



# Oregon

John A. Kitzhaber, M.D., Governor

## Department of Land Conservation and Development

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February 27, 2014

TO: Land Conservation and Development Commission  
FROM: Jim Rue, Director  
SUBJECT: **Agenda Item 4, March 13-14, 2014, 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 DLCD to report to LCDC 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 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 January 6, 2014 and January 31, 2014, the department received 14 copies of 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 December 1, 2013 and February 1, 2014, the department received copies of 24 recently issued LUBA opinions. Of these, LUBA dismissed 13, remanded four, reversed none, affirmed seven, remanded in part and transferred none, invalidated none, and transferred no petitions to circuit court.

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

Goal 4, ORS 215.448, OAR 660-006-0025(4)(s), Permitted Uses on Forest Land: *White v. Lane County*, LUBA No. 2013-063, issued December 10, 2013. LUBA remanded a decision by Lane County approving a temporary use permit to operate a commercial event venue on property

zoned for forest use. The county's temporary use permit provisions, acknowledged by LCDC to comply with statewide planning Goal 4 in 1987, allow temporary uses that are not otherwise allowable in the applicable zoning district. The county asserted that, because its plan is acknowledged, its decision was shielded from challenges made pursuant to provisions restricting uses on forest lands in state statute, statewide planning goal, or administrative rule.

LUBA found that, if the terms of a local code provision implementing a goal are ambiguous, and that ambiguity can be interpreted consistently with the applicable goals and rules, ORS 197.829(1)(d) dictates that the county cannot instead choose an interpretation that is contrary to the applicable goals. LUBA also found that this obligation operated not only on local code provisions expressly intended to directly implement a goal or administrative rule, but also in circumstances such as this where the local code provision (*e.g.*, Lane County's temporary use permit provisions) is a general provision applicable to all zones and not intended to implement any particular goal or rule. LUBA then noted that ORS 215.448 and OAR 660-006-0025(4)(s) both allow home occupations on forest resource lands, subject to specific conditions. Finally, LUBA found that the proposed use on the property most likely met the definition of a "home occupation," and thus was an allowed use on the property. Because Lane County's temporary use permit provisions *only* allow temporary uses not otherwise allowable in the zone, the county had incorrectly approved the application as a temporary use, and on remand is required to consider whether the proposal is properly characterized as a home occupation.

Two concurring opinions were issued by LUBA referees. The first did not agree with the majority in its finding that the proposed use was very likely a home occupation, arguing that home occupations are not "uses" in and of themselves, but rather are best described as a set of limitations on any use that make it secondary to the residential use of a property. However this concurring opinion found that the county's finding that this particular use was temporary in nature was implausible, and would have remanded on that basis.

The second concurring opinion would have also remanded the decision, but on different grounds, finding that the county's temporary use provisions were adopted prior to 1990 amendments to Goal 4 and thus are not in compliance with statewide planning goals, because they allow uses not allowed on forest lands. Therefore, pursuant to ORS 197.646(3), the provisions of OAR chapter 660, division 6 should have been applied directly to the application for a temporary use.

This decision does not require goal or rule amendments.

**3. Appellate Court Opinions**

None

**4. Other Opinions of Interest**

None

## **5. Appeal Notices of Interest**

Removal of Historic Landmark Designation: *Lake Oswego Preservation Society v. City of Lake Oswego*, LUBA 2014-009, filed January 28, 2014. Appeal of a decision by City of Lake Oswego removing historic landmark designation from Carman House and property pursuant to ORS 197.772(3).

Permitted Improvements on Forest Land: *Thomas v. Wasco County*, LUBA 2014-013, filed January 31, 2014. Appeal of a decision by Wasco County finding no code violations regarding improvement of property that is designated as forest resource land.

## **6. Measure 37/49**

None.

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

None.

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

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

Ocean and Coastal Services Division (OCSA) staff are involved with numerous coastal and ocean issues. This report is shorter than usual due to the timing of the February meeting and will focus on issues that are relevant to the south coast.

