



Oregon

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TO: Land Conservation and Development Commission
FROM: Jim Rue, Director
SUBJECT: **Agenda Item 13, January 22-23, 2015, 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 October 20, 2014 and November 17, 2014, the department received 15 notices of appeal filed with LUBA. The department filed none of these notices, and was not named as a party in any of these notices.

2. LUBA Opinions

Between October 14, 2014 and November 20, 2014, the department received copies of 11 recently issued LUBA opinions. Of these, LUBA dismissed five, remanded three, and affirmed three.

One decision concerns the application or interpretation of a statewide planning goal or LCDC administrative rule:

Goal 3, ORS 215.213(3) and (4), ORS 215.284(1), OAR 660-033-0130(4)(e), Non-farm dwellings on agricultural land; *Landwatch Lane County v. Lane County*, LUBA 2014-070, issued

November 12, 2014. LUBA affirmed a decision by Lane County approving a non-farm dwelling in an Exclusive Farm Use area. Lane County is a “marginal lands” county (one of two in the state along with Washington County) subject to the provisions regarding uses on farmlands found in ORS 215.213 rather than ORS 215.283, which applies to non-marginal lands counties. The county approved the dwelling pursuant to the standards set forth in ORS 215.213(3), which do not include a requirement that the parcel was created prior to 1993. The petitioners asserted that the county should have used the provisions of ORS 215.284(1), which include a requirement that the parcel was created before 1993, or, alternatively, the provisions of ORS 215.213(4), which include a requirement that the parcel was created between 1948 and 1983. If the petitioners’ objection was sustained, the county would have been required to deny the application, since the parcel was created after 1993.

LUBA first determined that ORS 215.284(1) did not apply to proposed farmland dwellings in Lane County, despite language in the statute indicating that the standards set forth applied to lands in the Willamette Valley. Looking at legislative history from 1993, ORS 215.284 was originally adopted as part of amendments to ORS 215.283, which applies only to non-marginal lands counties, and was inexplicably codified by the Office of Legislative Counsel after its enrollment as a separate statute. Since ORS 215.213, applying to marginal lands counties such as Lane County, was an existing statute in 1993, the legislature did not intend for ORS 215.284(1) to apply to marginal lands counties. In addition, OAR 660-033-0130(4)(e), an LCDC rule implementing the statute, states that marginal lands counties shall apply the standards set forth in ORS 215.213(3) through (8) for nonfarm dwellings on lands zoned Exclusive Farm Use that are not designated marginal or high-value farmland, as was the parcel for which Lane County approved this nonfarm dwelling.

Next, LUBA had to determine whether ORS 215.213(3) was correctly applied by Lane County to this application, or whether the county should have been required to apply ORS 215.213(4). ORS 215.213(3) allows approval of a nonfarm dwelling based upon several factors, including a finding that the site is “generally unsuitable land for the production of farm crops and livestock.” Petitioners argued that, paralleling the statutory provisions for non-marginal lands counties found in ORS 215.284, ORS 215.213(3) is not meant for application to parcels within the Willamette Valley. LUBA found that the petitioners’ attempt to import such a statutory parallel was “without merit.” LUBA also rejected the petitioners’ assertion that, because ORS 215.213(4) included an approval criterion related to the Willamette River Greenway, Lane County was required to apply this subsection rather than ORS 215.213(3).

Finally, LUBA rejected the petitioners assertion that OAR 660-033-0130(4)(e), which states that “[c]ounties that have adopted marginal lands provisions ... shall apply the standards in ORS 215.213(3) through 215.213(8) for nonfarm dwellings” required Lane County to apply all of the standards within ORS 215.213(3) through (8), and not just the provisions of ORS 215.213(3). LUBA found that word “standards” merely references the fact that there are multiple alternative standards for considering applications for nonfarm dwellings within the statute, and does not mean that all of the standards from the entire section must be applied to each nonfarm dwelling application.

This decision does not require goal or rule amendments.

