



Oregon

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February 26, 2009

TO: Land Conservation and Development Commission
FROM: Richard Whitman, Director
SUBJECT: Agenda Item 5, March 11-13, 2009, LCDC Meeting

DIRECTOR'S REPORT

I. INFORMATION UPDATES

A. RECENT LUBA AND APPELLATE COURT CASES

ORS 197.090(2) requires the director to report to the Commission on each case that the department participates in, and on the position taken in each case.

ORS 197.040(1)(c)(C) requires the Commission to review recent Land Use Board of Appeals (LUBA) and appellate court decisions, and determine whether goal or rule amendments are necessary as a result of those decisions.

1. Department Participation in Appeals

Between November 21, 2008 and February 13, 2009, the department received notice of 52 appeals filed with LUBA. The department filed none of these notices.

The department, with DOJ assistance, submitted an *amicus curiae* brief to the Supreme Court in *Johnson v. Jefferson County*. This is an appeal by a number of individuals and organizations of Jefferson County's comprehensive plan and zoning code amendments implementing the destination resort provisions of Goal 8 and ORS 197.435 *et seq.* The county's plan and code amendments were appealed to LUBA, which remanded the decision but upheld the county on several assignments of error (LUBA Nos. 2007-016, -018, -021, -022, -025, -026, -030 and -031). LUBA's decision was upheld by the Court of Appeals (221 Or App 156, 189 P3d 30 (2008)), and that decision has been appealed to the Supreme Court, which accepted the case. The department's brief addresses this proposition: "If an opponent of a PAPA presents evidence that a proposed new use 'could be' a use that conflicts with an inventoried Goal 5 resource site, a Goal 5 ESEE analysis must be performed before the local government may conclude that no such conflict exists. If the local government fails to do so, a remand for that purpose is required."

2. LUBA Opinions

Between November 21, 2008 and February 13, 2009, the department received copies of 63 recently issued LUBA opinions. Of these, LUBA dismissed 31, remanded 17, reversed 2, affirmed 11, and invalidated 0 local decisions, and transferred 2 petitions to circuit court.

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

- **OAR 660-033-0020(1):** *Shelley Wetherell, et al., v. Douglas County*, LUBA No 2008-071, filed 12-31-08: LUBA remanded county approval to divide a 259-acre parcel designated Agriculture and zoned Exclusive Farm Use-Grazing (FG) into 5-acre residential lots based on a county finding that the parcel is not agriculture land or forest land protected by Goals 3 and 4.
- **OAR 660-004-0020(2), 660-033-0120, 660-033-0130(2):** *Scott Young and Robin James, v. Jackson County*, LUBA No 2008-076, filed 12-23-08: LUBA remanded county denial of a reasons exception for a church within 3 miles of the Ashland UGB.
- **Goal 3, OAR 660-033-0090(1), 660-033-0100:** *Friends of Umatilla County, et al., v. Umatilla County*, LUBA No 2008-096, filed 12-9-08: LUBA affirmed county amendment of its EFU zone to allow 80-acre parcels and parcels smaller than 80 acres. The PAPA did not establish any “go below” areas.
- **Goal 11:** *Service Employees International, et al v. City of Happy Valley*, LUBA No. 2008-1243, filed 1-30-09: LUBA remanded adoption of Rock Creek Mixed Employment Comprehensive Plan and new Rock Creek Mixed Employment (RC-ME) zoning district based on city and Metro code provisions but found no Goal 11 violation.

One of these decisions requires rule amendments. In *Young and James v. Jackson County*, LUBA held that **OAR 660-033-00130(2)**, which prohibits churches within 3 miles of a UGB, violates the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) at 42 USC 2000cc-(b)(1) because it “treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution” because other assembly or institutional uses are permitted within 3 miles of a UGB.

3. Appellate Court Opinions

Between November 21, 2008 and February 13, 2009, the department received copies of 20 recently issued opinions from the Court of Appeals. The Court dismissed 8 and affirmed 12 of LUBA’s decisions.

