



# Oregon

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May 10, 2013

TO: Land Conservation and Development Commission

FROM: Jim Rue, Director

SUBJECT: **Agenda Item 6, May 23, 2013, 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 February 28, 2013 and April 22, 2013, the department received copies of 24 notices of appeal filed with LUBA. The department did not file any of these notices.

##### **2. LUBA Opinions**

Between March 12, 2013 and April 26, 2013, the department received copies of 15 recently issued LUBA opinions. Of these, LUBA dismissed four, remanded six, reversed none, affirmed three, remanded in part and transferred none, invalidated none, and transferred two petitions to circuit court.

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

Goals 3 and 5, ORS 215.301, OAR 660-023-0180(5) Mineral and Aggregate Resources and Agricultural Lands: *Poto v. Linn County*, LUBA No. 2012-065, issued March 12, 2013. LUBA remanded the county's approval of a decision to add 4 acres to an existing 33-acre quarry site, including amending the Goal 5 inventory designation and zoning designation of the site.

The petitioners alleged that the county had approved a new portable cement batching plant on the site in violation of ORS 215.301, which prohibits location of a batching plant within two miles of a planted vineyard except for batching operations approved prior to 1989. The county had approved batching operations in a 1981 permit, but a 1997 modification to the permit did not list batching operations as an allowed use on the site. The petitioners also alleged that the county's impact area for analysis of conflicting uses under Goal 5 (1,500 feet from the mining area), and its actual analysis of those conflicting uses, was inadequate, asserting that the language of ORS 215.301 mandated a finding that conflicts between the quarry and the planted vineyard within two miles could not be minimized. LUBA determined that the county's findings regarding the impact of the 1997 permit modification were not adequate to conclude that the batching use remained authorized, and also noted that a county condition of approval that required a modified conflicts analysis if batching plant operations were restarted on the site called into question the exemption for pre-1989 batching operations contained in ORS 215.301. However, LUBA rejected the petitioners' claims regarding the impact area and conflicting uses, noting that in a case of conflicting expert evidence, the county was justified in relying on expert evidence proffered by the applicant. LUBA also determined that ORS 215.301 did not preclude location of a batching plant within two miles of a planted vineyard under certain circumstances, and that the statute and the rule implementing Goal 5 were mutually exclusive constraints on the location of batching plants in the vicinity of planted vineyards.

ORS 215.448(1) Home Occupations in Exclusive Farm Use Zoning District: *Green v. Douglas County* LUBA No. 2012-092, issued April 9, 2013. LUBA affirmed the county's approval of a home occupation for events on a property zoned for Exclusive Farm Use.

The petitioners alleged that the county's approval of a home occupation on land zoned Exclusive Farm Use, allowing events such as weddings, receptions, reunion sand anniversary celebrations, exceeded the limits placed on such home occupations by ORS 215.448(1). Specifically, the petitioners asserted that the county's approval did not demonstrate that the events would be operated substantially in buildings (ORS 215.448(1) (b)), and would be operated with five or fewer persons employed to carry out the authorized events (ORS 215.448(1) (c)). LUBA disagreed, finding that the county's condition of approval allowing no more than 20 percent of any event to occur outside a building, while presenting future enforcement issues, was a reasonable response to the statutory requirement. LUBA also found that the county's interpretation of the five person employee limit to mean five employees "at any given time" was a reasonable interpretation of the statutory restriction.

Goal 15 Willamette River Greenway: *Gunderson v. City of Portland* LUBA No. 2010-039, 2010-040, 2012-041; issued April 26, 2013. LUBA remanded the city's adoption of the North River Reach Plan, amending the city's comprehensive plan and Willamette River Greenway Plan and

adopting implementing zoning provisions. The case was before LUBA on remand from the Court of Appeals, which found that LUBA erred in failing to consider petitioners' challenge to the adequacy of the city's inventory of "lands currently committed to industrial, commercial and residential uses" that is required by paragraph (B)(9) of Goal 15 Willamette River Greenway.

The petitioners asserted that the city's amendment of its Willamette River Greenway boundary to include additional land triggered a requirement to revise its Goal 15 inventory to add that land. LUBA agreed with this assertion of the petitioners. The petitioners also asserted that the city's adoption of a river environmental overlay zone with associated vegetation enhancement standards for its North River Reach Plan also required the city to update its Goal 15 inventory for all lands committed to urban uses within the existing Greenway. On this issue, LUBA remanded to the city to determine if the current inventory or portions of that inventory were used in developing the new zoning standards. If this was the case, then the city must update its existing Goal 15 inventory. If not, then the city must adopt findings explaining why no update to its Goal 15 inventory is required. LUBA noted that Goal 15 is silent regarding whether amendments to greenway regulations trigger an obligation to update the greenway inventory, and if so whether the entire inventory must be updated or only parts of the inventory that are affected by the amendments, and suggested that LCDC may want to elaborate on the Goal 15 inventory requirement.