3. Appellate Court Opinions

Between September 25, 2014, and November 17, 2014, the department received two opinions from the Court of Appeals. The Court affirmed one decision without opinion and dismissed one petition for review as moot. Neither decision concerns the application or interpretation of a statewide planning goal or LCDC administrative rule.

4. Other Opinions of Interest

None.

5. Appeal Notices of Interest

Residential Rezone in Keizer: *Herber Farm LLC v. City of Keizer*, LUBA 2014-091, filed October 24, 2014. Appeal of a decision by the City of Keizer denying a proposed comprehensive plan map amendment and zone change to allow higher density housing on 7.5 acres in the city.

Mixed-Use Project in Downtown Lake Oswego: *LO 138 LLC v. City of Lake Oswego*, LUBA 2014-092, filed October 27, 2014. Appeal of a decision by the City of Lake Oswego approving a mixed-use project in downtown Lake Oswego for 201 residential units and 36,500 square feet of commercial space on 2.5 acres.

Mineral and Aggregate Resources in Josephine County: *Rogue Advocates v. Josephine County*, LUBA 2014-095, filed October 29, 2014, and *Corcoran v. Josephine County*, LUBA 2014-096, filed October 28, 2014. Appeal of a decision by Josephine County approving a comprehensive plan amendment and zone change for the Sunny Valley Sand & Gravel application.

New Oregon State University Bend Campus: *Truth in Site Coalition v. City of Bend*, LUBA 2014-098, filed November 4, 2014. Appeal of a decision by the City of Bend approving a design review and site plan application for the first phase of a new Oregon State University campus in Bend.

Pacific Connector Gas Pipeline in Coos County: *McCaffree v. Coos County*, LUBA 2014-102, filed November 14, 2014. Appeal of a decision by Coos County approving an extension of a previous approval of the Pacific Connector Gas Pipeline in the county.

Neskowin Erosion Adaptation Plan: *Seabreeze Assoc. v. Tillamook County*, LUBA 2014-106, filed November 26, 2014. Appeal of a decision by Tillamook County approving the Neskowin Erosion Adaptation Plan.

Lincoln City Vacation Rental Zoning District: *Oregonians in Action Legal Center v. Lincoln City*, LUBA 2014-108, filed December 11, 2014. Appeal of a decision by Lincoln City creating a new Vacation Rental zoning district.

6. Measure 37/49

None.

B. GRANTS, INTERGOVERNMENTAL AGREEMENTS, AND CONTRACTS

None.

II. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES

A. OREGON COASTAL MANAGEMENT PROGRAM (OCMP)

Oregon Coastal Management Program (OCMP) staff have been involved with many ocean and coastal issues including presentations on Oregon's estuary planning program and shorefront protection at the national Restore America's Estuaries National Summit on Coastal and Estuarine Restoration in Washington DC. Two OCMP staff also attended the West Coast Ocean Data Portal annual meeting in California with funding from the West Coast Governor's Alliance for Ocean Health. Staff have been very engaged with planning for an Ocean Summit in early January that will bring together representatives of 40 west coast tribes, 10 state agencies and 10 federal agencies to discuss regional priorities for ocean health.

Marine Issues: The Ocean Policy Advisory Council (OPAC) held a meeting on October 16th in Newport. The Oregon Department of Fish and Wildlife (ODFW) provided an update on the state's Marine Reserve System implementation. National Oceanic and Atmospheric Administration (NOAA) staff from headquarters and California provided updates on the progress of the National Ocean Policy and regional ocean planning partnerships, and on the NOAA Marine Sanctuaries Program, which recently initiated a new process for groups to nominate areas. OPAC made a decision to focus on marine sanctuaries and is planning to make sanctuaries the main subject of their next meeting which will be held in late April or May in Bandon.