4. LUBA Appeal Notices of Interest

Measure 37/49: None.

Others

- *Kevin Spencer, et al., v. Crook County*, LUBA No. 2008-199, and *Remington Ranch, LLC v. Crook County*, LUBA No. 2008-198, both filed 11-10-08; Amendment of the county's **Destination Resort Overlay Zone** (eligibility map).
- *Metro v. City of Tualatin*, LUBA No. 2008-215, filed 12-5-08: Ordinance **removing minimum density requirements** of certain residential zones.
- *Joel Fuller and Williwaw, Inc v. Jefferson County*, LUBA No. 2008-216, filed 12-5-08: Adoption of **Urban Reserves for City of Madras**.
- *Friends of Marion County, et al v. Marion County*, LUBA No. 2008-225, filed 12-24-08: Approval of **Elkhorn Golf Resort Planned Development** with exceptions to Statewide Planning Goals 11(Public Facilities) and 14 (Urbanization) to subdivide 65.3 acres into 153 lots, on a total of 464 acres in the Public zone, Timber Conservation zone, and Acreage Residential-Limited Use Overlay zone.
- *Sane Orderly Development and Bill Mull v. City of Roseburg*, LUBA No. 2008-226, filed 12-24-08: Update of the **population forecast** for Roseburg's Urban Area based on a 2.5 percent annual growth rate.
- *Rose & Associates, LLC v. City of Bend*, LUBA No. 209-010, filed 1-15-09; *Swalley Irrigation District v. City of Bend*, LUBA No. 2009-011, filed 1-16-09; and *Central Oregon Landwatch v. City of Bend*, LUBA No. 2009-020, filed 1-28-09: Adoption of updated water and sewer master plans into the comp plan.
- *Swalley Irrigation District v. City of Bend*, LUBA Nos. 2009-012 and 2009-013, filed 1-16-09: Amendments to the TSP and development code to implement the city's **UGB expansion**.
- *Joyce Morgan v. Douglas County*, LUBA No. 2009-014, filed 1-20-09: **Interpretation of M-2 Medium Industrial zone to allow a Costco Wholesale use**.
- *ODOT v. Crook County*, LUBA No. 2009-016, filed 1-21-09, and *Gary and Mollie Eder, et al v. Crook County* LUBA No. 2009-018, filed 1-26-09: Approval of Crossing Trails **Destination Resort Development Plan** for 580 acres zoned EFU-3 with Destination Resort overlay.

5. Decisions of interest

Department appeals

- *DLCD v. Lane County*, LUBA No. 2008-078, filed 12-8-08: LUBA dismissed the department's appeal of Resolution No 08-4-30-12, which deferred preparation of new coordinated population forecasts.

Measure 37/49

- *Fischer v. Benton County*, LUBA No. 2008-115, Court Of Appeals No. A140635, filed 1-9-09: Dismissed due to petitioner's failure to file the opening brief in established time limit.
- *John and Dorothy Alto v. City of Cannon Beach*, LUBA No. 2008-126, filed 11-25-08 (Larsen claim): LUBA transferred to Circuit Court a county determination that the petitioners don't have a vested right under Measure 49 to continue development of an addition to their existing house, because LUBA doesn't have jurisdiction.

- *Karol Susan Welch, et al., v. Yamhill County*, LUBA No. 2008-129, filed 12-15-08 (Kroo claim): LUBA reversed county approval of a 10-lot subdivision on a 31.03 acre parcel zoned AF-20 based on a Measure 37 waiver.

