



# 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>

October 2, 2008



TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director

SUBJECT: **Agenda Item 1, October 15-17, 2008 LCDC Meeting**

### **DIRECTOR'S REPORT**

#### **1. INFORMATION UPDATES**

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

ORS 197.090(2) requires the Director to report to the Commission on each appellate case in which the Department participates, and on the position taken in each such case.

ORS 197.040(1)(c)(C) requires the Land Conservation and Development Commission to determine whether recent Land Use Board of Appeals (LUBA) and appellate court decisions require goal or rule amendments.

##### **1) Department participation in appeals**

Between July 17 and September 23, 2008, the department received notice of 60 appeals filed with LUBA.

The department filed one notice of appeal. *DLCD v. Yamhill County*, LUBA No. 2008-130 (Kroo Family Trust) (filed July 29, 2008), which challenged approval of a subdivision on an AF-20 parcel based on a Measure 37 waiver. The department has withdrawn this appeal after working with Yamhill County to clarify whether the county intends to issue development permits for this project.

The department expects to file one additional notice of intent to appeal in the near future (prior to the LCDC meeting in Prineville). The appeal concerns a decision by Clatsop County to approve a subdivision (Carlson) based on a Measure 49 vested rights determination. This matter will be described in more detail under Agenda Item 6 in a hand – carried staff report.

## 2) LUBA opinions

Between July 17 and September 23, 2008, the department received copies of 48 recently issued LUBA opinions. Of these, LUBA dismissed 15, remanded 20, reversed 2, affirmed 11, invalidated no local decisions, and transferred no petitions to circuit court.

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

- **Goal 10, Goal 14, OAR 660, Division 8: *GMK Developments, et al v. City of Madras***, LUBA Nos. 2008-003 & 2008-005 (filed July 22, 2008): Madras' Urbanization Report with housing need analysis may be adopted and acknowledged as a post-acknowledgment plan amendment before the city completes its UGB evaluation process.
- **OAR 660, Division 12 (the TPR): *Kinnett, et al v. Douglas County***, LUBA No. 2008-066 (filed August 5, 2008): LUBA found county's TPR findings adequate for plan and zone change from rural residential to industrial.
- **Goal 14, OAR 660-004-0020(4), 660-004-0022(4): *Wetherell v. Douglas County***, LUBA No. 2008-024 (filed August 19, 2008): County correctly required a Goal 14 reasons exception to expand boundary of an unincorporated community, but LUBA remanded for better findings.
- **Goal 3, Goal 14, OAR 660-004-0018, 660-004-0025, 660-004-0028, 660-004-0040: *Johnson, et al v. Malheur County***, LUBA No. 2008-049 (filed August 22, 2008): County erred in finding that physically developed and irrevocably committed Goal 3 exceptions were justified, and adopted a goal 14 exception without substantial evidence.
- **Goal 9, OAR 660-009-0010, 660-009-0015 through 0030: *Freedman, et al v. City of Grants Pass***, LUBA No. 2008-056 (filed September 4, 2008): LUBA remanded decision to approve plan map amendment from Industrial to Business Park for development of a Home Depot because the most recently adopted Economic Opportunities Analysis (EOA) is out of date and city relied on an unadopted draft EOA.

In its *Madras* decision, LUBA appears to be evolving away from the basis for its remand decision in *DLCD v. City of McMinnville*, LUBA No. 2001-093. Since 2001, the *McMinnville* decision has stood for the proposition that LCDC's "housing" rules under OAR 660, division 8, require a "housing need analysis" to be consistent with Goal 14, and especially the iterative process of UGB evaluation required in Goal 14. In *McMinnville*, LUBA ruled that a housing need analysis cannot be judged to "comply" with Goals 10 and 14 without submission to DLCD of *all* necessary components of a UGB amendment "in the manner of periodic review," rather than submission of individual components (such as the housing analysis). Otherwise, according to *McMinnville*, acknowledgment of the individual component may "lock in place" data and conclusions that should be subject to change during the iterative UGB analysis. However, in the *Madras* decision, LUBA seemed to reverse itself on *McMinnville*, rejecting the applicability of Division 8 and relying instead on ORS 197.296, which limits the "piecemeal" prohibition in *McMinnville* to cities over 25,000 (a very small percentage of cities statewide). The "Phase 2 UGB Rulemaking Work

Group” is considering this issue and may recommend alternatives for the Commission to consider through rule-making.

