



Oregon

Kate Brown., Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



July 9, 2015

TO: Land Conservation and Development Commission
FROM: Jim Rue, Director
SUBJECT: **Agenda Item 13 July 23-24, 2015, LCDC Meeting**

DIRECTOR'S REPORT

I. 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 (DLCD or department) to report to the Land Conservation and Development Commission (LCDC or commission) 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

A. Department Participation in Appeals

Between April 1 and May 31, 2015, the department received 18 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.

B. LUBA Opinions

Between April 1 and May 21, 2015, the department received copies of 13 recently issued LUBA opinions. Of these, LUBA dismissed three, remanded six, and affirmed four.

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

Goal 10, ORS 197.303, ORS 197.307(4), 660-008-0030(1), housing needs on rural lands, *Seabreeze Associates v. Tillamook County*, LUBA 2014-106, issued April 16, 2015. LCDC intervened in this case to support the respondents. LUBA remanded a decision by Tillamook County approving the adoption of a coastal hazards overlay zone for the unincorporated

community of Neskowin. The petitioner asserted that the county erred in failing to consider whether adoption of the new zoning district is consistent with Statewide Planning Goal 10 (Housing) and related statutes and administrative rules. LUBA noted that Goal 10, associated administrative rules, and the needed housing statutes generally do not impose planning obligations on counties for lands within an unincorporated community such as Neskowin. However, the county's housing element, originally adopted in 1982, included inventories of residential land and projections of additional housing needed within Neskowin and other unincorporated communities. The record contained no information as to whether housing in Neskowin was needed only to meet rural needs, in which case Goal 10 and ORS 197.303 are inapplicable, or whether the housing in Neskowin met housing needs in lieu of housing within urban growth boundaries in Tillamook County. LUBA remanded the decision to the county to make this determination. If, on remand, the county determines that housing within Neskowin is needed to meet urban housing needs, LUBA directed the county to evaluate the adopted zoning district against the requirement in ORS 197.307(4) that clear and objective standards are required, and also to determine whether it coordinated changes in housing need with cities in the county as is required by OAR 660-008-0030(1).

Goal 10, ORS 197.303, Goal 9, OAR 660-009-0025(3), restrictions on vacation rental dwellings, *Oregonians in Action v. Lincoln City*, LUBA 2014-108/2015-002/003, issued April 22, 2015. LUBA affirmed a Lincoln City decision amending the city's zoning code regulating vacation rental dwellings. The petitioner asserted that the decision reduced the availability of single-family second homes for "seasonal residents seeking shelter," a category of "needed housing" pursuant to ORS 197.303 as determined by the city's housing element. The petitioners also asserted that the decision violated Goal 9 requirements to provide an adequate supply of sites for a variety of commercial and industrial sites and the requirement of OAR 660-009-0025(3) to "designate suitable land to respond to economic development opportunities as they arise." LUBA affirmed the city's decision that "vacation rentals" are occupied by tourists, not seasonal residents seeking shelter, and that vacation rental dwellings are not single-family second homes. Thus the city did not impact any category of "needed housing" found in the city's housing element. LUBA also determined that the ordinance did not impact commercial and industrial lands identified pursuant to Goal 9 because vacation rentals remain an unlimited permitted use on commercial zoned lands and the city did not propose to rezone any such lands.

Goal 3, OAR 660-033-0130(20), OAR 660-033-0130(2)(a), golf courses and associated structures on agricultural land, *Oregon Coast Alliance v. Curry County*, LUBA 2015-006, issued May 15, 2015. LUBA remanded a decision by Curry County approving an 18-hole golf course, clubhouse, and maintenance facility. OAR 660-033-0130(2)(a) limits the total design capacity of any enclosed structure or group of structures associated with a golf course on agricultural land within three miles of an urban growth boundary to no greater than 100 persons. The county found that this requirement was met because no more than 100 persons would be anticipated to use the structures under normal operation. LUBA found this determination to be erroneous; instead the county must determine that the structure's *design capacity* was for no greater than 100 persons. LUBA gave guidance to the county, based upon review of LCDC proceedings amending this rule in 2010, that "design capacity," was not the same thing as "maximum

occupancy” pursuant to safety codes, and that the rule applied only to portions of a facility that were designed for use by people, and thus did not apply to the proposed maintenance facility.

LUBA rejected the petitioner’s assertion that the proposed golf course did not comply with OAR 660-033-0130(2), which limits golf courses in EFU zones to a regulation 18-hole golf course that is “generally characterized by a site of about 120 to 150 acres of land.” LUBA determined that the word “generally” did not constitute a fixed upper limit of 150 acres – the proposed golf course is 198 acres. LUBA also found that the county’s findings justifying the larger course, for reasons of environmental protection, justified the larger size.