Others

- *GMK Developments, LLC, et al., v. City of Madras*, Consolidated LUBA Nos. 2008-003, 2008-005, Court of Appeals No. A139688, filed 12-31-08: The Court affirmed LUBA and the city, holding that Goals 2 and 10 and the Goal 10 rule don't require urban areas like Madras with fewer than 25,000 people (and therefore not subject to ORS 197.296) to **contemporaneously adopt** with the PAPA (here, the city's Urbanization Report) **other plan amendments** that implement the conclusions of the PAPA, such as **policies to increase capacity in the UGB and expansion of the UGB**.
- *Hildenbrand, et al v. City of Adair Village*, LUBA No. 2008-125, filed 12-17-08: LUBA affirmed amendment of Plan Policy 4 regarding residential development **densities in lands that are added to the UGB**.
- *Port of St. Helens v. City of Scappoose*, LUBA No. 2008-114, filed 12-31-08: LUBA affirmed approval of a new Airport (A) plan designation and Airport Related (AR) zone that **authorize airport residential development** with through-the-fence access to the airport.
- *Friends of Umatilla County, et al v. Umatilla County*, LUBA Nos. 2008-102, 2008-103, 2008-104 & 2008-105, filed 11-25-08: LUBA affirmed 4 county approvals to **partition EFU land** into parcels smaller than 160 acres for farm use and without dwellings.
- *Woodard and Kilmer v. City of Cottage Grove*, LUBA Nos. 2008-022, 2008-054, 2008-055, Court of Appeals No. A139800, filed 1-14-09: The Court affirmed LUBA's remand of ordinances that re-zoned several parcels, holding that the **Transportation Planning Rule (OAR 660-012-0060) applies to "small tract zoning map amendments"** as well as other land use regulations.
- *Columbia Riverkeeper, et al v. Clatsop County*, LUBA No. 2008-052, filed 1-27-09: LUBA remanded county approval of plan amendments, zone changes, and development approvals for a liquefied natural gas (**LNG terminal**), pipeline and related facilities.
- *Columbia Riverkeeper, et al v. Clatsop County*, LUBA No. 2008-067, filed 1-27-09: LUBA affirmed county approval of variance to road standards to facilitate construction of **LNG terminal**.
- *Service Employees International, et al v. City of Happy Valley*, LUBA No. 2008-1243, filed 1-30-09: LUBA remanded adoption of Rock Creek Mixed Employment Comprehensive Plan and new Rock Creek Mixed Employment (RC-ME) zoning district in part because the city's **45-day notice didn't include the proposed text**.

II. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES

A. MEASURE 49 DEVELOPMENT SERVICES

Measure 49 Processing Status:

Three hundred and thirty-six (336) final orders have been issued and 747 preliminary evaluations

have been mailed as of February 20, 2009. The division is progressing toward our goal of issuing at least 200 Measure 49 final orders per month. In conjunction with the Department of Justice, we continue to examine ways to increase the speed of processing Measure 49 claims. The LCDC public hearing for proposed rule amendments that would facilitate the processing of certain types of claims and update counties' requirements to provide notice of Measure 49 application and decisions to DLCD is scheduled for March 12. We anticipate some testimony concerning the proposed rule changes. The staff report for the proposed rule changes is part of the Commission packet and available on the department's website.

The following is a summary of a vested rights determination (VRD) case in Polk County (Martinson). The claimant's VRD for a 137-acre commercial development was denied by the Polk County Community Development Director (CDD). The CDD found that the claimant may be vested in a smaller, 30-acre development of car lots. The claimant reinstated the VRD by filing a local appeal of the denial with the Polk County Hearings Officer. The department agrees with the CDD's conclusion that the applicant "has not vested a 137-acre commercial use on the subject 137-acre subject property." Applicant did not provide any factual framework necessary to determine whether they have vested a use of their property in accordance with Measure 49, Section 5(3). A claimant is entitled to just compensation as provided in a Measure 37 waiver to the extent the claimant has a common law vested right as of December 6, 2007. The claimant must define the ultimate use sought to vest of the total project before they can prove a vested right to complete that project.

The Polk County Hearings Officer held a hearing on February 10, 2009. The claimants submitted a memorandum/testimony in support of the appeal prior to the hearing. At the request of those opposing the application, the Hearings Officer agreed to keep the record/hearing open to allow for additional comments until February 25, at 5:00 p.m. The claimant will then have five days for rebuttal - March 2. The decision will then be issued within fifteen days following the close of the hearing.

