



# Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Costal Fax: (503) 378-6033

Second Floor/Director's Office: (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

June 5, 2008

TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director  
Rob Hallyburton, Planning Services Division Manager

SUBJECT: **Agenda Item 4, June 18–20, 2008 LCDC Commission Meeting**

**REVIEW OF A DIRECTOR'S DECISION TO APPEAL  
TO THE LAND USE BOARD OF APPEALS**

**LANE COUNTY**

**I. RECOMMENDATION**

The director recommends, based on the information contained in this report, that the Commission authorize the department to proceed with the appeal of a Lane County decision to the Land Use Board of Appeals (LUBA). The department filed a Notice of Intent to Appeal with LUBA on May 21, 2008. The 21-day period for filing an appeal concluded on May 21, 2008.

**II. CASE SUMMARY**

The Lane County Board of Commissioners adopted Resolution 08-4-30-12 on April 30, 2008, declining to act on the request of 10 cities to initiate population forecasting (Attachment A). The resolution states the county will conduct the population forecast at its next periodic review. However, counties are no longer required to complete periodic review (ORS 197.629).

Lane County is required to "establish and maintain" coordinated population forecasts for the entire area with its borders (ORS 195.036). The county has not adopted updated population forecasts in many years, and the effect of the April 30 decision is potentially to delay fulfilling this responsibility indefinitely. Coordination with the cities in Lane County had already been completed, and consensus forecasts had been presented for adoption by the county. The county has the discretion to accept or reject the results of this prior coordination, but it does not have the authority to elect to forego compliance with ORS 195.036. Several cities are scheduled to complete comprehensive plan updates that

depend on a coordinated, adopted population forecast, (including one in periodic review) and cannot proceed without county action.

The department participated in the local proceedings through written comments in several letters prior to the board's April 30 action. On May 21, 2008, the Department of Justice filed a Notice of Intent to Appeal to LUBA, on behalf of the department (Attachment B).

On May 28, 2008, the Lane County Board of Commissioners passed a motion to withdraw Resolution 08-4-30-12. DLCD intends to withdraw the appeal once applicable appeal periods have passed. In the meantime, DLCD recommends that the appeal not be withdrawn.

Pursuant to OAR 660-001-0220, the department has notified Lane County of its intent to request Commission approval to pursue an appeal of the decision. In the notice, the department informed the county of the factors in OAR 660-001-0230(3) upon which the Commission will base its decision on whether or not to direct the department to proceed with this appeal and indicated that an opportunity exists to appear before the Commission to discuss those factors.

### **III. APPEAL FACTORS**

To proceed with an appeal, the Commission must base its decision on one or more of the following factors from OAR 660-001-0230(3):

- (a) Whether the case will require interpretation of a statewide planning statute, goal or rule;
- (b) Whether a ruling in the case will serve to clarify state planning law;
- (c) Whether the case has important enforcement value;
- (d) Whether the case concerns a significant natural, cultural or economic resource;
- (e) Whether the case advances the objectives of the agency's Strategic Plan;
- (f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance.

### **IV. ANALYSIS**

#### **(a) Whether the case will require interpretation of a statewide planning statute, goal or rule.**

This case involves the interpretation of ORS 195.036, and by reference ORS 195.025, because the county has delayed compliance with these statutes to an indefinite date.

#### **(b) Whether a ruling in the case will serve to clarify state planning law.**

ORS 195.036 is a general requirement and does not contain a date for compliance or penalties for nonconformity. This case has the potential to clarify counties' responsibilities regarding timely decisions on coordinating population forecasts.

**(c) Whether the case has important enforcement value.**

This case is most important to the cities that requested the county coordinated population forecasts. County adoption of coordinated population forecasts is important for proper planning around the state. Lane County is experiencing growth, and a number of planning projects could be delayed due to the appealed decision.

**(d) Whether the case concerns a significant natural, cultural or economic resource.**

This factor is not applicable.

**(e) Whether the case advances the objectives of the agency's strategic plan.**

The 2007-09 agency plan includes this objective: "Work with local governments and state agencies to assure an adequate supply of developable land for housing (including affordable housing), commerce, and employment areas. . ." This is an outgrowth of the goal in the six-year strategic plan to "Promote Economic Development and Quality Communities." Coordinated population forecasts are essential to calculating land need.

**(f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance**

The department worked closely with city and county staffs to develop alternatives with the hope that one of them would be acceptable to the board of commissioners, but that effort ultimately proved unfruitful. Since the county made a decision that appears to violate a statutory requirement, an appeal is a necessary action.

**V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION**

The department recommends that the Commission support the director's recommendation and proceed with an appeal of Lane County Resolution 08-4-30-12.

