



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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TO: Land Conservation and Development Commission

FROM: Cora Parker, Acting Director

SUBJECT: **Agenda Item 9, Nov. 28-30, 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 September 1 and November 8, 2007, the Department received notice of 164 appeals filed with LUBA, including **three filed by DLCD:**

- On September 11, 2007, the department filed **two** notices of appeal contesting two county approvals of development applications based on **Measure 37** waivers to now-deceased claimants. (*DLCD v. Douglas County*, LUBA No. 2007-176, and *DLCD v. Jefferson County*, LUBA No. 2007-177).
- On October 4, 2007, the department filed a notice of appeal contesting **Klamath County's** approval of a zone change for 120 acres from heavy industrial to light industrial and a conditional use permit for a planned unit development of large format retail and residential development on this parcel (*DLCD v. Klamath County*, LUBA No. 2007-199.) ODOT filed an appeal of the same decision on the same date (*ODOT v. Klamath County*, LUBA No. 2007-198).

## 2) LUBA opinions

Between September 1 and November 8, 2007, the Department received copies of 89 recently issued LUBA opinions. Of these, LUBA dismissed 33, remanded 37, reversed 5, affirmed 13, invalidated 0, and transferred 1 petition to circuit court.

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

- **Goal 3 and OAR 660-033-0100:** *Thompson, et al v. Umatilla County*, LUBA No. 2007-052, filed July 5, 2007 (the Umatilla “go below” case)(affirmed);
- **OAR 660-004-0018 & 660-004-0028:** *Gordon v. Polk County*, LUBA No. 2007-102, filed September 18, 2007 (remanded);
- **Goal 14 and OAR 660-004-0010 & 660-025-0040:** *Gordon, et al v. Polk County*, LUBA No. 2007-054, filed August 30, 2007 (affirmed);
- **Goals 12 & 14 and OAR 660-012-0060 & 660-024-0040:** *Hildenbrand, et al v. City of Adair Village and Benton County*, LUBA Nos. 2007-092 & 2007-093, filed August 31, 2007 (Adair Village UGB expansion) (remanded);
- **Goal 12 and OAR 660-004-0020, 660-004-022 & 660-012-0060:** *Gordon v. Polk County*, LUBA No. 2007-083, filed September 20, 2007 (affirmed);
- **Goal 2:** *Jacobsen v. City of Winston*, LUBA No. 2006-162, filed October 10, 2007 (affirmed);
- **OAR 660-023-0180:** *Walker v. Deschutes County*, LUBA No. 2007-013, filed October 3, 2007 (remanded);
- **Goal 5 and OAR 660, divisions 016 and 23:** *Wood v. Crook County*, LUBA No. 2007-087, filed October 9, 2007 (remanded);
- **Goals 4 & 5 and OAR 660-004-0040:** *Lofgren, et al v. Jackson County*, LUBA No. 2007-061, filed October 4, 2007 (remanded).

None of these decisions requires goal or rule amendments.

## 3) Appellate court opinions

Between September 1 and November 8, 2007, the Department received copies of 5 recently issued opinions from the Court of Appeals. The Court affirmed 2, remanded 2, and reversed 1 of LUBA’s decisions. These decisions include:

- The Court of Appeals agreed with LUBA that LUBA lacks **jurisdiction** over appeal of a county’s modification of its zoning ordinance in response to a **Measure 37** claim because ORS 196.352 states that a local decision under this statute is not a land use decision under ORS 197.015 (*DLCD v. Klamath County, et al*, LUBA No. 2007-009, Court of Appeals No. A135614, filed October 2, 2007).
- The Court of Appeals affirmed without opinion LUBA’s decision on yet the latest appeal of **Tangent**’s latest approval on remand of a quasi-judicial UGB expansion. (*Mondalee Lengkeek, et al v. City of Tangent*, LUBA No. 2007-007, Court of Appeals No. A135665, filed August 22, 2007).