In their memorandum, the claimant argued that the CDD erred by finding that he could not issue a vesting determination as to a lesser use than the VRD requested. The CDD stated in a footnote that claimants would likely have vested Phase I of their development or a 30-acre development. At the appeal, the claimant argued that the CDD could have found that they were vested in the 30-acre development in lieu of the 137-acre development.

The department argued through DOJ staff at the hearing that the claimant's request was untenable because it violated public participation requirements under Goal 1. The Hearings Officer disagreed because he believes that Goal 1 does not apply because vested rights determinations are not land use decisions for purposes of review.

The department will be submitting additional comments to the Hearings Officer to address whether a 30-acre development is vested. Department of Justice staff are currently conducting additional investigation into certain costs to date expended by the claimant. The claimant attributes a substantial portion of their costs to acquiring a commercial access route to the property. If the hearings officer agrees with the claimant's lesser-use argument, the department may dispute such a lesser-use findings issue on a writ of review.

B. CLIMATE CHANGE WORK GROUP

The department has established an internal Climate Change Work Group to help the department and Commission evaluate ways that the land use program can help address problems related to global warming. The work group includes staff with expertise in the various program areas that relate to climate change policy: urban, transportation, rural, coastal, and floodplain/hazards management.

The work group's initial task is to outline a range of possible options for consideration by the Commission at its April meeting. The work group will assess how the state land use program relates to key climate change strategies outlined by the Governor's Climate Change Integration Group in January 2008.

<http://www.oregon.gov/ENERGY/GBLWRM/docs/CCIGReport08Web.pdf>

The work group will examine existing rules and programs that relate to climate change planning; evaluate how those requirements should be changed to implement or support efforts to address climate change. Work group recommendations will identify options that use existing resources and authorities, and identify possible changes to rules or programs that would better support or accomplish state climate change strategies.

We expect that the work group will provide options that correspond to the three major elements of the state strategy to respond to climate change – adaptation, mitigation, and sequestration:

Adaptation will involve identifying likely changes to Oregon's climate and their effects on important resources and development patterns. As the Commission learned at its January meeting, global warming will result in sea level rise, more severe storms and changes to Oregon's climate that will affect water availability, vegetation patterns, wildlife habitat, as well as farm and forest lands. Options will assess ways that land use policies should be revised to avoid new hazards and support protection of important resource lands and natural resources.

Mitigation efforts will address ways that land use policies and plans will need to be revised to support state and national goals to reduce greenhouse gas emissions. The primary focus of mitigation efforts is likely to be on identifying ways that state policy can help communities plan for future development that reduces use of carbon-based fuels. As the Commission learned in the May 2008 briefing on climate change, compact urban development patterns and increased transportation choices that reduce the need for automobile travel are likely the primary way that land use policy can help achieve this goal. Planning also aids in reducing greenhouse gas emissions by revising rules and plans to expand development of alternative energy sources – especially wind, solar and wave energy.

Sequestration – which involves changes to land management practices that retain carbon stored in plants and soil – will also be addressed. While the state planning program does not directly regulate land management activities, improved protection of resource lands that have high potential for sequestration can support achieving this strategy.

III. DEPARTMENT ORGANIZATIONAL AND MANAGEMENT INFORMATION

A. NEW STAFF AND PROMOTIONS

Dave Gulledge joined the Agency as the M49 Development Services Division Operations Manager on February 17. Dave will be working closely with the M49 administrative staff and the M49 database. Dave came to us from the City of Salem, Planning Division, where he worked as an Administrative Analyst. Prior to that, he was a Code Enforcement Officer for the city. His experience and training will be a valuable asset to the Division.

Steve Miller joined the department on February 23rd as the M49 County Communication & Compliance Coordinator (Planner 3). Steve owned his own land-use consulting business for the last year. Prior to that, Steve worked as a Senior Planner in Bend for both Pahlisch Homes and the City of Bend. He also worked as a Planner for Deschutes and Curry Counties.