The Northwest National Marine Renewable Energy Center (NNMREC) Pacific Marine Renewable Energy Center (PMEC) Collaborative Workgroup held its quarterly meeting on December 9th in Portland. The workgroup is assisting PMEC in the Federal Energy Regulatory Commission (FERC) licensing, state and federal permitting, and U.S. Bureau of Ocean Energy (BOEM) lease processes for the South Energy Test Site (SETS) off of Newport. The facility will be grid connected and will require a facility onshore where the cable will deliver power to the grid from the offshore devices. Based on bottom surveys, PMEC has had to alter its plans for routing the cable to shore and will have to extend the length of the cable, and possibly shift the location of the facility within the BOEM lease block. The workgroup is still collaborating with NNMREC and FERC on establishing the regulatory timeline, study plans and monitoring.

The Marine Affairs Coordinator continues to work with BOEM and Principle Power on the Windfloat Project application for five wind turbine platforms in federal waters 17 miles off Coos Bay. On November 24th, Principle Power held a meeting in Charleston to discuss the project, and specifically the cable portion. The meeting was targeted toward the regional fishing interests who

are interested in both the route and the burial aspects of the cable. Principle Power also indicated that they may deploy larger 8 MW wind turbines instead of the 6 MW turbines as originally planned, which would make the development a 40MW power facility.

The annual Marine Technology Summit was held in Newport on October 21. It brought together the technology producers, researchers, resource agencies and fishing industry professionals. All manner of technologies and their capabilities were on display and discussed.

Coastal Hazards and Climate Change: On October 29th the Tillamook County Board of Commissioners unanimously adopted, with significant community support, the Neskowin Coastal Hazards Adaptation Plan and associated land use amendments. The department believes that the amendments will be an important model that can be used to assist other coastal communities address increasing coastal erosion. DLCD has supported Tillamook County in this process. The amendments were recently appealed to LUBA. DLCD has filed a Motion to Intervene and is requesting LCDC approval (see Item 12). OCSD staff continues to support and provide technical assistance to the Tillamook County Community Development Department staff on a variety of other chronic and catastrophic hazard land use planning issues including review of coastal development applications (e.g., proposed Bayocean Spit development).

OCMP staff continues to work with a number of other communities on coastal hazard and dune management issues. Examples of this work during the reporting period include working with: Cannon Beach staff and citizens on a recent dune grading proposal; Gearhart staff and citizens to further coordinate and provide mapping support for development of a dune management plan; Port Orford staff assisting with revisions to their hazard development code requirements and providing new hazard mapping; and Lincoln County staff regarding Bayshore (near Waldport) on two key dune grading projects. These and similar efforts will be ongoing in the foreseeable future.

OCSD staff continues to work with a NOAA coastal fellow who is studying an array of issues associated with beachfront protection and the related Goal 18 beachfront protective structure eligibility inventory. This information, developed over the next year, should assist in future policy discussions with applicable agencies and local governments. The NOAA coastal fellow and Coastal Shores Specialist are also continuing to work with coastal local governments to use and adopt the new Goal 18 beachfront protective structure inventories which provide benefits including simplified eligibility determinations, greater consistency, and enhanced public awareness.

OCMP staff are developing application materials for the next NOAA 309 funding cycle in order to continue to secure needed resources related to our coastal program. These potential resources emphasize coastal hazard resilience measures.

OCMP staff continues to provide tsunami land use assistance and otherwise participate and support hazard planning efforts. Examples include:

- 1) Ongoing development of detailed guidance related to tsunami evacuation facilities improvement planning. This added tool should further the productivity of the overall tsunami land use guide by providing significant assistance to local governments as they develop important financial and development code evacuation financing strategies and options. It should also facilitate more productive OCMP staff assistance to local communities in the future. The consultant team has developed initial draft materials for review and coordination with OCMP staff.
- 2) Education and outreach meetings and visits with a number of communities and citizens. Staff has continued to meet with coastal jurisdictions (Coos County, Bandon, and Lincoln City) to discuss tsunami guidance land use options. This effort will be long term but the outreach efforts have been helpful in encouraging and assisting this important work to move forward.
- 3) OCMP participation in a number of hazard related resilience efforts. Examples of this work include participation in a Lincoln County Risk Map Resilience workshop effort, and an Oregon Sea Grant-led workshop on exploring coastal community resilience in Oregon.