Marine Issues: NOAA and the Bureau of Ocean Energy Management (BOEM) are engaged in a joint regional project to produce the Pacific Regional Ocean Uses Atlas (PROUA), designed to document where coastal communities use the ocean across a full range of typical human activities and sectors. The objective is to assist BOEM in its marine renewable energy leasing program. The NOAA team has used participatory mapping techniques to create a series of marine use and development maps on local, state, and regional planning scale. The PROUA maps for Oregon are currently in review by the project participants. The PROUA maps are to supplement those already produced by Oregon, which are available in Oregon MarineMap.

Governor Kitzhaber and BOEM Director Beaudreau joined Secretary of the Interior Sally Jewell to announce that BOEM has given the green light for Principle Power, Inc. (PPI) to submit a formal plan to build a 30- megawatt pilot project using floating wind turbine technology offshore Coos Bay, Oregon. PPI will seek to site the project within a proposed 15 square mile off Coos Bay. The project, which received \$4 million in Department of Energy funding, is designed to generate electricity from five floating “WindFloat” units, each equipped with a 6-megawatt offshore wind turbine. PPI applied to BOEM for a commercial wind energy lease in May, 2013, and BOEM issued a Request for Interest (RFI) in the Federal Register to determine whether there were other developers interested in constructing wind facilities in the same area. BOEM received 18 responses to the RFI, none expressing competitive interest in the area. The majority of the

comments submitted to BOEM discussed potential effects on commercial fisheries, which BOEM will consider during the course of evaluating the project. BOEM has now published a Determination of No Competitive Interest (DNCI) which clears the way for PPI to submit a plan for the proposed lease area. This triggers BOEM to complete a NEPA analysis, which includes opportunity for public comment, before making any final decision on lease issuance and plan approval. PPI is seeking a second award from the US DOE to support the full development.

The OSU Pacific Marine Energy Center (PMEC) has also applied for a BOEM lease for the South Energy Tests site in Newport, and is currently in the RFI process, for which a DCNI is also anticipated.

Two companies, Resolute Power and M3 Wave Energy Systems, are working with the Oregon Military Department to site separate temporary test projects at Camp Rilea. The test projects are planned for 2015. Both test devices will be fixed on the bottom below sea surface, will not be grid connected, and will also provide an assessment of the location for future development.

Coastal Hazards and Climate Change: OCS staff has completed a tsunami land use planning guidance document for local governments:

<http://www.oregon.gov/LCD/OCMP/Pages/Publications.aspx>

(Agenda Item 4). Staff will be working actively with local governments on utilizing the guide to develop local land use strategies and options to improve community resilience to tsunamis beginning early in 2014. This work will be ongoing for a number of years and is not only important to address coastal hazard directives related to Goals 7 and 18 but also to address Chapter 3 of the Oregon Resilience Plan. Next steps include the development of a detailed evacuation route plan model that can be used by local governments in applying mitigation funding strategies and land use requirements as development occurs.

Federal Consistency: The department anticipates receiving a federal consistency certification and associated materials for the Jordan Cove Energy Project sometime this spring. (You will visit the Jordan Cove site as part of the Commission tour.) The Jordan Cove Energy project is located on the North Spit of Coos Bay, and consists of a proposed liquefied natural gas (LNG) export terminal, associated pipeline, access slip/marine berth, and natural gas fueled power plant (south Dunes Power Plant). The Oregon Energy Facility Siting council (EFSC) has jurisdiction over the power plant, and the department will provide comments through the EFSC process. The Federal Energy Regulatory Commission and the U.S. Army Corps of Engineers have jurisdiction over the remainder of the project, and once the applicants have submitted the federal consistency certification and necessary materials, OCS staff will review the project for consistency with the Oregon Coastal Management Program. The review will include a public comment period and continued coordination with networked state agencies and local governments.

Estuary Updates: As reported in the February Director's Report, the department received a six-month extension to the estuary project of special merit, extending the contract with NOAA through June 30, 2014 (Agenda Item 7). OCS staff will hold the project's second (and last) technical

advisory committee meeting on March 14 in Newport. The meeting will provide for review of draft data products by our external partners.