Mara Ulloa has accepted a promotional opportunity of Accountant 1 with the Operations Services Division. She comes from the department's Community Services Division where she acted as Plan Amendment Specialist. She brings to the department's fiscal team, a strong educational and private sector accounting experience from Chemeketa Community College, US Bank, and other private sector employers.

B. DEPARTING EMPLOYEES

James Mitchell (Operations Services Division) left the department in early February.

Kathryn Smith, Publications Specialist, and Shirley Reams, Intake Specialist for Measure 49 Development Services, left the agency in February.

C. RECRUITMENTS

The department is in the recruitment process for two positions, a Publications & Completeness Review Specialist (AS1) and a Claims Analyst (PA1) for the Measure 49 Development Services Division. The department is currently holding some other positions vacant in the Measure 49 Development Services Division in order to meet current and potential budgetary restrictions resulting from the recent General Fund revenue situation.

D. BUDGET UPDATE

The forecast released on Friday, February 20th showed continued deterioration in the state's General Fund revenue forecast. It points to a projected \$855.3 million General Fund deficit in the 2007-09 biennium. The forecast for the 2009-11 biennium has decreased an additional \$1.7 billion from the forecast released in December 2008. The General Fund deficit for that biennium, compared to a "current service" level, is more than \$3 billion. Clearly, this was not good news, but it was also not a significant surprise. In fact, the Governor and legislative leadership have been working with agencies for weeks and months to prepare for the difficult conversation and the hard choices that will now begin.

With that in mind, the Governor recently announced a series of management and executive service salary actions to cut costs through the remainder of the 2007-09 biennium. Management and executive service employees will participate in a series of unpaid furlough days. In addition, the Governor has also established a salary freeze for executive and management service employees that will take effect on March 1. No step increases will be granted from that date forward. In addition, the new top step that was implemented effective July 1, 2008, will be rolled back. Management and executive service employees at that step will return to the prior salary step. These actions do not apply to represented staff.

The Joint Committee on Ways and Means also recently approved a series of actions to balance the current biennial budget. While those items have not yet (at the writing of this document) been voted on by the full legislature, it is probable that they will be substantially, if not fully, approved. For DLCD, the rebalance items include approximately \$1.36 million in General Fund reductions. A large proportion of the reduction relates to holding vacancies and related legal cost savings in the Measure 49 Development Services Division. Additional savings were taken in the Landowner Notification program where funds were already projected to be unspent. The largest single reduction, however, relates to our General Fund grant program. Approximately \$585,000 in funds are proposed for reduction, representing the amount of funds that are not actually under signed contract. This substantial reduction will impact the department's ability to fund periodic review and other local government planning projects. The department plans to discuss this situation with the commission at its March meeting.

Discussions regarding 2009-11 will begin immediately following legislative action to balance the current biennium. The department's initial budget hearings begin March 4, 2009.

E. DIRECTOR ACTIVITIES

Highlights of the director's activities during January and February of 2009 include:

- Participation in the Governor's Agency Advisors Committee
- Participation in the Natural Resources Cabinet
- Ongoing senior staff meetings with the Department of Transportation and the Oregon Economic and Community Development Department, to help improve coordination and communication between DLCD, ODOT and OECDD
- Participation in Metro Reserves Steering Committee, preceded by meetings with fellow state agency participants as well as Metro's Policy Advisory Committee
- Several meetings with legislators and others to discuss the department's bills as well as Big Look
- Meetings with ODOT to discuss Big Look legislation, recommendations from the Oregon Global Warming Commission, and the Governor's Jobs and Transportation Act
- Arranged a meeting with the Department of Environmental Quality to discuss the climate initiative, role of land use in climate change, and greenhouse gas reduction efforts Jan 6
- Attended a briefing on PNW Land Conversion Jan 6
- Traveled to Central Oregon for meetings regarding the Metolius Basin Area of Critical State Concern designation. Met with Jefferson and Deschutes County Commissioners, officials from the City of Sisters, property owners, Deschutes Land Trust, Central Oregon

Land Watch, the Warm Springs Tribe, and ODOT (Jan 8-9) In addition, met with a variety of legislators, interest groups, property owners and their representatives regarding the Metolius throughout January and February. Public hearings on the Metolius ACSC were held Feb 11, 12 and 26.

