



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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TO: Land Conservation and Development Commission

FROM: Lane Shetterly, Director

SUBJECT: **Agenda Item 10, June 14, 2007 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 April 6 and May 24, 2007, the Department received notice of 26 appeals filed with LUBA. These include DLCD's notice filed on April 24, 2007 regarding the City of Boardman's approval of a zone change for a 91.63-acre parcel south of I-84: from Manufactured Home Park to Tourist Commercial for 30.5 acres, and from Future Urban to Manufactured Home Park for 15.74 acres (LUBA No. 2007-086). ODOT also appealed this decision, on the same date (LUBA No. 2007-085).

##### 2) LUBA opinions

Between April 6 and May 24, 2007, the Department received copies of 39 recently issued LUBA opinions. Of these, LUBA dismissed 12, remanded 16, reversed 3, affirmed 8, 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:

- *Mondalee Lengkeek, et al v. City of Tangent*, LUBA No. 2007-007, filed April 25, 2007: On this third appeal to LUBA of city approval of an 84-acre UGB expansion to add property owned by a City Councilor, LUBA reversed. Goals 10 and 14 prohibit use of either an expired buildable lands inventory, or the applicant's updated BLI that

has not been adopted into the comprehensive plan, to justify a UGB amendment for residential land.

- *Friends of Linn County, et al v. Linn County*, LUBA No. 2006-223, filed May 9, 2007: LUBA remanded the county's approval of partition of 44 acres of Exclusive Farm Use land following a Measure 37 waiver, based on the Goal 3 definition of "existing commercial agricultural enterprise."

Neither of these decisions requires goal or administrative rule amendments.

### 3) **Appellate court opinions**

On May 24, 2007, the Oregon Supreme Court issued its decision in *Shelley Wetherell, et al., v. Douglas County, et al.*, (LUBA 2005-045; 2005-075) (CA A129999; A130181) (SC S53437; S53438). The court held OAR 660-033-0030(5) - which prohibits considering profitability or gross farm income in determining whether land is agricultural land under Oregon's land use policies - was in direct conflict with ORS 215.203(2)(a) and, therefore, was invalid. The Court held that, because Oregon's agricultural policy provides that "farm use" is defined as "the current employment of land for the primary purpose of obtaining a profit in money[,]" local governments may consider "profitability" or "gross farm income" in determining whether land is "suitable for farm use," and, therefore, is "agricultural land." Because OAR 660-033-0030(5) precludes such consideration, the Court held it to be invalid. Accordingly, on remand, LUBA must reconsider its decisions with respect to the county's land use determinations at issue in the case in light of that conclusion.

Department staff will present a more complete discussion of the case and its implications at the Commission meeting.

### 4) **Other notices and opinions of note**

- *DLCD v. Klamath County*, LUBA No. 2007-009, filed April 18, 2007: LUBA dismissed the department's appeal of Klamath's County's approval of a zone change for 80 acres from Forest/Range to Suburban Residential following a **Measure 37** waiver. A decision to "modify" a zone under **Measure 37** is not a "land use decision" over which LUBA has jurisdiction.
- *Virginia Corey, et al v. DLCD*, Court of Appeals No. A129905, filed May 9, 2007: The Court granted the department's motion for reconsideration of the Court's opinion in *Corey v. DLCD*, 210 Or App 542 (2007) that due process requires the State to provide a contested case hearing to determine the extent of the relief to which a claimant is entitled under **Measure 37**.
- *Wal-Mart Stores, Inc. v. City of Gresham*, LUBA No. 2006-225, filed April 4, 2007: LUBA remanded the city's denial of application to develop a 121,877-square foot **Wal-Mart Supercenter** on the west half, zoned Community Commercial, of an 11-acre site on W. Powell Boulevard, and a surface parking lot on the east half, zoned Corridor Mixed Use. The issue was traffic impacts.
- *Carlton Woodard, et al, v. City of Cottage Grove*, LUBA Nos. 2006-055, 2006-056, 2006-057, filed May 3, 2007: LUBA remanded the city's approval of a rezone and master plan for the **Cottage Grove Speedway** and adjoining Western Oregon Exposition site. The issue was impartiality of decision-makers.

- *Annunziata Gould v. Deschutes County*, LUBA Nos. 2006-100, 2006-101: LUBA remanded the county's approval of a conditional use permit and conceptual master plan for a **destination resort** with 1,425 dwelling units, two golf courses, clubhouse, community center, restaurants, and meeting facilities on 1,970 acres of EFU land in a Destination Resort Overlay Zone near Sisters, Tumalo, Bend, and Redmond in Central Oregon. The main issues involve interpretation of the phasing requirements in statute, especially regarding overnight accommodations.
- *Jerry Hildebrand, et al v. Benton County*, LUBA No. 2007-093, and *Jerry Hildebrand, et al v. City of Adair Village*, LUBA No. 2007-094, filed May 10, 2007: Appeals challenge **Adair Village's** 142-acre **urban growth boundary expansion** for future urban residential and open space uses.
- *Sane Orderly Development, Inc. v. City of Roseburg*, LUBA No. 2007-080, filed April 16, 2007: Challenges Roseburg's population forecast and buildable lands inventory updates to the comprehensive plan.

