined. The conditional use process ensures that proposed dog kennels are compatible with nearby farm and forest uses. The department’s farmland administrative rules (OAR 660, division 33) further limit dog kennels to non high-value farmland. Dog kennels are not permitted in forest zones. These provisions are seen by legislation proponents as too onerous for siting dog kennels outside urban growth boundaries in the Willamette Valley, where there is a significant amount of high value farmland. Counties differ in their approaches as to what they consider to be dog kennels. Some interpret the term broadly to include breeding, raising and training dogs, and some do not. At least one county is planning to allow dog training facilities as a home occupation, with sideboards. However, home occupations must be operated substantially indoors and dog training occurs primarily outdoors.

During the legislative session, department staff, ODA and the Farm Bureau offered to support statutory expansion of the definition of dog kennels to clearly include the breeding, raising and training of dogs. However, bill proponents objected to a conditional use process and will probably propose that the use be permitted outright in the 2012 Legislative session. Staff suggests allowing a conditional use through amendments to current rules to forestall future legislation.

PROPOSED POLICY EFFORT: Amend OAR 660, division 33, to clarify that “dog kennels” (a conditional use currently allowed) includes the breeding, raising and training of dogs, and explore the possibility of allowing the use on high-value farmland.