C. Appellate Court Opinions

None

D. Other Opinions of Interest

None

E. Appeal Notices of Interest

Private Park in Clackamas County: *King v. Clackamas County*, LUBA 215-022, filed April 20, 2015. Appeal of a decision by Clackamas County rezoning 80 acres of forest land and approving a conditional use permit for a private park at the Bull Run Powerhouse site near Sandy.

Measure 49 Partition in Wallowa County: *Lenahan v. Wallowa County*, LUBA 2015-025, filed April 29, 2015. Appeal of a decision by Wallowa County approving a three-lot minor partition on farmland pursuant to a Measure 49 final order.

Replacement Dwelling in Jefferson County: *Treadway v. Jefferson County*, LUBA 2015-029, filed April 29, 2015. Appeal of a decision by Jefferson County approving a replacement dwelling on farmland.

Rural Residential Subdivision in Lane County: *Lovinger v. Lane County*, LUBA 2015-031, filed May 6, 2015. Appeal of a decision by Lane County approving a 27-lot rural subdivision.

Private Park in Deschutes County: *Central Oregon Landwatch v. Deschutes County*, LUBA 2015-034, filed May 8, 2015. Appeal of a decision by Deschutes County approving a private park on farmland for the purpose of hosting special events.

Riverbend Landfill Expansion in Yamhill County: *Stop the Dump Coalition v. Yamhill County*, LUBA 2015-036, filed May 13, 2015. Appeal of a decision by Yamhill County approving expansion of the Riverbend Yamhill and placement of a berm in the floodplain of the South Yamhill River.

Approval of Goal 3 Exception in Yamhill County: *Friends of Yamhill County v. Yamhill County*, LUBA 2015-039, filed May 20, 2015. Appeal of a decision by Yamhill County approving a plan amendment, rezone, and Goal 3 exception for a portion of a 40-acre farm parcel.

II. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES

A. OREGON COASTAL MANAGEMENT PROGRAM (OCMP)

Marine Issues: The Ocean Policy Advisory Council (OPAC), staffed by OCMP, held an all-day informational workshop on the National Oceanic and Atmospheric Administration (NOAA) Marine Sanctuary Program in May followed by a regular OPAC meeting the next day. The forum brought together experts, officials and community interests from NOAA, other states, and communities affected by existing sanctuaries. The participants engaged in panels that discussed various aspects of the sanctuary program and its effect on other users. The forum had been prompted by the possibility that a local group would submit a proposal to NOAA to begin the process to create a marine sanctuary near Cape Blanco. That group has since announced they will not be doing so, and there are currently no other specific proposals for a marine sanctuary in Oregon. There were about 50-60 people in attendance for the forum, and each panel was followed by lengthy Q&A with audience members and OPAC.

OPAC held its meeting the next day. Following up on the forum the previous day, OPAC concluded its meeting by sending a letter to the Governor's office which recommended that no action be taken on marine sanctuaries at the present time. OPAC elected officers, retaining the current chair and electing a new vice chair. Agenda items included a review of the legislative session and an update on ocean acidification.

The Coastal Program Manager will be representing the state with the Governor's Office at a West Coast Ocean Partnership strategic planning meeting in Oakland, CA. The goal of the meeting is to further the discussion started at the Ocean Summit held in January in Portland. Participants representing 40 west coast tribes, 10 state agencies and 10 federal agencies agreed in Portland that a west coast ocean partnership was valuable but that the two existing groups, the West Coast Governor's Alliance for Coastal Health and the West Coast Regional Planning Body, should be combined and should include tribal representation in addition to state and federal participation.

NOAA Coastal Fellowship Update: The Coastal Program selected a new NOAA Coastal Management Fellow, Julie Sepanik, who was selected at the end of April through the matching workshop in Charleston. She is a very highly qualified individual who will be a great asset to our program over the next couple of years. Julie will be visiting us for a site visit in the latter half of July, and will be joining us at the beginning of September. Her project is titled "Shorelands at Risk: Building an Inventory of Vulnerable Estuarine Resources" which will contribute to the work of the department on coastal resiliency and climate change adaptation.

Major Federal Consistency Reviews: Oregon LNG submitted a consistency certification and associated materials in July 2013. DLCD has signed seven stay agreements with the applicant,

the most recent resulting in a new decision deadline of October 23, 2015. Federal Energy Regulatory Commission has not yet issued a schedule for the Environmental Impact Statement, and has not indicated when it may issue a draft EIS. This project continues to generate controversy and interest from local citizens, statewide conservation groups, trade and union organizations, and the media. Clatsop County's land use permit denial was recently upheld by the Oregon Court of Appeals and the decision was not appealed by the applicant. The OCMP is currently reviewing the enforceable policies of the OCMP that were used as a partial basis for that decision

Jordan Cove Energy project has also submitted their consistency certification and associated materials to DLCD. DLCD expects to execute another stay agreement with the applicant, as the most recent has a decision deadline of July 30, 2015. This project also continues to generate controversy and interest from local citizens, statewide conservation groups, trade and union organizations, and the media.

