



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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June 5, 2008



TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director

SUBJECT: **Agenda Item 11, June 18-20, 2008, LCDC Meeting**

### DIRECTOR'S REPORT

#### 1. INFORMATION UPDATES

##### A. PARTICIPATION IN APPEALS, AND RECENT LUBA AND APPELLATE COURT OPINIONS

ORS 197.090(2) requires the Director to report to the Commission on each appellate case in which the Department participates, and on the position taken in each such case.

ORS 197.040(1)(c)(C) requires the Land Conservation and Development Commission to determine whether recent Land Use Board of Appeals (LUBA) and appellate court decisions require goal or rule amendments.

##### 1) Department participation in appeals

Between February 28 and April 9, 2008, the Department received notice of 14 appeals filed with LUBA. The department did not file any notices during this period (a notice was filed in May, see Item 4).

##### 2) LUBA opinions

Between February 28 and April 9, 2008, the Department received copies of 29 recently issued LUBA opinions. Of these, LUBA dismissed 7, remanded 13, reversed 1, affirmed 7, invalidated 1, and transferred 0 petitions to circuit court.

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

- **OAR 660-012-0065:** *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2006-178, filed March 13, 2008. LUBA remanded approval of partition and road dedication for two non-farm dwellings and access on a 44-acre parcel zoned EFU and Surface Mining.

- **OAR 660-004-0018, -0025, & -0028:** *Landwatch Lane County v. Lane County*, LUBA No. 2006-235, filed April 1, 2008. LUBA affirmed County plan and zone map changes for 19 parcels and Goal 3 & 4 exceptions for 2 parcels in the Coast Fork Willamette watershed.

Neither of these decisions requires goal or rule amendments.

### 3) Appellate court opinions

Between February 28 and April 9, 2008, the Department received copies of 12 recently issued opinions from the Court of Appeals. The Court affirmed 6, dismissed 3, and remanded and reversed 3 of LUBA's decisions.

### 4) Cases of interest

#### Measure 37

- *DLCD v. Jefferson County*, LUBA No. 2007-177, filed January 24, 2008. The County approved a 60-lot residential subdivision after the death of the owner of a Measure 37 waiver (William H. Burk). LUBA reversed. This decision has been appealed to the Oregon Court of Appeals.
- *Eager v. Crook County*, LUBA No. 2007-237, filed January 2, 2008. LUBA granted petitioner's motion to dismiss.
- *Reeves v. Yamhill County*, LUBA No. 2007-122, filed December 26, 2007. LUBA remanded the County's approval of a 16-lot subdivision and conditional use permit for residential development of a 41.9-acre EFU parcel, based on a Measure 37 waiver.
- *Hines v. Marion County*, LUBA No. 2007-185, filed March 19, 2008. LUBA remanded County approval of application to divide 217.43-acre EFU parcel into 43 lots, based on a Measure 37 waiver.

### 5) Appeal notices of interest

#### Measure 37

- *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2008-011, filed January 10, 2008, challenges approval of a minor partition of a 40-acre parcel in the F-2 (Forest) zone for residential development.
- *Hoff v. Clackamas County*, LUBA No. 2008-014, filed January 23, 2008, challenges denial of an application for a 40-lot subdivision of a 53-acre EFU parcel based on a Measure 37 waiver.
- *Confederated Tribes of Warm Springs v. Jefferson County*, LUBA No. 2008-015, filed January 24, 2008, challenges approval of a 39-lot subdivision of land on Lake Billy Chinook in the Three Rivers Recreation Area Waterfront and Metolius Deer Winter Range Area Overlay zones, based on a Measure 37 waiver. This case likely will be settled.
- *Schipporeit v. Marion County*, LUBA No. 2008-018, filed January 25, 2008, challenges denial of an application to divide a 23.25-acre EFU parcel into 21 lots for residential development, based on a Measure 37 waiver.

