



Oregon

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TO: Land Conservation and Development Commission
FROM: Jim Rue, Director
SUBJECT: **Agenda Item 10 September 22-23, 2016, LCDC Meeting**

DIRECTOR'S REPORT

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 June 6 and August 5, 2016, the department received 13 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 June 7 and July 25, 2016, the department received copies of 12 recently issued LUBA opinions. Of these, LUBA dismissed six, remanded four, affirmed one, and reversed one.

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

ORS 197.307(4), ORS 197.303(1), ORS 197.831 – Clear and Objective Standards for Needed Housing: *Walter v. City of Eugene* LUBA 2016-024, issued June 30, 2016. LUBA reversed a decision by the city of Eugene denying a 10-lot residential subdivision (for needed housing, as defined by ORS 197.303(1)) and planned development application. The petitioners asserted that

the city's sole reason for denial of the application – noncompliance with a city code provision regarding street layout – was invalid because the provision was not clear and objective and thus did not comply with ORS 197.307(4). LUBA agreed with the petitioner, citing the legal standard it expressed in a 1998 decision that an approval standard is not clear and objective if it “imposes subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed, or (2) the adjoining properties or community.” The city code standard required that “the street layout of the proposed [application] shall disperse motor vehicle traffic onto more than one public local street.” LUBA found that the code standard and the term “disperse” had two plausible interpretations – it could be interpreted to require that traffic be able to leave the site in two directions, or it could be interpreted to require that traffic be able to leave the site in each direction and go around to the point of beginning. Since “disperse” as used in the code is undefined and ambiguous, and could lead to two different results, the city had not proved, as required by ORS 197.831, that the code standard is capable of being imposed only in a clear and objective manner. Since this was the only reason the city denied the application, LUBA reversed the city's decision and directed that the city approve the application.

ORS 215.296(1) – Farm Impacts Test for Uses on Agricultural Land: *Stop the Dump Coalition v. Yamhill County*, LUBA 2016-026, issued July 8, 2016. LUBA remanded a decision from Yamhill County approving site design and floodplain development review to authorize expansion of an existing landfill on land that is zoned for exclusive farm use. The county reapproved the application with additional findings after LUBA remanded the first approval. The remand was based upon the county's insufficient findings regarding cumulative impacts on individual farms from the proposed landfill expansion. However, LUBA rejected several other assertions of the petitioners. Most notably, LUBA found that it is permissible, through a condition of approval, to shift the costs or burdens of performing actions necessary to prevent a significant change in accepted farm practices or significant increase in costs on an affected farm to the applicant for the permit that would impose those costs and burdens. NOTE: A recent news article indicated that the petitioners before LUBA are appealing the decision to the Oregon Court of Appeals.

These decisions do not require a goal or rule amendment

3. Appellate Court Opinions

Between June 1 and July 31, 2016, the Oregon Court of Appeals issued two decisions providing judicial review of orders by the Land Use Board of Appeals (LUBA). The Court of Appeals affirmed both LUBA decisions. One of those decisions concerns the application or interpretation of a statewide planning goal or LCDC administrative rule:

Gilmour v. Linn County, 279 Or App 584, issued July 20, 2016. The Court of Appeals affirmed a LUBA opinion and order reversing an earlier decision by Linn County. The LUBA order had the effect of defining a Linn County farmer's hay-baling operation as “preparation” of farm crops, a permitted farm use pursuant to ORS 215.203(2)(a), rather than “processing” of farm crops,

defined as a commercial activity in conjunction with farm use, and allowed only conditionally pursuant to ORS 215.296. In addition to determining that the LUBA determination was a correct application of the statute, the Court of Appeals determined that LUBA was not required to defer to the county's interpretation of its own code, because that code provision was based upon the statutory requirements of ORS 215.203(2)(a), and courts are not required to give deference to local government interpretations of local land use regulations that implement state law. This decision does not *require* a goal or rule amendment, but it does highlight a tension caused by current definitions of "preparation" of farm crops, which a county may not regulate (and can be quite intensive), and "processing," which is subject to county review and approval. The correct threshold for operations that a county should reasonably be allowed to regulate is a policy issue that could come before the commission.

4. Other Opinions of Interest

None.

5. Appeal Notices of Interest

Mineral and Aggregate Uses in a Floodplain in Jackson County: *Rogue Advocates v. Jackson County*, LUBA 2016-069, filed June 16, 2016. Appeal of a decision by Jackson County approving improvements and aggregate-material stockpiles in a mapped floodplain. This appeal is of interest because it exemplifies controversies over mineral and aggregate uses, a Goal 5 resource, and development in floodplains, a natural hazard pursuant to Goal 7.