### 3) Appellate court opinions

Between July 17 and September 23, 2008, the department received copies of 21 recently issued opinions from the Court of Appeals. The court affirmed 19, dismissed one, and remanded and reversed one LUBA decisions.

- *Johnson, et al v. Jefferson County*, LUBA Nos. 2007-015, 2007-016, 2007-017, 2007-018, 2007-019, 2007-020, 2007-021, 2007-022, 2007-023, 2007-024, 2007-025, 2007-026, 2007-028, 2007-029, 2007-030 & 2007-031, Court of Appeals Nos. A138263 & A138243 (filed July 9, 2008): The court affirmed LUBA’s affirmation in part of the county’s approval of plan and zoning ordinance amendments for mapping lands eligible for destination resorts without updating its Goal 5 inventory.

### 4) Decisions of interest

#### Department appeals

- *ODOT v. Klamath County* and *DLCD v. Klamath County*, LUBA Nos. 2007-198 & 2007-199: Appeal suspended July 22, 2008 for parties to discuss settlement.

#### Others

- *Southern Oregon Pipeline Information Project, Inc., et al v. Coos County*, LUBA No. 2007-260, remanded July 15, 2008 (administrative conditional use approval for liquefied natural gas receiving terminal).
- *Southern Oregon Pipeline Information Project, Inc. v. Coos County*, LUBA No. 2008-016, affirmed August 22, 2008 (administrative conditional use approval for liquefied natural gas marine terminal and access channel).

### 5) Appeal notices of interest

#### Measure 37/49

- *Welch, et al v. Yamhill County*, LUBA No. 2008-129 (filed July 29, 2008), challenges approval of Kroo Family Trust subdivision application for site in AF-20 zone. (DLCD filed notice on same decision, as noted above.)
- *Walker, et al v. Josephine County*, LUBA No. 2008-136 (filed August 13, 2008), challenges approval of Feinberg/Blackburn/Ferrar subdivision application for site in Woodlot Resource zone.
- *Biggerstaff v. Yamhill County*, LUBA Nos. 2008-109, 2008-110, 2008-111 & 2008-112 (filed July 10, 2008), challenge approval of Ralph Johnson’s replacement dwelling application for the EF-20 zone.
- *Fischer v. Benton County*, LUBA No. 2008-115 (filed July 15, 2008) challenges denial of Lillian M. Fischer Revocable Living Trust subdivision application based on vested rights issue.

- *Alto v. City of Cannon Beach*, LUBA No. 2008-126 (filed July 23, 2008) challenges approval of Larsen Living Trust application to expand duplex based on vested right.

#### Others

- *Hildenbrand et al v. City of Adair Village*, LUBA No. 2008-125 (filed 7-23-08), challenges plan amendment establishing average density in UGB expansion areas.
- *Port of St. Helens v. City of Scappoose*, LUBA No. 2008-114 (filed July 15, 2008), challenges new Airport Related zone for airport residential development with through-the-fence access to the Scappoose Industrial Airpark.
- *Hereditary Chief Wilbur Slockish, et al v. ODOT and OTC*, LUBA No. 2008-101 (filed July 8, 2008), challenges approval of the US 26 Salmon River Bridge – E. Lolo Pass Road Project.
- *Morgan v. Douglas County*, LUBA Nos. 2008-152, 208-155, 2008-158, 2008-159, 2008-160 & 2008-161 (filed August 25, 2008) challenge interpretation of the Medium Industrial (M-2) zone to permit a Costco store and fueling station within the Roseburg UGB, and related permits.
- *Homebuilders Association of Lane County v. City of Eugene*, LUBA Nos. 2008-148 & 2008-149 (filed August 25, 2008), challenge new height limitations and parking standards in the R-3 and R-4 zones near the University of Oregon.
- *Friends of Umatilla County et al v. Friends of Umatilla County*, LUBA Nos. 2008-102, 2008-103, 2008-104 & 2208-105 (filed July 9, 2008), challenge approvals of four “go below” partitions of EFU parcels.