- *McKillip v. Marion County*, LUBA No. 2008-048, filed April 1, 2008, challenges denial of an application to divide a 79.44-acre EFU parcel into a 47-lot PUD based on a Measure 37 waiver.

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

### **General Fund Grants**

To date, the department has approved 33 Technical Assistance grants and approximately 70 Planning Assistance grants for the 2007-2009 biennium. Essentially all of the department's general fund grants are contracted or committed for the biennium. The department continues to reserve a portion of the grants budget for jurisdictions that develop periodic review work plans this biennium. The Commission has initiated Periodic Review for a total of 11 jurisdictions, including a customized periodic review for Junction City. Periodic Review grant applications will likely continue to arrive over the next six to eight months following local governments' completion of individual work plans (see Periodic Review below). Once the department knows the demand for PR grant funds, staff will determine whether any funds remain available for additional Technical Assistance grant projects.

## **C. PERIODIC REVIEW WORK TASKS/PROGRAMS**

The department received submittal of Lane County's final task for the rural portion of that county's periodic review work program. Those documents are under final review and are expected to be approved in June 2008.

The department also received the final periodic review completion submittal from Polk County, following the county's successful completion of Task 3 (Planning for unincorporated communities). Polk County's final submittal is also under final review and will receive a decision in June.

In October 2007 the Commission scheduled five cities to commence periodic review (Forest Grove, Keizer, Portland, Hermiston, and The Dalles). To date, four of the five (Portland, Forest Grove, Keizer, The Dalles) have requested extensions of the due date for plan evaluation and work plan submittal. Those work programs are now due in August and September 2008. All five cities will likely seek grant funding for specific work tasks during the 2007-2009 biennium.

The department also sent letters four additional cities notifying them to commence periodic review (Lake Oswego, Pendleton, Tigard and Troutdale). This second round of cities now have approximately six months, until November 2008, to complete and submit their plan evaluations and draft work plans. Some of these cities are also likely to request grant funding during the 2007-2009 biennium.

## **2. DEPARTMENT PROGRAM ACTIVITIES AND INTITIAIVES**

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

On March 26<sup>th</sup>, the Governor issued Executive Order No. 08-07 directing state agencies to work with coastal Communities in identifying marine reserves and areas that may be suitable or unsuitable for wave energy projects. Coastal Program staff continues to provide staff to administer and coordinate OPAC's activities. Based on that order, the Department of Fish and Wildlife has assumed the lead in assisting the Ocean Policy Advisory Council (OPAC) with the process of selecting sites for evaluation as potential marine reserves. The site selection process, which is open to the public, will be conducted between June and September. The Governor has determined that no more than 9 marine reserves will be considered for inclusion in the system, and that social and economic impacts shall be avoided in the selection of the sites. OPAC is to make a recommendation to the Governor by January 1, 2009, of those sites that should be evaluated for inclusion the system. Coastal program staff serves on the OPAC Marine Reserves workgroup which has developed the evaluation criteria and will review the proposed sites. The legislature must provide funding in order for marine reserve site evaluation process to be conducted and the system to be implemented.

Also on March 26<sup>th</sup>, Oregon signed an MOU with the Federal Energy Regulatory Commission (FERC) on the coordination of state and federal programs related to the siting and approval of wave energy facilities in the Territorial Sea. Under the MOU, the FERC recognizes that the state can create a comprehensive plan that identifies locations appropriate for siting wave energy facilities, and specifies that FERC would consider such a plan in reviewing permit and license applications for new projects. The Governor's Executive Order No. 08-07 instructs DLCD to seek OPAC's recommendations for appropriate amendments to the state Territorial Sea Plan that will provide the comprehensive plan provisions for wave energy project siting. Coastal staff has already begun the process of reaching out to a wide range of stakeholders, including a variety of fishing interests, the environmental community and the Oregon Wave Energy Trust, to seek their involvement in developing the plan amendment. The coastal program anticipates asking the Commission for permission to create a rulemaking advisory workgroup to assist in that process.