None of these decisions require goal or rule amendments.

### **3. Appellate Court Opinions**

Between March 19 and April 24, 2013, the department received four opinions from the Court of Appeals. The Court affirmed two decisions; reversed and remanded one decision, and affirmed in part, reversed in part, and remanded one decision.

Goal 3, ORS 215.283(2) (a), OAR 660-033-0120, OAR 660-033-0130: The Court of Appeals affirmed LUBA's decision in *Friends of Yamhill County v. Yamhill County* (Stoller)LUBA No. 2012-005. *See* 255 Or App 636, issued March 19, 2013.

In that decision, LUBA affirmed Yamhill County's decision to allow the expansion of a winery at a vineyard in an EFU zone, including a commercial kitchen and an increase in the number and types of events that may occur there. LUBA determined that events at wineries may be allowed under the provisions of either ORS 215.452 governing wineries, or as a "commercial activity in conjunction with a farm use" pursuant to ORS 215.283(2) (a). LUBA found specifically that, pursuant to language from a Supreme Court decision addressing the meaning of the term "commercial activity in conjunction with a farm use," (*Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989)) the number of events and facilities constructed to serve these events would "reinforce the profitability of operations and the likelihood that agricultural use of the land will continue."

The Court of Appeals affirmed LUBA's decision, noting that legislative history from 1989 reinforced the notion that the adoption of ORS 215.452 permitting wineries and ancillary uses in exclusive farm use zoned areas was not intended to preclude the consideration of such ancillary uses as a "commercial activity in conjunction with a farm use."

Goal 5, OAR 660-023-0250(3): The Court of Appeals affirmed LUBA's decision in *Hatley v. Umatilla County*, Court of Appeals decision LUBA No. 2012-017, 2012-018, and 2012-030, issued April 3, 2013. LUBA affirmed amendments to land use regulations regarding wind energy facilities. LUBA determined that the county's intent was to protect highly erodible soils and federally listed species, neither of which were inventoried Goal 5 resources, and that unintended effects of providing additional protection to inventoried Goal 5 resources such as riparian and fish habitat areas is not sufficient to constitute an amendment to a Goal 5 protection plan requiring that Goal 5 be addressed by the county.

The Court of Appeals affirmed LUBA's decision on this issue, noting that the county's ordinance has the practical effect of providing additional protections to only a small subset of the inventoried riparian and fish habitat areas. The Court of Appeals remanded the decision on an unrelated issue regarding whether the petitioner had waived his ability to raise certain issues.

#### **4. Other Opinions of Interest**

None

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

Green Corridor and Rural Reserves in Clackamas County: *City of Sandy v. Clackamas County*, LUBA No. 2013-02 filed February 28, 2013. An appeal of a resolution by Clackamas County terminating an intergovernmental agreement on green corridor and rural reserves and population coordination among Clackamas County, Metro, ODOT, and the City of Sandy.

Destination Resort in Curry County: *Oregon Shores Conservation Coalition v. Curry County*, LUBA 2013-33 filed April 15, 2013; *Oregon Coast Alliance v. Curry County*, LUBA 2013-34, filed April 16, 2013. An appeal of a decision approving a destination resort master plan in the Pistol River area.

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

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

Ocean and Coastal Services Division (OCSD) staff are involved with a number of coastal and ocean issues. In March the OCSD manager participated in the third National Working Waterfronts & Waterways Symposium in Tacoma, Washington as both a speaker and moderator. Registration was provided as part of Oregon's participation in the West Coast Governor's Alliance.

Recently the National Oceanic & Atmospheric Administration (NOAA) informed the agency that as a result of federal sequestration, DLCD's annual coastal grant will be reduced by approximately 6 percent starting in July 2013. The department will be able to take the budget cuts without loss of staff and will be able to continue to provide planning assistance grants to local governments at the 2012 level.

Marine Issues: Working as a temporary employee for a month, Todd Hallenbeck was able to take the collection of marine data from the Territorial Sea Plan (TSP) process and produce a catalog of geospatial data that provides a record of this important process that can be discovered and used to access the information crucial to the decision making process. Todd worked with OCSD staff to produce a "smart" catalog of records and GIS web services that can be used in the generation of online maps, website applications, and a publicly available archive of the GIS data. This information is now available for distribution to regional ocean planning efforts (the West Coast Governors Alliance and the West Coast Regional Planning Body) and to the Bureau of Ocean Energy Management (BOEM) which will be conducting a planning exercise for the Outer Continental Shelf off Oregon for marine renewable energy in the coming year.