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

### **General Fund Grants**

The Grants Advisory Committee will meet June 1, 2007 (after the mailing date of this report). The committee is expected to complete its recommendation for a 2007-09 Grants Allocation Plan. If the committee acts as expected, the allocation plan will be presented for Commission approval under Commission Business.

The 2005-07 grant program is winding up. The pace of payment requests has increased slightly since the April Commission meeting. Close-outs for Planning Assistance ("Small City/County") grants have been submitted in increasing numbers, as well.

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

The proposed periodic review schedule for 2007-09 will be considered under Agenda Item 8. Task activity has been very slow, with no new task submittals and only one approval since the April director's report. The one approval resulted in completion of the Eugene-Springfield periodic review. The department has received two UGB amendments that will be reviewed in the manner of periodic review (Shady Cove and Newport).

## **D. STATUS OF PLAN AMENDMENTS RECEIVED**

A quarterly summary of post-acknowledgment plan amendments (PAPAs) received by the department is set forth in Attachment A. PAPAs are changes to an acknowledged comprehensive plan or implementing ordinance, or a plan or zoning map, completed by local governments outside of the periodic review process. DLCDC may provide technical assistance to local governments in the development of PAPAs and the department may review and comment on a PAPA. Any appeal of a PAPA goes to LUBA.

The first page of Attachment A summarizes submittals by quarters for 2006. A submittal may include multiple amendments. The reported adoptions include submittals that may have been submitted in a prior or the current quarter.

The second page shows activity over the last several years by quarter and annually. The last page displays DLCD participation for the last years. “Y=Participated” and “YA=Advisory Participation” on the third page mean that the proposal was reviewed by department staff, not that the department submitted comments. Those where the department commented are shown under the three middle columns, categorized by the medium of the response.

Taken together, the three types of participation yield the following results (comments/no comments):

2000 – 137/339  
2001 – 184/322  
2002 – 82/338  
2003 – 149/209  
2004 – 104/284  
2005 – 87/234  
2006 – 129/389

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

### **A. OUTREACH & EDUCATION**

The department hosted a Planners’ Network Meeting in The Dalles on May 2 for the north central region, including Gilliam, Hood River, Sherman, Wasco and Wheeler Counties. The meeting was attended by planners from five counties, two cities, the Columbia River Gorge Commission, and ODOT; planning commissioners from two cities; one city councilor; and a Big Look Task Force member, in addition to DLCD staff. The department provided an overview of current issues and program highlights. The jurisdiction representatives participated in a roundtable where they discussed a variety of issues, including UGB expansions, Measure 37, a speedway proposal, and growth pressures in the Gorge.

The department also hosted a “C2M 2001” Coastal Planners Network Meeting in Newport. It was well attended by elected and appointed officials and planners from several coastal counties and cities.

### **B. TRANSPORTATION AND GROWTH MANAGEMENT (TGM)**

During May, the TGM program completed review of TGM grant applications and announced proposed grant awards for the 2007-2009 biennium. (The awards are conditional and depend upon legislative approval of the ODOT and DLCD budgets and negotiation of a detailed statement of work for each project.) Forty-eight projects are

recommended for grants for a total of \$4.4 million. A list of the recommended grant awards is set forth in Attachment B. The grant review and award process has been accelerated by two months to give local governments additional time to complete grant projects within the biennium.

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

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

Jon Dunsmore joined the Operations Services Division as an Information Specialist 4 (ISS4) on May 21, 2007. His strong customer service skills and private sector information technology experience from the American Title Insurance Company will serve our department well in his role of providing front end user support.

The Department welcomes Darren Nichols as the new Community Services Division Manager. Darren has served in this position on an interim basis since October 2006, while also fulfilling his duties as the Northeast Regional Representative. Darren will continue to operate from the La Grande office while we recruit and train a new Regional Representative for the Northeast Region. We are pleased to have Darren join our management team.

Cyndi Smith has accepted the position of Human Resource Manager. Cyndi joins us from DAS, where she worked as a manager in the Statewide Training section. Most recently, Cyndi has been filling the HR position on an interim basis (since February 2006). The Department is happy to have Cyndi join our team.

#### **B. RECRUITMENTS**

The department is preparing a recruitment to fill the budget officer position.

Interviews for a transportation planner vacancy in the TGM program were completed on May 30; additional information should be available at the Commission meeting.

#### **C. DEPARTING EMPLOYEES**

Richard McNew, the department's Fiscal Analyst 2 (Budget Officer), has accepted a promotional transfer to the Oregon Health Licensing Agency effective May 29, 2007. He has been a tremendous asset to the department. We wish him well on his new endeavors.