### **B. INFORMATIONAL BRIEFING ON HARBOR HILLS**

Regional representative Dave Perry has conferred with David Pratt, Curry County Planning Director, concerning the issues raised at the last Commission meeting. A brief memo from David Pratt is attached to this report, as Attachment A.

### **C. MEASURE 49 DEVELOPMENT SERVICES**

A milestone will be reached in early July when all Measure 49 elections will be due to the department. As of June 6, about 3,900 elections have been received out of about 6,500 eligible claims. The vast majority of these claims are of the Express variety--about 95%.

Staff has started work on processing the elections, with a goal of beginning to issue final orders in July. Much of this initial work involves working with the claimants and counties to verify and complete application information. The Measure 49 Development Services Division has begun to staff up to their eventual capacity of about 30 staff, from the current 12, and a site is being secured to house the additional staff. The Governor has appointed Alwin Turiel, a native Oregonian and veteran planner, as Oregon's Measure 49 Compensation and Conservation Ombudsman.

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

#### **A. NEW STAFF**

As noted above, Alwin Turiel has been appointed by the Governor and the Measure 49 Compensation and Conservation Ombudsman. Alwin is working with private landowners and local governments to resolve difficult claims. Alwin was planning director for Klamath County and for Jackson County. During her 27-year career she also has worked in the Portland metro area and on the Oregon coast. She has also been a planner in four other states, including California and Florida. Alwin received a master's in urban planning from the University of Oregon, where she focused on regional economics, analytic modeling and land use planning. Her undergraduate degree is from the Art Institute of Chicago, where she studied design.

Katherine Daniels has accepted an offer to be the departments' new Farm/Forest Lands Specialist. Katherine received her Bachelors degree in Conservation of Natural Resources from the University of California, Berkeley and her Masters in Urban & Regional Planning from University of Oregon. For the last five years, she has worked as the senior planner with the New York Planning Federation. She has 30 years of planning experience, including four years at DLCDC (1981-85) as a Plan Review Analyst/Coordinator.

John Evans has been hired as a Planner 3 staffing the Big Look Task Force. John has over 15 years planning experience including the last four years at Parametrix in Corvallis and Portland. His experience also includes working for Downtown Restoration, Cascades West Council of Governments, and Environmental Science Associates (ESA). In his spare time John enjoys cooking, fly fishing, woodworking and restoring his old house. He lives in Corvallis with his wife and two teenage daughters. John has his Bachelor's degree in Environmental Studies/Planning and Public Policy from the University of California, Santa Cruz.

Jennifer Donnelly has joined DLCDC's Community Services Division as the department's new regional representative in the Tri-County/Metro area. Jennifer worked with the City of Hood River as a senior planner for eight and half years. She has several years of planning experience in both Oregon and Washington State, including projects in transportation, land division and urban design. She also brings to the department special interests in sustainability and energy conservation. Jennifer holds a masters degree in planning from

Columbia University. In her spare time she trains for marathons and triathalons; she also enjoys camping and has a passion for traveling/exploring both near and far.

Diane Lucas has been hired as an Administrative Specialist for the Big Look Task Force (assisting with Jody Haury). Diane was most recently employed with the Borough of Chester, New Jersey as their Deputy City Clerk and Zoning Code Enforcement Officer. Prior to that she worked in hazardous materials management in San Diego, CA and as the City Clerk for the Town of Nederland, Colorado.

Doug Crook was hired into the Fiscal Analyst 2/Budget Officer position in Operations Services effective June 2. Doug has his Bachelor's degree in Urban Planning from the University of Washington and his Master's degree in Business from Oregon State University. For the last 15 years he has worked with the Department of Consumer and Business Services as a fiscal analyst.