## **B. COMMUNITY SERVICES**

General Fund Grants Program: Grant managers are continuing to negotiate several scopes of work for Technical Assistance grants. The Grants Administrative Specialist and Community Services Division Manager are busy drafting contracts for those grants with complete scopes.

The January director's report stated that negotiations with the Columbia River Gorge Commission were almost complete for the urban planning project which received funding through the 2013 Legislature. Since then, the gorge commission learned that it needs allotment authority from the Washington Legislature to utilize the funds, and obtaining that authority may slow the project down for several months. Gorge commission staff is pursuing a solution through the Oregon Legislature during the 2014 session.

The department has released a request for proposals to assist the department in development of model exclusive farm use and forest zones, and then to assist several counties in updating their zoning ordinances. The department received preliminary indication of interest from about 10 counties. Consultant selection will take place soon after the March commission meeting.

Periodic Review: The department received a submittal from the City of Gresham in late January relating to its transportation system plan. The submittal responds to a partial remand of the task. The department received no objections to the submittal and is preparing an approval order.

Urban Growth Boundaries: The department approved Prineville's submittal of two separate UGB amendments. The amendments total 256 acres, all designated Light Industrial. Crook County owns 96 acres that is included in the UGB for expansion of the Apple data center. The Department of State Lands owns the 160-acre expansion area. DLCD is not aware of immediate development plans for that site. DLCD received no objections to either submittal and approved them.

## **C. DIRECTOR'S OFFICE**

An oral update will be provided.

## **D. ADMINISTRATIVE SERVICES**

Fiscal (Budget, Accounting, and Procurement): The fiscal team continues working with the director's office and division managers to ensure accuracy in financial reporting and timely expenditure projections for 2013-15, including creation of a new financial model reflecting information at a summary level. Additional evaluations regarding department needs are also underway. A department-wide financial model is presented at each LCDC Budget and Management subcommittee meeting.

The accounting team continues its evaluation efforts in implementing an indirect cost rate proposal to the department's primary cognizant partner, National Oceanic Atmospheric Administration (NOAA). NOAA recently approved the indirect cost rate. The accounting team is working with division managers in implementing this structure for the next fiscal year.

Procurement continues working with department managers and project officers in ensuring accountability and adherence to state procurement and leasing rules. This includes a recent agreement with the Department of Parks and Recreation for natural hazards mitigation planning efforts with the department.

IT: The unit continues working with the Information Management Modernization Initiative Coordinator in the analyses and implementation of specific systems and modifications to current systems. An example of this effort includes continued migration of the PAPA/PR databases to SQL and in-house development of a SharePoint Intranet site. The unit also continues working with department management in evaluating and determining current and future technological needs for the department including evaluating teleconferencing capacity and potential changes in this area based on department need.

#### **E. PLANNING SERVICES**

Transportation: The Transportation and Growth Management (TGM) program is accepting pre-applications through March 14.

<http://www.oregon.gov/LCD/TGM/Pages/grants.aspx>

Measure 49: See the separate agenda item to initiate rulemaking for transfer of development rights (TDR). In the legal arena we received good news that we will not have to pay attorneys costs in the Rosboro case. The court found that the state's position, while incorrect, was a reasonable one to take. The substance of the Rosboro case was described in the Director's Report from November 2013.

Natural Hazards: We recently hosted a joint meeting with the Department of Geology and Mineral Industries (DOGAMI), the Office of Emergency Management (OEM) and the Oregon Partnership for Disasters Resilience (OPDR) to stay coordinated on current projects and to develop a more formal collaborative program to make Oregon more resilient to natural hazards. This is a continuation of the work we discussed with the commission last September at the joint meeting with the governing board of DOGAMI.