### **B. GRANTS, INTERGOVERNMENTAL AGREEMENTS AND CONTRACTS**

#### **General Fund Grants**

The department’s general fund grants are essentially committed for the remainder of the 2007-2009 biennium. The department continues to receive inquiries and applications for technical assistance grant funds, although the funds for those projects are now fully expended. Requests for assistance with periodic review tasks, however, are slower than anticipated. The department will re-evaluate the relative demand for technical assistance grants and periodic review grants before the Commission’s meeting in December.

### **C. PERIODIC REVIEW WORK TASKS/PROGRAMS**

Those cities currently in periodic review are working to complete plan evaluations and work programs. The department approved a work program for the City of Keizer and that city has initiated its periodic review planning efforts. Department staff is also reviewing work program submittals from Hermiston, Portland and Forest Grove.

## **2. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES**

### **A. COASTAL MANAGEMENT PROGRAM**

Marine Reserves: Coastal staff have been working extensively with colleagues from the Department Fish and Wildlife, National Marine Fisheries Service, and Oregon State University College of Oceanography and Atmospheric Sciences to develop and implement a website to support the public proposal process directed by the Governor in his March 2008 Executive Order (Attachment A). These proposals were due to ODFW by September 30. Coastal staff, principally Andy Lanier, the NOAA Coastal Fellow, and Tanya Haddad, Coastal Atlas Coordinator, developed a set of GIS templates by which to support rapid assessment by a state agency technical team and then reporting to the Ocean Policy Advisory Council. These staff, as well as Jay Charland and Paul Klarin will continue to assist the Ocean Policy Advisory Council in assessing proposed sites and preparing recommendations for the Governor.

Wave Energy: Greg McMurray, Marine Science Specialist, has been a principal participant in a 16 month-long process to develop a Settlement Agreement for a proposed ocean wave energy project near Reedsport. The terms of the Agreement will be used by state and federal agencies in reviewing and approving the licenses and permits for a small pilot project that will deploy one buoy in 2009 and nine more in 2010. This settlement process has provided DLCD coastal staff with an opportunity to come up to speed on a wide range of issues related to ocean wave energy development and to collaborate with the range of stakeholders and agencies likely to be involved in other larger projects and in the anticipated wave energy plan rulemaking (see Agenda Item 8 and Attachment A).

Climate Change: Jeff Weber, Coastal Conservation Specialist, has completed a first draft of a Coastal Climate Change Impacts Strategy and has sent it to several collaborating agencies for review and comment. The draft was also discussed at the All-Coast Planners meeting in Florence.

Annual network meeting: The Coastal Division held its annual All-Coast Planners meeting at the Florence Events Center on October 8 and 9. Approximately 60 people attended, including city and county planning staff, elected officials, state agency and federal agency staff. The first day was devoted to presentations and discussions related to the issue of potential impacts of climate change on the Oregon coast. The second day focused on floodplain planning and management, stormwater planning for small cities, and the ever-popular local government round-table.

National Coastal Zone Management: Bob Bailey, Coastal Division manager, continued to lead work by the Coastal States Organization to develop proposed legislation to re-authorize and re-vamp the federal Coastal Zone Management Act which was first enacted in 1972 and last re-authorized in 1996. The draft legislation will be discussed by the CSO members at the annual meeting in Pt. Clear, Alabama, October 22-25.

**B. MEASURE 49 DEVELOPMENT SERVICES**

On September 25<sup>th</sup>, 2008, the Department testified before the State Emergency Board to request release of a portion of the 1.5 million dollar General Fund Special Purpose Appropriation for implementation of Measure 49 made in the February supplemental session of the Legislature. As part of that testimony the department submitted a report detailing Measure 49 implementation and processing activity. The information below is taken from that report. Data points are reported as of September 22, 2008.

The Department began implementation by issuing and receiving election notices for claims filed under Measure 37. Claimants had 90 days from the date the election notice was issued to submit their election to the Department.