OCMP staff are continuing to work with project co-leads Oregon Sea Grant and the Oregon Partnership for Disaster Resilience and other project partners in south Clatsop County under the NOAA-funded “Coastal Community Resilience Networks Pilot Project” to finalize guidance for resilience planning at the community level. OCMP has requested a three-month no-cost extension the grant (to March 31, 2015) to provide additional time to meet with local planning commissions to discuss possible applications of the resilience planning guidance.

In a complementary project that involves a broader area, the OCMP and project partner Oregon Sea Grant facilitated the third in a series of three meetings under a project to ‘align’ agency climate adaptation priorities in Clatsop and Tillamook Counties. The project is designed to bring all agencies and parties involved in climate change adaptation planning together to collaboratively identify priority climate risks and measures to address those risks. The project team is currently drafting a ‘regional framework for climate adaptation’ based on outputs from four work groups—for infrastructure, health and safety, natural systems, and working lands—that identify priority climate risks, management objectives to address those risks, and actions to achieve those objectives. The framework is expected to be released for comment in early January. Project partners represent most federal and state agencies with management responsibilities in Clatsop and Tillamook counties, several communities, and non-governmental organizations.

Estuary Updates: The OCMP has just submitted a proposal for funding to NOAA under the Section 309 Project of Special Merit (PSM) competition for funding to continue working on phase II of the Estuary Habitat Atlas project. This current PSM proposal seeks to extend the methods developed during the previous PSM work to incorporate additional high-value estuarine data sets that are not coast-wide. Our new work will result in a second generation Oregon Estuaries Coastal and Marine Ecological Classification System (CMECS) product that utilizes the best available modern data for all estuaries encompassed by the 2012-2014 PSM project, and

at a spatial scale that is highly relevant for effective resource management practices. We will hear back from NOAA regarding the status of our application in early Spring of 2015.

We are also working with staff at the South Slough National Estuarine Research Reserve on the incorporation of estuary specific habitat information from the Coos Estuary Inventory Project. OCMP staff are providing technical assistance and guidance on the implementation of CMECS classifications and the transformation of data into the established CMECS Framework.

B. DIRECTOR'S OFFICE

An oral update will be provided.

C. ADMINISTRATIVE SERVICES

Fiscal (Budget, Accounting, and Procurement): The fiscal team continues to work with the director's office and division managers to ensure accuracy in financial reporting and timely expenditure projections for 2013-15 while also developing the 2015-17 budget.

The fiscal team continues to evaluate ways to improve services to its customers. A part of this effort includes the accounting unit's efforts in working with the department's SharePoint Work Group. The team is developing a travel claim workflow process within SharePoint. One of the outcomes of this effort will be electronic submittals of travel claims by employees to managers and to the accounting unit. The accounting team will also begin its efforts in biennium year-end statewide financial reporting in the next few months.

Information Technology: The network administrator continues to provide all IT services for the department and is continuing to work with department management in evaluating and determining current and future technology needs for the department. The department continues to recruit for the Information Support Specialist 4 with duties focusing on SharePoint administration and end user support.

D. PLANNING SERVICES

Transportation: The Eugene-Springfield metropolitan area is on the commission agenda as item 7 to present their ongoing scenario planning to reduce greenhouse gas emissions from light vehicles.

The TGM program is making good progress on the grants that were awarded in the fall of 2014. One project has been initiated ahead of the rest, largely because it does not involve a contract with a consultant. Several projects are in the consultant selection process. The rest of the projects are developing statements of work with the local governments, and will soon move into consultant selection. The 2015 grant cycle will start in early February when the pre-application form is sent to all cities, counties, and tribes.

Natural Hazards: The department received an updated draft from NOAA Fisheries describing the “reasonable and prudent alternatives” they believe should be implemented as part of the National Flood Insurance Program to protect threatened salmon. The new draft responds to some of the comments the department provided to NOAA, but still has the potential to create problems for local governments that are trying to comply with the requirements of the Federal Emergency Management Agency (FEMA) and NOAA. The department continues to work with the federal agencies to find a way to protect salmon and protect communities from flooding.