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

#### **A. NEW STAFF AND PROMOTIONS**

Alwin (Ali) Turiel will join the land use and transportation section on March 17. A native Oregonian, Ali earned her Master's degree in Urban Planning from the University of Oregon, where she focused on regional economics, analytic modeling and land use planning. Her undergraduate degree is from the Art Institute of Chicago. Ali comes to us from the City of

Hillsboro, where she has been an Urban Policy Planner. Prior to that Ali was with the department as the Measure 49 Ombudsman in 2008. She has also worked for Klamath and Jackson counties, as well as the City of Beaverton and Napa, CA. We are looking forward to having her on our team.

Dave Smith joined us February 25 as our part-time Database Administrator. He will be working closely with Gail Ewart and with the many IMMI project teams. Dave has been a self-employed IT consultant for over 20 years and holds a Bachelors Degree in Economics from Willamette University. Dave's education and experience will be a valuable asset to the IMMI project and the department as a whole, and we are looking forward to him becoming part of our team.

#### **B. DEPARTING EMPLOYEES**

None.

#### **C. RECRUITMENTS**

Interviews were held February 24 and 25 for the vacant Policy Analyst position. We have a strong candidate pool and are considering a second round of interviews during the first week of March.

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

Several projects on the department's Policy Agenda are underway, as described below:

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

UGB Streamlining: The department convened its first meeting with the Urban Growth Boundary Rules Advisory Committee on October 31 and held a second meeting on November 26. The department had tentatively scheduled a third meeting in January but decided instead to meet with one or two small groups to help the department prepare items for consideration by the either the larger committee or an official subcommittee. A meeting is tentatively scheduled for March 20. The administrative rules charged to this committee must be adopted by LCDC by January 1, 2016. The rules will implement HB 2254, which requires LCDC to establish an alternative, simplified UGB amendment process.

Population Forecasting: The department is recommending that the commission initiate rulemaking at the March meeting (Agenda Item 8).

Farm and Forest "Housekeeping" Rule Amendments: This involves minor and technical changes to farm and forest rules (div 6 and 33) in order to align the rules with new legislation enacted by the 2013 legislature. Because of staff limitations, this cannot be accomplished in March, as originally scheduled. The rules will instead be scheduled for adoption by LCDC at the

commission's May, 2014 meeting. Because these are minor and technical changes a rule advisory committee is not necessary.

Solar Siting: The commission initiated this administrative rule project in November 2013. Consideration of the existing rules regarding solar siting on farmland was requested by legislators. LCDC delegated to the department the authority to appoint individual members to the rules advisory committee (RAC). This project was delayed for a short time during December while department staff worked to ensure coordination with the Governor's Office. The necessary coordination has occurred and the rulemaking is moving forward. Conversations with the RAC members are underway and the department expects to present a proposed rule to the commission at its July meeting in Ontario.

Youth Camps: The department is recommending that the commission initiate rulemaking at the March meeting (See Agenda Item 8).

Ballot Measure 49 Transfer of Development Rights: The department is recommending that the commission initiate rulemaking at the March meeting (See Agenda Item 8).

## **B. OTHER POLICY ACTIVITIES**

SageCon: The state has submitted its comments to BLM on the draft EIS addressing revision of the management plans for the four affected districts in Oregon. None of the comments directly address the statewide land use planning program. The effort looking forward will focus on the ODFW Sage Grouse plan to be provided to the USFWS regarding its listing decision.

Population Forecasting (HB2253): The department is participating in a rules advisory committee convened by the Population Forecast Center at Portland State University (PSU) to develop a methodology to guide PSU's population forecasting, as required by HB 2253. The group has met three times and is intending to propose a set of rules for PSU adoption by April, 2013. The department will begin work on related rules for LCDC adoption once PSU has completed its rulemaking and is asking the commission to appoint a RAC at the March LCDC meeting (Agenda Item 8).

Metro Boundary Issue: The department will be convening a work group to consider whether to approach this problem through rulemaking or a legislative concept for the 2015 session. While it is not clear yet whether legislation is needed, the department is asking authorization to submit a placeholder legislative concept (Agenda Item 10). This has been discussed mostly in the context of the Metro UGB, but other UGBs in the state may have a similar problem. The department expects to begin this discussion in April or May.

## **V. 2014 LEGISLATIVE SESSION**

Agenda Item 9.