B. DIRECTOR'S OFFICE

An oral report will be provided at the meeting.

C. ADMINISTRATIVE SERVICES

Fiscal (Budget, Accounting, and Procurement): The fiscal team will be working with the management team in evaluating the 2013-15 reports' functionality and accuracy. Potential modifications will be implemented for 2015-17.

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 has developed a travel claim workflow process and is currently training department staff. The accounting team is also working on statewide financial reports due to the Department of Administrative Services in the next few months.

Information Technology: The network administrator continues to provide all IT services for the department while the department finalizes its recruitment for the Information Support Specialist 4. The director will have an update on this recruitment at your upcoming meeting.

D. PLANNING SERVICES

Natural Hazards: The Oregon Natural Hazards Mitigation Plan was submitted to the Federal Emergency Management Agency (FEMA) for review. The department anticipated that they would return it to us with a list of revisions that would be required for approval. Instead, they accepted it as submitted, which is a testament to the careful work of Marian Lahav who was coordinated this massive effort. The Governor will adopt the plan in early July, and final approval from FEMA should follow shortly.

Transportation: The Transportation and Growth Management (TGM) program received 58 applications for grants. In a typical grant cycle TGM would award around 20 grants, so this will be a very competitive year. Results will be announced in August.

Measure 49: The department has been actively involved in a vesting rights case: *Friends of Yamhill County et al v. Board of County Commissioners and Ralph and Norma Johnson*. On June 30 department staff and our attorney from the Department of Justice attended a hearing on the writ of review in Yamhill County Circuit Court. Unfortunately the judge was not prepared to make a ruling at the hearing, so we are awaiting a decision.

The most important issue in this case is the connection between vested rights and discontinuation of nonconforming uses. Measure 49 specifies that if a Measure 37 claimant established a common law vested right, then they are allowed to complete the project and continue the use despite the fact that Measure 49 replaced Measure 37. These vested rights are nonconforming uses and are subject to laws governing discontinuance or abandonment. Yamhill County ordinances state that if a nonconforming use is discontinued for one year, then it is abandoned and may not be reestablished.

In this case, the owners have previously made multiple applications for a vested right determination for a 41-lot subdivision. Yamhill County determined in each case that they had a vested right. These determinations were appealed through the courts, and ultimately remanded back to the county to correct errors in the determinations. Most recently, the owners reapplied for a vested rights determination after a discontinuation of over a year from the last remand. The county failed to apply their nonconforming use regulations and approved the application. The writ of review seeks to remedy this error. The department is hopeful that this case, along with three similar cases in Yamhill County, will clearly establish that counties must apply nonconforming use regulations to vested rights.

E. COMMUNITY SERVICES

General Fund Grants Program: The 2013-2015 grant period has closed, so payment activity is underway. All grants closed by June 30, 2015. The final amount expended (and reverted) for the biennium is not known at the time of this report.

The 2015-2017 grant period is starting. Division staff plans to have Technical Assistance grant applications distributed before the commission meeting in July. Preparation of other grant offers – Planning Assistance, Dispute Resolution, and Columbia River Gorge – will begin as soon as 2015-2017 grant payment activity draws to a close.

The department invested a portion of the 2013-2015 Technical Assistance grant allotment in a project designed to benefit multiple jurisdictions. The “[Multi-County Code Update Project](#)” was managed by the Farm and Forest Lands Specialist, and consisted of two phases: (1) development of model exclusive farm use and forest zones and (2) application of the model zones to update several counties’ zoning codes. The grant funds were used to retain a consultant to assist the department and advisory committees in development of the model zones during phase 1, and to

assist the counties directly in phase 2. Coos, Hood River, Lake, and Union counties received hearings-ready draft updates for their resource zones while Curry and Wheeler counties received initial assistance that stopped short of zone drafts. In all six counties, the existing codes were many years out of date, so the project gave them compliant farm and forest zones. The model zones will be placed online and will enable all counties to more easily keep their farm and forest zones current. By all accounts, the project was a success, and the department anticipates that it will continue in 2015-2017 to update more county codes.

Periodic Review and Urban Growth Boundaries: Since the last director's report, the department has not made a decision on a periodic review task or urban growth boundary submittal. The department has received no new submittals during this period. One city – Canyonville – amended its urban growth boundary to include 49 acres, but this amendment is under the jurisdiction of LUBA, so it was not submitted to DLCD for review.