- Attended the Community Development Forum Jan 12
- Big Look Task Force meeting and thank you ceremony Jan 11
- Regular meeting with ERT directors Jan 20
- Met with Tom Tuchmann from US Forest Capital Jan 21
- Appeared before the Senate Environment and Natural Resources Committee Jan 22 and the House Land Use Committee on several different occasions
- Gave a presentation to the Salem City Club on the Big Look Task Force Jan 23
- Met with Sen. Devlin on M49 issues; and provided information to Sen. Devlin on other issues outside the breadth of M49 Jan 27
- Met with Central Point Mayor and City Administrator regarding regional problem solving Jan 28
- We held a "catch-up" new employee orientation for the several employees that have been hired in approximately the last year. The session included very brief overviews from each of the division managers, as well as an engaging listen to Governor McCall's opening speech to the Legislature that "started it all." Jan 29
- John VanLandingham and I met with Will Collin, Chair of the Environmental Justice Task Force Jan 29
- Gave a presentation on the Department's bills to the Oregon Coastal Zone Management Association, and received endorsement for Territorial Sea Plan update effort. Jan 30
- Attended a portion of the Vernonia school siting subcommittee meeting Feb 2
- Met with the department's management, policy & legislative review teams
- Meeting with the Governor and business owners on Rogue Valley land use issues Feb 9
- Met with Senator Prozanski and others on possible Measure 49 legislation Feb 9
- Met with the Water Resources Department to review maps of the Metolius area Feb 10
- Feb 10 meeting with the LCDC legislative subcommittee (first in on-going bi-weekly series during session) to review what's happening in the Capitol Building
- Feb 10 meeting to discuss Vernonia school siting issue with the interim city administrator, Jim Johnson and Greg Winterowd
- Feb 13 met with forest industry representatives to discuss TDRs
- Feb 16 had a follow-up meeting with Oregonians in Action and 1000 Friends of Oregon regarding M49 legislation
- Attended meetings regarding Vernonia school siting Feb 19
- Attended Greg Macpherson's hearing before the Senate Rules Committee Feb 19
- Attended Ways & Means subcommittee meeting re: 2007-09 budget Feb 19
- Attended the grand opening of the Newport office (Coastal Services Center) Feb 20
- Feb 23 attended a power point presentation on transportation modal splits by George Crandall of Crandall Arambula
- Orchestrated several meetings with state agency reps and staff from Clackamas, Washington & Multnomah counties to discuss urban and rural reserves
- Discussed Newberg URA with internal staff Feb 24

IV. LCDC RULEMAKING UPDATE

The Commission's Affordable Housing work group met two times since the January Director's report (January 9 and 26). The work group is scheduled to meet at least once more on February 23rd and may schedule additional meetings. The department's legislative concept for an affordable housing pilot project, HB 2225 (a concept shared with the Department of Housing and Community Services), was the primary discussion item at these meetings. The work group identified a series of issues with the legislative concept, and asked the department to draft proposed amendments to the bill in order to invite a broader consensus of the work group. The bill is not scheduled for hearing at this time, but will be scheduled in the near future. The work group is also continuing to discuss other ideas to encourage affordable housing. The department's website has information and materials regarding this rulemaking project, including a schedule of meetings, at the following link:

http://www.oregon.gov/LCD/meetings.shtml#Affordable_Housing_Work_Group

LCDC's "Phase 2 UGB Work Group" met on January 13 and 27, 2009, in order to conclude its work on "safe harbors" and other proposed administrative rules intended to clarify and streamline the UGB amendment process. The work group has forwarded a recommendation to LCDC for consideration at this March meeting (see Agenda item 4). Meeting summaries and materials are on the department's website, along with other information, at the following link:

http://www.lcd.state.or.us/LCD/ugb_rulemaking_project.shtml