

July 20, 2005

TO: Land Conservation and Development Commission
FROM: Lane Shetterly, Director
SUBJECT: **Agenda Item 11, Aug. 4-5, 2005 Commission Meeting**

DIRECTOR'S REPORT

1. INFORMATION UPDATES

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

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.

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

1. Department participation in appeals

Between May 16 and July 8, 2005, the Department received notice of 35 appeals filed with LUBA.

2. LUBA opinions

Between May 16 and July 8, 2005, the Department received copies of 29 recently issued LUBA opinions. Of these, LUBA dismissed 14, affirmed 4, remanded 11, reversed 0, and transferred 0 petitions to circuit court.

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

City of West Linn v. Metro, LUBA No. 2003-015 (Goal 14).
Max Hellberg v. Morrow County, LUBA No. 2004-200 (OAR 660-023-0180)
Friends of Yamhill County v. Yamhill County, LUBA No. 2005-057 (Goal 14; OAR chapter 660, division 22)

None of these decisions would raise the question as to whether LCDC should consider a goal or administrative rule amendment.

Also of interest is the latest decision in an Oregon challenge to a local planning decision based on the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): *Corporation of the Presiding Bishops of the Church of Jesus Christ of Latter Day Saints v. City of West Linn*. The chronology is as follows:

1. The city denied the church's application for a conditional use permit for a new meetinghouse in the R1 zone;
2. The church appealed to LUBA, which held that the city violated the church's rights because denial was a "substantial burden on religious exercise" under RLUIPA (45 Or LUBA 77 (2003));
3. The city appealed to the Court of Appeals, which reversed and held that the city decision was not a substantial burden (192 Or App 567 (2004));
4. The church appealed to the Supreme Court, which allowed review, affirmed the Court of Appeals, and remanded the case back to LUBA (SC #S51504, May 5, 2005);
5. On June 13, LUBA affirmed the city's denial of a conditional use permit (LUBA No. 2002-155).

3. Appellate court decisions

Between May 16 and July 8, 2005, the Department received a copy of one recently issued opinion from the Court of Appeals:

City of West Linn v. LCDC, Court of Appeals Nos. A120189, A120957, A120979 (June 15, 2005). This decision struck down OAR chapter 660, Division 026: Regional Urban Growth Boundaries, which was adopted by the Commission in 2002 and effective in 2003. These rules allowed Metro to determine and allocate "need" under the Goal 14 UGB amendment factors on a sub-regional basis. The court determined that the rule exceeds the statutory authority of the agency because it could be used in such a way as to authorize "a violation of the legal standard expressed in Goal 14." Specifically, the court found that the rule does not require the region-wide application of Goal 14's locational factors in evaluating land to accommodate the regional need. We note that the court also dismissed a petition of 1000 Friends of Oregon, finding that the organization had not demonstrated it was adversely affected by the adoption of this division and thus does not have standing in this case.

Legal counsel advised the department that this opinion represents the extension of a new legal standard in the review of administrative rules. Previously, a rule would be declared valid if there was a way to construe it to be consistent with the goals. This opinion suggests that if there is any way to implement a rule in a manner inconsistent with a goal (regardless of whether such implementation has actually occurred), the rule may be found to be invalid. This standard of review could have implications for other rules of the Commission, as well as other state agencies. On advice from legal counsel, the Director has authorized the Department of Justice to appeal this decision to the Oregon Supreme Court.

B. GRANTS, INTERGOVERNMENTAL AGREEMENTS AND CONTRACTS

General Fund Grants

The 2003-05 biennium is complete, so grant close-outs have started to arrive fairly frequently. Since the department's 2005-07 budget is not yet complete, the Grants Allocation Plan cannot be effectively updated and the department cannot begin awarding new grants. Application forms for Periodic Review and Technical Assistance grants have been distributed, but with the instructions that no agreements can be signed until we have a budget. This should provide potential grantees an opportunity to develop work scopes and budgets so that the award process can move quickly once the opportunity presents itself.

C. PERIODIC REVIEW WORK TASKS/PROGRAMS

There has been a slight upturn in periodic review activity this summer (see Attachment A). Since the last director's report, the department has received six task submittals. Two of these are pending, and four have been approved. Two previously submitted tasks are also still pending. With the grant close-out deadline approaching, the department anticipates a few more task submittals soon.