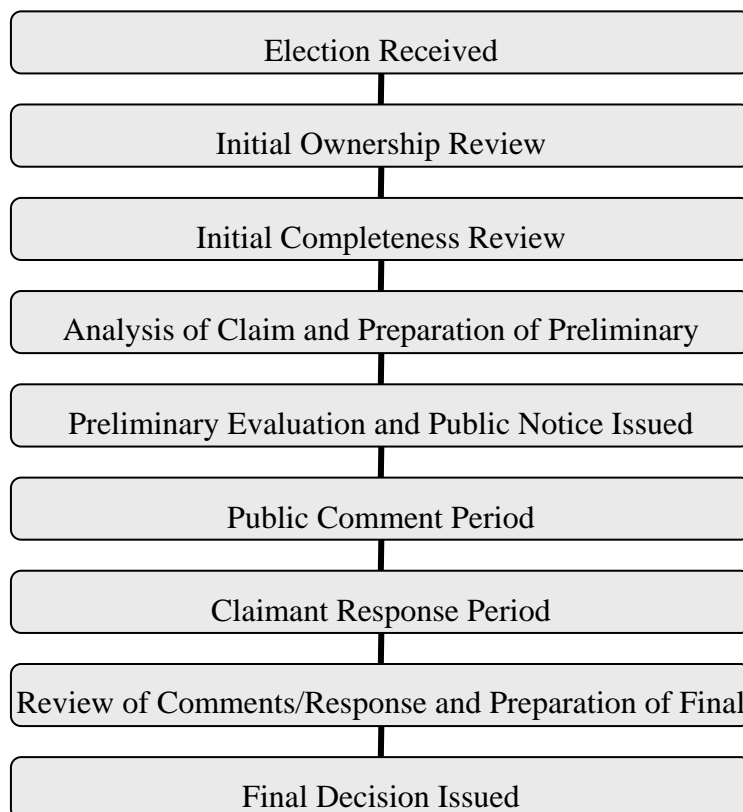
- 10,629 election notices were issued to the claimants and agents of 6,619 claims filed under Measure 37.
- 4,536 elections for claims filed under Measure 37 were timely received, as follows:
  - 4,133 claims elected to proceed under Section 6;
  - 194 claims elected to proceed under Section 7;
  - 137 claims notified the Department that they considered themselves vested;
  - 33 claims notified the Department that they were within a city or UGB;
  - 39 claims elected to withdraw.
- 11 appraisals have been received for the 194 claims that timely elected to proceed under Section 7 (which requires an appraisal of the claim property).
- The following number of timely elections was received per county (displayed by Department regional teams):

<u>Northwestern</u>		<u>Eastern</u>		<u>Southwestern</u>	
Clatsop	56	Baker	76	Benton	80
Columbia	76	Clackamas	788	Coos	122
Marion	316	Crook	28	Curry	61
Multnomah	62	Deschutes	108	Douglas	166
Polk	217	Gilliam	1	Jackson	332
Tillamook	48	Grant	7	Josephine	114
Washington	458	Harney	0	Lane	291
Yamhill	308	Hood River	141	Lincoln	77
		Jefferson	89	Linn	273
		Klamath	97		
		Lake	1		
		Malheur	18		
		Morrow	0		
		Sherman	0		
		Umatilla	30		
		Union	32		
		Wallowa	35		
		Wasco	26		
		Wheeler	2		
<b>TOTAL</b>	<b>1,541</b>	<b>TOTAL</b>	<b>1,479</b>	<b>TOTAL</b>	<b>1,516</b>

In coordination with the Department of Justice, the Department has begun the supplemental review of those 4,327 claims that elected to proceed under either Section 6 or Section 7. As of September 22, the following numbers of claims have proceeded through the indicated process steps:

- Initial ownership reviews have been completed for 1,131 claims.
- Initial completeness reviews have been completed for 249 claims.
- 194 claims have been assigned to claims analysts.
- 119 draft Preliminary Evaluations have been forwarded to the Department of Justice for review.
- 77 draft Preliminary Evaluations have been returned to the Department for completion and issuance.
- 77 Preliminary Evaluations have been issued.
- Public Notices have been issued to 1,325 interested persons with 3 comments received in response.
- 6 final decisions are being prepared.

### Measure 49 Processing Overview



### **C. PLANNING SERVICES**

Rob Hallyburton, division manger, has attended several sessions of the “Exempt Groundwater Policy Consensus Work Group.” This group was formed at the request of Representative Jackie Dingfelder. This is a mediated consensus group with the goal of identifying “what, if anything, should be done with the state’s policy on exempt groundwater.” A variety of user, development and conservation organizations are represented, as are a number of state agencies and local governments. DLCDC’s role is confined to informing the group of land-use solutions to identified problems, and helping craft any solutions, should the group get that far.