Amy Albrich was hired into the Accounting Technician 2 position in the Operations Services Division effective June 9. Amy has over 15 years' experience including positions at Sunwest Management, West Coast Bank and MAPS Credit Union. Her most recent experience is from the Oregon Department of Transportation's Motor Carrier Division where she was responsible for payroll and invoice processing. In her time away from work, Amy loves to garden, read and volunteer at the Heritage Museum and the Lord & Schryver Conservancy.

## **B. DEPARTING EMPLOYEES**

Ryan Miller, the department's FEMA Map Modernization Program Coordinator has resigned, effective June 17. Ryan has accepted a position working with Geographic Information Systems (GIS) for the Department of Forestry. Ryan was originally hired by DLCD in October 2007 as a GIS Specialist, and was promoted to program coordinator in February 2008.

Ron Eber retired at the end of May, after 33 years of service to the state and DLCD.

## **C. RECRUITMENTS**

The Planning Services Division is recruiting for a Transportation/Land Use Planner to join the Transportation and Growth Management program team to coordinate the Code Assistance program. This position was vacated with Steve Oulman accepted a transfer to the Community Services Division to be a Willamette Valley regional representative.

The Director's Office is recruiting for a second Policy Analyst to work with Bob Rindy. We have received a large number of applications for this position, and are currently evaluating them.

## **D. DIRECTOR ACTIVITIES**

During the period of this report the director and acting director have been involved in several activities in support of the work of the department, both within the department and internally. Highlights of the director and acting director's activities include:

- Economic Revitalization Team (ERT), Director's Field Trip (April 1-2, Lower John Day Region/City of the Dalles)
- Participation in the Governor's Agency Advisors Committee
- Participation in the Natural Resources Cabinet
- Ongoing senior staff meetings with the Department of Transportation, to help improve coordination and communication between DLCD and ODOT
- Ongoing senior staff meetings with the Oregon Economic & Community Development Department, to help improve coordination and communication between DLCD and OECDD
- Task Force on Land Use Planning (Salem, April 28)
- Vernonia School Siting Assessment Workgroup (Vernonia, May 5)
- City of the Dalles and Columbia River Gorge Commission (The Dalles, May 7)
- Retail Task Force (Portland, May 9)
- Oregon Chapter of the American Planning Association Conference (Portland, May 15)
- Tribal Information Day (Salem, May 16)
- Task Force on Land Use Planning (Bend, May 19)
- Regional Tour of NE Oregon (Baker City, Union County, La Grande, City of Union, Umatilla County, Milton-Freewater, and Pendleton, May 20).
- Vernonia School Siting Assessment Workgroup (Vernonia, May 27)
- MPAC/Infrastructure Finance Conference (Portland, May 28)
- State Agency Coordination Workgroup (Salem, May 30)
- Oregon Global Warming Commission, Transportation and Land Use Subcommittee

(Portland, June 3)

- RPS Attorneys Meeting (Salem, by phone, June 6)
- Economic Revitalization Team (ERT) Field Trip (NW Metro/Hood River Region, June 10-11)
- Smart Growth Realtors Conference (Eugene, June 11)
- House Interim Agriculture and Natural Resources (Salem, June 13)
- Oregon Global Warming Commission Transportation and Land Use Committee (Portland, June 16)

#### 4. LEGISLATIVE UPDATE

##### A. DLCD LEGISLATIVE CONCEPTS

The department filed seven legislative concepts with DAS on April 4, as outlined in the April Director's report (see summary, below). On May 9, DAS informed the Department that Concept #1, the Placeholder for Affordable Housing, had been approved and sent to Legislative Counsel. On May 16<sup>th</sup>, DAS indicated that Concept # 7 regarding state agency coordination has also been approved and sent to Legislative Counsel for drafting. Finally, on May 23<sup>rd</sup> the Department of Administrative Services informed the Department that the remaining concepts (#2 – 6) had been approved and sent to Legislative Counsel for drafting. The department anticipates that drafting of these concepts may not be complete until late summer, and perhaps later.