- The Court of Appeals denied a petition for reconsideration of its affirmation of LUBA's decision in *NE Medford Neighborhood Coalition, et al v. Medford*, LUBA No. 2006-132, Court of Appeals No. A134897, filed July 11, 2007. (This decision **requires housekeeping administrative rule amendments**; see staff report on 2007-2009 policy agenda for October 2007 LCDC meeting in Enterprise.)
- In *VinCEP, et al v. Yamhill County*, LUBA No. 2006-157, Court of Appeals No. A135362, filed October 10, 2007 (the proposed **luxury hotel on EFU land** in the Red Hills of Dundee), the Court of Appeals affirmed most of LUBA's remand decision but reversed and remanded for further consideration of the sufficiency of the Goal 3 exception findings because, according to the opinion, a **Goal 14 exception** does not excuse the need for a separate **Goal 3 exception**.

#### 4) Other cases of interest

- In *Foland v. Jackson County* and *Skreptos, et al v. Jackson County*, LUBA Nos. 2006-206 & 2006-211, filed September 26, 2007, the Court of Appeals affirmed LUBA's reversal of the county's approval of a preliminary development plan for a **destination resort**.
- LUBA reversed the county's approval of an application by a now-deceased claimant for a subdivision application for AF-40 land based on a **Measure 37** waiver (*Dunn v. Yamhill County*, LUBA No. 2007-050, filed October 11, 2007).
- A **Measure 37** claimant appealed county denial of applications for a partition of a 24-acre parcel in the Farm Forest Zone and the establishment of a farm dwelling on one of the new parcels (*Ratzlaff v. Polk County*, LUBA No. 2007-207, filed October 16, 2007).
- Neighbor appealed county approval of a subdivision/PUD on EFU land pursuant to a **Measure 37** waiver (*Gardener v. Marion County*, LUBA No. 2007-226, filed October 31, 2007).

## B. GRANTS, INTERGOVERNMENTAL AGREEMENTS AND CONTRACTS

### General Fund Grants

In response to the department's invitation sent September 28, 2007, local governments are now submitting applications for 2007-2009 general fund planning grants. As of November 16, local governments have submitted 10 requests for Technical Assistance and two requests for Periodic Review. Four additional requests have already been awarded: three for Gorge grants and one for Dispute Resolution. DLCD regional representatives have been asked to prioritize all other proposed and potential grant projects according to priorities outlined in the Grants Allocation Plan and according to local governments' readiness to proceed. Within the next several weeks, staff will identify projects statewide that are ready for immediate funding.

The department's invitation for grant applications did not identify a deadline for application; local governments were encouraged to apply as early as possible to ensure funds are available and to give grant projects sufficient time for completion.

On November 13, 2007, the department also sent notice to the five cities scheduled to start periodic review. Those cities are expected to complete plan evaluations and select work tasks within the next few months; the department expects to receive grant requests from them sometime after the first of the year. By then the subscription rates for both Technical Assistance and Periodic Review grant funds should be clear.

If you have questions about specific grant applications or about the grants selection process, please contact the department's Grants Specialist Larry French at 503.373.0050 x283 or at [Larry.French@state.or.us](mailto:Larry.French@state.or.us), or contact Grants Program Manager Darren Nichols at 503.373.0050 x255 or at [Darren.Nichols@state.or.us](mailto:Darren.Nichols@state.or.us).

### **Federal Fund Coastal Management Grants**

Congress has yet to approve the FY08 budget (which began October 1) for the Department of Commerce, which contains the budget for the National Oceanic and Atmospheric Administration (NOAA), which provides funds to Oregon (approx \$2.19 Million annually) and other coastal states under the Coastal Zone Management Act (CZMA). NOAA, as all federal agencies, is operating under a Continuing Resolution. It appears likely that the budget amount for FY08 will be level funded from FY07, which was level funded from FY06, which was level funded from FY05. The net result is likely to be that the Department's FY08 federal CZMA grant (which is effective July 1, 2008) will be at the same amount as the past four years, which will result in significant erosion of program capacity within the Department and in grants to support local planning capacity.