Mineral and Aggregate Site in Polk County: *Setniker v. Polk County*, LUBA 2016-072, filed July 11, 2016. Appeal of a decision by Polk County approving an amendment adding 124 acres of land zoned Exclusive Farm Use to the county's inventory of significant mineral and aggregate resources. This appeal is of interest because it exemplifies the continuing tensions and controversy over the mineral and aggregate uses, a Goal 5 resource, on rural and agricultural lands.

Co-Housing in the City of Eugene: *Conte v. City of Eugene*, LUBA 2016-077, filed August 5, 2016. Appeal of an approval by the city of a planned unit development for a co-housing project. This appeal is of interest as it relates to community controversies regarding the development of alternative housing types.

I. ACTIVITIES AND INITIATIVES

A. OREGON COASTAL MANAGEMENT PROGRAM (OCMP)

Marine Issues: The Marine Affairs Coordinator has been leading work of the Territorial Sea Plan Working Group (TSPWG) on the Rocky Shores Management Strategy amendment process. The group held its second meeting in July 2016. The TSPWG is working on the establishment of a work plan for the amendment process which will be presented to the Ocean Policy Advisory Council in December 2016. The work plan will lay out a strategy and timeline for the public process, as well as the goal and scope of the amendment process that is recommended.

The Bureau of Ocean Energy Management (BOEM) will continue to keep the BOEM Oregon Intergovernmental Renewable Energy Task Force informed of their work as it moves forward with the Federal Energy Regulatory Commission (FERC) on processing the research lease request for the Pacific Marine Energy Center, South Energy Test Site (PMEC-SETS) proposed by Oregon State University offshore Newport, Oregon. The PMEC Collaborative Work Group is continuing to make progress on the development of an adaptive management framework and mitigation measures that will be required by the federal agencies for licensing the PMEC-SETS facility when a license application is submitted. The PMEC-SETS group is currently in competition for an allocation of US Department of Energy funding that will enable them to move forward in the development of their testing facility.

The WindFloat Pacific project, proposed by Principle Power, Inc. for offshore Coos Bay, Oregon was not selected for additional funding. Shortly following that announcement by the US Department of Energy, the Bureau of Ocean Energy Management received official indication from Principle Power, Inc. that they will withdraw their commercial lease request for their project offshore Coos Bay, Oregon.

Coastal Processes and Hazards:

Foredune Grading: Foredune grading cannot be authorized except within an area with an approved foredune management plan that is consistent with Statewide Planning Goal 18 provisions. Pacific City and Bayshore (Waldport area) have approved dune management plans. These areas are currently impacted by significant sand inundation and as a result, the State of Oregon is experiencing significant dune grading activities. Requirements within plans include stabilization (replanting) of disturbed or graded areas as part of local and Oregon Parks and Recreation Department (OPRD) permitting. Previous dune grading projects have not adequately stabilized graded areas which has ultimately exacerbated sand movement in these areas. Replanting is costly and enforcement of these requirements (and other dune management requirements) has been controversial. This had made recent management of these areas extremely difficult. OCMP staff has been working extensively with County and OPRD to address these issues and insure management consistent with Goal 18 requirements. Progress is being made and relationships with county and OPRD staff is good.

2016 Tsunami Project of Special Merit, Tsunami land use resilience work: OCMP staff is moving forward as indicated below:

Memoranda of Understanding (MOUs) have been completed/signed with the following jurisdictions to partner with DLCD to develop resilience measures and strategies within their jurisdictions:

- Cannon Beach,
- Tillamook County (including a number of its rural communities),
- Waldport,
- Florence,
- Reedsport,
- and Coos County (including Charleston/Barview).

MOUs are nearly complete for:

- Coos Bay
- North Bend

Additionally, contracts have been developed and are nearing completion with the Oregon Department of Geology and Minerals Industry (DOGAMI) for “Beat the Wave” mapping and modeling which includes critical evacuation route planning data that can be used in developing resilience strategies.

The Project of Special Merit work will officially begin October 1, 2016. The anticipated projects will include two parts, (1) DOGAMI Beat the Wave modeling/mapping s an important part of tsunami resilience planning, and (2) local tsunami land use resilience work utilizing the DLCD tsunami land use guide.

Curry County all hazards project: DLCD staff continues to work with Curry County on an all hazard project which should result in land use amendments to further address coastal natural hazards including coastal erosion, landslides, liquefaction, flooding, wildfire and tsunamis. All draft products have now been reviewed/modified by the project management team. The county is prepared, with assistance from DLCD, to move into a public outreach process, with the goal of adoption in six months. With declining financial resources for a variety of reasons the department is encouraged by these additional, although limited, funding opportunities and staff is working hard to utilize them.

An additional Goal 18 issue of note includes new discussions to potentially modify and or reduce existing limitations on beachfront protective structures. Some of these discussions were included in two Goal 18 panels held at the Oregon Coast Economic Summit this August 2016. There will likely be a coastal caucus legislative subcommittee work group on this issue.