#### **D. 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 DLCDC and ODOT
- Ongoing senior staff meetings with the Oregon Economic & Community Development Department, to help improve coordination and communication between DLCDC and OECDD
- Planners Network Meeting (May 2, The Dalles)
- Oregon City Attorney's Association (May 5, Newport)
- Oregon Association of Nurseries (May 15, Wilsonville)
- Philomath Chamber of Commerce (May 17, Philomath)
- Task Force on Land Use Planning (May 23 & 24, Salem)
- Water Resources Commission (May 31, Salem)

#### **4. LEGISLATIVE UPDATE**

The department continues to track bills related to land use or to department programs (see Attachment C), and the director and staff are engaged in ongoing contacts with legislators and legislative staff. The department has provided requested fiscal impact estimates for over 100 additional bills that do not relate to land use (i.e., bills tracked as "priority 4 or 5").

The department has worked on several bills that affect the program and that appear likely to pass at this time, including some of the most significant bills listed below. In some cases, bills are moving or have passed that include provisions not supported by the department (these bills are indicated by an asterisk \* below):

- HB 3540, which revises Measure 37 and appropriates money to a Compensation and Conservation Fund to Department of Land Conservation and Development to pay expenses incurred to review claims. Refers Act to people for their approval or rejection at special election to be held on date specified in House Bill 2083.
- HB 3546, which allows public entity additional 360 days to review and act on certain Measure 37 claims before property owner is entitled to just compensation

- and may file civil action. Declares emergency, effective on passage.
- SB 1011, Metro's bill authorizing counties and metropolitan service districts to create process to designate rural reserves and create a modified process for designating urban reserves. The department supported the general bill concepts.
  - HB 2051, which would allow the Metro UGB to be reevaluated on a seven year cycle, rather than a five year cycle.
  - SB 30, which will substantially curtail destination resorts in the Metolius River basin.
  - SB 1044, which will amend destination resort statutes to repair drafting errors from 2003 session.
  - HB 2723, regarding lots previously created illegally without knowledge of current owner.
  - HB 2992A, which allows property owners to retain farm dwelling rights when transferring substantial portion of EFU property for open space protection by not-for-profit land conservation organization.
  - HB 3337\*, which will separate the Eugene and Springfield combined UGB, and will require these cities to evaluate buildable land supply within two years. Department supported two-year evaluation as a joint exercise, but urged the boundary not be divided into two boundaries. However, this bill appears to be passing in a form that will divide the regional boundary into two UGBs.
  - HB 3436\*, which will codify LCDC's recent UGB population forecast safe harbors, but will allow city to use its own forecast if the county does not take action on the city's forecast within six months.
  - SB 665\*, which will substantially expand the ability for Morrow County to approve a major motor speedway and related commercial, industrial, residential, marina, and resort development.

Three members of the Commission's Legislative Subcommittee (Chair VanLandingham, Commissioner Worrix, and Commissioner Derby) met on April 11 to provide advice to the department regarding land use legislation.

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

### **A. RULEMAKING**

No rulemaking has occurred since the last Director's report. Some legislation under consideration and that is moving will require rulemaking. SB 1011, Metro's proposal regarding urban and rural reserves, would require substantial LCDC rulemaking to clarify urban and rural reserves and implement the bill.

## **6. TASK FORCE ON LAND USE PLANNING UPDATE (SENATE BILL 82)**

The Oregon Task Force on Land Use Planning (the task force) met twice in Salem since the last LCDC meeting.

At the April meeting, consultant John Fregonese led a discussion of the land consumption model the consultant team has developed to model land consumption projections for each of the four scenarios the task force will study. This was followed by the introduction of a detailed matrix of the features of the four scenarios, consultant John Parr's discussion of various available growth management tools and a comparison of planning systems in various other states. This discussion continued at the May meeting. All materials are available on-line.

Also at the April meeting the task force discussed possible plans for the public engagement work program. This topic was continued in May, along with discussion of legislative budget considerations, and necessary fund raising activities.

The May meeting continued discussion and exploration of the four scenarios and the public outreach work program from April. Consultant Sorin Garber reviewed some of the organizations available as fiscal agent to handle any money collected during fund raising. He was directed by the task force to explore one option in more depth so that it can be presented in detail at a future meeting.

DLCD economic development planning policy analyst Tom Hogue is filling in as the staff liaison while Becky Steckler is out on maternity leave.

The next task force meeting is scheduled for June 18-19, 2007 in Bend, Oregon.

John Fregonese will be present at the Commission meeting to present an update on the task force under Agenda Item 7.

### **ATTACHMENTS**

- A. Quarterly Summary of Post-Acknowledgment Plan Amendments
- B. TGM Grant Award Recommendations 2007-2009
- C. Legislative Tracking List May 25, 2007