



# Oregon

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## Department of Land Conservation and Development

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October 30, 2014

TO: Land Conservation and Development Commission  
FROM: Jim Rue, Director  
SUBJECT: **Agenda Item 9, November 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 the Department of Land Conservation and Development (department and/or DLCD) to report to the Land Conservation and Development Commission (commission and/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 August 21, 2014 and October 9, 2014, the department received 15 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 August 5, 2014 and September 30, 2014, the department received copies of 17 recently issued LUBA opinions. Of these, LUBA dismissed seven, remanded seven, and affirmed three.

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

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces, ORS 197.772(3), Removal of Historic Property Designation Imposed by Local Government, *Lake Oswego Preservation Society v. City of Lake Oswego*, LUBA 2014-009, issued August 5, 2014. LUBA

remanded a decision by the city removing a house from the city's Statewide Planning Goal 5 inventory of historic resources pursuant to ORS 197.772(3).

ORS 197.772 has as its subject matter the consent of a property owner for initial and continued historic property designation by a local government. ORS 197.772(1) allows a property owner to refuse to consent to initial designation of his or her property with a historic property designation, and ORS 197.772(3) allows a property owner to, at a later date, remove from the property a historic property designation that was imposed on the property by the local government. The petitioners objected to Lake Oswego's removal of the historic property designation, initially imposed in 1990, on a home within the city, arguing that the ability of a property owner to remove the historic designation only applied to the initial property owner who had objected, not to a subsequent owner of the property. Based upon legislative history from enactment of ORS 197.772 in 1995, LUBA agreed with the petitioner, and remanded the decision to the city for consideration of the removal of the historic designation under an alternative city code provision governing such applications.

Goal 2, Part II(c) Land Use Planning; OAR 660-004-0020 and 660-004-0022, "Reasons" Exceptions to Statewide Planning Goals. *Columbia Riverkeeper v. Port of St. Helens*, LUBA 2014-017/018, issued August 27, 2014. LUBA remanded a decision by Columbia County approving a comprehensive plan amendment, zone change, and reasons exception to Goal 3 (Agricultural Lands) for 957 acres adjacent to the Port Westward Industrial Park along the Columbia River.

While there were many specific assignments of error made by the petitioners, some sustained and some denied by LUBA, the overall decision concludes that, while a local jurisdiction is not precluded as a matter of law from pursuing a "reasons" exception to statewide planning goals for a broad, general class of industrial uses, in practice it would be a very difficult and complex task for a local jurisdiction to undertake, as opposed to pursuing a "reasons" exception for a specific industrial use or limited category of industrial uses.

The petitioners made multiple assignments of error, and LUBA sustained the following assertions:

The county's findings that the exception was justified under OAR 660-004-022(3)(b), which authorizes an exception for rural industrial uses on resource land where "the use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible in densely populated areas," was not supported by an adequate description of the proposed uses and their impacts sufficient to determine that such impacts were either "hazardous" or "incompatible in densely populated areas."

The county's findings that the existing Port Westward site, which does not require a new exception, cannot reasonably accommodate the proposed use (OAR 660-004-0020(2)(b)), were insufficient. The county concluded that land within the existing Port Westward site was unavailable because it was subject to a long-term lease to Portland General Electric (PGE) and

also because it contained a large amount of wetlands. LUBA determined that there was insufficient evidence in the record the PGE had made the leasehold unavailable for industrial development and also insufficient findings regarding the possibility of filling and mitigating wetlands on the site, especially since the existing Port Westward developed site consists of 300 acres of wetlands that had been filled for development in the past.

The county's findings that other industrially zoned properties in the region cannot reasonably accommodate the proposed industrial uses, also pursuant to OAR 660-004-0020(2)(b), were insufficient. Because the county advanced three separate non-overlapping "reasons" to justify the exception, and purported to take an exception for a large number of industrial uses, the county could not reject a site solely because it could not reasonably accommodate one subset of proposed industrial uses if the site could reasonably accommodate other subsets of proposed industrial uses. Additionally, the county did not establish that alternative sites had to be of a similar size to accommodate all of the large-lot industrial uses, because the county's findings did not establish that the multiple large lot industrial uses must be located together at a single site. In particular, the county's findings that an alternative 450-acre industrial site in the city of Rainier could not reasonably accommodate some of the proposed industrial uses were insufficient.