OCSD staff is participating with other state agencies as members of the Coordination Committee for the Ocean Power Technologies (OPT) Reedsport marine renewable energy project pursuant to a settlement agreement. OPT was not able to deploy the buoy as planned during the summer of 2012, as the attempt to deploy the anchor along with the float and marker buoy was not successful. Due to this failure, OPT is asking Federal Energy Regulatory Commission (FERC) to amend its license agreement. The agencies are coordinating with the Governor's office on a coordinated state response and the development of a new schedule for conducting the monitoring and other studies associated with a the development.

OCSD staff, along with other state and federal agencies, is participating in the coordination committee for the Pacific Marine Energy Center (PMEC) which will be developed south of Newport. The committee is assisting PMEC in navigating the siting, permitting and leasing process.

The OCSD has begun a project to develop a Geographic Location Description (GLD) under the auspices of the federal Coastal Zone Management Act, for the federal waters within Oregon's Ocean Stewardship Area. This project will result in the submittal of a GLD to NOAA specifically for marine renewable energy development projects within the designated area. Once approved, all federal actions related to MRE projects, such as permits and leases, will be automatically subject to the federal consistency review process based on the foreseeable effects of those projects on the resources and uses within Oregon's coastal zone. It is anticipated that the project, which will be a collaborative effort between the OCMP, NOAA and BOEM, will take up to 18 month to complete.

OCSD staff continues to review a number of ocean-related state legislative proposals.

Coastal Hazards: Several OCSD staff are involved with coastal hazards. Staff are working closely with Tillamook County, providing much needed technical assistance to the Neskowin

Coastal Hazards Committee. Staff are working on tsunami planning guidance for local governments and providing technical assistance to local governments interested in UGB plan amendments in response to tsunami hazards. OCSD is working with a consultant to assist with development of a tsunami planning handbook. Staff is working with several local governments to better define their coastal shorelands boundary.

OCSD staff has started a two-year pilot project using a \$100,000 grant from NOAA's "Coastal Community Resilience Networks" program. The pilot project is a joint effort of the OCMP, Oregon Sea Grant and the Oregon Partnership for Disaster Resilience. The grant is being used 1) to develop a template for, and examples of, local *community resilience plans*; and 2) to establish an interdisciplinary network of agencies, experts and communities that have a role in planning for community resilience to natural hazards. This pilot involves Clatsop County and the cities of Seaside, Gearhart, and Cannon Beach. The scope of the project is intended to include both climate-related "chronic" hazards including sea level rise, flooding, and drought, and "catastrophic" hazards related to tectonics, such as earthquakes and tsunamis.

Several OCSD staff was involved with OSSPAC which developed a state resiliency plan recently finalized and submitted to the 2013 legislative session. The OCSD and PSD managers participated in a legislative work session on the plan.

OCSD's Coastal Shores Specialist and a staff member from OPRD will attend a fellowship matching workshop in April to select a Sea Grant fellow to work on coastal shoreline protection issues for the next two years. The fellow will be jointly funded by DLCD and OPRD.

Estuary Updates: The Estuary Project of Special Merit is moving ahead on several fronts including: the translation of existing digital data into the new Coastal and Marine Ecological Classification System framework; the delineation of study area boundaries, and the compilation of existing digital datasets into a comprehensive data collection. This work is all being done in preparation for review by the technical specialist that was hired earlier in the year as a contractor for the project. All of the work being conducted now is in direct preparation for the generation of new habitat map products for each estuary along the coast. We are also in the early stages of planning a workshop for mid-May, when a group of technical experts will be convened to review and comment on the products being generated by the project.

OCSD staff is working on an estuary data viewer which has been designed to help local governments use available estuary information in decision making. The draft product was very well received by coastal planners at the spring coastal planners meetings on the north and south coasts this April. OCSD also has a contract with a consultant to develop a trends assessment for estuaries and is developing an estuary regulatory assessment in-house. All of these products are designed to enable future updates to estuary plans that were developed in mid-1980s.

Federal Consistency: We continue to make headway on updating and identifying specific "enforceable policies" within the local comprehensive plans and networked state statutes that comprise the Oregon Coastal Management Program. The division has worked with NOAA's Office of Ocean and Coastal Resource Management (OCRM) to streamline the process for

submitting Routine Program Changes (RPCs), and has started two contracts, one for assistance preparing local comprehensive plan RPCs, and one for preparing state statute RPCs.

In addition to the RPC work, the division worked with the Department of State Lands (DSL) to develop an explanatory guide and checklist that will assist both the division and DSL in implementing Part Two of the Territorial Sea Plan. The division and DSL are also working on a similar checklist for the recently amended Part Five.

In consistency review work, the division has seen an upswing in the number of federal permits that require consistency review and has begun working with the U.S. Army Corps of Engineers on a major project to rehabilitate portions of the South Jetty at the Mouth of the Columbia River.