Measure 49: Most of the focus has been on the rulemaking to give counties a framework to establish systems for transferable development credits. These rules are presented for commission consideration as agenda item 6. The department also continues to monitor and participate in court cases regarding vested rights determinations in Yamhill County.

E. COMMUNITY SERVICES

Urban Growth Boundaries: Since the last director’s report, the department received for review an adopted UGB amendment submittal from the city of Keizer and Marion County for a 58-acre expansion to include an existing park. The department did not receive any objections to the submittal and approved the amendment.

Periodic Review: Several cities are continuing to work on task completion, but no submittals are currently under review by the department.

General Fund Grants Program: While several grant projects are a little behind schedule, all are expected to reach conclusion by the end of the biennium. Payment requests have begun, and are expected to accelerate from now through May, when most projects will wrap up.

The Grants Advisory Committee will meet in January. The committee will begin its deliberations on a recommendation to the commission regarding the 2015-17 Grants Allocation Plan. The committee considers appropriate uses of and priorities for General Fund grants. The committee will assume the amount contained in the Governor’s budget is available as the allocation plan needs to be complete by about the same time as the legislature concludes and the department’s grant budget is settled. The department expects the commission will be asked to approve the allocation plan at its May 2015 meeting.

Regional activities: In the Portland metropolitan area, DLCD’s regional representatives provide technical assistance on a wide variety local planning projects. Currently of note:

- The cities of [Hillsboro](#) and [Beaverton](#) and [Tigard](#) are considering comprehensive plan provisions for areas recently added to the Metro urban growth boundary.
- Metro, Washington County, ODOT, and several cities are engaged in a major project to develop a locally driven package of land use and transportation solutions for [the corridor between downtown Portland and Tualatin and Sherwood](#) – the [Southwest Corridor Plan](#).

- Multnomah County is updating the [Sauvie Island Rural Plan](#), which includes contentious agri-tourism and boat house issues.
- [Portland](#), [Lake Oswego](#), and [Troutdale](#) are working on completion of their periodic review work programs.
- Washington County is completing a [concept plan for Bonny Slope West](#), an area transferred from Multnomah County by the 2013 legislature.

Regional representatives provide guidance regarding procedural and substantive planning requirements for these projects, participate in technical advisory committees, coordinate with the department and other state agency staff to provide assistance as necessary, and keep the Regional Solutions Team apprised of important developments. The reps manage grants for some of these projects.

F. NEW STAFF AND PROMOTIONS

Heather Wade joins us January 5, 2015 as our new Coastal State-Federal Relations Coordinator. Heather comes to us from Portland...Portland, TEXAS, that is, where she most recently worked for Texas Sea Grant as the Coastal Planning Specialist and Program Manager. She has a Masters in Urban and Regional Planning from Texas A&M and has participated in a number of various marine and environmental projects within the University. Heather's education and experience will be a valuable asset to the department, and we are looking forward to her becoming part of our team.

Amanda Long joins us January 12, 2015 as our new half-time Office Specialist in the Director's Office. Amanda's focus will primarily be supporting Amie and Casaria, in addition to assisting with a variety of Department projects. Amanda spent 3 years as an Office Manager for Credit Team USA and another year and a half as a Loan Processor with Lighthouse Home Loans. Most recently she was employed with DHS in their Information Record Management Office. We are excited to have her aboard.

G. DEPARTING EMPLOYEES

Laura Lehman left the department in November to work for the city of Portland.

H. RECRUITMENTS

The department is in the process of recruiting for two transportation and land use planners to fill the vacancies created by the departure of Karen Swirsky (now at the City of Bend) and Laura Lehman (now at the City of Portland). Initial interviews were held December 19, and finalists will be further evaluated in January.