### **3. DEPARTMENT ORGANIZATIONAL AND MANAGEMENT INFORMATION**

#### **A. NEW STAFF**

Linda Smith was promoted into the Accountant 3 position in Operations Services on September 30. Linda’s experience in account structures, reconciliation and financial reporting with the Department of Human Services and a private CPA firm will serve the department well.

Steve Lucker joined the department on August 13 as the Floodplain/Natural Hazards Mapping Specialist in the Planning Services Division. Steve is heading up the Flood Map Modernization program. Most recently, Steve worked for the Oregon Department of Revenue on their geographic information system.

Angela Lazarean also joined the department on September 8 to fill the newly created Urban Planner position in the Planning Services Division. She will bring added capacity to the department in the areas of housing, economic development, and Geographic Information Systems. Angela comes to us from the City of Adair Village where she was the Assistant Planner/Economic Developer.

Rachel Ferdaszewski joined the department on September 22 as the Land Use/Transportation Planner in the Planning Services Division. She will coordinate Code Assistance services within the Transportation and Growth Management program. For the last two years, Rachel was the Associate Planner at Pierce County Public Works in Washington.

Several new staff have been recently hired in the Measure 49 Development Services Division.

Diane Rolph joined the department on July 29 as a Planning Claims Analyst 2. Diane worked at Marion County for the last seven years as an Associate Planner. Prior to that, she was an Associate Planner in both Polk and Jefferson Counties.

Shelly Raber was promoted into the Completeness Review Specialist position on August 1. Shelly has worked for the Division for the last year and her knowledge of the administrative operations will be a great asset.

Sandy Austin joined the Division on August 11 as a Claims Intake Specialist. Sandy was employed with the Oregon Department of Transportation Financial Services Division for 4.5 years. Prior to that, she was an Operations Manager with Commercial Bank in Silverton.

Alinda Meola also joined the Division on August 11 as a Claims Intake Specialist. Alinda has over 12 years office and clerical experience in various Salem businesses.

Lee Willeman joined the department on September 8 as a Planning Claims Analyst 2. For the last two years, Lee worked at the Oregon Lottery where he was a Product Specialist.

Patrick McGovern joined the department on September 22 as a Planning Claims Analyst 2. Patrick has worked at his own planning practice since 2000. He also has planning experience with the City of Concord and Contra Costa County Community Development.

Andy Hardwick joined the department on October 6 as a Planning Claims Analyst 1. He has an extensive background in real estate appraisal having owned and managed his own company for the last 20 years.

Tim Fitzgerald joined the department on October 6 as a Planning Claims Analyst 1. He has been working on political campaigns, after recently receiving his Master's degree in European Political Economy from the London School of Economics. Prior to that, he was an auto claims adjuster. Tim has his Bachelor's degree in Economics and Political Science from the University of Oregon.

## **B. RECRUITMENTS**

We are recruiting for an Accountant 1 in the Operations Services Division to fill the position previously held by Linda Smith.

Recruitment continues for a number of positions in the Measure 49 Development Services Division. Notably, the division Manager (PEM-D) position is open through the end of September, and we are currently evaluating applications for the Measure 49 Ombudsman. We are also in various stages of recruitment for Publications Specialists, Completeness Specialists, and Intake Specialists.

At the time of the Commission meeting, these recruitments will have closed and application review commenced.

## **C. DIRECTOR ACTIVITIES**

During the period of this report the director has been involved in several activities in support of the work of the department, both within the department and externally. Highlights of the director's activities include:

- Participation in the Governor's Agency Advisors Committee
- Participation in the Natural Resources Cabinet
- Participation in Metro Policy Advisory Committee (MPAC) (several meetings during this period)
- Participation with the Economic Revitalization Team (ERT) Directors
- Ongoing senior staff meetings with the Department of Transportation, to help improve coordination and communication between DLCD and ODOT
- Coordination and support for Bear Creek Valley Regional Problem Solving (RPS)
- The director and department staff have had multiple meetings with local governments and private parties in central Oregon to explore options for creating a new State Forest and a new Community Forest.
- Meetings and tour with Harney County (Burns, August 5)
- Oregon State Bar Real Estate and Land Use Section Annual Conference (Salishan, August 8)
- Oregon Transportation Commission (Redmond, August 20)
- Meeting with City of Medford (Medford, September 8)
- Metro Urban Reserves Steering Committee (Portland, September 10)
- Oregon Planning Institute (Eugene, September 11)
- Senate Environment & Natural Resources and House Agriculture & Natural Resources (Newport, September 12)
- Oregonian Editorial Board (Portland, September 23)
- TGM Advisory Committee (Salem, September 18)
- Big Look Town Hall Meetings (Eight meetings around the state - September 17-October 2)
- Legislative Rules Committee (LCDC Nominations, September 24, Salem)
- Legislative Emergency Board (September 25, Salem)
- The Dalles' Periodic Review Coordination Meeting with The Dalles, Wasco County, Columbia River Gorge Commission and Tribes (The Dalles, September 30)
- Planners Network Meeting (Bend, October 2)
- Realtors Annual Conference (LaGrande, October 9)