2. DEPARTMENT PROGRAM ACTIVITIES AND INITIATIVES

A. DEPARTMENT HONORED BY UNIVERSITY OF OREGON

The department has been honored as "Community Partner of the Year" at the University of Oregon's Fourth Annual Awards Program on June 3. As the award states, the UO's Department of Planning, Public Policy and Management is "grateful to the DLCD for working for many years with our students and faculty and for serving as a model of exemplary public administration and planning." In partnership with DLCD, the UO's Community Planning Workshop will soon publish a handbook on school siting that will give school districts, local governments, and others guidance on "best practices" for locating schools. Students have played a major role in this project.

B. COASTAL DIVISION ACTIVITIES

Ocean Policy Advisory Council: The Marine Affairs Coordinator has been meeting with the Governor's Natural Resources office to plan for the first meeting of the Ocean Policy Advisory Council (OPAC) subsequent to Senate confirmation in April of members appointed by the Governor. The OPAC membership and mandate was amended in the 2003 legislature and has not met since December, 2002. The department is charged with providing staff support the OPAC. In addition, the Director will serve as the department's ex-officio member.

C. TRANSPORTATION GROWTH MANAGEMENT PROGRAM

Educational Workshops: TGM Outreach conducted eight workshops this spring. The workshops took place in Stayton, Eagle Point, Medford, Enterprise, Echo, Irrigon, Dayton and North Bend. Each workshop is tailored to the individual community and identifies ways to enhance transportation choices for local residents through a variety of strategies. These include: streetscape improvements to make walking and biking more convenient; better connections between local destinations; elimination of development code barriers to transportation-efficient development; and better coordinated transportation and land-use planning. There is no cost to participating communities. More workshops will take place in the upcoming fall, winter, and spring.

Educational Brochures: Educational brochures on mixed-use development, infill and redevelopment, higher-density housing, and transportation-efficient development have been completed for the City of Eugene. These materials will be adapted for other communities and added to the TGM web site.

3. DEPARTMENT ORGANIZATIONAL AND MANAGEMENT INFORMATION

A. NEW STAFF

Richard McNew has begun his work as department's Fiscal Analyst/Budget Officer. He brings budget and accounting expertise to the department from agencies such as Insurance Pool Governing Board, Oregon Medical Health Plan at DHS and most recently from the Department of Fish and Wildlife

B. DEPARTING STAFF

Brenda White ended her position at the department effective June 23. Brenda had served the department for several years in a variety of positions, most recently as Planning Service and Rulemaking Support Specialist. She will be missed.

C. DIRECTOR ACTIVITIES

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

- Ongoing participation in the Governor's Economic Revitalization Team.
- 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 participation with a Metro workgroup regarding Measure 37.
- Salem Kiwanis (Salem, June 21)
- McMinnville Editorial Board (McMinnville, June 28)
- Keizer Chamber of Commerce (Keizer, July 13)

D. TRAINING

The department continues to evaluate affirmative action training opportunities to meet Affirmative Action Reporting requirements.

4. LEGISLATIVE UPDATE

A. SESSION LEGISLATIVE ACTIVITIES

The director meets regularly on legislative issues with state Agency Heads and the Natural Resources Cabinet. Bob Rindy met regularly throughout the session with legislative coordinators from other Natural Resources Agencies, and the director and Bob Rindy also met regularly with the Commission's Legislative Subcommittee to review legislation and legislative strategies. However, both the legislative coordinators group and the Commission's Legislative Subcommittee have concluded their regularly scheduled meetings and will not meet again this session unless legislative circumstances arise necessitating such a meeting.

The pace of land use legislation has slowed considerably over the past three weeks as regular committees have closed down. There are a few major and minor bills still in play, especially those involving Measure 37 (SB 1037), the "Big Look" (SB 82), periodic review (HB 3310), and rural industrial lands (HB 2458; as of the date of this report HB 2458 has passed both houses and is on the Governor's desk. The bill eliminates the sunset on 2003 legislation removing LCDC building size restrictions on industrial land outside the Willamette Valley).