Already, in FY07 (July 1, 2007 – June 30, 2008), the Department dropped the popular 306A Small Scale Construction and Acquisition Program (\$150K), halved the Technical Assistance Grant Program to local governments (\$75K), and greatly reduced the amount of contracts for technical and planning services with local governments, state agencies, and NGOs. FY07 Planning Assistance grants to local governments were maintained at FY06 levels, but inflation increasingly renders those grant levels inadequate to meet local planning needs and opportunities.

The root of stagnation of federal CZM funding to states lies in failure of the Congress to reauthorize the national Coastal Zone Management Act (enacted in 1972 and last reauthorized in 1996) and an analysis by the Office of Management and Budget (OMB) that, nationally, the CZMA cannot "demonstrate results" for effective use of funds. Thus, the Department's Coastal Program Manager is actively working with the leadership in the Coastal States Organization (CSO) and in NOAA to develop principals and practices for reauthorizing the federal Coastal Zone Management Act in the 2008 Congress. Over the past 20 months, NOAA and CSO have engaged in a nation-wide "visioning" process to identify needed improvements to the CZMA to meet the concerns of the OMB, the Congress, and coastal states. As a result, there is a heightened interest and support in both the House and

Senate in introducing and enacting a modernized and re-vitalized CZMA and thus demonstrate Congressional support for the work of coastal states such as Oregon to address significant development and conservation pressures in the coastal zone.

Because the timing for action by the Congress is always problematic, it is all but certain that the Department will need to make difficult choices about allocating federal grant funds when it prepares the FY08 federal grant application in February 2008. In the meantime, the Department will work with the Governor's Office to identify program elements currently funded by federal CZMA funds that would be appropriate for funding through state General Funds in the 2009-2011 biennium and to include those program elements in the Department's 2009-2011 budget request. For the past three decades, federal CZM funds have been the primary source of financial support for the Department's Coastal Program and a significant source of planning assistance funding and technical support for coastal local governments. Despite the iconic nature of the Oregon Coast and its importance to the state's economy and culture, the Department has received only very small amounts of state General Funds to support coastal planning, mostly in the form of "state match" for federal funds. That era may, of necessity, be over.

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

On November 13, 2007, the department sent notice to five cities formally initiating periodic review for those cities. Notice packets included a letter from the department and a copy of *The Complete Planners Guide to Periodic Review*, a step-by-step guide to the periodic review process. Cities were also reminded to look for a follow-up packet with comments and suggestions from other state agencies regarding periodic review opportunities.

Several jurisdictions currently in periodic review have submitted grant applications to continue work on existing work tasks/programs. Those requests will continue to receive top priority for funding from the department's general fund grants program.

### **D. TRANSPORTATION PLANNING RULE IMPLEMENTATION**

#### **Central Lane Metropolitan Area Transportation Planning Update**

On November 8, the Central Lane Metropolitan Planning Organization (CLMPO) adopted the federally required Regional Transportation Plan (RTP) for the Eugene-Springfield-Coburg area. Under the Transportation Planning Rule (TPR), adoption of the federal RTP triggers an obligation for local governments to within 30 days either adopt findings that the federal plan is consistent with existing locally-adopted plans, or provide the department with a post-acknowledgment plan amendment (PAPA) notice initiating necessary conforming amendments to the state-required regional transportation system plan (RTSP). The TPR also requires that necessary amendments be adopted within one year, or by a later date where the Commission has approved a work program allowing additional time.

Local government staff have advised the department that they anticipate the need for RTSP amendments but are unable to meet the 30 day PAPA notice requirement. In addition, local

governments anticipate that completing an update of the RTSP will take more than the one year allowed by the rule, and consequently, that local governments will request that the Commission approve a work program that would allow additional time to complete the update.

Local governments have asked the department to confirm that failure to meet the 30 day PAPA notice requirement would not trigger a finding of noncompliance or other enforcement action by the department. While the department cannot waive the 30 day notice requirement, we have advised local governments that based on their stated intent to work with us to prepare a work program to complete the needed amendments, the department is not recommending any action by the Commission at this time on the failure to meet the 30 day notice deadline.