#### **4. LEGISLATIVE UPDATE**

##### **A. DLCD LEGISLATIVE CONCEPTS**

The director and staff met with the Office of Legislative Counsel to discuss drafting of approved legislative concepts, including the sequence of drafting, given that some of the concepts are still “placeholders” or are still in the process of refinement by the department and stakeholders. The department has submitted its final form of the legislative concepts to Legislative Counsel, except for the two placeholder concepts. Legislative counsel drafting has begun. Two DLCD concepts are placeholders (Big Look and Affordable Housing), and cannot proceed to drafting until more formal recommendations are available from the Task Force or work groups.

##### **B. OTHER LEGISLATIVE ITEMS**

Interim Legislative Committees met in August and September to discuss (or have briefings concerning) a variety of land use related issues, including the Big Look, Measure 49, water issues, marine reserves, and issues concerning rural sewer systems near La Pine.

Regarding the latter issue, on Friday Sept 26 the sewer issue in and around La Pine will be a topic in a joint meeting in Bend involving the Senate Interim Environment and Natural Resources Committee and the House Interim Committee on Energy and the Environment.

Subcommittees of these interim committees are also holding meetings that will likely determine legislation for the 2009 Legislative Session. DLCD staff has been actively involved with a group discussing legislation on Transfer of Development Rights (TDRs).

#### **5. LCDC POLICY AND RULEMAKING UPDATES**

##### **A. RULEMAKING**

At its March and April meetings, the Commission appointed an advisory workgroup for the Affordable Housing rulemaking pilot project. The workgroup has met five times to focus on options for a pilot project involving new rules to encourage affordable housing, but has also discussed other options for rule (and possibly legislative) changes to address this issue. The workgroup is scheduled to meet at least one more time (October 27) prior to forwarding recommendations to LCDC. The department’s website has information and materials regarding this project, including as schedule of meetings, at the following link: [http://www.oregon.gov/LCD/meetings.shtml#Affordable\\_Housing\\_Work\\_Group](http://www.oregon.gov/LCD/meetings.shtml#Affordable_Housing_Work_Group)

LCDC appointed a “Phase 2 UGB Workgroup” to consider new “safe harbors” and other administrative rules intended to clarify and streamline the UGB amendment process. The workgroup has met four times, most recently on September 30. LCDC intends to review the work group’s recommendations and possibly adopt amendments to the UGB amendment rules in OAR 660, Division 24 by the end of this year. 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](http://www.lcd.state.or.us/LCD/ugb_rulemaking_project.shtml)

## **B. OTHER POLICY ACTIVITIES**

### **New Rulemaking**

The department also is proceeding with a rulemaking regarding wind power generation on farmland. At its August meeting, the Commission appointed an advisory workgroup to review and clarify existing rule language and its applicability to wind generators. The workgroup toured a project that is currently under construction in Gilliam County and discussed alternative approaches to reviewing wind projects on farmland at its first meeting on September 15. The department's website includes information and materials as well as future meeting dates, at the following link:

[http://www.lcd.state.or.us/LCD/wind\\_energy\\_facility\\_siting\\_on\\_farmland.shtml](http://www.lcd.state.or.us/LCD/wind_energy_facility_siting_on_farmland.shtml).

### **Metro Urban and Rural Reserves**

The department is continuing to participate in Metro's process for designating Urban and Rural Reserves, and to coordinate with other state agencies in that effort. The Metro Reserves Steering Committee has met five times, and Metro and the three counties involved in leading the process have agreed on the study area for the effort. The next Reserves Steering Committee meeting will be held on Wednesday November 12, 2008.