***Proposed Motion:*** I move that the Commission approve a department appeal of the subject decision from Lane County to the Land Use Board of Appeals because the information included in this report demonstrates that OAR 660-001-0230(3) (a), (c), (e) and (f) apply.

***Alternative motion:*** I move the Commission not approve an appeal of the subject decision from Lane County because \_\_\_\_\_.

**ATTACHMENTS**

- A. Lane County Board of County Commissioners Resolution
- B. Notice of Intent to Appeal



**BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY,  
OREGON**

RESOLUTION NO. ) IN THE MATTER OF ADOPTING A NEW  
08-4-30-12 ) POPULATION FORECAST FOR LANE  
 ) COUNTY

WHEREAS, Lane Council of Governments (LCOG) has prepared a population forecast for Lane County; and

WHEREAS, LCOG and certain cities have petitioned the Board of County Commissioners (Board) to adopt the LCOG population forecast into the Lane County Comprehensive Plan; and

WHEREAS, the preparation of the LCOG forecast followed a process, and resulted in conclusions, that are not necessarily the same as may have occurred if the Board had initiated its own forecast; and

WHEREAS, concerned citizens and consulting demographers Winterbrook Planning and ECONorthwest have provided letters and testimony stating that in their opinion, the LCOG forecast is not legally defensible; and

WHEREAS, the Board has reservations that the LCOG forecast can be made legally defensible, and does not wish to assume responsibility for a forecast performed by a different entity, under a different process than the Board may have followed; and

WHEREAS, under ORS 195.036, Lane County has a statutory obligation, during the next periodic review of its comprehensive plan, to prepare and adopt a population forecast for the County and all the urban areas therein; and

WHEREAS, ORS 195.034 (HB 3436) provides an alternate population forecasting method that cities may use prior to the Board adopting a population forecast; and

WHEREAS, the practical effect upon the cities of the application of ORS 195.034 does not appear to the Board to be materially different than if a Safe Harbor forecast were adopted under OAR 660-024-0030(4); and

WHEREAS, Lane. Code 16.400(3)(b) provides that comprehensive plan components addressing a single or special need, such as population forecasts, are deemed "Special Purpose Plans"; and

WHEREAS, Lane Code 16.400(9) provides that "amendments to Special Purpose Plans may only be initiated by the County", but others "may request the Board initiate such amendment"; and

WHEREAS, Lane Code 16.400(9) further provides that requests for Special Purpose Plan amendments "must set forth compelling reasons as to why the amendment should be considered at this time, rather than in conjunction with a periodic Plan update"; and

WHEREAS, Lane Code 16.400(9) further provides that "an offer to participate in costs incurred by the County shall accompany the request" for a Special Purpose Plan amendment; and

WHEREAS, the Board received a request dated February 4, 2008, from ten Lane County cities to initiate a population forecast; however, the - request' did not comply with all the requirements of Lane Code 16.400(9).

RESOLVED, that the LCOG forecast shall not be used, as the basis for any future forecast; and

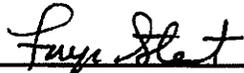
FURTHER RESOLVED, that the Board intends to conduct a population forecast at the next periodic review of the Lane County Comprehensive Plan; and

FURTHER RESOLVED, that the Board will entertain requests to conduct a forecast earlier than the next periodic review of the Comprehensive Plan, provided such requests comply with the requirements of Lane Code 16.400(9); and

FURTHER RESOLVED, that the County Administrator deliver a letter to all Lane County cities advising them of the foregoing.

Adopted this 30th day of April, 2008.

BOARD OF COUNTY COMMISSIONERS OF  
LANE COUNTY, OREGON

By: 



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1 682-4203 and has as its legal counsel: Teresa Wilson, Office of County Counsel, 125 East 8<sup>th</sup>  
2 Avenue, OR 97401, telephone number 541-682-4442.

3 IV.

4 As indicated by its records in this matter, Lane County did not mail written notice of the  
5 land use decision.

6 V.

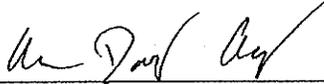
7 Purchase order # 70122 in the amount of \$325.00 is enclosed with this notice for filing  
8 fees and costs.

9 NOTICE: Anyone designated in paragraph IV of this Notice who desires to participate as  
10 a party in this case before the Land Use Board of Appeals must file with the Board a Motion to  
11 Intervene in this proceeding as required by OAR 661-010-0050.

12 DATED this 21st day of May 2008.

13 Respectfully submitted,

14 HARDY MYERS  
15 Attorney General

16   
17 Steven Shipsey, OSB #944350  
18 Danielle Aglipay OSB #076627  
19 Assistant Attorneys General  
20 Of Attorneys for Department of Land  
21 Conservation and Development  
22 State of Oregon

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