As of July 13, 2005, the department is tracking approximately 269 bills in some manner related to land use, the program, or the department. DLCD has prepared 318 fiscal impact statements (including amendments) in response to requests from the Legislative Fiscal Office – this exceeds the average number of fiscals prepared for previous sessions (average 170). Except for a handful of bills in the final stages of approval, and except for those bills listed as enacted in the attached report, most of the bills tracked by the department died when committees closed down a few weeks ago.

Currently about thirty land use bills DLCD is tracking have passed both houses and are either on the governor's desk or signed into law (see Attachment B). The department would not characterize any of these as "major legislation," and with the exception of HB 2458, the

department has been supportive or neutral on the bills that have passed. We note that some bills regarding city annexations have also passed and are signed into law. The department did not participate in these bills since DLCDC has no annexation responsibilities. However, cities have expressed some concerns with the adverse effects of this legislation on the implementation of acknowledged urban growth and public facilities plans statewide.

B. LEGISLATIVE ACTION REGARDING THE AGENCY BUDGET

The Senate Budget Subcommittee work session occurred June 30, 2005 and Senate approval occurred July 7, 2005. As expected, the Senate approved the department's budget with the following elements of particular interest:

1. Funding for the deputy director position, with only a slight adjustment.
2. \$600,000 for the 30-year review with two FTE (not including the PIR2 - Information Officer - originally requested in this package).
3. Funding for the IT package (two positions and funding for infrastructure).
4. \$1.5 million for Measure 37 claims. This amount funds 9 positions (8.5 FTE) and provides money for Attorney General costs, services and supplies.

The House Budget Subcommittee work session occurred June 29, 2005 with House approval on July 1, 2005. As expected, the House approved the department's budget with the following elements of particular interest:

1. No General Funded policy packages (i.e., no deputy director, no 30-year review, and no IT package).
2. \$800,000 for Measure 37 claims (4 Positions/FTE).
3. 3% reduction in certain supplies and services applied by the House across the board to all state agencies.

Both Chambers approved the following budget packages:

- POP 107 (Coastal Atlas)
- POP 108 (Coastal Projects Coordinator)
- POP 109 (TGM Reconciliation)
- POP 110 (Flood Hazard Map Modernization)

Both Chambers also approved various technical adjustments recommended by the Legislative Fiscal Office.

Our FTE for the 2003-05 biennium (under the Legislatively Approved Budget) is 52.05. The House budget would increase that number for 2005-07 to 58.46. The Senate budget would increase the department FTE to 67.96.

5. LCDC RULEMAKING WORKGROUP UPDATES

A. RURAL COMMERCIAL AND INDUSTRIAL WORKGROUP

This workgroup met in June and discussed: recent legislative activity, what other states do regarding rural commercial and industrial uses, and considerations regarding appropriate levels of rural development in commercial and industrial zones. The meeting was lightly attended and no decisions were made. Another meeting was scheduled for July 20 but that meeting has now been cancelled and is not yet rescheduled.

This group's work will be affected by the likely passage of HB 2458 (currently the bill has passed the house and senate and is on the Governor's desk). This bill removes the sunset on 2003 legislation that authorized industrial development of any scale on rural lands zoned of industrial use outside UGBs except in the Willamette Valley. As such, if the bill is signed into law, the commission will need to amend Goal 14 to conform to that legislation, and the workgroup would not likely propose new rules regarding industrial development except in the Willamette Valley. The Commission is authorized to amend Goal 14 after only one hearing. The legislation does not affect commercial uses.

B. UGB AMENDMENT PROCESS WORK GROUP

At its April meeting, LCDC instructed the department to schedule no additional meetings of this workgroup until the conclusion of the legislative session. At its April 21 meeting, the UGB workgroup tentatively scheduled Thursday, July 21, 2005, as a potential workgroup meeting date, pending the adjournment of the legislative session. However, that meeting has been canceled since the legislature will not be adjourned by that date. The department will not schedule another workgroup meeting until the conclusion of the session.

6. BALLOT MEASURE 37 UPDATE

Information on department activities relating to Ballot Measure 37 will be covered separately under Agenda Item 6.

Attachments

- A.** Report on Land Use Legislation Passed in the 2005 Session
- B.** Legislative Bill Tracking Summary