The department expects to work closely with local governments and ODOT staff to develop a proposed work program to complete the RTP update that we would submit for Commission approval in March 2008. We will update you on progress in preparing a work program in subsequent director's reports.

The delay in completion of an updated RTSP is a serious concern for the department and for the Oregon Department of Transportation (ODOT). TPR amendments adopted in 2006 revised the schedule for plan updates so that state and federally required updates would occur at the same time. The rule also provided clear direction that "insofar as possible" local governments should use the same planning process to meet federal and state requirements. For the Central Lane area this does not appear to have occurred: TransPlan - the preexisting RTSP - adopted in 2002, remains unchanged - despite policies in TransPlan which schedule a "major update" for 2007. The department's specific concerns about implementation of TransPlan and compliance with TPR provisions are outlined in the department's letter of October 27, 2007, to the Central Lane MPO - included as Attachment A.

### **Metro Request for Commission Review of Metro Regional Transportation Plan**

On November 14, 2007, the department received a request from Metro staff for the Commission to agree to review the Metro Regional Transportation Plan "in the manner of periodic review." A copy of Metro's request is attachment B. A specific provision in statute authorizes Metro to request review by the Commission (ORS 197.274(2)). The Commission received a briefing from Metro staff about the Regional Transportation Plan (RTP) at its June 2007 meeting. At that time Metro indicated it would likely make the request for Commission review.

The department intends to confer with the Commission's Transportation Subcommittee in preparing a recommendation on whether or not the Commission should agree to this request. We would expect to provide a recommendation for the Commission's consideration at its January 2008 meeting. Metro anticipates adoption of the state version of the Regional Transportation Plan next fall, which would mean review by the Commission during the winter of 2008/2009.

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

### **Coastal Management Program**

Liquefied Natural Gas Import Facilities: Dale Blanton, Federal Affairs Coordinator, and others have been monitoring activities and coordinating closely with the applicants, as well as staff of state and federal resource agencies on three proposed projects:

- Bradwood Landing in Clatsop County on the Columbia River;
- Skipanon River site in the City of Warrenton near the mouth of the Columbia River estuary; and
- Jordan Cove Energy in Coos County on the Coos Bay Estuary.

Coastal staff are waiting for documents from the Coos County Board of Commissioners who gave land use approval to the siting of the Jordan Cove LNG facility on North Spit in an area long-planned and zoned for Water-related Industrial. News reports indicate that the Commissioners based their decision on findings and recommendations of a Hearings Officer but added additional conditions.

Marine Reserves: DLCD coastal program staff, particularly Greg McMurray and Paul Klarin, continue to work closely with the Office of Governor to provide staff assistance and support to meet the charge from the Governor to designate a limited system of marine reserves. In addition, Tanya Haddad and Andy Lanier are working with other state and federal agencies and university specialists to develop basemaps and other information to be used in the public marine reserves nomination and designation process. The Coastal Management Program provides funding support to the Ocean Policy Advisory Council by paying all member travel and meeting costs and associated costs of conveners and other experts.

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

### **A. NEW STAFF**

Ryan Miller joined the department on Monday, October 15, 2007, as the Floodplain/GIS Specialist in the Planning Services Division. Ryan has a Bachelor's degree in Geography from Western Oregon and has worked with the Department of Forestry as their GIS Coordinator for the State Forests Program. Ryan lives in McMinnville with his wife Elisha and enjoys volleyball, wakeboarding, camping and working out. Ryan's GIS experience will be a valuable asset to the natural hazards program and DLCD as a whole.

Ed Moore will join the department around December 3, 2007, as the new South Willamette Valley Regional Representative in the Eugene office. Ed has a Bachelor's degree in Geography from San Diego State University. Ed comes to us from ODOT where he has over 10 years of planning experience, most recently as a Senior Regional Planner. Prior to ODOT, Ed has worked for the City of Corvallis and City of Forest Grove, and numerous other cities in Colorado and California. We look forward to Ed joining the Department.