III. LCDC POLICY AND RULEMAKING UPDATES

A. POLICY AGENDA

UGB Streamlining: The University of Oregon is nearing completion on the research the department commissioned to determine past development patterns and trends in cities throughout the state. The Rules Advisory Committee for the UGB streamlining project is scheduled to meet on January 28th and will hear a final report on the research at that time. The department anticipates that advisory committee meetings will continue during the legislative session, recognizing that there will be some additional scheduling complications for a good portion of the members (which will need to be accommodated). Research and policy framing are scheduled to be completed this spring, with initial rule drafting completed by the end of the summer, so that hearings on proposed new rules can begin in the fall.

Population Forecasting: See agenda item 3.

Measure 49 Transfer of Development Rights: See agenda item 6.

Primary Processing of Forest Products: The Rules Advisory Committee has met twice and will meet again on January 14, in order to reach a consensus on a proposed definition for the primary processing of forest products in forest zones. Staff plans to bring this rulemaking item to the commission for potential adoption at its March 12-13, 2015, meeting.

B. OTHER POLICY ACTIVITIES

Sage Grouse Conservation Plan: See agenda item 10.

C. PROPOSED LEGISLATION

The agency will be proposing three legislative concepts for the 2015 session, reported to the commission previously. These have now been filed by the Governor's office with the house, and new bill numbers are listed below:

1. HB 2456 – Repair drafting error in 2013 UGB streamlining legislation:

HB 2254, enacted in the 2013 session, requires DLCD to adopt administrative rules establishing a streamlined urban growth boundary (UGB) amendment process. HB 2254 included two almost-identical sections specifying criteria that LCDC must follow to guide the development of new rules – a section regarding small cities (less than 10,000) and a different section for large cities (more than 10,000). Unfortunately, it was not until well after this bill was enacted that the department and other stakeholders noticed that there had been a drafting error in the large city section. Specifically, in the large city section of the bill, a subsection that was meant to contain certain specific requirements to guide the rulemaking was inadvertently omitted from the bill. This omission relates to how a city will determine the supply and development capacity of lands the city proposes to add to the UGB.

2. HB 2457– Allow Land Divisions on Farm and Forest Land for Land that Straddles a UGB:

Several cities, and especially Metro, have made a concerted attempt to follow streams and other natural features in establishing their urban growth boundaries (UGBs); as a result, some farm or forest parcels are partially split by the UGB, with a portion inside the boundary and a portion outside. The result is that these properties are also split in terms of the planning policies, with cities charged to zone and plan the land inside the UGBs for urban uses, and counties charged to maintain farm and forest lands in large parcels.

In cases where the portion of a parcel outside the UGB is smaller than the statutorily required minimum lot size (see ORS 215.780), the parcel cannot be divided, even those portions inside the UGB. This bill proposes to correct this problem and authorize land partitions for farm or forest parcels straddling a UGB even if the newly created portion of the parcel outside the UGB would be smaller than the statutory minimum lot size. The legislation would ensure that the parcel outside the UGB remains protected in farm or forest use regardless of the size of the parcel, and that the parcel inside the UGB will be planned and zoned for urban uses in accordance with the applicable acknowledged comprehensive plan.

DLCD staff and legal counsel have determined that because the minimum lot size restrictions for new parcels outside the UGB are specified in state law, rulemaking is not a reasonable option for LCDC to resolve this problem. Legislation is required.

3. HB 2458– Mapping Corrections for Metro Reserves and UGB. Washington County believes there were several minor and technical errors with the map of Metro reserves enacted in the 2014 session under HB 4078, the so-called “grand bargain” bill. These errors primarily concern map descriptions for road right of ways and small isolated areas of land that, according to the county, are not appropriately designated in the legislation based on the designations of surrounding areas and other factors. Washington County has worked with Metro, the City of Hillsboro, 1000 Friends of Oregon and other stakeholders to identify these errors and reach consensus on a bill to correct them. Metro and the county assert they cannot make the necessary adjustments to the maps using local procedures because the map was legislatively enacted, and because of other provisions in the law that prevent re-designation of land designated reserves. The county and Metro have asked the department to propose this legislative concept and the department has agreed to carry the legislation.