Regional activities: In the Eastern Oregon Region, the DLCD regional representatives, with assistance and input from department specialists, provide technical and grant management assistance to local communities on a wide variety local planning projects. Currently of note:

- Malheur County has recently received 10 applications for photovoltaic solar power generating facilities for about 800 acres. The department has provided written and oral testimony assisting with rule interpretations.
- Two cities – Hermiston and Pendleton – are completing their final periodic review tasks. Hermiston is awaiting review of its local wetland inventory by the Department of State Lands, and if the review is positive that city's work program will be nearly complete. Pendleton similarly needs to finish its local wetland inventory and Goal 5 program but isn't quite as near completion.
- Regional Solutions Center activities will be addressed under agenda item 7.

Planners Network Meeting: The department, in partnership with the Oregon Chapter of the American Planning Association and the city and county planning director associations, hosted a one-and-one-half-day Planners Network Meeting in Redmond on June 24–25. The agenda included training sessions – “Oregon Planning 101” for new planners, urban growth boundary streamlining, and public involvement best practices – as well as department updates and a participant roundtable opportunities. Four division staff members provided training while the director and deputy director contributed to the department updates. Planners from the city of Prineville and the Confederated Tribes of Warm Springs, along with a representative of the Latino Community Association and a public involvement specialist from a firm in Portland also provided training.

Thirty-nine people attended some or all of the event: 34 registered for the half-day “Planning 101” session, while 26 registered for the full-day session, with 19 of these individuals attending both days. Attendees included city and county planning staff (including planners from outside Central Oregon), planning commissioners, state agency staff (Oregon Department of Fish and Wildlife and the Oregon Department of Transportation), consultants, and interested public.

F. RETIREMENTS, NEW STAFF AND PROMOTIONS

Interviews were held for the Coastal Conservation Coordinator (replacing newly retired Jeff Weber) on Monday, July 6th. Selection is pending additional information regarding CZARA.

David Michael will be joining us Monday, July 13th as our Information Systems Specialist 4 in the Administrative Services Division. David most recently worked with two different contractors for the U.S. Department of Energy as a System Administrator. Previously, David worked in the Reno, Nevada area in various technical support roles. His strong technical experience and customer service skills will be a valuable asset to the department.

As reported in May, Bob Rindy, Senior Policy Analyst, is now working exclusively on the UGB streamlining rules, and anticipates retiring at the culmination of that rulemaking project. Therefore, the department began recruiting for his replacement and will hold the first round of interviews for the position on Friday, July 10.

Our Information Management Project Coordinator, Gail Ewart, has announced her desire to retire later this summer. Gail has been instrumental in our Information Management Modernization Initiative, which, among other projects, has modernized our PAPA and Farm/Forest databases, improving our service delivery to stakeholders as well as the department's ability to evaluate program outcomes. She has successfully developed a project portfolio aimed at modernizing many of our information resources and that work will continue with her successor. We thank Gail for her service to DLCD and wish her well. A recruitment is currently underway and we hope to fill the position in July in order to allow for overlap between Gail and her successor.

III. LCDC POLICY AND RULEMAKING UPDATES

Economic Opportunity Analyses (EOAs) in the Metro region: The 2013-2015 policy agenda includes "new policy projects," and one of the projects on the list is "Industrial Lands." The description of this project in the October 2013 staff report to the commission describes part of this project as: "A workgroup to consider direction and clarity for Goal 9 planning by jurisdictions within the Metro UGB." Over the last several months, department staff met informally with planning professionals from cities across the region to gather feedback on EOAs rather than meeting as a group. The department asked what they found useful, what could be better or easier, and what they hoped to get out of a project to amend the rules pertaining to economic development planning.

Outside Metro, cities complete EOAs as part of land supply planning, typically as a precursor to an urban growth boundary (UGB) amendment. Cities in the Metro region are required to maintain a current EOA as part of the economic development element in their comprehensive plans, but that work only indirectly affects the Metro growth decision and UGB.

In the conversations, department staff learned that cities like having regular reporting of up-to-date local economic data to help steer their economic activities (an employment forecast, for example). While the underlying data for the EOA is valuable, it is difficult to explain or link to practical outcomes outside the UGB amendment context. There is concern and frustration with doing work that has few implementable results at the expense of work that could be more relevant to the city's activities (such as the Tigard public-private infrastructure financing project presented to the commission in May).

Those interviewed expressed a variety of opinions on the role of Metro, counties, and individual cities regarding employment land planning in the Metro region. When we previously asked similar questions in 2013-2014 it was apparent that it was not a good time to open a discussion on the economic development planning rules. This time there was a sense that it was time to make some changes, but no consensus on what the changes should be and some skepticism that the outcome would be meaningful and successful enough to make the effort worthwhile. Some felt that there is more to lose than to gain.

There is no "low hanging fruit" that would be easy and quick to pick. Indeed, there are difficult policy issues that would need to be addressed. Nevertheless there are some positive options available for consideration when the timing is right. These options will be addressed as the department develops its recommendation for the 2015-2017 policy agenda.