## **B. RECRUITMENTS**

The Planning Services Division is recruiting for a Planner 3 to fill the Planning and Economic Outreach Specialist position. This recruitment closes on November 26, 2007. We hope to announce the selection by late December.

The Operations Services Division will be conducting interviews on November 16, 2007, to fill its Information Specialist 7 (ISS7) position. The Division hopes to announce recruitment results shortly thereafter.

Measure 37/49 Division is recruiting for an Office Specialist 1 to perform clerical support functions related to claims processing. This recruitment closed on November 8, 2007. It is further anticipated that the division will need to recruit for several additional positions to implement Measure 49.

## **C. DEPARTING EMPLOYEES**

Dan Sproule (ISS7 in Operations Services Division) left the department in October. He accepted a position as Network Administrator for the City of Salem. This is a great opportunity for Dan. We wish him the best at the City of Salem.

Becky Steckler (Program Analyst 3 in Big Look) left the department on November 2. In the short-term, she plans on staying home and enjoying the time with her son.

Dixie Bryant (Program Analyst 2 in Measure 37) left the department in October as she accepted a position at the Oregon Health Licensing Agency. We wish her well in her new position.

## **D. DIRECTOR ACTIVITIES**

During the period of this report the acting director has been involved in several activities in support of the work of the department, both within the department and internally. Highlights of the acting 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 senior staff meetings with the Oregon Economic & Community



Development Department, to help improve coordination and communication between DLCD and OECDD

- Government to Government Summit (Nov. 7-8, Kah-Nee-Ta)
- Association of Oregon Counties Annual Conference (Nov. 14-15, Portland)

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

The Oregon State Legislative Assembly Supplemental Session commences February 4, 2008. The department will be tracking legislation that concerns land use and the department. The Governor's office briefed agency legislative coordinators on November 15, 2007, and indicated that, at this point, the only land use matter on the Governor's agenda is funding for the Task Force on Land Use Planning. However, individual legislators will also introduce legislation, and that leaves open the possibility that other land use matters will emerge.

The department is working with AOC and others on a legislative proposal to address issues raised in the Court of Appeals case concerning lot line adjustments in farm and forest zones. The bill would be introduced in the Interim Committee on Agriculture and Natural Resources, and would be based on a similar bill, HB 3549, that died in the final days of the 2007 session.

We also note that the deadline for agencies to submit legislative concepts for the 2009 legislation is early April 2008. As such, the department will begin an internal discussion of potential DLCD legislative concepts for the 2009 session.

Finally, in addition to funding for the Task Force on Land Use Planning, the department has also submitted a request for funding related to implementation of Ballot Measure 49.

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

##### **A. RULEMAKING**

The Commission approved a 2007-2009 Policy and Rulemaking agenda at its October meeting: a summary of the Policy Agenda is attachment C to this report. At this point, the department is planning on waiting until the Metro Reserve rulemaking is complete in January before beginning other rulemaking tasks listed in the Policy Agenda. However, the department may begin working on some of these tasks prior to formal initiation by the Commission. For example, many legislatively mandated and other rule updates will be combined into a single rulemaking, which would not require a workgroup (because the rule updates are legislatively mandated or are "minor and technical" in nature). Much of the staff work on this project should be well underway prior to the March LCDC meeting, at which time this rulemaking may be ready for LCDC action.

The Metro Urban and Rural Reserves Rulemaking Workgroup appointed by LCDC to draft rules for Commission consideration held its 5<sup>th</sup> meeting on November 5, 2007, and agreed to issue a draft set of rules for public comment (see Item 6 on the November LCDC Meeting Agenda). The workgroup has scheduled two additional meetings prior to the January 24, 2008, LCDC meeting, where it is anticipated these rules will be adopted. The department (Bob Rindy) also attended the Metro Regional Roundtable on October 26, 2007, where the work on Metro reserves and the rulemaking were topics of discussion among elected officials and other stakeholders in the region.