The county's findings that, under OAR 660-004-0020(2)(d), the "proposed uses are compatible with other adjacent uses or will be rendered through measures designed to reduce adverse impacts," were insufficient. The county deferred findings of compliance with an exception standard to a subsequent permit proceeding, and such action is not permissible.

Given the sheer breadth and the ill-defined parameters of the uses authorized by the goal exception, the county did not provide evidence in the record or appropriate findings to buttress its conclusion that the proposed amendments did not authorize urban uses on rural lands, and did not also require an exception to Goal 14 (Urbanization). The county's first alternative finding that OAR 660-004-0022(3), governing proposed exceptions for rural industrial land, somehow exempted the county from the requirement to take an exception to Goal 14, was erroneous and had no basis in law. The county's second alternative finding, to adopt a perfunctory exception to Goal 14 based upon the same record and findings directed as satisfying the general exception standards for Goal 3 failed because the Goal 14 rule, at OAR 660-014-0040, has its own set of specific standards for reasons exceptions to Goal 14, which the county did not address in its findings.

Goal 4, Forest Lands, ORS 215.750(1)(c), OAR 660-006-027(3)(c)(b), Forest "Template" Dwellings. *West v. Multnomah County*, LUBA 2014-048, issued September 30, 2014. LUBA affirmed a Multnomah County decision denying an application for a forest "template" dwelling in a Commercial Forest zoned area. ORS 215.750(1)(c) allows a new dwelling in a forest zone to be permitted if at least 11 parcels in a 160-acre area around the dwelling site existed in 1993, and at least three dwellings existed on those parcels. OAR 660-006-027(3)(c)(B) adds a requirement that the three dwellings must not only have existed in 1993, but must continue to exist at the time of the development application. LUBA upheld the county's decision in this particular circumstance that one of the three required dwellings surrounding the petitioner's property which

had been vacant for many years and was in a state of disrepair that precluded residential occupancy, did not qualify as a dwelling that existed at the time of the development application.

Goal 2, Land Use Planning, OAR 660-004-0018(4)(b), Modification of a “Reasons” Exception to a Statewide Planning Goal. *Foland v. Jackson County*, LUBA 2014-050, issued September 30, 2014. LUBA affirmed a decision by the county approving a modification to condition of approval regarding the supplier of irrigation water for a proposed interstate highway rest stop near Ashland. OAR 660-004-0018(4)(b) requires that a change in the type or intensity of public facilities and services for an area approved under an existing “reasons” exception to a statewide planning goal requires a new “reasons” exception be approved by the local jurisdiction. LUBA first determined that the intent of the administrative rule was to require a new “reasons” exception when the proposed change made the use less compliant with statewide planning goals. LUBA then determined that the proposed change, which substituted the Talent Irrigation District as water supplier for the City of Ashland, made the overall application more compliant with statewide planning goals, not less, and thus did not require a new goal exception.

These decisions do not require goal or rule amendments.

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

Between August 20, 2014, and September 24, 2014, the department received two opinions from the Court of Appeals. The Court affirmed two decisions, one without opinion. Neither of these decisions concerns the application or interpretation of a statewide planning goal or LCDC administrative rule

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

None

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

Excavation in Salmon River Estuary: DD Spruce LLC v. Lincoln County, LUBA 2014-075, filed August 21, 2014. Appeal of a determination by the county that its comprehensive plan and land use regulations do not apply to a proposed excavation in the Salmon River Estuary in an effort to locate the remains of Sir Francis Drake.

Salem Hospital Expansion: South Central Association of Neighbors v. City of Salem, LUBA 2014-083, filed September 18, 2014. Appeal of a decision by the City of Salem approving a major expansion to Salem Hospital.

Amphitheater for Outdoor Events: Hood River Valley Residents’ Committee v. Hood River County, LUBA 2014-088, filed October 7, 2014. Appeal of a decision by Hood River County approving an amphitheater for outdoor music concerts, festivals, weddings and other commercial events along Dee Highway and Lost Lake Road.