Major Federal Consistency Reviews: The Federal Energy Regulatory Commission has granted the applicants for the Jordan Cove Liquefied Natural Gas facility in Coos Bay a rehearing on the FERC denial of the project. Prior to a rehearing, state agencies continue to process the application pending a final decision from FERC. A stay agreement between the applicant and DLCD was signed and ends in January 2017.

The United States Army Corps of Engineers (Corps) issued their proposal to reissue the Nationwide Permits, which are set to expire April 2017. DLCD is working with the Corps in the reissuance process and will provide conditions for the Nationwide Permits and the associated federal consistency advanced concurrence projects.

The United States Army Corps of Engineers has also proposed a regional general permit for dredging for the south coast (Douglas County to the California border). This will be a federal permit review and the coastal effects and enforceable policies analysis and coastal certification statement have not been received at this time, but are expected soon.

Routine Program Change Update: Approximately a dozen local jurisdiction Routine Program Changes were contracted out to Robert Bailey. Most of these have been received and reviewed. They will be ready for review by the new Coastal State-Federal Relations Coordinator when they come on board, and can begin submission to the National Oceanic and Atmospheric Administration (NOAA) in October or November. This will nearly complete the process of bringing coastal local comprehensive plans up to date with NOAA, important in federal consistency reviews.

B. DIRECTOR'S OFFICE

An oral report will be provided at the meeting.

C. ADMINISTRATIVE SERVICES

Fiscal (Budget, Accounting, and Procurement): The department's fiscal team submitted the 2017-19 Agency Request Budget Document August 31, 2016, to the Chief Financial Office. The [document](#) is posted on the department's website under DLCD Budget Information. The fiscal team has also submitted the required information and documents for the state's Comprehensive Annual Financial Report and Schedule of Federal Expenditures.

Information Technology: DLCD five-year plan known as the Information Management Modernization Initiative (IMMI) will conclude this biennium. Since 2012, IMMI project deliverables have improved DLCD processes and increased operational effectiveness through more digital operations and less manual paper processing and data entry, as well as improved information and GIS resources. This work has been completed by a number of people, in different divisions.

As the "initiative" portion of IMMI winds down, Teddy and Rachel, together with the Director's Office, considered various options for how to best manage the work that came out of IMMI, and

continue work that the department will need to do to both maintain and develop new information resources. Teddy also worked with the director's office to ensure that we have the staff capacity to manage increasing federal and other funds grants and serve Geospatial Enterprise Office's budget and accounting needs. The department has made a decision that we'd like to tell you about.

Effective September 1, 2016, Rachel Smith assumed the responsibilities of DLCD's Chief Information Officer. As such, she will help DLCD reach objectives related to the supporting technology infrastructure, as well as our provision of data and information to local governments and for the department. This change also means that the department is combining the IMMI staff with the IT staff; Rachel now directly supervises three staff members, Jon Dunsmore, David Michael, and Dave Smith. As a part of this transition, the department will change existing "IMMI" references to "Information Resources." This title may evolve over time, but for now, seems to make the most sense. Information Resources will be within the director's office (as IMMI has been).

D. PLANNING SERVICES

Natural Hazards: In August the department learned that the Federal Emergency Management Agency gave initial approval to grant applications for buy-outs on a motel and a house damaged in the 2015 floods. DLCD staff played a significant role in identifying these buy-out opportunities, and gathering information for the applications, but the DLCD will not be involved in the actual buy-out. The Oregon Office of Emergency Management will receive the federal funds and handle the rest of the buy-out process.

Department staff prepared draft sections of the Medford Natural Hazards Mitigation Plan, and local staff have been very engaged in reviewing them. A public review draft of the risk assessment and community profile chapters will be published in October 2016. Work on the Tillamook Natural Hazards Mitigation Plan is also focused on the risk assessment with the help of the Oregon Department of Geology and Mineral Industries. DLCD is preparing these plans on behalf of the local governments with federal funding from the Pre-Disaster Mitigation program.

The September LCDC meeting includes a presentation (Agenda Item 4) and separate staff report about the ongoing work on the National Flood Insurance Program and the Endangered Species Act.

Transportation:

The September LCDC meeting includes a presentation (Agenda Item 14) and separate staff report about the grants recently award by the Transportation and Growth Management program.

Measures 37 and 49: In August 2016 the state filed a brief in support of a write of review for a Clatsop County decision on a vested right for a Measure 37 claim. The department challenged the county decision in the Aspmo case on two grounds. First, the department objected to the county decision that the owner was vested in a 15-lot subdivision, because this was not the project that the owner had started. The owner had started on a 6-lot subdivision that was intended to be the first phase of 30-lot development. Second, the owner did not pursue the project for over a year, so any vested right that might have existed was lot to discontinuance. Trial is scheduled for October 5, 2016.