The department met with the Oregon Housing Council Chair (Larry Medinger) and the director (Victor Merced) and staff of the Oregon Housing and Community Development Department (OHCDD) on November 2, 2007, to discuss ideas and the schedule for rulemaking to encourage affordable housing. It was agreed that additional meetings with OHCDD and stakeholders should be scheduled soon in order to continue this discussion. OHCDD requested that the department, OHCDD and stakeholders also discuss whether there will be a need for legislation on this topic, along the lines of SB 187 from the 2007 session. If so, OHCDD indicated it would like to partner with DLCD on such legislation for the 2009 Legislative session. This project is described in the Policy Agenda Summary attached (see item 4 of attachment C). The department intends to report to the Commission in January regarding ongoing discussions with Oregon Housing and Community Development Department with respect to ideas for rulemaking. The department is aiming for formal initiation of this project at the March meeting.

## **B. Other Policy Activities**

- The department met November 9, 2007, with the Department of Aviation (ODA), OECDD, Senator Betsy Johnson, and representatives of the three airports selected as “pilot projects” under 2005 legislation SB 680 regarding “Through-the-Fence” agreements with business on or adjacent to the airport boundary. These “pilot project” airports, Scappoose, Aurora, and Baker City, will be reporting to the 2009 Legislature on the through-the-fence agreements pursued under the current legislation, and on related issues, including land use issues that concern this project. The department is named in that legislation as a participant in this process, and has been advising ODA and other participants in this group regarding land use rules concerning airports. As indicated in the Policy Agenda, the Commission will have a discussion about airport planning in a Commission meeting in 2008, although a date has not yet been determined.
- The Department of Administrative Services (DAS) has proposed a major revision and update of its State Agency Coordination Agreement. The agreement for the Department of General Services (now DAS) was “certified” by LCDC in 1989, in accordance with state laws and LCDC rules for such agreements (OAR 660, div, 30). Since that time, the Capitol Planning Commission was subsumed by DAS, and as such, the revised SAC agreement for DAS will also update the previously certified SAC agreement regarding the functions previously performed by the

Capitol Planning Commission (CPC). The department is reviewing the draft amended agreement, and will be providing formal comments to DAS regarding the agreement. Under OAR 660-030-0075, the Commission is not required to review or take action on amended SAC agreements, but the department is required to review the amended agreement and provide comments as to whether it meets Goal and rule requirements. At this point, the department is interpreting this as an amended agreement for DAS and CPC, rather than a new agreement, but will be seeking further advice from DOJ on this interpretation. If the agreement is instead interpreted as a **new** SAC agreement for DAS (which technically has no previous agreement under that agency name), LCDC would need to review the agreement.

- In May 2007 the Governor received a draft of an aggregate policy briefing memo developed by his staff and state agencies. The department received a final copy, but only recently received word that the memo is in fact final and available for public distribution. It is attachment D to this report. The memo, prepared in part due to the demise of the unsuccessful agriculture/aggregate consensus process last year, provides an overview of aggregate related issues and information to begin developing strategic state policies for the long-term management of aggregate resources in Oregon. This work is mentioned in the Policy Agenda. At the time of this report it is not clear as to the nature or scope of DLCD's involvement in subsequent steps listed as "Actions for Consideration" in the memo.

On a related note, we previously reported on a multi-agency effort to respond to a 2005 budget note regarding aggregate mining. Agencies, including DLCD, reached conceptual agreement on a Memorandum of Understanding (MOA) among the agencies that review mining proposals. The MOA was to improve coordinated agency response to pre-applications and/or to local government plan amendment requests involving gravel mining, and established a "pilot project" to test the process. The Natural Resources Cabinet recently agreed that the cooperation between the agencies is sufficient and an MOA is not necessary.

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

No further Task Force activities are scheduled at this time. As noted above, the department recently submitted a funding request to fund the Task Force at the level originally recommended by the Governor for 2007-09.

### **ATTACHMENTS**

- A. DLCD Letter to Metropolitan Planning Committee, October 26, 2007
- B. METRO letter to Commission, November 13, 2007
- C. LCDC Policy Agenda for 2007-2009
- D. Aggregate Resources in Oregon – Policy Briefing Memo, May 4, 2007