The DLCD legislative concepts filed with DAS for approval include the following:

1. Land Supply for Affordable Housing (Placeholder; LCDC has appointed rulemaking workgroup to determine which statutes, if any, require amendment to authorize the intended affordable housing pilot project.)
2. Land Use Appeal Fees (Improve the opportunity for organized citizen planning organizations to have effective access to local land use appeals.)
3. Destination Resort Siting (Authorize LCDC to revise destination resort siting provisions to ensure that resorts function as intended – to attract and serve visitors and tourism rather than as residential or second-home communities; study and address issues with regard to concentrations of resorts in certain areas.)
4. Resource Land Conversion and Climate Change (Provide incentives for retention of working forest and agricultural resource land base; authorize transfer of residential

development rights from at-risk but functional forest lands and farmlands to more conflicted lands or to UGBs; reduce residential development potential on lands being converted from forest cover to pasture or range in order to provide an incentive for reforestation; in forested areas that are already conflicted, cluster residential development but also provide for active management and fire protection on remaining lands.)

5. Big Look Task Force Implementation (Placeholder for the Task Force Recommendations.)
6. State Agency Coordination Program Update (Ensure local government issuance of a LUCS is not a separate land use decision where it is based on a prior permit decision; provide direction to DLCD to update the SAC program rules to improve coordination between state agency permit decisions and local land use planning and to make this program more transparent.)

“Placeholder concepts” must have completed wording filed with Legislative Counsel by June 27 unless the agency receives specific approval from DAS to continue beyond that date. The department will not have completed “placeholder” wording for the “Big Look” concept or (probably) the “affordable housing” concepts by that date. As such, staff will be working with DAS and the Governor’s office to obtain approval to draft this legislation at a later date.

The department reported to DAS that two of these concepts would have fiscal impacts that could not be absorbed by the Department’s base budget – Concepts 2 and 4 (If there will be additional fiscal impacts for the placeholder concepts, the department will not know that until the substance of those concepts is determined). Fiscal impacts must be accounted for in the Agency Request Budget. A Policy Option Package (POP) has been prepared for concepts #2 and 4.

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

### **A. RULEMAKING**

1. At its March and April meetings, the Commission appointed an advisory workgroup for the Affordable Housing rulemaking pilot project. The workgroup held its first meeting on May 27, including a general discussion of the issues for this project.
2. The department will be meeting with members of the proposed UGB workgroup on June 10, in order to discuss the schedule, timeline, and issues (see Item 9 on June 18 LCDC agenda).
3. The department filed permanent rules regarding Measure 37 and 49 with the Secretary of State Office on May 23. Many (but not all) of these rules were already in effect as temporary rules. The new rules took effect upon filing. The new and amended rules are

posted on the DLCD website.

**B. OTHER POLICY ACTIVITIES**

The department is continuing to participate in Metro's process for designating Urban and Rural Reserves, and to coordinate with other state agencies in that effort. The Metro Reserves Steering Committee has met four times and anticipates designation of "Reserve Study Areas" by August 2008 (see Briefing under Item 8 on this agenda).

Attachments:

- A. Letter from David Pratt, Curry County Planning Director

Dave:

Sorry, I have been trying to catch up on "things" here in the office. I was out the later part of last week.

Regarding your request, here are my responses to Ian Maitland's comments:

**Response to Issue No. 1:**

As background, the County recently passed a resolution and order (No. 12819) to establish County Public Record Request Fees and Policy on April 7, 2008. Mr. Maitland comments, I believe, is in reference to a specific request from a resident in Harbor for copies of emails to and from to County Commissioners containing specific information over a specified timeline. It was estimated that it would take staff between 40 and 200 hours and cost the County between \$1,870.00 and \$8,200.00 to retrieve, compile, search, and sort email messages that were requested.