Modification of Portland Japanese Garden: MacKenzie v. City of Portland, LUBA 2014-089 filed October 9, 2014. Appeal of a decision by the City of Portland approving a conditional use permit allowing modification of the Portland Japanese Garden in Washington Park.

**6. Measure 37/49**

None.

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

**II. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES**

**A. OREGON COASTAL MANAGEMENT PROGRAM (OCMP)**

Oregon Coastal Services Division (OCSD) staff hosted the fall Coastal States Organization (CSO) meeting in Astoria, Oregon this year. There were representatives of most of the coastal states and territories as well as several National Oceanic and Atmospheric Administration (NOAA) Washington DC managers and staff. Additional NOAA managers and staff attended the first west coast regional coastal zone managers meeting in four years in Portland just prior to the CSO meeting.

Marine Issues: M3 Wave Energy Systems of Salem Oregon (M3) successfully deployed, tested, and recovered its submersible water pressure energy device off of Camp Rilea during a three week research trial in September. The device, which was anchored to the seabed at approximately 50' depth, operated perfectly and produced power at a level well beyond the model expectations according the data collected by M3 staff. M3 is hoping to use this success to procure additional funding so that it can deploy a full scale device for a longer period of time, perhaps as early as next year.

The Northwest National Marine Renewable Energy Center\Pacific Marine Renewable Energy Center (PMEC) Collaborative Workgroup held its quarterly meeting on September 10 The workgroup is assisting PMEC in the Federal Energy Regulatory Commission (FERC) licensing, state and federal permitting, and U.S. Bureau of Ocean Energy (BOEM) lease processes for the South Energy Test Site (SETS) off of Newport. As required by the National Environmental Protection Act for the FERC license, the final scoping document for the PMEC SETS project has been published, and the application is on schedule to be approved in 2015.

On September 22, the U.S. Department of Energy, with assistance from the Pacific Northwest National Laboratory in Seattle and BOEM, conducted a workshop in Portland for state and federal agency staff on the regulation of marine renewable energy projects in the outer continental shelf. The training session was followed by the Oregon Wave Energy Trust (OWET) Marine Renewable Energy Developers Summit on September 23, which is an invitation-only event for industry and government officials. The summit was followed by the 2014 Ocean Renewable Energy Conference, also sponsored by OWET along with the Oregon State University Northwest National Marine Renewable Energy Center, which was held on September

24 and 25 at the same location. A wide range of industry representatives from both the U.S. and abroad participated in both events.

The Marine Affairs Coordinator continues to work with BOEM and Principle Power on the Windfloat Project application for the five wind turbine platforms in federal waters 17 miles off Coos Bay. BOEM will be scheduling meetings with the regional fishing interests this fall to discuss the location of the project and the cable route.

The Ocean Policy Advisory Council (OPAC) had its second 2014 meeting in Newport on October 16. One of the main topics of discussion was planning for an OPAC Marine Sanctuary Forum in spring, 2015. NOAA has released amended rules for nominating marine sanctuaries. The new regulations focus on community supported nominations. There is some community interest in nominating a Marine Sanctuary off the south coast of Oregon near Port Orford.

Coastal Hazards and Climate Change: OCSD staff continues to work with a number of communities on dune management issues. Examples of this work during the reporting period include working with: Gearhart citizens to identify Goal 18 dune grading requirements and begin determining if a dune management plan should be developed there, Cannon Beach staff and citizens in potentially updating their existing dune management plan, and Bayshore (near Waldport) to develop and proceed on two key dune grading applications/projects. These efforts will be ongoing in the foreseeable future.

OCSD staff continues to support and provide technical assistance to the Tillamook County Community Development Department staff on a variety of chronic and catastrophic hazard land use planning issues. An example of this work includes significant assistance related to the adoption process for the Neskowin Coastal Hazards Adaptation Plan and associated land use amendments. These amendments address chronic coastal erosion issues in Neskowin. On October 8 the Tillamook County Board of Commissioners received public testimony on this matter and unanimously adopted the amendments on October 29.