In September 2016, the department received an opinion from Yamhill County Circuit Court Judge Stone that supported the department's arguments that a vested right is lost if the owner discontinues the project for over a year. This opinion seems to conflict with two opinions previously issued by Judge Collins, also with Yamhill County Circuit Court. The prior decisions are already on appeal.

E. COMMUNITY SERVICES

General Fund Grants Program: The status of the grants program is mostly unchanged since the last director's report. Nearly all grant funds have been awarded for the biennium and most awards have an effective grant agreement in place. See also agenda item 7 regarding examples grant project completed last biennium.

Periodic Review and Urban Growth Boundaries: Regarding periodic review tasks, the Portland City Commission approved plan amendments to complete Task 3 (consideration of alternatives) and Task 4 (policy choices) on its periodic review work program. The department has not received the submittal for review at the time of this report. Submittal will trigger a 21-day objection period, and the director must approve or remand the submittal, or refer it to the commission, within 120 days of the date it gets submitted. Portland also recently submitted a notice of proposed amendment regarding Task 5 (implementation), with the first hearing date set for October 6, 2016.

Regarding urban growth boundary (UGB) amendments, as explained in the May 2016 director's report, the director remanded the Lafayette UGB because it did not accommodate the projected 20-year need for housing units or residential land. The city and Yamhill County have approved amendments (to the boundary and the zoning code) to address the remand. The city submitted the amendment and the department received one objection. The department is reviewing the submittal and objection at the time of this report.

The city of Coburg amended its UGB to include 105.72 acres of land for light industrial use, 2 acres for high-density residential use, 15 acres for medium-density residential use, and 131.84

acres for low-density residential use (254.56 total). The department participated in the hearings in writing. The department raised concerns regarding some of the findings and conclusions in the adopted amendment but ultimately chose not to appeal the decision. Since Coburg is smaller than 2,500 population, the local decision is not submitted to the department for review, but rather is subject to a LUBA appeal. ORS 197.626. A local party did, however, appeal the decision and LBA remanded it on several counts, mostly related to the location analysis. The LUBA opinion was released in August so it will appear in the November director's report under section A, "Participation in Appeals, and Recent LUBA and Appellate Court Opinions."

The city of Bend has conducted its final hearings on its UGB amendment in response to the commission's 2009 remand. The city council is scheduled to adopt the amendments on September 21, 2016, while Deschutes County is scheduled to take final action on the amendments on September 26, 2016. The city will submit the co-adopted amendments sometime thereafter. Submittal will trigger a 21-day objection period, and the director must approve or remand the submittal, or refer it to the commission, within 120 days of the date it gets submitted.

F. RETIREMENTS, NEW STAFF AND PROMOTIONS

The current Coastal State-Federal Relations Coordinator, Heather Wade, has taken the Associate Director position at Texas Sea Grant. Her last day was September 2, 2016. The department is nearing completion of the recruitment process for this position. As reported previously, Laren Woolley, the current Coastal Shores Specialist, will be retiring. His last day in the office is anticipated to be September 28. Meg Gardner, former NOAA Coastal Fellow, has joined DLCD as the new Coastal Shores Specialist. The department is very pleased to have Meg return. Her prior experience with DLCD and the Oregon Parks and Recreation Department will be invaluable as she assumes the coastal processes and hazard issues described elsewhere in this report.

II. LCDC POLICY AND RULEMAKING UPDATES

The department is currently working on four rulemakings:

- Pilot UGB Expansion Process for Affordable Housing (HB 4079). An report on this rulemaking is provided to the commission in Agenda Item 15;
- Metropolitan Transportation Planning and Greenhouse Gas Reduction Targets. The Rulemaking Advisory Committee met August 23, 2016. Most of the discussion was about targets, and whether it would be better to set one target that applied to all metropolitan areas, or to calculate separate targets for each metropolitan area. The Rulemaking Advisory Committee also heard a presentation from the University of Oregon about how other states are setting targets, and a presentation from the Oregon Chapter of the American Planning Association about regional planning.
- Goal 5 Historic Resources. A briefing on this rulemaking is provided to the commission in agenda item 12.

- **Periodic Review Replacement.** The Rulemaking Advisory Committee met three times during the summer, and the department will present proposed rules to the commission for public hearing and adoption at its November 2016 meeting.

The department has also received drafts from Legislative Counsel for each of its two 2017 legislative concepts. One concept ensures that cities with a population under 25,000 that identify a need for additional housing capacity take steps to address the identified need. The other concept clarifies that a lot or parcel may not be approved for a forest template dwelling if the lot or parcel would not have qualified prior to reconfiguration of the lot, parcel, or tract through property line adjustments. Both legislative concepts are still subject to final approval by the Governor's Office before introduction as 2017 legislation.