## **B. COMMUNITY SERVICES**

CSD staff continues to be engaged in a broad variety of activities serving local government, other state agencies and the legislature. Staff is currently reviewing one periodic review task submittal for which the department received objections, and could therefore result in a commission hearing. Staff is working closely with four cities on urban growth boundary amendments that have or are likely to result in a submittal in the next few months (Junction City, Ontario, Newberg and Newport). Our Central Oregon Regional representative is working with Central Oregon Intergovernmental Council, the city of Redmond, and Deschutes County to prepare an inventory of industrial lands in Redmond to “test” the large-lot industrial sites process adopted by the county in 2012, and for which the commission adopted authorizing rules. Division specialists provide the initial analysis for many of the bills being reviewed by the department for the current legislative session.

## **C. DIRECTOR’S OFFICE**

An oral update will be provided.

## **D. ADMINISTRATIVE SERVICES**

The fiscal team continues working with the director’s office and division managers to ensure accuracy in financial reporting and analyze and timely expenditure projections for 2011-13. A department-wide model is presented at each LCDC Budget Advisory Meeting subcommittee meeting.

The department’s presentation to the Ways and Means Subcommittee on Natural Resources occurred on March 12, 13 and 14. The director will report results of that conversation to you at your upcoming meeting.

The information technology unit continues working with department management in evaluating and determining current and future technological needs for the department.

The administrative services manager and key staff of the department continue long term efforts toward better department-wide information management. The coordinator is working with the administrative manager, the department's GIS and SharePoint workgroups and other key staff in implementing better information management and continues setting the stage for this five year effort.

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

Two new employees (Marian Lahav and Lisa Peffer) joined the Natural Hazards section. We are currently working through the list of programs and projects to determine who will be responsible for what. In the Transportation Section, we are in discussions with Oregon Department of Transportation to restructure the financial relationship between the two agencies for the 2013-2015 biennium. This would include the Transportation and Growth Management (TGM) program that supports local planning and the Oregon Sustainable Transportation Initiative (OSTI) that seeks to reduce greenhouse gas emissions. The goal is to simplify the accounting without changing the overall level of support for transportation and land use planning. In the Measure 49 section the major project is moving the database from server operated by an outside vendor to server operated by the department. Also in progress is research regarding property line adjustments and county compliance in general.

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

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

Laura Buhl started April 22 and is also a member of the TGM team as a Code Assistance Planner. Laura was most recently employed as a planner with the City of Detroit, Michigan. Previously she taught planning, worked for Wasco County as a planner, and worked in Chile. She has a Master's degree in Community and Regional Planning from University of Oregon.

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

Todd Hallenbeck completed his temporary assignment with OCSD at the end of March. Todd was working to organize and catalog the GIS information collected and used during the TSP amendment process.

#### **C. RECRUITMENTS**

PSD will be recruiting a Planner 3 for the TGM program.

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

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

See legislative update, Agenda Item 5.

## **B. CURRENT RULEMAKING**

No rulemaking is currently underway

## **C. OTHER POLICY ACTIVITIES**

Metro Climate Smart Communities Scenarios: See Agenda Item 7

Southern Oregon Pilot Project: The three counties have all been hard at work preparing maps and holding Technical Advisory Committee (TAC) Meetings.

All three counties have gathered data to prepare the base mapping for Task 4 of the Grant Contract. Our department has been coordinating with the participating state agencies to supply the counties with necessary state data. The base maps are mostly completed. The counties are making final changes before they make the maps available to the public.

The Josephine County TAC has met three times. The first meeting was an introduction and review of the maps prepared for Task 4. The second and third meetings addressed farm and forest land respectively. The Jackson County TAC has met twice. The first meeting was an introduction and the second meeting addressed forest land. Douglas County's TAC has met once for an introduction. The TAC meetings have all been well attended and have had lively and diverse conversation. No clear direction has surfaced yet as to what the counties are going to focus on as part of this program.

The counties have also been in conversation with the department about extending the Pilot Program into the next biennium. The reality is that this project is too complex to be carried out in the time originally allotted. Discussions are underway to determine the appropriate amount of additional time and the appropriate level of funding necessary to accomplish the Tasks outlined in the Grant Contract.

Local Park Planning Forum The department participated in a series of meetings to discuss and make recommendations regarding local park planning procedures and rules. At the time of this report the forum has concluded but has not issued a final report. Members of the forum suggested future actions DLCD and LCDC actions, but the forum as a whole concluded it should not label these as "recommendations", since forum members did not vote on recommendations. However, the department will be providing recommendations to the department and the commission as part of the 2013-2015 policy report in a future LCDC meeting. These will include rulemaking to clarify provisions of LCDC rules regarding parks.