It should be noted that this request was not related to a land use or limited land use request. It should also be noted that, under Section VI (Procedure), any "...Department Head may allow verbal or written requests to be made direct to the Department for public records maintained by the Department which are routinely requested by member requested by member of the public as part of the Department's regular work." I consider pending land use and limited land use applications as public records that are part of the Department's regular work and will be accessible to the public as they have been in the past.

**Response to Issue No. 2:**

Regarding the comment on Curry County violating and the State not enforcing the directive that development is not to occur on the west face of the Harbor Hills, there are no land use applications pending before the County for development on the west face of the Harbor. There are references to the Court of Appeals case (Hummel v. DLCD (1852 Or App. 404 P.2d 824 (1998))). In the past, members of the Harbor Community Action Committee (HCAC) have focused on the statement in the Hummel case that the City of Brookings decided on the best location for additional vacant buildable acres was the Harbor Hills which included a large portion of the Hills "...beginning directly east of the Harbor Bench area agricultural lands and continuing over the top of the hills and down the other side, in the expanded UGB." They also focus on the statement in the Court decision that the topography of the western slopes is not buildable. The reason for the additional "unbuildable" acreage, as being advocated, was to create a logical UGB boundary for providing urban services, such road, storm drainage, sewer, etc. With these comments in mind, the following points should be considered:

- a. The slopes referenced in the appeal are based on DOGAMI Maps that were published in 1976. County GIS maps, which are based on aerial photographs that were taken in 2005, indicate slightly different configurations with slopes of less than 25 percent in some areas where the 1976 maps indicate slopes of greater than 30 percent.

- b. Exactly what is buildable land seems to be the focal point. There are a multitude of factors that determine whether or not land is buildable (i.e., slopes, soil conditions, vegetation, hydrology, etc.). Land with slopes of greater than 25 percent may be buildable while land with slopes of less than 25 percent may not given the soil conditions, vegetation, and hydrology. Banning development on all slopes of greater than 25 percent is not practical. Development must be determined on a case by case basis taking in consideration geological studies and/or studies.
- c. It appears the that the definition of “buildable land” is based on OAR 660-008-0005 (Interpretation of Gold 10 Housing – Definitions), where it is defined as “...residentially designated vacant and, at the option of the local jurisdiction, redevelopable land within the Metro urban growth boundary that is not severely constrained by natural hazards (Statewide Planning Goal 7) or subject to natural protection measures (Statewide Planning Goals 5 and 15).” This definition also states that “...publicly owned land is generally not considered available for residential use...” and “...Land with slopes of 25 percent or greater unless otherwise provided for at the time of acknowledgement and land within the 100-year floodplain is generally considered unbuildable for the purposes of density calculations.” This definition does not preclude development of land on slopes of greater than 25 percent. Furthermore, there are statements in the “Petitioners Brief and Abstract of Record” on the appeal (page 13), acknowledging that the DLCDC expansion of the Urban Growth Boundary does not prohibit “...this admittedly excess acreage from being urbanized.”

It should be noted that the Court of Appeals affirmed LCDC approval of the City of Brookings expanded UGB. They expressed no opinion on “...whether actions that the city, DLCDC, and LCDC may take at later stages of that process will require any reevaluation of that issue.”

### **Response to Issue No. 3:**

Regarding building 50 homes on the Harbor Hills since the 1998 court decision, I am not aware of any recent construction activity on the “west face” of the Harbor Hills that does not comply with the current JMA (2001) between the City of Brookings and Curry County. Most of the recent construction activity on the Harbor Hills has been on the north side overlooking the Chetco River in the Crown Terrace area. This area is within the “old” Urban Growth Boundary that was adopted in 1983.

I am not sure what Ian Maitland is referencing regarding no “grandfathering” for development in the Harbor Hills other than the construction that is occurring within the old urban growth bounding or what is in compliance with the JMA. (See Response to comment No. 4)

Dave