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

OCSD staff is beginning the development of application materials for the next NOAA 309 funding cycle in order to continue to secure needed resources related to our coastal program. These potential resources emphasize coastal hazard resilience measures.

OCSD staff continues to provide tsunami land use assistance. Examples include such things as:

- 1) Development of detailed guidance related to tsunami evacuation facilities improvement planning. This added tool should further the productivity of the overall tsunami land use guide by providing significant assistance to local governments as they develop important financial and development code evacuation financing strategies and options. It should also facilitate more productive OCSD staff assistance to local communities in the future. The selected consultant is now fully engaged and working on the project.
- 2) Education and outreach meetings and visits with a number of communities and citizens. Staff has continued to meet with coastal jurisdictions (Cannon Beach, Port Orford, Gearhart, and Clatsop County) to discuss tsunami guidance land use options. This effort will be long ranging but these outreach efforts have been helpful in encouraging and assisting this work to move forward.
- 3) Participation in outreach efforts and other education processes: OCSD staff has participated in a number of collaborative events including such things as an Oregon Resilience Plan Implementation meeting with the Coastal Caucus in Tillamook, and leading a workshop/field visit for NOAA staff relating to Oregon resilience efforts along the coast.

OCSD staff is working with partner agencies and communities under the NOAA-funded “Coastal Community Resilience Networks Pilot Project” to review and revise a draft ‘resilience framework’ for the partner communities in south Clatsop County. OCSD is managing a project meeting in late October to discuss the contents of the draft framework with the partner communities.

In mid-September, the OCMP and partner Oregon Sea Grant facilitated the second in a series of three meetings on the north coast under the project to ‘align’ agency climate adaptation priorities. The project is designed to bring all agencies and parties involved in climate change adaptation planning together to collaboratively identify priority climate risks and measures to address those priority risks. As in the first meeting which occurred in July, over 50 participants represented most federal and state agencies with management responsibilities in Clatsop and Tillamook counties, several communities, and non-governmental organizations. Oregon Sea Grant and OCSD staff are now preparing for the third and final meeting, which will occur in November in Seaside.

Estuary Updates: The Estuary Project of Special Merit project is now complete. The OCSD Coastal Atlas Administrator and Coastal Natural Resource Specialist have worked to fully document and publish online the results of the project including: the completion of a detailed project methods report; the generation of GIS files and federal standards-compliant metadata; and the generation of an online estuary module for the Oregon Coastal Atlas. The release of the final products in early September coincided with our submission of a cumulative project performance report to the NOAA program office.

## **B. DIRECTOR’S OFFICE**

An oral update will be provided.

## C. ADMINISTRATIVE SERVICES

The department welcomed Mara Ulloa back on October 21, 2014, from her job rotation to the Department of Forestry. While at Forestry, Mara became a vital member of Forestry's Federal Emergency Management Agency (FEMA) payment team. Forestry really appreciated her efforts in support of their processes. There were many DLCD team members who assisted at DLCD in her absence. They included: Angela Houck, Linda Smith, Doug Crook, Lorinda DeHaan, Amie Abbott, Casaria Taylor, and Teddy Leland. Angela and Linda covered her primary duties and their efforts are especially appreciated.

## D. PLANNING SERVICES

Transportation: At the May LCDC briefing on greenhouse gas (GHG) models, commissioners suggested that it would be useful to hear more about scenario planning in the Eugene-Springfield area. It did not work out to have a presentation at the September or the November meetings, so it is tentatively scheduled for the January meeting. In the meantime, a summary is provided in this report, with details online:

Project Website:

<http://www.clscenarioplanning.org/>

Presentation to local governing boards:

<http://www.clscenarioplanning.org/wp-content/uploads/2014/09/CLSP-officials-9-14-v3.pdf>

Three scenarios have been analyzed, and the results are being presented to local governing boards. Scenario A uses adopted plans and current trends. Scenario B would maximize actions consistent with the current policies, and assumes additional revenues. Scenario C shows what could be accomplished with new policies and actions.

The next step is to create a preferred scenario based on the feedback from the three scenarios. House Bill (HB) 2001 (2009 Legislature) requires that the region develop a scenario that would meet the GHG reduction target adopted by the commission (20% per capita for light vehicles). HB 2001 does not, however, mandate adopting or implementing the scenario. The region will use the results of scenario planning to provide additional information for decision-making about the future of the metropolitan area. As described on the project website:

*"scenario planning is a method for exploring our communities' long-term future – in other words, "where are we headed?", and "is that where we want to go?"*

Natural Hazards: The department partnered with the Office of Emergency management to apply for money from FEMA to help local governments prepare natural hazard mitigation plans. Initial feedback from FEMA is very positive, and we hope to have official results in November. If awarded, the grant would support planning for Tillamook County, the City of Medford, and the City of Albany.

Measure 49: In early October the Court of Appeals affirmed a Measure 49 denial in the last of the court cases over initial Measure 49 orders issued by the department. While this is a notable milestone, it is not the end of all litigation. The department is currently participating in several

cases that challenge counties' interpretations of law in determining if a claimant had a vested right to continue and complete a project pursuant to Measure 37 waivers. Friends of Yamhill County and affected neighbors are participating in two of these cases. The department will continue to monitor vesting decisions and the implementation of Measure 49, so there may be other court cases in the future.

#### **E. NEW STAFF AND PROMOTIONS**

OCSD has offered the Coastal State-Federal Relations Coordinator position to Heather Wade who will be starting with the department on January 5, 2015. Heather joins us from the Texas Sea Grant program where she was a Coastal Planning Specialist. She has a MS in Urban and Regional Planning and Environmental Hazards Management from Texas A&M and an undergraduate degree in Environmental Studies also from Texas A&M. We are excited about Heather joining the department in January feel she will be a valuable asset to the department.

#### **F. DEPARTING EMPLOYEES**

None

#### **G. RECRUITMENTS**

The department is in the process of recruiting for a transportation and land use planner to fill the vacancy created when Karen Swirsky went to work for the City of Bend.

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

#### **A. POLICY AGENDA**

Youth Camps: See agenda item 12.

UGB Streamlining: See agenda item 11.

Population Forecasting: The rulemaking advisory committee will meet on November 4, 2014.

Measure 49 Transfer of Development Rights: The rulemaking advisory committee continues to meet, and staff continues to refine the draft rules. This project will also include model ordinance and forms that counties can use. Hopefully these additional documents will make it more likely that counties implement a program. Also, developing the additional documents has helped us identify issues that need to be addressed in the rule. The rules are scheduled to come to the commission in January 2015.

Primary Processing of Forest Products: The rules advisory committee that was appointed to develop a definition for "primary processing of forest products" in forest zones, led by

commissioner Cribbins, met for the first time on October 27, in Salem, with all 11 committee members present. Staff anticipates that the RAC will meet twice more and present a recommendation to the commission at its January meeting.

## **B. OTHER POLICY ACTIVITIES**

Sage Grouse Conservation Plan: See agenda item 13.

Review of Metropolitan Greenhouse Gas Reduction Targets: Staff is doing preliminary coordination with other agencies. More information will be presented at the January commission meeting.

DLCD's proposed concepts are:

### 1. LC 599 – HB 2254 “fix-it bill”:

HB 2254, enacted in the 2013 session, requires DLCD to adopt administrative rules establishing a streamlined urban growth boundary (UGB) amendment process.

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

### 2. LC 600 – Allow Land Divisions on Farm and Forest Land for Land That Straddles a UGB:

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

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

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

3. LC 601 – Mapping Corrections for HB 4078 (2014 session): Washington County believes there were several minor and technical errors with the map of Metro reserves enacted in the 2014 session under the “grand bargain” bill. These primarily concern road right of ways and small isolated areas of land that, according to the county, are not appropriately designated in the legislation based on the designations of surrounding areas and other factors. Washington County has worked with Metro, the City of Hillsboro, 1000 Friends of Oregon and other stakeholders to identify these errors and reach consensus on a bill to correct them. Metro and the county assert they cannot make the necessary adjustments to the maps using local procedures because the map was legislatively enacted, and because of other provisions in the law that prevent re-designation of land designated reserves. The county and Metro have asked the department to propose this legislative concept and the department has agreed to carry the legislation.